Joint Views of the Hong Kong Bar Association and the Law Society of Hong Kong on The Proposed Offence of "Persistent Sexual Abuse of a Child"

I. INTRODUCTION

1. We fully appreciate and share the public concern as to the seriousness of offences involving the sexual abuse of a child, particularly where this has been persistent.

2. We support measures to ensure that perpetrators of such offences be brought to justice, and if convicted, sentenced in such a way to reflect the gravity and persistence of the sexual abuse sustained by the child.

3. We accept that HKSAR v Chim Hon Man has highlighted practical difficulties in the successful prosecution of cases where there has been repeated sexual abuse of a child and note (but do not accept) views suggesting that the decision may provide a "charter of immunity" to offenders where a child complainant is unable to differentiate between offences.

4. We also accept that insufficient "specimen charges" may make sentencing on the total criminality of the abuse difficult.

5. However, we balance against all these criticisms the need to protect the right of all defendants to know with some particularity the case they have to meet and to have that case proved beyond reasonable doubt for the purposes of conviction and so that there is certainty for the purposes of sentencing.

6. We consider that the proposed new legislative measure has conceptually unacceptable elements.

7. We take the view that a proper case has not been made out for the introduction of the proposed new offence of persistent sexual abuse of a child.

8. We are in the process of obtaining further comments from other jurisdictions as to how they cope with this problem and whether the solutions they have adopted are working.

9. We may therefore wish to make further submissions at a later stage when such views are received and in any event if a draft Bill is available.

II. THE PROBLEM

10. The problems highlighted in HKSAR v Chim Hon Man [1999] 1 HKLRD 764 **[Appendix 1]** include:

(a) Difficulties in drafting the Indictment for offences involving sexual abuse of a child where there are multiple instances of abuse, over a lengthy period and the child victim is not able to remember details of the sexual assaults;

(b) Difficulties as to the evidence that can be led because the rules of evidence normally prohibit the prosecution from relying on offences not the subject matter of the charge as evidence of the accused's general propensity to commit offences similar to the one for which the accused has been charged. ("The Rule as to Similar Fact Evidence"); and

(c) Difficulties in sentencing to reflect the persistence of the sexual abuse if this is not achieved by bringing sufficient "specimen counts."

11. We view these as essentially procedural problems.

12. We do not accept that the problems are insurmountable.

13. On the facts of Chim's case, the apparent difficulties of bringing the prosecution and securing conviction reflecting the gravity and persistence of the offence(s) could have been overcome had the indictment been properly drafted. Sir Anthony Mason NPJ provided the "answer to the problem" when he advised at p.780 I, referring to suggestions in Archbold (1998 Ed p 49) **[Appendix 2]**:

> "…in cases where differentiation is impossible, an indictment may be drawn to include a number of counts, each, apart from the first, alleging 'on an occasion other than that alleged [in the previous counts]'. That course can be pursued where the series of offences is alleged to have been committed over a relatively short period of time. It is a course which might have been adopted in the present case and it would have provided an answer to the problem."

14. Had this been done, the convictions would have been upheld and the trial judge would have had the basis to pass a sentence reflecting the repeated nature of the offence(s).

15. We therefore do not accept that Chim's case provides a charter of immunity, thereby justifying a drastic departure from the existing substantive law and the introduction of the proposed legislation.

III THE PROPOSED SOLUTION

16. The proposed solution to the alleged problem is the creation of a new offence of “Persistent Sexual Abuse of a Child”.

17. We reserve comment on the drafting of such legislation pending sight of a Draft Bill.

A The Proposed New Law

18. The proposed new legislation would be based on the NSW model (see: Detailed Drafting Instructions para. 16).

19. Salient features of this legislation include:

(a) The Particulars

20. The charge must specify with “reasonable particularity” the period and describe the nature of the separate offences (S. 66EA(5) of NSW Crimes Act)

(b) The Evidentiary Basis

21. (a) "The jury must be satisfied beyond reasonable doubt that the evidence establishes at least 3 separate occasions, occurring on separate days during the period concerned, on which the accused engaged in conduct constituting a sexual offence in relation to a particular child of a nature described in the charge"; and

(b) "the jury must be so satisfied about the material facts of the 3 such occasions, although the jury need not be so satisfied about the dates or the order of those occasions"; and

(c) "if more than 3 such occasions are relied on as evidence of the commission of an offence against this section, all the members of the jury must be so satisfied about the same 3 occassions" (S. 66EA(6)(a), (b) and (c) of the NSW Crimes Act).

(c) Jurisdiction

22. The proposed legislation permits evidence of extra-jurisdictional offences be introduced provided that on at least one occasion the "persistent conduct" occurred in HKSAR (Drafting Instructions para.19; S. 66EA(3) of NSW Crimes Act).

(d) Alternative Verdict

23. An alternative verdict on the substantive offence is to be permitted (Drafting Instructions para.22; S. 66EA(10) of NSW Crimes Act).

(e) Factual Basis for Sentencing

24. Sentence is to be commensurate with the substantive sexual offence committed. (Drafting Instructions para.23).

B Existing Problems Solved?

25. We do not accept that the proposed new legislation will solve the existing difficulties.

26. The perceived improvements that the proposed legislative measure will achieve are not necessary as the difficulties are surmountable even under the existing law. These include the following:

(a) The Particulars

27. It is not necessary under the existing laws, rules of drafting and rules of evidence that a specific date be specified. Hence the suggested approach of Sir Anthony Mason in Chim's case. Chan CJHC suggested another approach in HKSAR v Kwok kau Kan [2000] 1 HKC 789 at 798, which requires the prosecution to give particulars that can sufficiently identify the particular act charged in such a way as to distinguish it from other acts which the prosecution in adducing evidence may lead [Appendix 3]. No new law is required to improve this aspect.

(b) Similar Fact Evidence

28. Under the existing laws and rules of evidence as interpreted more recently in Kwok's case **[Appendix 3]** the adducing of evidence that other alleged similar offences were committed by the accused, whether led inadvertently or deliberately, need not result in the trial being aborted. Latitude can be given by the trial judge with any prejudice to the accused being dealt with in directions to the jury as to the correct approach to similar fact evidence. P. Chan CJHC said (at p.799)

> In cases in which multiple acts were alleged by the complainant to have taken place, it is very often not easy to stop her in time, particularly if she is of tender age, before she refers to other incidents which were not covered by the charges before the court. It is quite frequent that during the course of a trial, a witness

> may refer to acts which happened to her on other occasions but which do not form part of the charges before the court. Sometimes this is allowed in an attempt to make sense of the evidence of the complainant. It is obviously impracticable to abort a trial every time such evidence comes out, either inadvertently or deliberately. In the case of a trial without a jury, a professional judge would be able to put such evidence aside when considering the guilt or innocence of the accused. In the case of a jury trial, the judge may, depending on the circumstances of the case, have to direct the jury in his summing up to ignore evidence of acts other than those particularised in the charges. With sufficient directions from the judge, even if evidence relating to other acts is also adduced, the prejudicial effect of such evidence on the jury would be eliminated or kept to a minimum.

29. Where the extraneous evidence appears in a pre-recorded interview, the interview can be edited by consent. Alternatively charges can be brought on all incidents mentioned if consent is not forthcoming.

30. The proposed legislative measure is therefore not needed to prevent the collapse of trials because such evidence has been introduced.

(c) Alternative Verdicts

31. It is possible under the existing law for the jury to return a verdict of an alternative offence eg rape not proved, but the alternative verdict of indecent assault is. The new law does not have to improve this aspect.

32. The advantage of the existing law over the proposed legislative measure is that, under the existing law, the nature of the offence for which the accused is in fact found guilty is specified when the alternative verdict is returned. Sentencing is based on the jury's (alternative) verdict, and not on what the judge assumes the jury may have found.

(d) Sentencing

33. The difficulties in sentencing to reflect the persistent nature of the abuse arise where the prosecution has overly restricted itself to the bringing of "sample" or "specimen" charges.

34. It is possible under the existing procedure to charge the accused with multiple offences in the same indictment, to reflect the overall criminality of the offence. If there is evidence in support of such charges, they can be particularised as indicated by Sir Anthony Mason in Chim's case or by Chan CJHC in Kwok's case. If these are proved, the Court can sentence on the basis of the repeated acts of sexual abuse, and if appropriate, such sentences can be ordered to run consecutively.

35. The proposed legislative measure does not have to improve on this aspect to achieve a sufficiently severe penalty. To suggest otherwise implies that under the proposed legislative measure the Court will be able to sentence on the basis of offences not capable of proof.

36. The existing difficulties it will not overcome include the following:

(a) The need to particularise the period remains.

(b) The need to particularise the nature of the offences remains.

(c) The need to ensure that the evidence establishes the same 3 occasions will require the child to be able to distinguish the particular conduct of the 3 occasions in question in sufficient detail so that the jury is able to identify and agree upon these as the same incidents found to be proved.

(d) The need to direct the jury of the danger of convicting of "Similar Fact Edvidence" where acts other than those particularised are referred to by the child witness or as part of the prosecution's case. The directions proposed by Chan CJHC in Kwok's case will still be necessary.

C New Problems Created?

37. We foresee that the proposed legislative measure will create new difficulties.

38. The new problems it will raise will include:

(a) Conceptual Objection

39. It is conceptually unacceptable that the accused may be found guilty or sentenced upon criminal conduct that did not form part of the charge upon which he was indicted. These may not have been mentioned in any witness statement or video recorded evidence disclosed, simply emerging as part of the evidence in the course of the trial. Proof of guilt beyond reasonable doubt should be proof of a reasonably identifiable offence, not any alleged wrong doing of a like nature within a specified period.

40. We have grave concern that by allowing a situation where the boundaries of the alleged wrong doing are not defined with some particularity prior to the commencement of the prosecution, with the court/jury being asked effectively to “sort it out”, situations will arise where miscarriages of justice will occur. We note in particular that if, pursuant to the NSW model, the exact date of an alleged occasion of misconduct needs not be specified, a defendant is unable to defend his case on the basis of alibi.

41. If this results in a re-trial, a further injustice may arise where the child victim is forced to re-live the distressing incidents again in the witness box.

(b) Disguised Overloading of Indictment and Alternative Verdict(s)

42. The proposed legislative measure is intended to permit the prosecution to allege any number of occasion of misconduct amounting to a sexual offence within particularised period. Thus the prosecution can in substance overload the Indictment by presenting only one charge, namely an offence under the proposed legislative measure.

43. Further, since the proposed legislative measure permits the prosecution to allege different or a range of criminal conduct amounting an sexual offence under a charge of persistent sexual abuse of a child and to adduce evidence of the occurrence of misconduct coming within such a range of criminal conduct, the defendant in reality faces many charges of individual acts of criminal conduct, which will materialize into alternative verdicts of sexual offences in case the jury is not satisfied that the charge of persistent sexual abuse of a child is not proven.

(c) The Same 3 Occasions

44. The difficulties of ascertaining from the jury that all of them (ie unanimous decision, not a majority one) are satisfied beyond reasonable doubt on the same 3 occasions and the real danger that they may not be agreed as to which or how many of the many separate incidents are proved and/or the nature of the offence involved in each of the incidents.

(d) Similar Fact Evidence

45. The difficulties that the trial judge will have in directing the jury on "similar fact" evidence and the confusion that the jury will experience in distinguishing the basis upon which they can rely on such evidence. (See the Australian Court of Appeal decision in R v Kemp and R v Kemp No. 2 considered below) and annexed at **Appendices 6 and 8** respectively.

46. One such difficulty we envisage is the invitation to the jury to rely on the similar fact evidence as the basis of proof of the proposed offence of persistent abuse but the rejection of this evidence in support of the substantive offence on the alternative verdict of a substantive offence if less than 3 events are established.

(e) Jurisdictional Issues

47. The jurisdictional dilemma where different criteria exist for the definition of sexual abuse in different jurisdictions eg the relevant age of consent.

48. The further jurisdictional problem where proof of the 1 offence in HKSAR cannot be established but 3 offences can be proved in the other jurisdiction: will it be permissible to convict of an extraterritorial offence on the basis of the alternative verdict provision or should the Defendant be acquitted in spite of the existence of proof that there has been wrong doing elsewhere? In the latter case the child victim will have been put through the trauma of giving evidence and being cross examined for nought.

(f) Factual Basis for Sentencing

49. The factual basis for sentencing would not rest on proven offences as it is possible that the jury may have rejected the evidence of other occasions of misconduct and convicted solely only on evidence of 3 of the many occasions of misconduct adduced in evidence.

50. Further or in the alternative, there may well be a great variety of criminal conduct amounting to a sexual offence underlying the jury's verdict, ranging from touching of a barely indecent nature, to rape coupled with violence and beyond. Under our present system, there is no way in which the sentencing judge could find out upon which 3 occasions amongst the many occasions adduced in evidence that the jury based the conviction and/or the nature of the criminal conduct amounting to a sexual offence found proved.

51. Where is the starting point of sentence to be pitched? On what factual basis is the sentencing judge to deal with the accused? Should the judge speculate as to the basis of the jury's verdict, or is the judge to be permitted the liberty of sentencing regardless of the basis upon which the conviction was returned, with the proviso only that the sentence be "commensurate" with a range of criminal conduct amounting to a sexual offence with which the defendant could, according to the charge, have been found to have committed?

52. The alternative of asking the jury to specify which of them was satisfied of what offence would invite appeal points. Again, the possibility of a re-trial would not be in the interests of the child victim.

IV COMPARATIVE LEGISLATION AND PROBLEMS EXPERIENCED

53. We believe that there have been problems in the implementation of the legislation in Australia which, as far we are aware, is the only common law jurisdiction where such legislation currently exists.

54. Enquiries of practitioners in NSW have failed so far to result in any known prosecutions under the NSW legislation. We are following up these enquiries. However, in the discussion paper relating to the introduction of this legislation in NSW, it was noted by the Model Criminal Code Committee that

> "The Committee would be interested in receiving submissions on this issue. In particular, it would be interested in hearing about the operation of the offence in those jurisdictions where one has been adopted. Certainly, it is noted that in New South Wales, the decision in Ss case does not appear to present a practical problem. The practice in that jurisdiction has generally been to rely upon the first and/or last instance of an offence and to charge those within specified date ranges. At sentence, further evidence of sexual relationship is admitted to negative that the act was an isolated incident." **[Appendix 4]**

55. Enquiries of practitioners in Queensland, suggest that the comparable legislation has

> "caused grave concerns as to its fairness and its interpretation".

(see letters of the Queensland Law Society and M.J. Shanadan **[**at **Appendix 5]**

56. In R v Kemp [1997] 1 Qd R 383 **[Appendix 6]**, the Queensland Court of Appeal dealing with comparable legislation, was concerned as to the need for a proper direction on Similar Fact Evidence. The Court considered the difficulties imposed on the state in prosecuting cases of sexual abuse of children but balanced that with the need for fairness to the accused. The Court overturned the conviction of the Appellant.

Per Davies JA (at p. 19)

> "Those difficulties, together with the need to provide a more substantial penalty for multiple offences of this kind, appear to have been the reasons for the introduction of S229B: ……..However as this case illustrates, a charge under that section raises additional problems of fairness to an accused in being able to meet it for the very reason that the section appears to permit conviction without the need to particularise the date or the exact circumstances of any specific sexual offence. Those problems are increased where, as also occurred here, evidence is admitted of a continuous sexual relationship. There is then a risk that the jury might convict on one or more of the charges on the basis of a general disposition and that they might convict on the charge under s229B although they might not be agreed on which acts constituted the three or more offences of a sexual nature required by that section.
>
> "…In this case the trial judge should have directed the jury that evidence of sexual conduct other than that particularised in the specific counts of the indictment was admissible on two bases only: the first as evidence of the acts which the jury could conclude were offences for the purpose of deciding whether the appellant was guilty of the offence under 229B; and the second as evidence of similar facts showing the relationship between the appellant and the complainant. He should have emphasised to the jury that that evidence should not be substituted for the evidence on the specific counts in order to convict the appellant of any of those specific offences: and he should have told them that that evidence should not be used to convict the appellant of any of the offences of which he was charged on the basis that it showed a general disposition to commit offences of that kind."

Per Fitzgerald P (at p. 18)

> "While I do not suggest that the trial judge's directions to the jury failed to meet all of the requirements which I have spelt out, in my opinion, in the difficult situation which the prosecution case presented to both the accused and his Honour, his directions were inadequate to ensure that the appellant had the fair trial to which he was entitled. That entitlement is not qualified by notions of fairness to the complainant or the community, and references to such considerations are meaningless unless as qualifications of an accused person's

> right not to be tried unfairly. It is not open to the judiciary, at least at this level, to introduce a new theory of what is in the public interest into this area of the criminal law. The doctrine that an accused person is not to be tried unfairly is entrenched in the common law, which accepts the paramountcy of that public interest over competing interests in the vindication of victims and the convictions of guilty persons."

57. We respectfully agree with the observations of the Queensland Court of Appeal.

58. The Court of Appeal of Australia endorsed some of the problems we have outlined when considering the Queensland Legislation, in KBT v The Queen (1996-97)191 CLR 417 **[Appendix 7]** overturned the conviction of the Appellant.

per Brennan CJ (at p.423)

> "if the prosecution evidence in support of a charge under S.229B(1) is simply evidence of a general course of sexual misconduct or of a general pattern of sexual misbehaviour, it is difficult to see that a jury could ever be satisfied as to the commission of the same three sexual acts as required by S.229B(1A)."

59. We respectfully agree with that observation and envisage like difficulties and resultant confusion leading to injustice, should comparable legislation be introduced in Hong Kong.

V PROTECTION FOR THE CHILD VICTIM

60. In recent years much has been done "procedurally" to facilitate the prosecution of this type of offender and to assist the child witness. Some of these measures include:

(a) The abolition of the need for a child under 14 to give evidence on oath which had previously required a case by case enquiry into the child's maturity. Unsworn evidence is received in all such cases.

(b) The abolition of the need for corroboration for a child's evidence, and in particular in sexual cases.

(c) The introduction of closed circuit televised evidence as a means of protecting the child against the stress of having to face the accused in the formal surroundings of the court and the availability of support from professionals and familiar faces in the other room while the child is giving evidence.

(d) The introduction of video recorded evidence in lieu of live evidence in chief. This allows a comprehensive questioning of the child by persons trained in eliciting facts from a child, early in the investigation. Such questioning is recorded and relied upon at trial, without the need for the child to relive the events again in evidence-in-chief led by the prosecution, (subject to the right of the accused to cross-examine). This enables <u>all</u> the evidence that the prosecutor envisages to be necessary for the charges brought to be laid before the jury by video recording, suitably edited by consent, if appropriate, thereby overcoming the former problem of "leading" the child witness in evidence without the use of "leading questions".

(e) The increasing awareness of the need for protection of children has resulted in judicial latitude towards the evidence adduced from children. The approach of P. Chan CJHC in Kwok's case is one example of this.

61. There may be other ways to overcome the procedural difficulties highlighted by Chim's Case and further protect the child victim. This is beyond the scope of this paper. However we are of the view that any such aims to protect the child victim should not result in a draconian change in the substantive law particularly as the proposed legislative measure would not achieve the purpose for which it is advocated by those supporting its introduction.

VI CONCLUSION

62. We say the reasons against introducing this proposed legislation far exceed those set out by the Department of Justice. We do not accept the DOJ's proposition that the proposed offence would "carefully balance the need to protect children from sexual abuse with the rights of defendants".

63. We do not accept there are insurmountable problems under the existing law. Even if there are, we dispute that the proposed legislative measure will solve them. We say the proposed legislative measure will raise further problems. We submit that the real solution lies in re-examining the procedural and evidential rules, and applying them more effectively in the light of Chim's case.

64. **We therefore do not support the introduction of the proposed new offence of the "Persistent Sexual Abuse of A Child".**

Dated 19th February 2001

Appendix 1

Chim Hon Man Appellant

and

HKSAR Respondent

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(Court of Final Appeal)
(Final Appeal No 3 of 1998 (Criminal))

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Li CJ, Litton, Ching and Bokhary PJJ and Sir Anthony Mason NPJ 26, 27 November 1998 and 29 January 1999

Criminal evidence — witness — child — video recording admitted as evidence in chief pursuant to s.79C — whether evidence unsworn — Criminal Procedure Ordinance (Cap.221) s.79C

Criminal evidence — witness — "child" in s.79B(2) — "child" in context of "to ... be examined on video recorded evidence" and in context of "to ... be examined by way of live television link" was reference to "child" as defined for purposes of s.79C, that was, as defined by s.79A(2)(ii) — "child" person under 18 — Criminal Procedure Ordinance (Cap.221) ss.79A(2)(ii), 79B(2), 79C

Criminal law and procedure — rape — sexual abuse of child — child unable to give evidence which distinguished one offence in series from others — formulation of indictment — directions

Criminal law and procedure — indictment — general principle that where count alleged one specific offence, prosecution could not lead evidence of a number of acts which amounted to act charged and then invite jury to convict on any one of acts led in evidence — whether exception

Criminal law and procedure — directions — old charge and lack of particularity

[Criminal Procedure Ordinance (Cap.221) ss.9(3), 79A, 79B, 79C, 83(1)(a)]

刑事證據——證人——小孩——依據第 79C 條接納錄像爲主問證供——證供是否未經宣誓——《刑事訴訟程序條例》（第 221 章）第 79C 條

刑事證據——證人——第 79B(2)條接中的“小孩”——“小孩”在“將…被盤問其錄像之證供”的文意裏和在“將…被透過電視聯繫直接盤問”的文意裏是指爲第 79C 條目的而下定義的“小孩”，即是已在第 79(A)(ii)條解釋了——“小孩”是未滿 18 歲仕人——《刑事訴訟程序條例》（第 221 章）第 79(A)(ii)條、第 79B(2)、79C 條

刑法與刑事訴訟程序——強姦——兒童性侵犯——小孩不能作證令其中一項罪行和其他罪行有區別——公訴之制訂——指令

刑法與刑事訴訟程序——公訴——一般的原則是當某項控罪指控一個明確的罪行，控方不能引領一些屬於已被檢控的行動之證據及要求陪審團因那行動之證據而定罪——是否有例外規定

刑事法和訴訟程序——指令——過去的控罪及缺乏詳細
〔《刑事訴訟程序條例》（第 221 章）第 9(3), 79A, 79B, 79C, 83(1)(a)條〕

D was convicted on two counts of raping his stepdaughter, V. The prosecution case was that D raped V on a number of occasions between 14 July 1989 and 15 August 1989 ("the month"). No complaint was made about those events until five years later. The case depended upon the uncorroborated testimony of V. V could not particularise the dates of each rape or differentiate particular acts and her recollection of events was imprecise. Two "specimen counts" of rape were laid on the basis V was raped at least once during the first fortnight of the month and at least once during the second fortnight. At trial, V's evidence in chief consisted of video-taped interviews recorded when she was aged 15 and 16. Those tapes were admitted pursuant to s.79C of the Criminal Procedure Ordinance (Cap.221) (the Ordinance), which provided that where "a video recording has been made of an interview between an adult and a child who is not a defendant ... the video recording may ... be given in evidence." She was then cross examined via a live television link under an order (the order) made pursuant to s.79B(2) of the Ordinance. Section 79B(2) provided that "Where a child ... is to give evidence, or be examined on video recorded evidence under s.79C, in proceedings in respect of: (a) an offence of sexual abuse; ... the court may ... permit the child to give evidence or to be examined by way of live television link ...". The first issue on appeal was whether V's evidence in chief was unsworn. Section 79A defined a "child" for the purposes of Pt.IIIA as "a person who: (a) in the case of an offence of sexual abuse: (i) is under 17 years of age; or (ii) for the purposes of s.79C, if the person was under [17] when a video recording to which s.79C applies was made ..., is under 18 years of age". When the order was made V was 16 years old but by the time she gave evidence she was 17. The second issue raised was whether V was a "child" under s.79B(2), specifically whether s.79B(2) was in part "for the purposes of s.79C", and so the definition of "child" in s.79A(a)(ii) although not expressly applied to s.79B(2), should apply to it.

Despite the indictment containing only two counts of rape, the prosecution led evidence of various acts of rape, doing so on the basis of the jury being asked to find that at least one act of rape occurred in each period. The third issue raised was whether there was a general principle that where a count alleged one specific offence, the prosecution could not lead evidence of a number of acts which amounted to the act charged and then invite the jury to convict on any one of the acts led in evidence. The jury was not asked to identify the particular occasion of the rape and were directed that if they were satisfied there was at least one rape during each period they should convict. The fourth issue raised was the adequacy of the trial judge's directions.

Held, allowing the appeal, that:
Unsworn testimony
(1) Section 79C might be seen as providing for an exception to the general rule that only oral testimony on oath or affirmation might be admitted in

a criminal trial. A more accurate view was that s.79C made video recording admissible as evidence and then provided that a statement made by the child in the recording should have the same effect as if given in direct oral testimony (*R v Day* [1997] 1 Cr App R 181 and *R v Sharman* [1998] 1 Cr App R 406 considered). (See pp.772B-773E.)

Whether V was a "child" under s.79B(2)

(2) The effect of s.79A(a)(ii), with its extension of the age limit to under 18, was that s.79C was to be read with that definition in mind. So when s.79C was read with s.79A(a)(ii), a recording was admissible if the child was under 17 when the interview was made and was under 18 when the recording was tendered in evidence. (See p.774D-F.)

(3) Further, when s.79C(6)(a) provided that "the child ... shall be called by the party who tendered the recording in evidence," it must be read likewise as applying to a child under 18. Section 79C(6)(a) did not specify the manner in which the child should be called to give evidence, that was whether in court or by live television link. Section 79B(2), which was, in part, for the purposes of s.79C, addressed that question. Section 79B(2) provided for the way in which a child might give evidence in discharge of the obligation imposed by s.79C(6)(a), namely that, where a video recording was admitted, the child "shall be called." Accordingly, the reference in s.79B(2) to "child" in the context of "to ... be examined on video recorded evidence" and in the context of "to ... be examined by way of live television link" was clearly a reference to a "child" as defined for the purposes of s.79C, that was, as defined by s.79A(a)(ii). This construction entailed one unusual consequence, namely that the word "child" in s.79B(2), bore different meanings, according to whether a child was "to give evidence" or "be examined on video recorded evidence". (See pp.774F-775C.)

(4) (*Obiter*) The existence of an order giving leave for a child under 18, who was to be examined on a video recording, to give evidence by live television link would provide justification for taking that course after the child attained the age of 18. (See p.775F-G.)

Whether general principle

(5) There was a general principle that in the absence of any act or acts being identified as the subject of an offence charged in an indictment, the prosecution could not lead evidence that was equally capable of referring to a number of occasions, anyone of which might constitute an offence described in the charge, and invite the jury to convict on any one of them (*R v Accused (CA 160/92)* [1993] 1 NZLR 385, *R v P* [1998] 3 NZLR 587 considered, *Johnson v Miller* (1937-38) 59 CLR 467, *S v The Queen* (1989-1990) 168 CLR 266 applied). (See pp.776B-C, 776I-777B.)

(6) Even if there was an exception to this principle, so as to ensure the principle did not provide a charter of immunity to offenders where a complainant was unable to differentiate between offences, the present case did not fall within such an exception. (See pp.780I-J, 781C.)

(7) In cases where differentiation was impossible, an indictment might be drawn to include a number of counts, each, apart from the first, alleging

"on an occasion other than alleged [in the previous counts]". That course could be pursued where the series of offences was alleged to have been committed over a relatively short period of time. It was a course which might have been adopted in the present case and it would have provided an answer to the problem. The failure to confine each count to single act of rape was an error of law (*Archbold's Criminal Pleading Evidence and Practice* (1998 ed.) p.49) (See pp.780J-781B.)

Directions

(8) The jury were not instructed that to convict on both counts, they must be satisfied D committed one particular act of rape in each of the two periods specified in the indictment. Nor were they instructed that the absence of particularity with respect to the individual incidents alleged to have occurred so long ago made it difficult for D to meet the charges. That direction was important in ensuring fairness to an accused in cases involving old charges, especially where there is little particularity. Either direction might have affected the jury's consideration (*R v Rackham* [1997] 2 Cr App R 222 considered). (See p.782A-E.)

Mr Gerard McCoy QC, instructed by the Director of Legal Aid, for the appellant.

Mr Anthony E Schapel, Senior Assistant Director Public Prosecutions and Ms Denise Chan, Senior Government Counsel, of the Department of Justice, for the respondent.

Legislation mentioned in the judgment:

Canadian Criminal Code s.492(1)
Crimes Act 1961 s.329(6) [New Zealand]
Criminal Code (WA) s.689(1)
Criminal Procedure (Amendment) Bill [Eng]
Criminal Procedure Ordinance (Cap.221) ss.9(3), 79A, 79A(a)(i), (ii), (2)(ii), 79B, 79B(2), 79C, 79C(2), (4), (6), (6)(a), (7), 83(1)(a), Pt.IIIA
Indictment Rules [Eng]
Evidence Ordinance (Cap.8) s.4(1)
Indictment Rules (Cap.221, Sub.Leg.) rr.2(2), 3(1)

Cases cited in the judgment:

DPP v Merriman [1973] AC 584
Johnson v Miller (1937-38) 59 CLR 467
Parker v Sutherland (1917) 86 LJ KB 1052
R v Accused (CA 160/92) [1993] 1 NZLR 385
R v Day [1997] 1 Cr App R 181
R v Evans [1995] Cr LR 245
R v Farrugia (unrep., *The Times*, 18 January 1988)
R v Funderburk [1990] 2 All ER 482
R v Hulan (1970) 1 CCC 36
R v P [1998] 3 NZLR 587
R v Rackham [1997] 2 Cr App R 222
R v Sallas (1997) 116 CCC (3d) 435

R v Sharman [1998] 1 Cr App R 406
R v Shore (1989) 89 Cr App R 32
S v The Queen (1989-1990) 168 CLR 266

Other materials mentioned in the judgment:
Archbold's Criminal Pleading Evidence and Practice (1998 ed.) pp.49-50 *Hansard*, 19 July 1995, p.5518

Li CJ:
I have read the judgment of Sir Anthony Mason NPJ and agree with it.

Litton PJ:
I also agree.

Ching PJ:
I agree with the judgment of Sir Anthony Mason NPJ.

Bokhary PJ:
I concur in the judgment of Sir Anthony Mason NPJ.

Sir Anthony Mason NPJ:
The appellant was convicted by majority verdict of a jury (five to two) of two counts of rape after a trial before Chan CJHC in the High Court. An appeal against the two convictions was dismissed by the Court of Appeal. The appeal to this Court was brought from the order of the Court of Appeal dismissing the appeal to that Court. At the conclusion of the argument on the appeal this Court allowed the appeal, set aside the convictions and discharged the appellant from custody, stating that the reasons for the decision would be published later. What follows is a statement of my reasons for participating in the decision.

The indictment and the circumstances out of which it arose
The first count in the indictment alleged that the appellant "on a date unknown between 14 July 1989 and 31 July 1989" at his home raped his stepdaughter Wong Man Ling. The second count was in identical terms save that the date in the particulars of the offence charged was expressed as "on a date unknown between 1 August 1989 and 15 August 1989".

The complainant, Wong Man Ling, was born on 1 March 1980 and was 9 1/2 years old when the alleged offences were committed. She was then living with her mother and her stepfather, the appellant, who had married her mother in July 1988. They were living in a rented room at the rooftop of a building in Kwun Tong. It was a small room and there was only one bunk bed and some simple furniture. Wong Man Ling slept on the upper bunk. The mother and the appellant slept on the lower bunk which was a double bunk.

The prosecution's case, based on video-recorded interviews of the complainant which were admitted into evidence, was that when the mother

was pregnant with the complainant's younger sister, while the complainant was at home on school summer vacation and the mother was at work, the appellant repeatedly raped the complainant on the double bunk during the period between 14 July 1989 and 15 August 1989. The complainant was unable to differentiate in any significant way between any of the particular acts of rape. It seems that in aggregate, there were about 10 occasions in that time span when the appellant sexually molested her and that on the first few occasions rape did not take place because the appellant was unable to effect penetration. According to the complainant's account, sometimes these acts took place on consecutive days and sometimes only on every other day. The complainant's recollection of these events was far from being precise, a matter to which I shall return later.

She made no complaint about these occurrences until she spoke to a school friend in 1994, some five years later. She then told her elder sister and a social worker and finally her mother, after being persuaded by the school friend to do so. Even then, it was the mother, not the complainant, who first raised the question whether the appellant had molested her. The complainant told her mother that she did not want the matter mentioned to the appellant because she was scared and did not want to break up the family. The mother reported the matter to the police.

The complainant's failure to mention the matter to anyone before speaking to her friend in 1994 was said to be due to a combination of ignorance of the significance of the appellant's conduct, her unwillingness to share her problems with other members of her family, her apprehension and her desire not to break up the family. It seems also that she wanted to forget about the events.

The trial

The complainant's evidence was not corroborated by independent testimony. There was no medical evidence, no evidence of injury, apart from pain sustained by the complainant and no evidence of blood or other stains on the bedclothes or clothing. There was no admission by the appellant who denied the allegations and gave evidence contradicting the complainant's evidence. The appellant's case was that there was a "frame-up" on the part of the complainant who, influenced by her elder sister, reacted against discipline imposed by the appellant.

Notwithstanding the fact that the indictment contained two counts only of rape, the prosecution presented evidence of the various acts of sexual molestation without consent, including evidence that penetration took place except on the first few occasions when penetration was not effected. The evidence was led on the footing that the jury was asked to find that in each of the two periods one act of rape occurred, without being asked to identify the particular occasion when it occurred. The learned trial Judge put the prosecution case to the jury in this way:

> The prosecution case is this: between 14 July and 15 August 1989 the defendant had raped the girl on a number of occasions, she said about ten times. But you may recall that the girl did not remember the exact

> dates or the number of these occasions. She also said that on the first few occasions, it seemed that the defendant did not enter her private parts. Hence, it is not clear how many times the defendant had raped the girl during this time.
>
> So, the prosecution has laid two charges, instead of ten, in relation to two periods of time, the first from 14 July to 31 July 1989 and the second from 1 August to 15 August 1989. It is the prosecution's case that there was at least one rape during each period.
>
> If you are satisfied that there was at least one rape during each period, you should convict the defendant of the two charges but these two charges are, of course, separate charges and you should consider them separately.

The complainant's evidence-in-chief consisted of four video-taped interviews recorded between January and August 1996 when she was 15 and later 16 years old. The video-tapes were received in evidence pursuant to s.79C of the Criminal Procedure Ordinance (Cap.221) (the Ordinance) without objection by counsel for the appellant. Sections 79A, 79B and 79C form part of Pt.IIIA of the Ordinance, the heading of which is a "Special Procedures for Vulnerable Witnesses".

No particulars were sought or given of the offences charged. The contents of the recorded interviews were made known, however, to the appellant's lawyers in advance of the trial.

The complainant was cross-examined at the trial from a room outside the court room via a live television link. The cross-examination by way of live television link took place in consequence of an order made by Gall J on 22 November 1996, pursuant to s.79B of the Ordinance, permitting the complainant's evidence to be given in that way. When Gall J made this order, the complainant was 16. By the time she gave evidence at the trial at the end of March 1997 she had just turned 17. That is a matter of some significance by reason of the terms of the definition of "child" which is contained in s.79C.

The learned trial Judge shortly summarised the evidence and stated the issues for the consideration of the jury. He told the jury that there was no independent corroboration of the complainant's evidence and warned them of the danger of convicting on such evidence in a case involving an allegation of the commission of a sexual offence. Despite that warning, his Lordship instructed the jury, as he was bound to do, that it was entitled to bring in a verdict of guilty if it was satisfied beyond reasonable doubt of the elements necessary to establish the offence charged in the indictment. As will appear, a question arises as to the sufficiency of the directions in the light of the way in which the complainant's answers were elicited in the interviews and in the light of the frailty of her recollection.

Counsel for the appellant at the trial did not take any exceptions to the directions given to the jury by the trial Judge, nor did he seek any further directions.

The Court of Appeal

In refusing leave to appeal, the Court of Appeal rejected the three grounds of appeal which were advanced on behalf of the appellant. The first ground was

that the complainant's evidence in cross-examination by way of live television link was inadmissible because it was not authorised by ss.79A and 79B of the Ordinance, the complainant having just turned 17 when she was cross-examined. The second ground was that the trial Judge should have directed the jury to acquit on the second count of rape as there was no evidence satisfying the criminal standard of proof that sexual intercourse took place in the period specified in the second count. The third ground arose from the nature of the prosecution case in leading evidence of more than one rape in relation to each of the two counts. The appellant contended that the prosecution should have been called upon to elect as to the particular offence which was to be the subject of each count and that subsequently, the Judge should have directed the jury that it could only convict if the members of the jury were individually satisfied as to the commission of the same offence. After rejecting these grounds, the Court of Appeal concluded by saying that the convictions were in no way unsafe or unsatisfactory.

Grant of leave to appeal

In July 1998, the Appeal Committee granted leave to appeal to the Court of Final Appeal on the basis that there was an arguable case of substantial and grave injustice arising from the grounds of appeal argued in the Court of Appeal and from the way in which the video-taped interviews were conducted. In granting leave, the Appeal Committee noted that the Court of Appeal had certified on 8 May 1998 that its decision that the order of Gall J, made on 22 November 1996 allowing the complainant to give evidence by way of live television link, was not spent was a matter of great and general importance. The Appeal Committee accepted that view of the matter.

Grounds of appeal

The grounds of appeal argued in this Court, in the order in which it is convenient to deal with them, rather than in the order in which they were argued, were as follows:

(1) that the complainant's evidence-in-chief (the video-taped interviews) was unsworn;

(2) that the complainant's evidence by live television link was erroneously admitted into evidence;

(3) (a) evidence of some ten acts of rape was inadmissible in proof of two counts each alleging one act of rape; and

(b) that the convictions should be quashed because each was based on evidence of multiple offences;

(4) that because the complainant's answers in the video-taped interviews were elicited by leading questions and suggestions, the interviews should not have been received in evidence or should have been the subject of special directions by the trial Judge;

(5) (a) that the trial Judge's directions in relation to the way in which the prosecution sought to make out its case were erroneous and inadequate; and

(b) that the trial Judge should have directed the jury with respect to the frailty of the interview evidence and the danger of convicting on it;

(6) that the verdicts were unsafe and unsatisfactory.

1. The unsworn video-taped interviews

The appellant submitted that, before the interviews were received in evidence, the complainant should have been sworn and asked to adopt the truth of her statements in the interviews. Her adoption of those statements, it was argued, was a condition of their admission into evidence. Section 4(1) of the Evidence Ordinance (Cap.8) provided at the relevant time that the evidence of a child under 14 years of age in criminal proceedings shall be given unsworn. The corollary, so the argument runs, is that a person who is 14 or over that age *shall* give evidence either on oath or affirmation.

The answer to this submission is that s.79C(2) of the Ordinance expressly provides that, where in the proceedings to which it applies (the trial in this case being such a proceeding):

> ... a video recording has been made of an interview between an adult and a child who is not a defendant and the interview relates to any matter in issue in the proceedings, the video recording may, with the leave of the court, be given in evidence.

Subsequent sub-sections of s.79C make it clear that it is the video recording that is received into evidence. Thus, sub-s.(4) provides that where a video recording is tendered in evidence under the section:

> ... the court shall grant leave to admit the recording

subject to certain exceptions or qualifications one of which is that:

> ... it appears that the child ... will not be available for cross-examination (s.79C(4)(a)).

Sub-sections (6) and (7) are destructive of the appellant's argument on this point. Sub-section (6) provides that where a video recording is admitted:

> (b) the child ... *shall not be examined in chief*, save with the leave of the court, on any matter which, in the opinion of the court, has been dealt with in his recorded testimony. (Emphasis added.)

Sub-section (7) goes on to provide that, where a video recording is given in evidence:

> ... any statement made by the child ... which is disclosed by the recording shall be treated as if given by that witness in direct oral testimony ...

The effect of this sub-section is to give to the statements in the recording the same effect they would have if given in evidence on oath or affirmation, thus, making it unnecessary for the child to be sworn and to adopt the statements in the recording.

It should also be noted that sub-s.(7), though requiring that the child shall be called to give evidence, contemplates that the child will be called, after the video recording has been admitted into evidence, "by the party who tendered the recording in evidence". In other words, the recording is already in evidence and has evidential effect before the child is called to give evidence.

It follows that s.79C makes the video recording admissible and gives evidential effect to the statements which it records as if those statements had been given by the witness in direct oral testimony, without the need for the witness to be sworn or to give oral evidence adopting the statements. Section 79C may be seen as providing for an exception to the general rule that only oral testimony on oath or affirmation may be admitted in a criminal trial. That is the view which has been taken of comparable legislation in England (*R v Day* [1997] 1 Cr App R 181, *R v Sharman* [1998] 1 Cr App R 406). A more accurate view of the operation of s.79C is that it makes the video recording admissible as evidence and then provides that a statement made by the child in the recording shall have the same effect as if given in direct oral testimony.

2. The complainant's evidence by live television link

Section 79B(2) provides:

> (2) Where a child, other than the defendant, is to give evidence, or be examined on video recorded evidence under s.79C, in proceedings in respect of:
>
> (a) an offence of sexual abuse;
>
> ...
>
> the court may, on application or on its own motion, permit the child to give evidence or be examined by way of a live television link, subject to such conditions as the court considers appropriate in the circumstances.

Section 79A provides that in Pt.IIIA, unless the context otherwise requires:

> "child" means a person who:
>
> (a) in the case of an offence of sexual abuse:
>
> (i) is under 17 years of age; or

> (ii) for the purposes of s.79C, if the person was under that age when a video recording to which s.79C applies was made in respect of him, is under 18 years of age; ...

Section 79A also contains definitions of "live television link", "offence of sexual abuse" and "video recording" but no question arises in relation to these definitions or their application to the circumstances of this case.

The appellant submitted that, when s.79B(2) is read with the definition in s.79A of "child", the sub-section does not permit a child who is 17 to give evidence or be examined by way of a live television link. The Court of Appeal answered this argument by saying that, as the complainant was under 18, she fell within para.(a)(ii) of the definition of "child".

The definition contained in para.(a)(i), with its age limit of under 17, applies throughout Pt.IIIA, except to the extent that para.(a)(ii) makes different provision "for the purposes of s.79C", which deals with the reception in evidence of video recordings.

The effect of para.(a)(ii), with its extension of the age limit to under 18, is that s.79C is to be read with that definition in mind. Section 79C does not in terms provide when it is that the determination that a person is a child is to be made. Paragraph (a)(ii) seeks to answer that question in providing that "child" means a person who:

> ... if the person was under that age [ie 17] when a video recording to which s.79C applies was made in respect of him, is under 18 years of age.

So when s.79C(2) is read with this part of the definition, a recording is admissible if the child was under 17 when the interview was made and is under 18 when the recording is tendered in evidence, subject to the statutory qualifications.

When s.79C(6)(a) provides that:

> ... the child ... shall be called by the party who tendered the recording in evidence ...

It must be read likewise as applying to a child under 18. Sub-section (6)(a) does not, of course, specify the manner in which the child shall be called to give evidence, that is, whether in court or by live television link. That is a question to which s.79B(2), not s.79C, is addressed. As para.(a)(ii) of the statutory definition is not expressed to apply to s.79B, the consequence might appear to be that Pt.IIIA did not authorise the reception of the complainant's evidence by live television link.

The answer to this apparent difficulty is to be found in s.79B(2) which is directed, in part, to serving the interests of s.79C. Section 79B(2) provides for the way in which a child may give evidence in discharge of the obligation imposed by s.79C(6)(a), namely that, where a video recording is admitted, the child "shall be called". In that situation, namely "where a child ... is to be examined on video recorded evidence given under s.79C", s.79B(2) authorises

the court to permit the child "to give evidence or be examined by way of a live television link". The conferral of this power on the court is, accordingly, "for the purposes of s.79C", because an exercise of the power will provide for the way in which an obligation imposed by that section is to be discharged. The reference in s.79B(2) to "child" in the context of "is to be examined on video recorded evidence" and in the context of "to ... be examined by way of live television link" is clearly a reference to a "child" as defined for the purposes of s.79C, that is, as defined by s.79A(2)(ii).

This reading of s.79B(2) entails one unusual consequence, namely that the word "child", where appearing in s.79B(2), bears different meanings, according to whether a child is "to give evidence" or "be examined on video recorded evidence". In the first case, "child" means under 17; in the second, it means under 18. The ordinary rule is that a word should prima facie bear the same meaning in the same section. Here, s.79A makes specific provision for a different result.

The interpretation which I favour is entirely consistent with the recorded view of the Bills Committee on the Criminal Procedure (Amendment) Bill which in its final form was enacted as Pt.IIIA. *Hansard* of 19 July 1995 p.5518 contains the following passage:

> The Bills Committee has also considered the practical aspects of giving evidence by live television link. Members agree that there should be a provision to clearly spell out that cross-examination and re-examination will occur through the live video-link for a person who has given pre-trial evidence via a video-tape and *that the court will decide whether the child witness can give evidence by way of a live television link.* (Emphasis added.)

It is unnecessary for us to deal with the Court of Appeal's conclusion that the order made by Gall J giving leave to give evidence by television link was not spent. On the interpretation which I give to s.79B(2), that order was not spent. I would not, however, consider that the existence of an order giving leave for a child under 18, who is to be examined on a video recording, to give evidence by live television link would provide justification for taking that course after the child attains the age of 18.

3(a). Was the evidence of multiple acts of rape admissible?

(b). Should the convictions be quashed because they were based on evidence of multiple offences?

As each count in the indictment charged a single act of rape, the indictment was not bad for duplicity, as it would have been had each count charged more than one act of rape: see *Archbold's Criminal Pleading Evidence and Practice* (1998 ed.) p.50. There was accordingly, no basis on which the indictment could be quashed.

On the other hand, the facts alleged or the evidence led may disclose what has been described as a "latent ambiguity" in the indictment: see *Johnson v Miller* (1937-38) 59 CLR 467 at p.486 per Dixon I Such an instance of latent

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of more than one offence in proof of the one offence charged. In many cases the problem can be avoided by an appropriate amendment or by the giving of particulars which sufficiently identify the particular act charged in a way that will distinguish it from any other acts of which the prosecution intends to lead evidence or by election to proceed on a particular act alone. In the present case, the prosecution took none of these steps because the complainant was largely unable to distinguish any one of the incidents from the others except in terms of the appellant's inability to effect penetration on the first few occasions.

Two important and controversial questions arise. The first is whether it is a principle of the common law that, where a count in an indictment alleges one specific offence, it is not open to the prosecution to lead evidence of a number of acts which amount to the act charged and then to invite the jury to convict on any one of the acts led in evidence. The second question is whether the principle, if it exists, admits of an exception when the prosecution evidence shows that the offence was committed as part of a course of conduct and that the evidence does not enable more particularity to be given than an allegation that the conduct occurred over a specified period of time.

The questions are important by reason of the emergence of cases of repeated sexual abuse of children where the complainant is unable to give evidence which distinguishes one offence in a series from the others in that series. The questions are controversial by reason of the practice which appears to have developed in New Zealand and is developing in the United Kingdom of presenting "specimen counts", of which the counts in the present indictment may be regarded as instances, and because there are conflicting decisions of the High Court of Australia and the New Zealand Court of Appeal on the question.

The facts in *S v The Queen* (1989–1990) 168 CLR 266, the decision of the High Court of Australia, are, for relevant purposes, not unlike the present case. There an indictment charged the father with three counts of carnal knowledge of his daughter, then aged between 14 and 17. Each count charged one act of carnal knowledge on a date unknown within a specified period of 12 months. The three periods were 1 January 1980 to 31 December 1980, 1 January 1981 to 31 December 1981 and 8 November 1981 to 8 November 1982. The prosecutor did not identify the specific acts the subject of the counts; nor did he make an election to proceed on one act in each count. Although there were practical difficulties in particularising one or all of the offences, it was not clear that it was wholly impossible to do so; see p.288. The complainant gave evidence of two specific acts of intercourse but her evidence did not link either with any one of the specified periods. She also gave evidence of numerous further acts over a period of two years until she left home in November 1982. She could not remember details or frequency other than that it occurred "every couple of months for a year". Objection was not taken at the trial to the generalised evidence of intercourse between the father and the complainant. The accused was convicted on each count.

The Court, applying *Johnson v Miller* (1937–38) 59 CLR 467, held

equally capable of referring to a number of occasions, any one of which might constitute an offence as described in the charge and invite the jury to convict on any one of them. Concern was also expressed that the jury may not have been satisfied as to commission of any particular offence (at pp.276-277, 283, 287-288) and about the later availability to the accused of a plea of *autrefois convict* or *autrefois acquit* in relation to offences disclosed by the evidence (at pp.276-277).

In the result the Court held by majority (with Brennan J dissenting) that the course followed at the trial involved a substantial miscarriage of justice within the meaning of s.689(1) of the Criminal Code (WA) and that the convictions should be quashed. The Court ordered a new trial because it was thought that there might be some means of overcoming some or all of the difficulties which had been identified.

On the other hand, in *R v Accused (CA 160/92)* [1993] 1 NZLR 385, the New Zealand Court of Appeal held that the practice of presenting specimen counts was established in New Zealand and was not confined to sexual abuse cases but extended to cases in which a course of conduct was alleged. In that case, it was held that the relevant specimen counts, which charged sexual offences against children, were unobjectionable in that the prosecution evidence did not enable more particularity than that the conduct alleged occurred a number of times over quite a long period. The Court declined to follow *S v The Queen* (1989-1990) 168 CLR 266.

Very recently, in *R v P* [1998] 3 NZLR 587, the New Zealand Court of Appeal distinguished *R v Accused (CA 160/92)* [1993] 1 NZLR 385. In *R v P*, the appellant was convicted on a "representative" (specimen) charge of rape. The appeal was allowed on the ground that each of the various acts relied upon by the prosecution from which it invited the jury to find one act of rape was able to be addressed as an individual incident. Accordingly, the indictment should have been framed to contain six specific counts of rape. The consequence was that the appellant had been:

> ... deprived of the right to have each of [the] specific allegations tested separately under the criminal process according to law ... (at p.590)

The Court, in acknowledging that the practice of framing specimen charges may be appropriate where a course of conduct is alleged and the prosecution evidence does not enable more particularity to be given than that the conduct occurred on occasions over a specified period of time, pointed out (at p.590) that the statutory provisions relating to the framing of indictments must be observed. One of the relevant provisions, s.329(6) of the Crimes Act 1961 (New Zealand), provided that:

> Every count shall in general apply only to a single transaction.

This provision is in material respects the same as s 492(1) of the Canadian

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evidence of a series of offences: see *R v Hulan* (1970) 1 CCC 36, *R v Selles* (1997) CCC 435. This interpretation rests on an expansive interpretation of the words "single transaction", an interpretation which has not been adopted in the United Kingdom, and on the proposition that the statutory expression "in general" allows for the recognition of exceptions to the generality of the prescribed rule.

The Indictment Rules (Cap.221, Sub.Leg.), applicable in Hong Kong, which are modelled on the English Indictment Rules, take a different form. Rule 2(2) provides:

> Where more than one offence is charged in an indictment, the statement and particulars of each offence shall be set out in a separate paragraph called a count ...

Rule 3(1) then provides:

> ... every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence with which the accused is charged describing the offence shortly, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

These rules govern the framing of the indictment and do not in terms purport to regulate the way in which the prosecution may present its case on an indictment which is so framed as to comply with the rules. However, it is of some significance that, in *DPP v Merriman* [1973] AC 584, the English Rule on which r.2(2) was based was described by Lord Morris of Borth-y-Gest (at p.593) as "a general rule". Moreover, Lord Diplock noted (at p.607) that it had always been applied:

> ... in a practical, rather than in a strictly analytical way for the purpose of determining what constituted one offence.

The rule against duplicity contributes to a fair trial by enabling the accused to know the charge he is called upon to answer and the jury to found its conviction upon the specific offence charged. Once this is recognised, it is but a short step to the companion principle, affirmed in *S v The Queen* (1989–1990) 168 CLR 266, following *Johnson v Miller* (1937) 59 CLR 467, which in turn was based on *Parker v Sutherland* (1917) 86 LJ KB 1052, that confines the prosecution to the proof of one offence as the basis for a conviction of a single offence charged in a count in an indictment.

This principle serves the same general purposes as the rule against duplicity. Knowledge of the particular act, matter or thing which is the foundation of the charge is important in enabling the accused to ascertain and prove what, if any, defence, for example, an alibi, he may have to the offence charged and to subject complainant's evidence to searching scrutiny by reference to the surrounding

embarrassment if he is called upon to meet a charge of one offence based upon evidence of the commission of multiple offences, more particularly if the evidence is such that it does not enable each such offence to be clearly differentiated from the others. The degree of unfairness or embarrassment may vary according to the circumstances. If the prosecution case is based on evidence of many offences in an extended period of time the unfairness may be considerable.

The principle also plays a part in preserving the notion of a separate trial for a separate offence. In so doing, it enables the jury to focus on the single offence proved as the basis for a conviction of the offence charged and it encourages the jury to apply the criminal standard of proof to the evidence of that offence. In the event that the jury is invited, as it was here, to find the commission of at least one offence from evidence of multiple offences, there is either a risk of want of unanimity as to the same offence or a willingness to find guilt from the very frequency of the offences suggested by the evidence. The risk arises because the focus of the jury may be directed from the particularity of a single offence to the generality of the evidence of multiple offences.

Another purpose served by the principle is to secure certainty in the conviction or the acquittal, thereby making available a plea of *autrefois convict* or *autrefois acquit* to a subsequent prosecution for the same offence. The risk of uncertainty in the conviction, arising from the way in which the prosecution case was presented here, for the purpose of such a plea would not appear to be significant. For the reasons given by Brennan J in *S v The Queen* (1989-1990) 168 CLR 266 (at pp.271-272) it is inconceivable that the prosecution could discharge the onus of showing that a subsequent charge for an offence in a relevant period of time was other than for an offence for which he had been convicted or acquitted previously.

Although the purposes served by the principle do not all have equal force, the considerations relating to fairness and proper jury deliberation have very strong force and support the general principle upheld unanimously in *S v The Queen* (1989-1990) 168 CLR 266. That decision denies the suggestion that there is an exception or qualification which permits a prosecution for sexual abuse of a child to be presented on the basis of a specimen count when the complainant is unable to be precise as to the date, time and place of the particular offences of which complaint is made, is unable to distinguish between them and the offences extend over a long period of time.

It seems that this practice of using specimen counts has been countenanced by the English courts, so long as the occasions to be proved in evidence are particularised adequately and the prosecution case is not "overloaded" so as to subject the accused to unfairness: see *R v Evans* [1995] Crim LR 245, *R v Rackham* [1997] 2 Cr App R 222, especially at p.226 where *R v Farrugia* (unrep., *The Times*, 18 January 1988), is discussed; see also *R v Shore* (1989) 89 Cr App R 32, *R v Funderburk* [1990] 2 All ER 482.

The developing English practice, which amounts to an exception or qualification to the general principle arises from an acknowledgment that an

who are guilty of sex offences against children. If there is no relevant exception to the general rule the result may be that a prosecution cannot be conducted successfully when the complainant's evidence falls into the category just described.

In *R v Rackham* [1997] 2 Cr App R 222, Ian Kennedy J cited (at p.226) a passage from the judgment of Rougier J in *R v Evans* [1995] Crim LR 245, a case of persistent and multifarious abuse of a child where the complaint was of lack of particularity in an indictment. In the passage cited, Rougier J said:

> ... in these cases, when a child has allegedly been abused on many occasions, over a lengthy period, it is quite unrealistic to expect that child to be particularly specific as to precise dates or places under the sanction that if, owing to the very multiplicity of offences, coupled with the lapse of time and failing memory caused by a natural desire to put the experience behind him, he cannot do so, his abuser is immune. To hold otherwise would be a charter for those [who] commit this sort of offence.

In *R v Evans* [1995] Crim LR 245, the Court of Appeal (Criminal Division) quashed a conviction on a count which alleged indecent assault between December 1988 and June 1990 which was based on detailed evidence of multiple indecency of different kinds. An application for further and better particulars was refused by the trial judge notwithstanding the vagueness of the original particulars. The Court quashed the conviction because the prosecution should have given particulars specifying at least "the *type* of conduct" (original emphasis) alleged and because the directions given were inadequate in that they did not bring home to the jury the need to be satisfied as to the same act having taken place. The conviction was not quashed on the ground that the jury was invited to find the commission of one offence from evidence of a number of offences.

Although s.9(3) of the Criminal Procedure Ordinance (Cap.221) provides that:

> ... the practice and procedure in all criminal causes and matters ... shall be, as nearly as possible, the same as the practice and procedure from time to time and for the time being in force for similar cases in England

that provision is necessarily subject to the requirements of substantive principles of law. If, as I conclude, there is a general principle which precludes proof of more than one offence as the basis for the conviction of the single offence charged, s.9(3) cannot require the Hong Kong courts to depart from that substantive principle of law.

It is difficult to craft an exception to the general principle which would strike the right balance between ensuring that the principle does not provide a charter of immunity to offenders where a complainant is unable to differentiate [illegible] and providing adequate safeguards to an accused person.

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that in cases where differentiation is impossible, an indictment may be drawn to include a number of counts, each, apart from the first, alleging "on an occasion other than that alleged [in the previous counts]". That course can be pursued where the series of offences is alleged to have been committed over a relatively short period of time. It is a course which might have been adopted in the present case and it would have provided an answer to the problem. Although that approach would not have resulted in the giving of particulars or of more specificity in the complainant's evidence, it would have resulted in the jury's attention being focused on the individual acts alleged and the evidence relating to those acts, without any departure from the general principle.

For this reason, I do not regard the present case as one which falls within an exception to that principle, even if it were appropriate for this Court rather than the legislature to recognise a category of cases as constituting such an exception.

I conclude therefore that, in allowing the trial to proceed without confining each count to a single act of rape, there was an error of law. This must result in an order quashing the convictions, subject to the consideration of the other grounds of appeal and the possible application of the proviso.

4. The way in which the complainant's evidence was led

The appellant's submission that the recordings should have been edited to omit answers to leading questions and suggestions cannot be accepted. No relevant objection was taken or application made by counsel for the appellant at the trial.

There were recordings of four separate interviews extending over several months at which the complainant was questioned by a female detective and a female social welfare officer. The questioning was very persistent but it did not, in my view, result in the eliciting of material answers by means of leading questions. In any event, as the recordings were of interviews, it would not be right to insist that leading questions should not be asked, though recordings of interviews which reveal leading questions may be subject to adverse comment when received in evidence at a trial. The persistent questioning did, however, result in the complainant altering her answers. At first she could not remember how often acts constituting rape took place. After giving different answers, she later said that it occurred "about ten times". Initially, she said that the offences occurred within one or two weeks, a period which subsequently extended to a month. Again, after initially denying that she saw the appellant's penis, she said subsequently that she had seen it on one occasion. The alterations in the complainant's evidence, along with her lack of detailed recollection and the lapse of time rendered her evidence susceptible to critical comment.

The four separate interviews were, to a significant extent, repetitive and offered the opportunity, not ordinarily available to a witness in examination-in-chief, of elaborating, refining and strengthening the complainant's evidence. But this does

5. The trial Judge's directions

The learned Judge instructed the jury that they must be satisfied according to the criminal standard of proof that there was at least one rape during each period and that they were separate charges to be considered separately. The Judge pointed out to the jury the danger of convicting on evidence which lacked independent corroboration, though the strength of the caution was weakened by the statement that the jury might not think that the absence of corroboration was surprising in view of the long lapse of time. His Lordship also dealt with the appellant's defence that it was a "frame up" on the part of the complainant who was led astray by her elder sister and may have rebelled against discipline by the appellant.

There are, however, two aspects of the directions which call for comment. His Lordship did not instruct the jury that, in order to convict the accused on both counts, they must be satisfied that he committed the one particular act of rape in each of the two periods specified in the indictment. Nor did his Lordship instruct the jury to the effect that the absence of particularity with respect to the individual incidents alleged to have occurred so long ago made it difficult for the accused to meet the charges. In England, it is customary for a trial judge to remind a jury of the accused's difficulty in meeting old charges: see *R v Rackham* [1997] 2 Cr App R 222 at p.227. The giving of the last-mentioned direction is an important element in ensuring fairness to the accused in cases involving old charges, especially when there is little particularity. Had either direction been given, it might well have had an impact on the jury's consideration of the issue.

6. Unsafe and unsatisfactory

The comment just made is relevant to the question whether the convictions were unsafe and unsatisfactory within the meaning of s.83(1)(a) of the Criminal Procedure Ordinance (Cap.221). The way in which the case was presented, the absence of critical directions, together with the frailty, the uncertainty, lack of specificity and inconsistency of the complainant's version of events, coupled with the absence of any corroboration whatsoever, inevitably led to the conclusion that the convictions were unsafe and unsatisfactory and there was no basis for applying the proviso. The convictions were, accordingly, quashed. Because the evidence available to the prosecution could not sustain a conviction, a new trial was not ordered and the appellant was discharged from custody.

time of the act of indecency); *R. v. Allamby and Medford*, 59 Cr.App.R. 189, CA (having an offensive weapon in a public place, *post*, § 24–107); *R. v. Pickford* [1995] 1 Cr.App.R. 420, CA (inciting incest where boy incited was under age of capacity for part of period particularised); and *R. v. Macer, The Times*, February 17, 1995, CA (convictions quashed where based on general allegations rather than on specific evidence relating to the particular occasions charged).

Specimen charges; identifying the incident charged

1–131 A further problem can arise if evidence is put before the jury of a number of incidents occurring within the date span specified in the indictment (or relied upon by the prosecution) where any one of those incidents, if proved, could amount to the offence charged. Quite apart from the difficulties that a defendant may have in such a case in knowing precisely which incident to concentrate his defence upon, there is the risk that some members of the jury will found a conviction on one incident while other members of the jury will found a conviction on a different incident. (See *post*, §§ 4–391 *et seq.* for a discussion of a similar problem in other contexts, and see *ante*, §§ 1–116, 1–117 generally, and as to the practice of seeking further particulars.) Furthermore, the judge who passes sentence will not know which incident the jury have found proved. This problem can arise where specimen charges only are laid. The facts of *R. v. Shore*, 89 Cr.App.R. 32, CA, illustrate these difficulties. The defendant was charged with four counts of indecent assault against four different girls, the date span in each count being one of several years. The defendant was a school teacher and evidence was adduced of indecent acts by him against the four girls in three particular situations, namely during P.E. lessons, on a bus during school trips and at swimming lessons. No attempt was made to tie any count to any particular allegation. The Court of Appeal appears to have regarded this as unobjectionable, but it is submitted that such an approach is objectionable in that the allegations and the resulting convictions were too vague. The judge could not have known whether the jury were satisfied about one particular incident or about a course of conduct, or, indeed, about which type of incident.

1–132 In such circumstances, there is no reason why there should not be one count for each situation in which any particular child was alleged to have been assaulted. Where a child's statement refers not to situations but to particular occasions (a birthday, a holiday, a time when his or her mother was in hospital), the counts can be drafted to make clear what offences are being alleged. Where the prosecution does relate particular counts to particular incidents, it is incumbent on the judge in summing up to relate the evidence to the particular counts: see *R. v. Farrugia, The Times*, January 18, 1988, CA. This approach was followed by the Court of Appeal in *R. v. Rackham* [1997] 2 Cr.App.R. 222, where convictions in respect of alleged sexual assaults on children over a lengthy period of time were quashed on the ground that the trial judge should have acceded to a request for better identification of the specific incidents to which the various counts related. The court concluded that in such a case the indictment should be drawn or exemplified with as much particularity as the circumstances of the case will admit and that a difficulty in being precise in every respect is not a reason for not being precise when it is possible to be so. The decision in *R. v. Shore, ante*, it was said, reflected no more than that if a defendant chooses to meet general charges without objection he cannot easily raise lack of particularity in the Court of Appeal.

Where a child speaks of a number of incidents with no distinguishing features, a convenient course, in order to establish the systematic conduct of the accused, is to have a number of counts, each, apart from the first, alleging "on an occasion other than that alleged in [the previous counts]". The overriding principle is that the number of counts in the indictment should fairly reflect the alleged criminality (*R. v. Canavan*; *R. v. Kidd*; *R. v. Shaw* [1998] 1 Cr.App.R. 79, CA), otherwise sentencing problems may arise: *post*, § 5–14. It should not be too difficult in most cases to settle an indictment which steers a safe course between prejudicial uncertainty and overloading: *R. v. Rackham, ante*.

Further examples of the problems that can arise are to be found in *R. v. Evans* [1995] Crim.L.R. 245, CA, and *R. v. Macer, The Times*, February 17, 1995, CA, *ante*, § 1–130. See also *R. v. Litanzios* [1999] Crim.L.R. 667, CA, *ante*, § 1–117.

Continuous offence

1–133 It is not an essential characteristic of a single criminal offence that the prohibited act or omission took place once and for all on a single day, since it can take place continuously or intermittently over a period of time and still remain a single offence: *Chiltern D.C. v. Hodgetts* [1983] A.C. 120, HL. Upholding a conviction for failure to comply with an enforcement notice, the House said that the offence should be alleged to have been committed between the date when compliance with the notice was first required and the date when the information was laid or the notice complied with, whichever was the earlier. See also *post*, § 1–143.

(6) Value

1–134 It is unnecessary to state value, except where it is of the essence of the offence such as an offence against the *Insolvency Act* 1986, s.360(1)(a) (*post*, § 30–185).

(7) Immaterial averments—surplusage

1–134a Allegations which are not essential to constitute the offence and which may be omitted without affecting the charge, or vitiating the indictment, do not require proof and may be rejected as surplusage: *R. v. Barraclough* [1906] 1 K.B. 201 at 210. Similarly, the Crown need only prove sufficient of the particulars to constitute the offence charged, *e.g.* the theft of one of the several articles charged in the count or the theft of part of a sum of money (see also *R. v. Hancock and others* [1996] 2 Cr.App.R. 554, CA, *post*, § 33–43), but the problem identified at §§ 4–391 *et seq.*, *post*, should be borne in mind.

F. Duplicity

(1) The rule

1–135 The indictment must not be double; that is to say, no one count of the indictment should charge the defendant with having committed two or more separate offences: see rule 4(2) of the *Indictment Rules* 1971, *ante*, § 1–115, and rule 12 of the *Magistrates' Courts Rules* 1981. This rule though simple to state is sometimes difficult to apply. Duplicity in a count is a matter of form, not evidence: *R. v. Greenfield*, 57 Cr.App.R. 849, CA; *R. v. West* [1948] 1 K.B. 709, 32 Cr.App.R. 152, CCA; *R. v. Davey and Davey*, 45 Cr.App.R. 11, CCA; and *cf. R. v. Griffiths* [1966] 1 Q.B. 589, 49 Cr.App.R. 279, CCA. The general principle is well illustrated by the decision of the Court of Appeal in *R. v. Asif*, 82 Cr.App.R. 123 (*post*, § 25–517). In *R. v. Browning* [1974] Crim.L.R. 714, the Court of Appeal remarked that "the question which arises when an issue of duplicity is raised is one of substance and not of form." No authority is cited in support of this proposition, which is clearly inconsistent with *Greenfield*. Perusal of the transcript of the judgment in *Browning* shows that in truth no question of duplicity arose there. It is submitted that the remark was made *per incuriam* and should be disregarded.

In *Greenfield*, the Court of Appeal held that on this issue it is ordinarily unnecessary to look further than the count itself. If particulars have been

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Appendix 3

HKSAR v KWOK KAU KAN

COURT OF APPEAL
CRIMINAL APPEAL NO 627 OF 1998
CHAN CJHC, WONG JA AND YEUNG J
27 AUGUST, 21 OCTOBER 1999

Criminal Law and Procedure - Indictment - Indecent assault - Evidence of multiple offences apart from the occasions alleged in the charges - Principle that prosecution should confine to proof of one offence as basis for conviction of one single count specified in an indictment - Methods to provide adequate safeguards to defendant

Criminal Law and Procedure - Indecent assault - Evidence of multiple offences apart from the occasions alleged in the charges - Whether defence prejudiced - Complainant's evidence uncorroborated - No warning on danger of convicting in reasons for verdict - Whether trial judge had exercised sufficient caution when considering complainant's evidence

Criminal Law and Procedure - Sentencing - Indecent assault - Elderly offender committing offence against young acquaintance - Complainant being paid for allowing offender to touch her over clothing - Whether consent of complainant a mitigating factor

刑法與刑事訴訟程序－公訴書－猥褻侵犯－除了控罪所指的情況外的多重犯案證據－控方應限於就一項罪行舉證以作爲公訴書所指明的單一項控罪的定罪基礎的原則－向被告人提供足夠保障的方法

刑法與刑事訴訟程序－猥褻侵犯－除了控罪所指的情況外的多重犯案證據－辯方有否蒙受損害－原訴人的證據缺乏佐證支持－裁決理由沒有提及定罪風險的警告－原審法官在考慮原訴人的證據時有否行使足夠的謹慎

刑法與刑事訴訟程序－判刑－猥褻侵犯－年老罪犯結識年幼女童，繼而向她作出犯罪行爲－原訴人獲給予金錢以容許罪犯隔著原訴人的衣裳觸摸她－原訴人的同意是否減刑因素

The applicant was a 77-year old man who had become acquainted with a 12-year old girl who was living with her grandmother in the neighbourhood. On occasions the applicant would take the girl out for tea. Some two years later, the girl moved out of the flat and returned to stay with her mother, but during the summer holidays, she went to visit her grandmother almost everyday. The evidence was one night after 6pm in July 1997, the applicant telephoned the girl and asked her to meet him. He took her up a hillside path leading to a park and at a certain landing up the steps, he indecently assaulted her. He gave her $50 and told her not to tell anyone (count 1). A similar incident happened two or three

days later (count 2). There was also evidence of similar assaults on subsequent occasions at the same place. The third and fourth counts alleged two incidents, which took place between November 1997 and January 1998, involving the applicant meeting the girl on the staircase of the building where her grandmother lived, indecently touching her and giving her money. The girl testified that similar incidents happened several times around the time, but that sometimes the applicant would meet her and give her money without touching her. On 30 March 1998, the applicant telephoned the girl and asked her to meet him. They went to the park and he again touched her indecently (count 5). A resident saw them acting strangely and called the police who arrested the applicant.

The applicant denied all five counts of indecent assault but admitted that he had given money to the complainant from time to time. He was convicted after trial of all the charges and sentenced to a total term of five years' imprisonment. On appeal, it was argued that the trial judge erred to allow the prosecution to proceed on the first four counts by adducing evidence of multiple acts of indecent assault apart from the occasions alleged in the charges. As a result, it was impossible for the applicant to know which part of the complainant's evidence was relied on by the prosecution to support the first count as opposed to the second count and he was not in a position to know the basis on which he was convicted in respect of each count. The second ground of appeal was that as the complainant's evidence was uncorroborated the jury should be directed on the danger of convicting the applicant upon the uncorroborated evidence, but there was no mention in the reasons for verdict of such danger. On appeal against sentence it was argued that the trial judge had not paid sufficient regard to the mitigating factors, inter alia, that the complainant was a willing participant.

Held, allowing the appeal against convictions on the third and fourth counts and reducing the sentence to three years' imprisonment:

(1) The common law principle that the prosecution should be confined to the proof of one offence as the basis for a conviction of one single count was designed to avoid three evils: unfairness to an accused who may not know the basis on which he was to be convicted and was unable to ascertain and prove his defence; uncertainty with the jury's verdict in that there may be a risk of an insufficient majority on one and the same incident and of a willingness on the part of the jury to convict merely from the frequency of the alleged incidents suggested by the evidence; and uncertainty with the conviction in that it may be difficult to rely on the plea of autrefois convict in future. Problems could be avoided by an appropriate formulation of the charge as suggested in *Archbold* — namely, where differentiation was impossible, a number of counts could be drawn each, apart from the first, alleging 'on an occasion other than that alleged in the first count'. A further method was for the prosecution to give particulars which would sufficiently identify the particular act charged so as to distinguish it from other acts. These methods could help strike a proper balance between facilitating the prosecution of this type of offence and safeguarding the rights of the accused. In this case the indictment was drawn as suggested in *Archbold. Chim Hon Man v HKSAR* [1999] 1 HKC 428 applied (at 796D-797E, 797H-798D, 798H-I).

(2) In cases in which multiple acts were alleged, a witness might refer to acts which happened to her on other occasions but which do not form part of the charges before the court. It was impracticable to abort a trial every time such evidence came out, either inadvertently or deliberately. With sufficient directions from the judge, the prejudicial effect could be eliminated or kept to a minimum. From the way questions were put to this complainant she could not have confused the first two occasions with other acts. Nor was the trial judge confused. The two occasions were clearly identifiable, the second taking place one or two days after the first. The applicant knew what the allegations were in relation to the first two counts and had not been prejudiced in his defence. He knew the basis of his conviction and there would be no difficulty with a subsequent plea of autrefois convict. The two convictions on the first two counts were safe (at 799D-E, 800B-G).

(3) Although the third and fourth counts were drafted in a similar way, the evidence led from the complainant referred to more than two incidents. It was not easy to differentiate between any of the incidents in the complainant's evidence. It was unfair to the applicant, as he would not know which two incidents the complainant was referring to. It would be difficult for him to put up a defence. These two convictions would be quashed and the sentences set aside (at 800H-801D).

(4) The absence in the reasons for verdict of any reference to the usual warning was not necessarily fatal. A professional judge was expected to have applied the correct law and procedure unless it was clearly shown he had not. Even if a trial judge did not mention he had warned himself, this did not mean he had not in fact done so. The important thing was whether he had exercised caution in approaching the uncorroborated evidence of the complainant. It should be at the forefront of a judge's mind, particularly when deliberating on the evidence and before coming to a conclusion. It was reasonable to expect he would mention it when putting his reasons for verdict into writing. In this case, the judge dealt with all the evidence in meticulous detail and had considered whether the complainant had framed the applicant and whether she had told the truth. The trial judge had taken great care when considering the complainant's evidence and this showed she had exercised extra caution before reaching her verdict. *HKSAR v Lee Kam Wing* [1999] 2 HKC 563 considered (at 801I-802H).

(5) The consent of the complainant could not be a mitigating factor. Nor was the applicant's age. As far as the first two offences were concerned there was an aggravating factor that the applicant had corrupted the mind of a young girl by paying her after the event. These were serious offences. The fifth count was a very bad case of indecent assault on a girl aged 12. A deterrent sentence was warranted. The overall culpability of the applicant called for a total sentence of three years' imprisonment (at 803F-H, 804D-E).

Obiter

(6) In a non-jury trial where evidence was given on a number of other acts which amounted to the act charged, the risk of unfairness to the accused was greatly reduced. A professional judge could ignore any prejudicial effect it may have. Also there was no question of a risk of lack of unanimity in a verdict in the case of a trial by a single judge (at 798F-G).

Cases referred to

Chim Hon Man v HKSAR [1999] 1 HKC 428, [1999] 1 HKLRD 764

HKSAR v Lee Kam Wing [1999] 2 HKC 563

Other source referred to

Archbold *Criminal Pleading, Evidence and Practice* (1998 Ed) p 49

[*Editorial note*: for further discussion of the general rule that no single count in an indictment should allege two or more offences against an accused, see *Halsbury's Laws of Hong Kong* Vol 9, Criminal Law and Procedure [130.689] et seq; for offences of indecent assault generally see ibid [130.371]-[130.375].]

Application

This was an application by Kwok Kau Kan for leave to appeal against conviction after trial before Judge Toh in the District Court on five counts of indecent assault on a young girl and against sentence of five years' imprisonment. The facts appear sufficiently in the following judgment.

Wong Po Wing (Department of Legal Aid) for the applicant.

Patrick Cheung and Vivian Chan (Director of Public Prosecutions) for the respondent.

Chan CJHC: The applicant was convicted after trial before Judge Toh in the District Court of five counts of indecent assault. He was sentenced to imprisonment for three years on each count, with six months of each of the sentences for the second and subsequent counts to run consecutively to the sentence for the first count and to one another, making a total of five years. He now applies for leave to appeal against both conviction and sentence.

THE PROSECUTION CASE

In about 1995, the complainant (PW1) was 12 years old and was living with her grandmother in a Chai Wan estate. After school, she would wait for her grandmother to pick her up and take her home. The applicant who was in his 70s lived in the neighbourhood. He made acquaintance with the complainant and asked her to go and have tea with him in nearby fast food shops from time to time. At the end of 1996, the complainant moved back to live with her mother, but returned to Chai Wan in the evening to take lessons. She met the applicant again and told him that she had moved.

(1) The first and second counts

During the summer vacation in July 1997, the complainant returned to visit her grandmother in Chai Wan almost everyday. There she would stay from about 8:00am in the morning until about 9:00pm in the evening. She saw the applicant again and the applicant invited her to have tea. One

night, shortly after 6:00pm, the applicant rang up and asked her to come out and meet him at 7:00pm. When they met, he led her along a hillside path leading to a nearby park. They reached a certain landing up the steps (staircase) and stayed for a while. There the applicant touched the complaint's breasts over her clothes for a few minutes. After that, the applicant gave her $50 and told her not to tell anybody. About two to three days later, the applicant rang her up again at about 6:00pm and asked her to come out. When they met, he led her to the same place. There he again touched her breasts over her clothing for a few minutes. When he was leaving her, his lower part rubbed against her left buttock for a few seconds. On that occasion, the applicant also gave her $50. These were the two incidents referred to in the first two counts.

However, in her evidence, the complainant said that there were subsequent occasions when the applicant took her to the same place and indecently assaulted her in a similar way.

(2) The third and fourth counts

In September 1997, the complainant was then in Form 1. On three days in a week, she had to go to her grandmother's place in Chai Wan after she finished school at 3:00pm and returned home at about 9:00pm. In November 1997, she often saw the applicant. Sometimes he called her at her grandmother's place and sometimes she called him. They went to tea and she sometimes asked him to give her money to buy comic books. On one occasion, the applicant called her and they met at the staircase landing between the seventh and the eighth floor of the building where her grandmother lived. There the applicant lifted her skirt and touched her buttocks over her pants. After that, he gave her some money. She said that the same thing happened on several occasions. Sometimes she met the applicant at the staircase but he gave her money without touching her. These were the incidents in respect of the third and the fourth counts.

(3) The fifth count

In the evening of 30 March 1998, the complainant received a call from the applicant while she was at her grandmother's place. He asked her to come out. When they met, they went to the same landing of the steps along the hillside path leading to the park. When they reached that place, she stood in front of the applicant with her back towards him. He then held her waist and touched her breasts with his hands. He also rubbed her back, lifted her skirt and touched her buttocks over her pants. During the incident, the complainant's back was touching the front part of the applicant's body. Twice, she bent forward at an angle of about 30 degrees and then stood straight again. In that position, her buttocks were touching the applicant's private parts and he moved forward and backward. The

whole thing happened for a few minutes. While the applicant was doing all this to her, she was eating potato chips. A resident who was living nearby in the estate saw them behaving strangely and suspecting that something wrong was happening, he rang up the police. Having received a report, two police officers went to the scene. When the applicant saw the police officers coming up the steps, he pushed the complainant away and asked her to go up the steps first. One of the officers stopped her and asked her what she was doing there. She said that she was looking for something in the area. She later admitted that she had lied to the officers because she knew what she had done earlier was wrong and she did not want the police to know or to tell her mother. This incident was the subject matter of the fifth count.

According to another officer PW3, upon arrival at the scene, he saw the applicant holding the complainant. He also saw the applicant with one hand on one of her breasts and the other hand holding round the complainant's forearm and touching her other breast. They then separated. He went up and later stopped the applicant. When asked what he was doing there with the girl, the applicant replied that he was talking to her and that she was his godchild although he did not know her name or her parents. He also said that he thought the complainant was 16 years old. He denied having touched her. The officer admitted that the wall of the landing of the steps had blocked part of his view. The other officer (PW5) who arrived together with PW3 said he could only see the applicant's two hands resting off the complainant's shoulders for one to two seconds. He said that he was at a distance away and therefore could not see anything else.

The resident (PW4) who reported the matter to the police said that he saw the complainant in school uniform and holding a packet of potato chips. He also saw the applicant and the girl going to the second landing and stopped there. He then reported to the police and asked them to come so that they could see what happened. He said that he saw the applicant facing the complainant's back, that the complainant had bent forward to about 90 degrees and then stood straight again from time to time, and that she looked around as if she was afraid that she might be seen. However, he said that he did not see the applicant using his hands to wrap round the complainant or putting his hands on her breasts. This was because he had his views away from the applicant when he saw the police officers going up the steps.

THE APPLICANT'S CASE

The applicant gave evidence at the trial. He was living in the Chai Wan estate with one of his sons and his family. He was receiving old age allowance. He admitted he had already known the complainant for about three years although he did not know her name. He came to know her

when he saw her playing outside the estate and sometimes with his granddaughter. He said that he saw the complainant crying one day and she told him that she had nothing to eat. So he gave her $20. He knew the complainant lived on the eighth floor. He denied having indecently assaulted her. However, he admitted that he had given the complainant money from time to time. On 30 March, at about 6:00pm, he received a phone call from the complainant. She asked him for $200 to buy books. He met her downstairs and followed her to the landing of the steps in the park. At that time, he was panting while negotiating the steps. Then, the police officers came. He told the officers to 'give him face', that he had not done anything and that she was his godchild. He admitted that he knew the complainant's telephone number and her family background.

FIRST GROUND OF APPEAL

There are two main grounds of appeal. The first ground relates to the first four counts while the second ground applies to all of the five counts. Each of the first four counts charged the applicant with one act of indecent assault during a period of time.

In respect of the first around, counsel submits that the trial judge was wrong to allow the prosecution to proceed, with a view to prove the commission of the offence in relation to each of the counts, by adducing evidence of multiple acts during the respective specified periods. Counsel argues that the complainant's evidence suggested that the same act of indecent assault took place on a number of occasions and that she was unable or unwilling to give specific evidence of the two occasions mentioned in the first and second counts. As a result, it was quite impossible for the applicant to deal with the general allegations of a course of conduct when the first two charges referred to two specific incidents. The applicant was unable to know which part of the complainant's evidence was relied on by the prosecution to support the first count as opposed to the second count. He was also not in a position to know the basis upon which he was convicted in respect of each count. Similarly, counsel argues that in respect of the third and fourth counts, the complainant was not in a position to give specific evidence of the two occasions referred to in these counts. The applicant was similarly unable to know which part of the complainant's evidence was relied on by the prosecution to support the respective counts.

Counsel relies heavily on the recent Court of Final Appeal decision in *Chim Hon Man v HKSAR* [1999] 1 HKC 428, [1999] 1 HKLRD 764. Counsel further submits that if evidence of the other acts was adduced before the court, the trial judge should have stopped the evidence on other acts and asked the prosecution to stop such line of questioning. In a jury trial, the judge should also direct the jury to ignore those other acts.

THE CHIM HON MAN CASE

In *Chim Hon Man*, the appellant was convicted of two counts of rape each of which was alleged to have been committed during a period of time covered by the respective counts. There was evidence from the complainant that sexual intercourse took place on other occasions during those periods. The prosecution submitted and the judge directed the jury to the effect that if they were satisfied of at least one rape in each of the respective periods, they could convict the appellant of the two counts. The Court of Final Appeal, in quashing the convictions, held that there is 'a principle of the common law that, where a count in an indictment alleges one specific offence, it is not open to the prosecution to lead evidence of a number of acts which amount to the act charged and then to invite the jury to convict on any one of the acts led in evidence.' (See p 440H-441A (HKC), p 776 (HKLRD)) The Court also held that although there could be exceptions to this principle, that case did not fall within the exceptions. However, the Court did not specify what can constitute an exception.

Sir Anthony Mason with whose judgment the other members of the court agreed, took the view that the principle that the prosecution should be confined to the proof of one offence as the basis for a conviction of one single count specified in an indictment serves a number of purposes. He said at 443I-444C (HKC), 778I-779F (HKLRD):

> This principle serves the same general purposes as the rule against duplicity. Knowledge of the particular act, matter or thing which is the foundation of the charge is important in enabling the accused to ascertain and prove what, if any, defence, for example, an alibi, he may have to the offence charged and to subject a complainant's evidence to searching scrutiny by reference to the surrounding circumstances. An accused person may be subjected to unfairness and embarrassment if he is called upon to meet a charge of one offence based upon evidence of the commission of multiple offences, more particularly if the evidence is such that it does not enable each such offence to be clearly differentiated from the others. The degree of unfairness or embarrassment may vary according to the circumstances. If the prosecution case is based on evidence of many offences in an extended period of time the unfairness may be considerable.
>
> The principle also plays a part in preserving the notion of a separate trial for a separate offence. In so doing, it enables the jury to focus on the single offence proved as the basis for a conviction of the offence charged and it encourages the jury to apply the criminal standard of proof to the evidence of that offence. In the event that the jury invited, as it was here, to find the commission of at least one offence from evidence of multiple offences, there is either a risk of want of unanimity as to the same offence or a willingness to find guilt from the very frequency of the offences suggested by the evidence. The risk arises because the focus of the jury may be directed from the particularity of a single offence to the generality of the evidence of multiple offences.

> Another purpose served by the principle is to secure certainty in the conviction or the acquittal, thereby making available a plea of *autrefois convict* or *autrefois acquit* to a subsequent prosecution for the same offence. The risk of uncertainty in the conviction, arising from the way in which the prosecution case was presented here, for the purpose of such a plea would not appear to be significant. For the reasons given by Brennan J in *S v The Queen* (1989-1990) 168 CLR 266 (at pp.271-272) it is inconceivable that the prosecution could discharge the onus of showing that a subsequent charge for an offence in a relevant period of time was other than for an offence for which he had been convicted or acquitted previously.

It would seem that the common law principle is designed at avoiding the following evils:

(1) unfairness to an accused in that he may not know the basis on which he is to be convicted and is unable to ascertain and prove his defence;
(2) uncertainty with the jury's verdict in that there may be a risk of an insufficient majority on one and the same incident and of a willingness on the part of the jury to convict merely from the frequency of the alleged incidents suggested by the evidence; and
(3) uncertainty with the conviction or acquittal in that it may be difficult to rely on the plea of *autrefois convict* or *autrefois acquit* in future.

The principle is thus applied to provide adequate safeguards to the accused and to ensure that he has a fair trial. However, in many sexual offence cases, the complainants, because of their young age, the long lapse of time or the frequency of the offences, are unable to be precise as to the date, time and place of a particular offence or to distinguish between that particular offence and other offences committed in similar circumstances which extend over a long period of time. The difficulty the prosecution faces may be considerable and sometimes, it would seem, almost insurmountable. If the principle is strictly applied, it would amount to a charter for sexual offenders and may even encourage multiple offences. As the Court of Final Appeal said, there must be a fair balance between the rights of an accused and the interest of the community in bringing offenders to justice. Regrettably, the Court did not give any guidance as to what constitutes an exception to the general principle.

HOW TO SOLVE THE PROBLEMS

Sir Anthony Mason suggested that the problems facing the prosecution can be avoided in a number of ways: (1) an appropriate formulation of the charge; (2) the giving of particulars which sufficiently identify the particular act charged in a way that will distinguish it from any other acts of which the prosecution intends to lead evidence; and (3) by election to proceed on a particular act alone. (See p 440H (HKC), p 776A (HKLRD))

He seemed to approve of the practice suggested in *Archbold* (1998 Ed) p 49 that in cases where differentiation is impossible, an indictment may be drawn to include a number of counts, each, apart from the first, alleging 'on an occasion other than that alleged [in the previous counts]'. Although this would not, according to him, have resulted in the giving of particulars or more specificity in the complainant's evidence, it would have focused the jury's attention on the individual acts alleged and the evidence relating to those acts, without any departure from the general principle. (See p 445H (HKC), p 781B (HKLRD).)

Another method is for the prosecution to give particulars which can sufficiently identify the particular act charged in such a way as to distinguish it from other acts which the prosecution in adducing evidence may lead. By providing such particulars, an accused person would be in a position to know exactly the particular incident in which he is alleged to have committed the offence. He would not be handicapped in putting forth his defence. At the same time, the jury would also be able to focus their minds on the incident relating to the particular offence in respect of a in particular charge. Further, such particularity would be sufficient for the purpose of a subsequent plea of *autrefois convict or autrefois acquit*.

These methods will no doubt be helpful in striking a proper balance between facilitating the prosecution of this type of offence on the one hand and safeguarding the rights of the accused on the other. Whether any one or more of these methods can completely remove all the difficulties facing the prosecution and at the same time eliminate any unfairness towards the accused will depend very much on the circumstances of each case.

We should mention that *Chim Hon Man* was of course a case which was tried by jury. In a trial without a jury where, for whatever reason, there is evidence of a number of other acts which also amount to the act charged, the risk of unfairness to the accused will, in our view, be greatly reduced. A professional capable of handling such evidence and ignoring any prejudicial effect which may have. He is able to focus his mind on the evidence which is relevant to the charge before him. There is also no question of a risk of lack of unanimity in a verdict in the case of a trial by a single judge.

THE FORMULATION OF CHARGES IN PRESENT CASE

The indictment in the present case was drawn before the decision in *Chim Hon Man*. However, the person who drew this particular indictment was commendably wise in foreseeing the problems facing the complainant and the prosecution. The indictment was drawn in the form which followed that suggested in *Archbold*. The particulars in the first count alleged that the applicant had committed an indecent assault on an unknown date between 1 July and 31 August 1997 at the staircase landing

of the park. The particulars of the second count alleged the applicant of having committed another indecent assault at the same place on an unknown date during the same period of time but on 'an occasion other than the one set out in the first charge.' The third and fourth counts were 'twin charges' which were similar to the first and second charges. The third charge alleged an incident of indecent assault on a day unknown between November 1997 and January 1998. In the fourth count, the indecent assault was alleged to have taken place on a day unknown during the same period, 'being an occasion other than the one set out in the third charge'.

EVIDENCE OF MULTIPLE ACTS

The applicant complains that there was evidence of multiple acts apart from the occasions alleged in the charges. It is submitted that this should have been excluded by the trial judge.

In cases in which multiple acts were alleged by the complainant to have taken place, it is very often not easy to stop her in time, particularly if she is of tender age, before she refers to other incidents which were not covered by the charges before the court. It is quite frequent that during the course of a trial, a witness may refer to acts which happened to her on other occasions but which do not form part of the charges before the court. Sometimes this is allowed in an attempt to make sense of the evidence of the complainant. It is obviously impracticable to abort a trial every time such evidence comes out, either inadvertently or deliberately. In the case of a trial without a jury, a professional judge would be able to put such evidence aside when considering the guilt or innocence of the accused. In the case of a jury trial, the judge may, depending on the circumstances of the case, have to direct the jury in his summing up to ignore evidence of acts other than those particularised in the charges. With sufficient directions from the judge, even if evidence relating to other acts is also adduced, the prejudicial effect of such evidence on the jury would be eliminated or kept to a minimum.

In the present case, it can be noted from the transcript of the complainant's evidence that she did refer to other incidents. During the course of the trial, prosecuting counsel was alert to the difficulty facing the complainant in differentiating between the offences during the relevant periods of time and had taken great care in putting her questions to the witness. She was at pains to focus the complainant's mind on the first occasion when indecent assault was alleged to have taken place. Similarly, prosecuting counsel was very careful when examining the complainant to focus her mind on the second occasion which took place only a few days after the first occasion. From time to time, prosecuting counsel had deliberately prefaced her questions by drawing the complainant's attention to the first and the second occasions of indecent

assault. These were the occasions alleged in the first and second charges. As a matter of fact, it is also clear from the transcript that the trial judge had reminded the prosecution not to adduce evidence relating to other acts during the period referred to in the first two counts and prosecuting counsel did stop asking questions relating to these other incidents.

From the way questions were put to her, it is quite clear that when the complainant was giving evidence, she could not have confused the first two occasions with the other acts. Nor was the trial judge confused. This is evident from the reasons for verdict (at 24Q of the appeal bundle). The judge clearly referred to an occasion during the summer vacation in 1997 between July and August which was referred to as the first occasion and another occasion which took place one or two days after that which was referred to as the second occasion. These two occasions were clearly identifiable.

One of the main objections in *Chim Hon Man* was that in respect of each charge of rape, although there was evidence of multiple acts of rape during the same period of time, the jury was asked to convict if they were satisfied that the accused had committed at least one offence during that period. This did not happen in the present case. There was no doubt that when the judge was dealing with the first two counts, she was considering the evidence in relation to the first two occasions.

Hence, not only were the first two counts drafted in the form as suggested in *Archbold*, prosecuting counsel had also drawn the complainant's attention to the two particular incidents (ie the first and the second occasions) referred to in these counts. The complainant as well as the trial judge could not have and had not mistaken these two incidents with other subsequent incidents. The applicant knew what the allegations were in relation to the first two counts and had not been prejudiced in or prevented from putting up his defence. He would know the basis of the conviction on these two counts and there would be no difficulty with a subsequent plea of *autrefois convict*. The evils which the common law principle is aimed at avoiding did not arise in the present case in relation to the first and second charges.

THE CONVICTIONS ON THE THIRD AND FOURTH COUNTS

However, in respect of the third and fourth counts, although they were drafted in a similar way as that in the first and second counts, the evidence led from the complainant referred to more than two incidents during the period between December 1997 and January 1998. From the complainant's evidence, it is not easy to differentiate between any one of these incidents and unlike the case in respect of the first and second counts, there is nothing in the evidence to differentiate between the third incident and the fourth incident and between these two incidents and the other incidents. The judge, being a professional judge, would be able to

focus on two particular incidents and there is no risk of any lack of unanimity in the verdict. However, it would be unfair to the applicant as he would not be in a position to know which two incidents the complainant was referring to in relation to the third and fourth counts. This is particularly so since the complainant had testified to the effect that there were occasions when she met the applicant at the staircase landing between the seventh and eighth floor and was indecently assaulted by the applicant but there were other occasions when the applicant had simply given her money without indecently assaulting her. Without sufficient particularity, the applicant would not be able to focus his mind on any two particular occasions. It would be difficult for him to put up any defence in relation to the third and fourth counts.

Since the applicant might have been unfairly embarrassed or prejudiced in respect of these two counts, we are not satisfied that the convictions in respect of these two counts are not unsafe and unsatisfactory.

SECOND GROUND OF APPEAL

The second ground of appeal alleges that since the offences are of a sexual nature and the complainant's evidence was not corroborated, the jury should be directed on the danger of convicting an accused upon the uncorroborated evidence of the complainant. Counsel argues that nowhere in the reasons for verdict did the trial judge make any mention of such danger or the need for caution. Counsel submits that the complainant was of tender age and in view of her background, the danger was indeed real. Counsel relies on the case of *HKSAR v Lee Kam Wing* [1999] 2 HKC 563.

Before we deal with counsel's submissions, we would point out that in respect of the fifth count, if the evidence of the officer PW3 is believed, there is corroboration of the complainant's evidence.

The main reason for the need to exercise great caution before convicting an accused of a sexual offence upon the uncorroborated evidence of the complainant is that allegations of such nature are usually easy to make but difficult to refute. Hence, in the case of a jury trial, the judge should direct the jury on the danger of convicting without corroborative evidence but that the jury can, having warned themselves of such danger, still convict the accused if they are satisfied beyond reasonable doubt that the complainant is telling the truth. This direction will normally appear in the judge's summing up. In the case of a trial without a jury, this would normally appear in his reasons for verdict.

In *Lee Kam Wing*, this court took the view that whether in the reasons for verdict the judge had stated that he had given himself the warning is one thing, but whether he had actually given himself that warning is quite another. The absence in the reasons for verdict of any reference to the

usual warning is not necessarily fatal. A professional judge is expected to have applied the correct law and procedure, unless it is clearly shown that he had not. Even if a trial judge did not mention that he had given himself the warning, this does not mean that he had not in fact done so. The important thing is whether he had indeed exercised caution in approaching the uncorroborative evidence of the complainant. However, in a trial without a jury, the risk of convicting a person of a sexual offence without corroborative evidence should be in the forefront of the judge's mind. This is an issue which should be in his mind during the course of the trial, particularly at the time of deliberating on the evidence and before coming to his conclusion. If so, it is reasonable to expect that he would mention it when he comes to putting his reasons for the verdict into writing. And if he has not referred to such warning, one would begin to wonder whether he had indeed exercised caution and warned himself of this danger. It may then be necessary to examine the entire reasons for verdict to see whether he had done so or not.

In the present case, it is accepted that the trial judge did not expressly mention that she had warned herself of the danger of convicting the applicant without corroborative evidence. However, in her reasons for verdict, the trial judge dealt with all of the evidence in meticulous details. She said at p 24L that she had to consider the very important questions of whether the complainant had framed up the applicant, whether she had told the truth, the whole truth, or part of the truth or nothing true at all. The judge also said that she had kept all these questions in mind during the evidence of the complainant. She had borne firmly in mind that the complainant was only 13 years old and that it would be impracticable to require her to give a detailed description of what happened on any particular day. She had alerted herself to the strength and weaknesses in the evidence of the complainant.

We take the view that even though the trial judge had not expressly mentioned that she had given herself the usual warning, she did exercise great care when considering the complainant's evidence. The fact that she had asked herself these questions and borne these questions in mind during the course of the evidence demonstrates that she had indeed exercised extra caution before reaching her verdict. It is our view that what she had done had served the purpose. We do not think the second ground of appeal can succeed.

CONCLUSION ON APPEAL AGAINST CONVICTION

For the reasons given above, we are of the opinion that the convictions in respect of the first, second and fifth counts are well supported by the evidence. There was no confusion on the mind of the complainant or that of the judge. There was also no unfairness, embarrassment or prejudice to the applicant. The trial judge had exercised extra care in dealing with the

evidence of the complainant. We can see no merit in the two grounds of appeal in relation to these charges. The convictions on these counts are upheld.

However, in respect of the third and fourth counts, we take the view that because there was a breach of the common law principle prohibiting the prosecution from adducing evidence of multiple acts in relation to a charge of a single offence and the applicant might have been unfairly embarrassed or prejudiced in his defence, we do not think the convictions in relation to these two counts are safe or satisfactory. In these circumstances, we grant leave to appeal against conviction, treating the hearing of the application as the hearing of the appeal, allow the appeal in part to the extent that the convictions on the third and fourth counts are quashed. The sentences on these two counts are also set aside.

APPEAL AGAINST SENTENCE

Counsel for the applicant submits that the trial judge had paid no or no sufficient regard to the mitigating factors in this case, namely, that the applicant is 77 years old, that all of the offences involved the touching of the complainant over her clothing, that there was no violence involved, that the complaint was a willing participant, that on some occasions she took the initiative to call the applicant, that she had not made any complaint to the police and that there was no physical or mental harm done to her as a result of the offences.

In this type of offence, we do not think the consent of the complainant can be a mitigating factor. Nor is the applicant's old age. On the contrary, at least as far as the first two offences are concerned, there is the aggravating factor that the applicant had corrupted the mind of a girl of tender age by paying her after the event. The fact that the complainant had on subsequent occasions approached the applicant for money illustrates that the applicant had indeed corrupted her. The applicant's age, his fatherly figure and his initial friendly gestures towards the complainant would have inspired some confidence in the complainant. He had obviously abused that confidence. We take the view that these are very serious offences.

In respect of the fifth count, the evidence shows that it was a very bad case of indecent assault. The acts complained of were particularly revolting on a girl of 12. Although the acts were committed over her clothing, they were acts of a very nasty nature.

The applicant had three previous convictions of indecent assault. In 1991, he was given an absolute discharge. In the same year, upon a second conviction, he was sentenced to one month imprisonment and ordered to pay $500 costs. In 1998, he committed the offence a third time and was sentenced to 14 days' imprisonment. He is of course not to be punished for his record. However, it is clear that having been sentenced to

imprisonment on previous occasions for the same type of offence, he had obviously not learned any lesson and had not been deterred.

There is no usual tariff for indecent assault. This is because the circumstances of each offence can vary considerably. Bearing in mind the serious nature of the acts in the present case coupled with the corruption of a young mind, we think that a deterrent sentence has to be imposed. Of the three offences of which the applicant was convicted, the third one (ie the offence under the fifth count) is clearly more serious. There should be a difference in the sentences for the first two offences and that for the third. The overall culpability of what the applicant had done in the present case would in our view have called for a total sentence of three years. We think that in respect of the first and second counts, a sentence of $1^1/_2$ years' imprisonment each and in respect of the fifth count, a sentence of $2^1/_2$ years' imprisonment would be more appropriate. The first two counts were committed one shortly after the other and the sentences can be made concurrent. The fifth count however was committed at a much later time. Taking into consideration the totality principle and the separation of the three offences in time, we think that the following sentences would be appropriate: $1^1/_2$ years each for the first and second counts, both sentences to run concurrently and $2^1/_2$ years for the fifth count, one year of such sentence to run concurrently with the sentences on the first two counts. The total sentence would be three years.

For these reasons, we grant leave to appeal against sentence, we treat the hearing of the application as the appeal and we allow the appeal to the extent as indicated and impose those sentences.

Reported by Lindy Course

Letterhead of LAW SOCIETY OF HONG KONG

Appendix 4

Criminal

21 June 1999

BY FAX (00261292315809)
AND BY AIRMAIL

The President
The Law Society of New South Wales
170 Philip Street,
Sydney NSW 2000,
Australia.

Dear Sir,

Offence of "Persistent Sexual Abuse of a Child"

We understand that a new offence of "*persistent sexual abuse of a child*" was introduced recently in New South Wales under the Crimes Legislation Amendment (Child Sexual Offences) Act 1998 No.131 to specifically overcome the problems identified in *S v The Queen* (1989) 168 CLR 246, a decision of the High Court of Australia.

The Administration in Hong Kong has recently proposed to introduce a similar offence in Hong Kong and the Society's Criminal Law & Procedure Committee has a preliminary discussion on the proposal. While it is believed that the new offence has merit as it would protect sexually abused children, the Committee is concerned that the interest of the defendant will be greatly undermined by the introduction of the new offence. It would be difficult for the defendant to formulate his case if material information such as the date of the offence is lacking. It will be of great assistance if you can let us have your views and the circumstances leading to the enactment of the said offence in your jurisdiction including but not limited to the kind of arguments debated on during the legislative process.

The Committee will meet to discuss the proposal again in 5 July 1999 and I shall appreciate if you can let me have your views at your earliest convenience.

Yours faithfully,

Christine W.S. Chu
Assistant Director of Practitioners Affairs

From: Sherida Currie <src@lawsocnsw.asn.au>
To: <sg@hklawsoc.org.hk>
Date: 7/1/99 1:32pm
Subject: Response to Christine W S Chu - letter of 2/6/199 re "Persistent Sexual Abuse of A Child:

Dear Ms Chu
I refer to your letter of 21 June 199 seeking information about section 66EA CRIMES ACT 1900 being the offence of persistent sexual abuse of a child (maximum penalty: imprisonment for 25 years).

New South Wales was the last Australian jurisdiction to introduce legislation to overcome the problems identified in S v The Queen. However, it has been the Law Society's contention that the decision in S's case presented no practical problem in New South Wales. The practice of the Crown in NSW had been to rely upon the first and/or last instance of an offence and to use a 'between dates' formula.

For a full discussion, can I suggest you access the Model Criminal Code discussion paper on Sexual Offences Against the Person at http://law.gov.au/publications/Model_Criminal_Code/mccsex.pdf.

As you will appreciate, this law only commenced in NSW on 15 January 1999. As far as I am aware, no prosecutions have been commenced under it yet.

Please let me know if there is any other information I can provide you. Law Societies in other jurisdictions would no doubt provide you with information about how similar legislation operates in their States and Territories.

Yours faithfully
SHERIDA CURRIE
Senior Legal Officer, Practice & Events Department

THE L. .W SOCIETY OF NEW SOUTH WALES
ACN 000 000 698
170 Phillip Street
Sydney NSW 2000
Australia

Fax (02) 9233 7146
Phone (02) 9926 0252
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FACSIMILE

TO: Christin W S Chu Fax No. 0015 852 2845 0387

FROM: SHERID. CURRIE

Date: 2 July 1)9 Time:

Subject: Offence f "Persistent Sexual Abuse of a Child"

Total No. of Pages: 3 (including cover sheet)

IF YOU DID NOT RECEIVE ALL AGES, PLEASE CONTACT THE SENDER ON (02) 9926 0252

MESSAGE:

Dear Ms Chu

Further to my email of 1 July and today, I enclose the extracts from the Final Report of the Royal Commission into the NSW Police Service - Volume V The Paedophile Inquiry (paras 14.44-14.48).

Sherida Currie
Senior Legal Officer
Practice & Events Department

14.47 In *S v The Quee*··· the prosecution failed because of the latent ambiguity in the indictment, which was nc· removed by particulars, or by an election on the part of the prosecutor to nominate th·· particular act which was charged in each count. It was noted that this:

- might lead the ··cused to being convicted even though the jury were not unanimous as to ! ə occurrence of any one (that is, the same) act;
- might occasion tr· accused difficulty for a plea of *autrefois acquit* if he or she was subsequently ch ged with a further act during the period covered by the indictment;
- might prejudice · e ability of the accused to test the Crown case through alibi or other evidence ·· hich might have been available had the act charged been nominated with ·· me precision; and
- allowed an impe· ıissible use of similar fact or tendency evidence.

14.48 The Commissior ·onsiders that each of these matters is more theoretical than real, and pays insufficient re··gnition to the reality of child sexual abuse. The provision proposed in the Model C de in this respect, which this Commission supports, has been in force in most other Stat· and Territories, and seems not to have been the occasion of difficulty in its applicati· . The introduction of an offence in these terms is accordingly supported.

Exception to Yeoman's ··mendment

14.49 Whatever the o ·come in relation to the age of consent, the Commission is of the view that there should ! · an exception to s. 78Q(2) (or any equivalent provision) of the *Crimes Act 1900*, or an·· aiding and abetting provision, to spare health professionals and HIV or sexual counsello· from the risk of prosecution for providing, in the proper course of their professional duties counselling or medical assistance to children under the age of consent.

14.50 Whatever the ·· e of consent, no rational basis exists for the preservation of a distinction between tho·· engaged in male homosexual activity and other forms of sexual activity in this regard. ·oreover, the risks of unwanted pregnancies, sexually transmitted diseases, HIV, AIDS, h· atitis and the like are substantial, and the delivery of advice or assistance which might · inimise such risks should not be a crime.

14.51 As later explai··ed,[394] the Commission would not support any exception to the mandatory reporting co··litions in relation to child sexual assault,[395] but it does recommend an exception to s. 316(of the Crimes Act in relation to mandatory reporters, concerning information derived in t·· ə course of their professional duties.

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[394] See Chapter 18 of this Volu··

[395] *Children (Care and Protect··* Act 1987, s. 22.

14.43 This might co veniently consider:

- a repeal of t se sections which are directed specifically to male homosexual activity, and e ension (where necessary) of the remaining provisions so as to make them also app cable to male homosexual activity - this would result in a common age of consen a common defence of honest and reasonable mistake as to consent, and common aximum penalties;
- creating an of nce in relation to an extended group of persons standing in special relationships ss. 73 and 78A) as specified in paragraph 14.40, for which the relevant age would increase (17 years under s. 73) to 18 years (as is currently the case with s. N), to which the defence of consent but honest and reasonable mistake would not apply; and
- introduction of a defence of consent for sexual activity where a child has attained the age of 14 years, if there is not more than a two year differential between the parties, or if they are married.

OTHER RECOMMENDATIONS

Persistent Sexual Abuse

14.44 In order to overcome the very serious practical difficulties caused by the decision of the High Court in *S v The Queen*,[392] the Commission considers it essential for NSW to introduce an offence of persistent sexual abuse, along the lines of the Model Code. This would allow an accused to be charged where during a nominated period, he or she is shown to have committed sexual offences in relation to the one child on more than three occasions, on separate days, without the necessity of establishing the incidents with the specificity required by *S v The Queen*.

14.45 Similar legislative provision is already in place in the other States and Territories.[393]

14.46 Such a provision would recognise the reality of continuing or prolonged child sexual abuse, namely that:

- it is impossible for the victim to recollect the detail of many events when they tend to blur one into the other, or to fix any with complete certainty as to time and place; and
- on most occasions a sexual encounter of this kind encompasses a number of separate acts, rather than a single act, so that again it is difficult, particularly for a young child, to pinpoint exactly what occurred or to provide a consistent account of it, a circumstance that can be used to unfair advantage by defence counsel.

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[392] *S v The Queen* (1989) 168 CLR 266.

[393] *Crimes Act 1900* (ACT), s. 1[illegible]A; *Criminal Code Act 1983* (NT), s. 131A; *Criminal Code 1899* (Qld), s. 230; *Criminal Law Consolidation Act 1935* (SA), s. 74; *Crimes Act 1958* (Vict), s. 47A; *Criminal Code Act 1913* (WA), s. 321A; *Criminal Code Act 1924* (Tas), s. 125A.

DISCUSSION PAPER

MODEL CRIMINAL CODE

CHAPTER 5

SEXUAL OFFENCES AGAINST THE PERSON

Model Criminal Code Officers Committee of the
Standing Committee of Attorneys-General

November 1996

This is a discussion draft. It contains the views of the Model Criminal Code Officers Committee. It does not represent the views of the Standing Committee of Attorneys-General

Contents

34.6 Persistent sexual abuse of a child

(1) A person who engages during any period in conduct in relation to a particular child that constitutes offences against this Part on 3 or more separate occasions, each occurring on separate days in that period, is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

(2) It is immaterial whether or not the conduct is of the same nature, or constitutes the same offence, on each occasion.

(3) In proceedings for an offence against this section, it is not necessary to specify or to prove the dates or exact circumstances of the alleged occasions on which the conduct constituting the offence occurred.

(4) A charge of an offence against this section:

(a) must specify with reasonable particularity the period during which the course of conduct alleged against the defendant occurred, and

(b) must describe the general nature of the conduct alleged against the defendant (including the nature of the offences alleged to have been committed in the course of that conduct).

(5) In order to be convicted of an offence against this section:

(a) the trier of fact must be satisfied beyond reasonable doubt that the evidence establishes at least 3 separate incidents occurring on separate days during the period concerned that constitute offences against this Part in relation to a particular child of a nature described in the charge, and

(b) the trier of fact must be so satisfied about the material facts of the 3 such incidents, although the trier of fact need not be so satisfied about the dates of the incidents or the order in which they occurred.

In proceedings for an offence against this section, the judge must warn the jury (if any) of the requirements of this subsection.

(6) A person cannot be simultaneously charged (either in the same or in different instruments of charge) with an offence under this section and another offence against this Part alleged to have been committed in relation to the same child during the same period.

(7) A person who has been tried and convicted or acquitted on a charge of an offence against this section may not be charged with another offence against this Part in relation to the same child that is alleged to have been committed during the period over which the defendant was alleged to have committed an offence against this section.

(8) A person who has been tried and convicted or acquitted on a charge of an offence against this Part in relation to a child may not be charged with an offence against this section in relation to the same child during the same period.

(9) Proceedings for an offence against this section must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence against this section before the necessary consent has been given.

Notes

1. *The law which has given rise to this type of offence is canvassed in the Commentary. The Model Criminal Code offence is generally modelled on the South Australian provision.*

2. *There will be persistent sexual abuse of a child where a person, on three or more occasions, on three different days, does acts which would constitute an offence under Part 5.3 of the Model Criminal Code (Sexual Offences). The offence contains double jeopardy provisions.*

3. *Section 38.3 provides for alternative verdicts. Thus if a jury is not satisfied that the offence of persistent sexual abuse of a child has been established, but that an act has been committed during the relevant period which constitutes an offence under this Part, the jury may convict of that other offence.*

Persistent sexual abuse of a child (34.6)

All jurisdictions except New South Wales have introduced offences of 'persistent sexual abuse of a child'.[187] These provisions generally permit the prosecution to present an indictment which charges an accused with the offence of having a 'sexual relationship' with a child over a period of time. There must be a number of separate occasions (typically three) on which particular sexual acts occurred. However, it is not necessary to specify the times, dates or circumstances of the acts.

The provisions were introduced in response to the decision of the High Court in *S v The Queen*.[188] That case concerned an indictment for three counts of sexual assault. Each count alleged one act of carnal knowledge on an unknown date but within a specified twelve month period. Although regular on its face, each count referred to a number of acts which were indistinguishable from the other except that they took place on different occasions. The complainant gave evidence of a number of acts of incest by the accused over a period of three years but could not identify specifically when any one act occurred. Two took place 'about 1979, '80' and similar acts took place 'every couple of months' over the next two years.

A majority of the High Court held that the trial had been fundamentally flawed and overturned the convictions. The Court found that there was a lack of particulars, and the prosecution had not been required to specify which of the numerous acts of intercourse were relied on as the offences charged. The matter had effectively been left to the jury on the basis that they were to be satisfied that only one act occurred.

While an indictment may properly be framed such that each count charged one offence within a specified period, in *S*'s case a number of the alleged acts could meet the offence charged. This not only constituted an error of law,[189] but brought about unfairness to the accused:

> 'The occasion upon which the offences alleged took place were not identified and the applicant was, in effect, reduced to a general denial in pleading his defence. He was precluded from raising more specified and, therefore more effective defences, such as the defence of alibi. Because the occasions on which he was alleged to have committed the offences charged were unspecified, he was unable to know how he might have answered them had they been specified. It is not the point that the prosecution may have found

187 Vic *Crimes Act* s47A; SA *Criminal Law and Consolidation Act* s74; ACT *Crimes Act* s92EA; WA *Criminal Code* 321A; NT *Criminal Code* s131A; Qld *Criminal Code* s229B; Tas *Criminal Code* s125A

188 (1989) 89 ALR 321

189 At common law, an information must identify the essential factual ingredients of the actual offence alleged: *Johnson v Miller* (1937) 59 CLR 467 per Dixon J at 489

> it difficult or impossible to make an election because of the general unsatisfactory evidence of the complainant. An accused is not to be prejudiced in his defence by the inability of the prosecution to observe the rules of procedural fairness.'[190]

Other criticisms were made. One was that the lack of particularity meant that the admissibility of the evidence of other acts of intercourse, apart from those charged, could not be properly determined in accordance with established principles.[191] For instance, similar fact evidence can be admitted as evidence of propensity on the part of the accused. However, a proper assessment as to probative value cannot be made unless a particular act is isolated. Another was that the accused was denied the opportunity to test the credit of the complainant by reference to any precise time or surrounding circumstances.

A similar situation arose for consideration by the Full Court of the Supreme Court of Western Australia in *Podirsky v The Queen*.[192] The Court referred to the unfairness to the accused when faced with allegations of repeated acts of intercourse over an extended period, without sufficient particularity. The Court also referred to the difficulties faced by the prosecution:

> 'The situation carries with it a potential for injustice for the accused. It also carries with it an injustice to the complainant and generally because one effect of the decision in *S v The Queen* is that notwithstanding clear and cogent evidence of a course of conduct involving repeated acts of sexual intercourse in the relevant period ... the Crown have found it impossible to identify any particular act with sufficient precision to enable any offence to be charged. This means ... that there is a possibility that the more acts of intercourse or other acts of sexual abuse and the greater the length of time over which they occur, the more difficult it may be to establish that any one of a series of multiple offences has been committed. Some reform would seem desirable to cover cases where there is evidence of such a course of conduct.'[193]

Most jurisdictions have undoubtedly taken up this suggestion in order to meet the perceived difficulties which arise in the prosecution of offences involving the sexual abuse of young children. Typical difficulties include that the complainant may have been very young when the attacks commenced, the attacks occurred regularly over a lengthy period, no clear distinction can be readily made between the separate attacks, and no complaint was made for some time after the attacks began. Some of these problems can be attributed to the fact that the majority of sexual offences against children are perpetrated by persons known to and trusted by the victim.

190 *S v The Queen* (1989) 89 ALR 321 per Dawson J at 328
191 *S v The Queen* (1989) 89 ALR 321 per Dawson J at 328. See also *Harriman v The Queen* (1989) 88 ALR 161; *R v Ball* [1911] AC 47
192 (1990) 3 WAR 128
193 (1990) 3 WAR 128 at 136

The Committee discussed this issue at some length. On the one hand, an offence of 'persistent sexual abuse' raises a number of issues of principle. On the other, the problems faced by the prosecution in the area of sexual offences against children are a weighty factor.

The question is ultimately one of attaining an acceptable balance. The Committee's present view is that the Model Criminal Code should include such a provision with adequate safeguards.

The Committee would be interested in receiving submissions on this issue. In particular, it would be interested in hearing about the operation of the offence in those jurisdictions where one has been adopted. Certainly, it is noted that in New South Wales, the decision in *S*s case does not appear to present a practical problem. The practice in that jurisdiction has generally been to rely upon the first and/or last instance of an offence and to charge those within specified date ranges. At sentence, further evidence of sexual relationship is admitted to negative that the act was an isolated incident.

Recommendation

The Model Criminal Code should include an offence of persistent sexual abuse of a child.

Appendix 5

4.

Queensland Law Society Inc

Facsimile (07) 3842 [illegible]

Your Ref: Criminal

Our Ref: SSC:km:1490

5 August 1

Ms Christine W S Chu
Assistant Director of Practitioners Affairs
The Law Society of Hong Kong
3/F Wing on House - 71 Des Voeux Road
CENTRAL HONG KONG
Facsimile No: 0015 (852) 2845 0387.....Pages =

Dear Ms Chu,

OFFENCE OF "PERSISTENT SEXUAL ABUSE OF A CHILD"

Thank you for you facsimile of 14 July 1999. A copy of your letter has been provided to *Chairman of the standing Criminal Law Committee* of the Council of the Society, Mr Mick Shanahan. Mr Shanahan is a barrister-at-law and is also the Public Defender for the State Queensland.

Mr Shanahan should reply to you directly in due course.

Yours sincerely,

Scottie Carter
Solicitor to the Society

Law Society House 179 Ann Street BRISBANE QLD 4000
GPO Box 1785 BRISBANE QLD 4001 AUSTRALIA
DX 123 BRISBANE

Legal Aid
QUEENSLAND

Your Ref:
Our Ref: MJS:JuH
Date: 17 August 1999

Contact: Michael Shanahan
Telephone: (07) 3238 3204
Facsimile: (07) 3238 3340

Ms C.W.S. Chu
Assistant Director of Practitioners Affairs
Law Society Of Hong Kong
3/F Wing On House
71 Des Voeux Rd
CENTRAL HONG KONG

Dear Ms Chu,

OFFENCE OF "PERSISTENT SEXUAL ABUSE OF A CHILD"

I refer to your letter of 14 July 1999 to the Queensland Law Society concerning the above offence. The response has been delegated to me as Chair of the Society's Criminal Law Committee.

Queensland introduced a version of this law (s.229B Criminal Code; Maintaining a sexual relationship with a child) in 1989. I have enclosed a copy of the annotated section together with some case law of relevance.

The references to other sections of the Criminal Code are: s.208 Unlawful sodomy; s.209 Attempted Sodomy; s.210 Indecent treatment of children under 16.

As can be seen from the case law, particularly *R v Kemp* [1997] 1 Qd R 383 and *R v KBT* (1997) 191 CLR 417, the law has caused grave concerns as to its fairness and its interpretation.

I trust this material is of assistance.

Yours faithfully,

M.J. SHANAHAN
PUBLIC DEFENDER

c.c. Scott Carter, Qld Law Society.

R v KEMP — [1997] 1 Qd R 383

SUPREME COURT OF QUEENSLAND COURT OF APPEAL

FITZGERALD P, DAVIES JA, SHEPHERDSON J

No CA 82 of 1995

30 May; 29 August 1995

20 Pages

Criminal law — Jurisdiction, practice and procedure — Summing up — Charge of maintaining sexual relationship with child under 16 — Joinder with charges of specific sexual offences — Need for summing up to address special risks of unfairness to accused — Criminal Code s229B. (A Dig 3rd [802]).

Criminal law — Evidence — Similar facts — Relevance — Sexual offences — Similar acts in relation to same person — Need for fairness to accused - Probative value. (A Dig 3rd [522]).

S229B of the Criminal Code relevantly provides:

"Maintaining a sexual relationship with a child under 16

299B.(1) Any adult who maintains an unlawful relationship of a sexual nature with a child under the age of 16 years is guilty of a crime ...

(1A) A person shall not be convicted of the offence defined in subs(1) unless it is shown that the offender, as an adult, has, during the period in which it is alleged that the offender maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child ... on 3 or more occasions and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship not withstanding that the evidence does not disclose the dates or the exact circumstances of those occasions.

...

(2) A person may be charged in 1 indictment with an offence defined in subs(1) and with any other offence of a sexual nature alleged to have been committed by the person in the course of the relationship in issue in the first-mentioned offence and the person may be convicted of and punished for any or all of the offences so charged."

Held:

(1) (Per Fitzgerald P and Shepherdson J) That where an accused person was charged pursuant to s229B not only with specific sexual offences but also with the broad and imprecise offence of maintaining an unlawful sexual relationship, the trial judge's summing up was required to take account of the difficulties thereby faced by that person. They included the risks that he would be convicted on the basis of the jury's conclusion that he had a propensity to commit sexual offences and that his conviction on a charge alleging a breach of s229B(1) might in part depend on different conclusions by different jury members in relation to pans of the complainant's evidence.

Per Davies JA: In this case the trial judge should have directed the jury that evidence of sexual conduct other than that particularised in the specific counts of the indictment was admissible on two bases only: the first as evidence of acts which the jury could conclude were offences for the purpose of deciding whether the appellant was guilty of the offence under s229B; and the second as evidence of similar facts showing the relationship between the appellant and the complainant. He should have emphasised to the jury that that evidence should not be substituted for the evidence on the specific counts in order to convict the appellant of any of those specific offences; and he should have told them that that evidence should not be used to convict the appellant of any of the offences of which he was charged on the basis that it showed a general disposition to commit offences of that kind. Further, the judge should have told the jury that, in order to convict the appellant of the offence under s229B, they must be satisfied that on three or more occasions the appellant had done an act of the defined kind that those acts could but need not include one or more of the acts the subject of the specific counts; but that whether they did or not the jury should be agreed upon at least three of the acts as constituting the offences of a sexual nature for the purpose of s229B whether or not they were acts particularised in the evidence as to dates or exact circumstances.

(2) (Per Fitzgerald P and Shepherdson J) That evidence of "guilty passion" was admissible in prosecutions for sexual offences subject to the court's discretion to exclude unnecessary evidence in fairness to the accused. In some circumstances, such as this case where it was a contest of "word for word", such evidence had little or no legitimate probative value as it did not logically add to or detract from the probability that disputed critical matters occurred.

R v Bradley(1989) 41 A Crim R 297; R v Beserick (1993) 30 NSWLR 510 considered.

[1997] 1 Qd R 383 at 384

CASES CITED

The following cases are cited in the judgments:

B v The Queen (1992) 175 CLR 599.
Briginshaw v Briginshaw (1938) 60 CLR 336.
De Jesus v The Queen (1986) 61 ALJR 1.
G v R (CCA 13/1995 (SA); 4 April 1995, unreported).
Harriman v The Queen (1989) 167 CLR 590.
Hoch v The Queen (1988) 165 CLR 292.
Johnson v Miller (1937) 59 CLR 467.

Liberato v The Queen (1985) 159 CLR 507.
Longman v The Queen (1989) 168 CLR 79.
Markby v The Queen (1978) 140 CLR 108.
Perry v The Queen (1982) 150 CLR 580.
Pfennig v The Queen (1995) 182 CLR 461.
Podirsky v The Queen (1990) 3 WAR 128.
R v B [1989] 2 Qd R 343.
R v Beserick (1993) 30 NSWLR 510.
R v Bradley (1989) 41 A Crim R 297.
R v Butun (CCA 191/1990 (WA); 15 February 1991, unreported).
R v Cooper (CCA 92/1991 (Vict); 6 December 1991, unreported).
R v Fisher (CA 439/1994; Court of Appeal, 17 December 1994, unreported).
R v Hamzy (1994) 74 A Crim R 341.
R v O'Brien (CCA 60483/1992 (NSW); 5 November 1993, unreported).
R v O'Neill [1996] 2 Qd R 326.
R v Thorne (CCA 33/1995 (Vict); 9 June 1995, unreported).
R v Turney (1990) 52 SASR 438.
R v TJW, ex parte Attorney-General [1988] 2 Qd R 456.
R v Witham [1962] Qd R 49.
S v The Queen (1989) 168 CLR 266.
Sutton v The Queen (1984) 152 CLR 528.

The following additional cases were cited in argument:

Barton v The Queen (1980) 147 CLR 75.
Connelly v Director of Public Prosecutions [1964] AC 1254.
M v The Queen (1994) 181 CLR 487.
R v Charles [1994] 1 Qd R 597.
R v George [1980] Qd R 346.
R v Hand (CA 174/1993; Court of Appeal, 23 November 1993, unreported).
R v Hocking [1988] 1 Qd R 582.
R v Johnson (CA 126/1994; Court of Appeal, 5 September 1994, unreported).
R v Kerim [1988] 1 Qd R 426.
R v Lapuse [1964] VR 43.
R v McK [1986] 1 Qd R 476.
R v M [1995] 1 Qd R 213.
R v Norfolk County Council Social Services Department, ex parte M [1989] QB 619.
R v Sakail [1993] 1 Qd R 312.
R v Stephens (CA 149/1994; Court of Appeal, 12 August 1994, unreported).
R v Stewart, ex parte Attorney-General [1989] 1 Qd R 590.
R v Wruck (CA 399/1994; Court of Appeal, 4 December 1994, unreported).

CRIMINAL APPEAL

Appeal from convictions before Wylie DCJ and a jury.

FG Connolly for the appellant.

DL Bullock for the Crown.

CAV

Fitzgerald P
On 8 February 1995, the appellant was convicted after trial on one count of unlawfully and indecently dealing with a female child under the age of 12 years who was at the time in his care, four counts of unlawful carnal knowledge of the girl when she was under the age of 16 years and in his care, and one count of maintaining an unlawful sexual relationship with the girl while she was under the age of 16 years and in his

[1997] 1 Qd R 383 at 385

care: it was a circumstance of aggravation that, in the course of that relationship, the appellant had unlawful carnal knowledge of the girl while she was under the age of 12 years and in his care. The offence of maintaining, an unlawful sexual relationship was count I on the indictment, which also alleged 11 specific offences; counts 2 and 3 charged indecent dealing and counts 4 to 12 charged unlawful carnal knowledge. The jury was unable to agree on count 2, acquitted the appellant on counts 4, 5, 6, 8 and 11 and convicted him on counts 3, 7, 9, 10 and 12. The appellant, who gave evidence denying the offences, has appealed against his convictions.

The appellant was born on 20 September 1946 and, in late 1990, was living at Helidon with at least some of the children of his first marriage: his first wife was dead. The appellant subsequently remarried, and, at the time of his conviction, had five children, ranging in age from 27 to 4 years.

The complainant, who was born on 14 March 1979, was in Grade 6 at school in 1990, and living with her father and some of her siblings at Acacia Ridge. Her parents were divorced. Her sister, Pam, who was born in 1976, was living at Helidon with the appellant and his family, and subsequently married the appellant.

Because the complainant was rebellious, she went, with her father's consent, to live with the appellant and his family and Pam at Helidon in November 1990. The offences of which the appellant was convicted occurred between then and late January 1993, during periods when the complainant lived with the appellant and his family. The complainant was under the age of 12 years until 14 March 1991.

Helidon: Counts 2 to 6 - November 1990 to January 1992

According to the complainant, the appellant indecently dealt with her the night she arrived at his home in Helidon. That incident was the subject of count 2 on the indictment, on which the jury was unable to agree.

The indecent dealing count on which the jury convicted the appellant was count 3, which also related to an incident at Helidon a few days after the complainant arrived at the appellant's home. The offence consisted of the digital penetration of the complainant's vagina. According to the complainant, there was similar conduct by the appellant every night for the following two or three weeks.

In his submissions specifically related to the appellant's conviction on count 3, his counsel pointed out that, on the complainant's evidence, the indecent dealing occurred at a location in the house which was visible from a number of other places in the house and easily approached by others living there and "others living in a caravan alongside the house, who

also used the toilet and kitchen facilities".

The appellant was acquitted on counts 4, 5 and 6, which alleged offences of unlawful carnal knowledge at Helidon:

- between 30 January and 7 February 1991 - count 4
- between 7 April and 1 May 1991 - count 5
- between 30 April 1991 and 1 January 1992 - count 6.

The complainant also gave evidence that sexual intercourse occurred on other unspecified occasions at Helidon, but that she could not remember any details: she said that intercourse occurred "first off every couple of nights for a while and then it slowed down to maybe once or twice a week". That was the only evidence upon which the jury could have found the circumstance of aggravation in count 1 ie, that an act of intercourse

occurred before the complainant's twelfth birthday. Before this Court, it was effectively conceded by counsel for the prosecution that the evidence was insufficient to establish that fact, while some of the complainant's testimony might, in a general sense, have indicated an earlier date, her evidence overall suggested that, apart from count 4 which the jury rejected, intercourse only occurred after she had commenced to take a contraceptive pill, which was when she was 12 years old. The appellant, who said that he had had a vasectomy prior to his first wife's death, stated that the complainant and her sister. Pam, took contraceptives with the consent of their father as a precaution and to alleviate menstrual problems.

Murphy's Creek: Counts 7 and 8 - January to May 1992

The appellant and his family, together with the complainant and her sister, Pam, moved to Murphy's Creek, initially to Duggenden Road, where, according to the complainant, there were a few acts of sexual intercourse of which she was unable to give any details. Counsel for the appellant submitted that such activity was unlikely "in a tiny house of single walls where a large family in the home and two caravans alongside, all using the facilities, had seen nothing".

The appellant and his family, together with the complainant and her sister, Pam, moved to a house at Karella Street, Murphy's Creek prior to the end of January 1992. Another of the appellant's sisters, Faylene, also resided there with them for part of the time. Further, for some months, perhaps March to May 1992, the complainant's father lived in a caravan near the house.

Count 7, on which the appellant was convicted, related to an act of sexual intercourse in the Karella Street house between 31 January and 31 March 1992. Count 8, on which the appellant was acquitted, related to intercourse in the caravan between 13 March and 1 April 1992.

A number of criticisms were levelled at the complainant's evidence on count 7, most of which were merely matters for the jury's consideration; it is appropriate, however, to note that the sexual activity which the complainant described in her evidence differed from earlier statements.

Reliance was also placed by the appellant upon the unsatisfactory evidence given by the complainant in relation to count 8.

The complainant described an act of sexual intercourse on the night before the appellant's daughter's wedding, when there were a number of visitors staying in the house and, on the

evidence of some witnesses, the caravan. According to the complainant and her sister. Faylene, they both slept in the caravan that night on the instructions of the appellant, but Faylene gave no evidence which otherwise supported the complainant; on the contrary, their accounts differed significantly. On the complainant's account, she went to bed in the caravan, the appellant came in later and intercourse occurred, the appellant left and the complainant remained in the caravan: the complainant's evidence suggests that the appellant would have departed about 10.30 pm. Faylene gave evidence that, when she went to the caravan to go to bed prior to that time, neither the complainant nor the appellant was there. The complainant came in later, and she and Faylene talked about the forthcoming wedding.

By late May 1992, the complainant and her sisters, Pam and Faylene, were living with the appellant and his family at Karella Street, Murphy's Creek. Earlier, Faylene had been residing with another family by name

Pollington, who wanted to adopt her. While living with Mr and Mrs Pollington, Faylene told them about photographs taken by Pam of some girlfriends posing topless in the bedroom and also that she and the complainant were taking a contraceptive pill. The Pollingtons complained to the police and, on 23 May 1992, the complainant and Faylene were interviewed at school in Toowoomba. Both girls denied any impropriety by the appellant.

Later that day, police officers visited the appellant's home with a warrant and searched it but found no evidence of an incriminating nature. The complainant and Faylene were again interviewed, as was their father who was there at the time. The girls again denied any wrongful conduct on the part of the appellant.

The complainant and Faylene returned with their father to Redcliffe where he lived, but both stayed only a very short time. They then returned to the appellant's house at Karella Street, Murphy's Creek, and later went with him and his family to Mt Morgan, where the complainant expressed a desire to live permanently with the appellant's family.

Rockhampton: Count 9 - May 1992 - guilty

The appellant and his family purchased a house at Mt Morgan, and he had to go to Rockhampton a few days ahead of the others to complete the purchase. Pam remained at Murphy's Creek to complete packing and organise the removalist. The complainant went with the appellant to keep him company and keep him awake while driving at night. The appellant obtained one room at a motel, which had two beds in it, because it was cheaper.

Apart from a general contention that the complainant's evidence could not support a guilty verdict, the points made by the appellant's counsel were that the complainant's evidence of the sexual act lacked detail, the appellant was exhausted, and he and Pam "were living in an engagement situation in a happy home, and there was no suggestion of a rift at any time in their relationship which proceeded on to a happy marriage".

Mt Morgan: Count 10 - 31 May to 1 July 1992 - guilty

Count 11 - 31 May to 1 July 1992 - not guilty

Count 12 - 7 January to 29 January 1993 - guilty

Count 10 related to an act of intercourse on a night which the appellant and the complainant

spent in the house at Mt Morgan prior to the arrival of Pam. Faylene and members of the appellant's family. The appellant's specific criticisms of this part of the complainant's testimony related to differences between her evidence and earlier descriptions of the sexual activity, and conduct which she described which, it was submitted, was "unlikely for a middle-aged man".

The complainant's evidence in relation to count 11 was similarly criticised, and, in addition, it was said that the appellant's activities that day, which involved driving long distances, made it unlikely that he would have had intercourse because "he suffered from a bad back condition". Perhaps more telling were discrepancies in the complainant's evidence of activities that day, and conflicts between her evidence and that of other witnesses.

When their father went to Mt Morgan to bring them to his home at Redcliffe on 16 July 1992, both the complainant and Faylene were very upset and did not want to leave, but the appellant encouraged them to

accompany their father, following which they kept in touch with the appellant's household by letter and telephone.

While the complainant and Faylene were living with their father at Redcliffe, they were interviewed by police on 20 July 1992, and again denied any misconduct by the appellant. The complaint on that occasion was laid by Mr and Mrs Pollington and the complainant's father.

The complainant and Faylene continued to reside at Redcliffe with their father, who instructed them not to go near the appellant. However, in November 1992, in the company of three young men, the complainant and Faylene visited the appellant's home at Mt Morgan and stayed for some days.

Although the complainant and Faylene then returned home, the complainant again visited the appellant's home in December 1992 and remained there for about a month, into January 1993. On that occasion she told the appellant's daughter, Trish, that, although she loved her father, she was drawn both ways and wanted to live permanently in the appellant's home.

Count 12 related to an incident in January 1993, when the complainant was a visitor to the appellant's home at Mt Morgan. She said that she accompanied him to the home of a neighbour who was away on holidays: the appellant was permitted to receive messages on the neighbour's answering machine and was generally watching over the neighbour's property. Pam, who usually went, did not want to accompany the appellant on that occasion and the complainant went in her place. She went willingly although aware of the appellant's likely conduct, and intercourse occurred.

The specific complaint concerning the complainant's evidence of that occasion concerned discrepancies in her accounts at different times and the asserted improbability of one description which she gave of complex sexual acts, especially because of the risk of interruption by a neighbour.

The complainant also alleged that sexual intercourse occurred on four or five other unspecified occasions while she was living at Mt Morgan with the appellant and his family. The complainant said that she came from the bedroom which she occupied with her sister, Faylene, and had intercourse with the appellant in front of a heater. Other witnesses, the appellant's son, Shane, and his then girlfriend, Christie, both agreed that throughout that period they were sleeping in front of the heater each night. Further, it was said that the heater

was located opposite the door to Pam's room and also visible from a verandah room occupied by two other girls.

After the complainant had finished her evidence but was still in the witness box, the prosecutor sought and was given permission to adduce further evidence from her in relation to the appellant's conduct at Mt Morgan on the basis that it was relevant to count 1. She said that the appellant often "used to come up to [her] and touch [her] breasts" and "say things like, 'Yep, they are growing.'"

As the appellant's counsel pointed out to the trial judge at the time, if he cross-examined on that evidence after having earlier concluded his cross-examination, it might highlight the evidence and give it importance in the minds of the jury. However, worse for the appellant was to come. Faylene and Christie gave evidence confirming and expanding the complainant's evidence on this subject, with details of not mere touching, but grabbing and groping and manipulating the complainant's breasts, both outside and

inside her clothing: the complainant's evidence contained none of those allegations. That evidence from Faylene and Christie was the only evidence which confirmed any part of the complainant's allegations of sexual impropriety against the appellant.

After departing from Mt Morgan in January 1993, the complainant lived at Redcliffe with her father and, from time to time, with a woman whom she knew as "Auntie Jackie Barnes". During that period, Barnes met the appellant and took an instant dislike to him. Further, she told the complainant's sister, Pam, that she should report an earlier sexual molestation of both the complainant and Pam by their de facto stepfather, that is, a man with whom their mother lived after she and their father separated.

Subsequently, Barnes and the complainant's godmother had a conversation with the complainant's father and, following discussion of her molestation by her de facto stepfather, the complainant went upstairs with her godmother and, in a highly emotional state, alleged for the first time that the appellant had engaged in sexual misconduct with her.

Following that, the complaint which led to the appellant's charges and trial was made to police in late August 1993 by the complainant, her father and Auntie Jackie Barnes.

Reference has earlier been made to the verdicts at the appellant's trial. After those verdicts were returned by the jury, an unusual colloquy occurred between the trial judge and the jury foreman.

When the jury verdicts were returned, the prosecutor requested the return of the indictment to "check a point ... in respect of count 1", and then asked for the jury to be tied up for just a few moments while he raised a matter with the trial judge. The judge requested the jury members, telling them that he could not compel them, to go to the jury room and collect their belongings and return. In their absence, the prosecutor informed the judge that the jury's guilty verdict on count 1, including the circumstance of aggravation that sexual intercourse occurred when the complainant was under 10 years of age, could not be reconciled with the verdict acquitting the appellant on count 4. Discussion between the judge and counsel proceeded on the basis that his Honour could "correct" the verdict on count 1 to make it "accord with law".

Shortly afterwards, the jury returned and the following discussion occurred:

"HIS HONOUR: Ladies and gentlemen, when you returned your verdict on count 1, it was

guilty.

FOREPERSON: Yes, Your Honour.

HIS HONOUR: And I believe I asked you did that include the circumstance of aggravation.

FOREPERSON: Yes, Your Honour.

HIS HONOUR: Now, as we went through the verdicts and took them, with respect to count 4. your verdict was not guilty.

FOREPERSON: That's correct, Your Honour.

HIS HONOUR: Now, count 4 charged carnal knowledge at a time when Estelle was under the age of 12.

FOREPERSON: Correct, Your Honour.

HIS HONOUR: So you found her not guilty of that.

[1997] 1 Qd R 383 at 390

FOREPERSON: Yes, we did, Your Honour.

HIS HONOUR: Or found Mr Kemp not guilty of that. Now, essentially, that is the only charged act of carnal knowledge —

FOREPERSON: Yes, Your Honour.

HIS HONOUR: — that occurred when she was under 12.

FOREPERSON: Yes, Your Honour, but can I say something? We felt the way you summed up the other day that we could go on - the way we understood part one, the second part of part one, was if —

HIS HONOUR: If there was some —

FOREPERSON: — carnal knowledge within that given period happened, if we had reason to believe, enough information to believe that it did happen in that period —

HIS HONOUR: If there was some other allegation by her —

FOREPERSON: Yes.

HIS HONOUR: — of some other act that she couldn't particularise as to date or place.

FOREPERSON: Yes. Yes, Your Honour.

HIS HONOUR: Well, I - that requires us to have a look at the first of those. It's rather difficult when a date isn't given in evidence, of course, to ascribe it to any particular period. Essentially, you are saving that you are satisfied that there was another act of carnal knowledge at some time before 13 March in 1992.

FOREPERSON: Yes, Your Honour.

HIS HONOUR: I have all sorts of notes and - I'm sorry, 14 March 1991. That was her twelfth birthday.

[PROSECUTOR]: Page 83 might be what Your Honour is looking for, at about line 19.

HIS HONOUR: Yes. Well, save me time and just read it to me. [Prosecutor].

[PROSECUTOR]: Yes. Question by myself to Estelle: 'Now, did his behaviour ever develop past just touching you on the vagina? — Yes.

Can you tell us when that happened? — After we came back from the holidays. It was on the first day of school, but we didn't go to school that day. Everybody was tired from the trip.'

And then she went on to explain that that was a day the others went over to Trisha's place and she and the accused stayed there. Essentially, the Crown case has always been, therefore, that that was the first occasion when unlawful carnal knowledge took place. Now, that was on 1 January. If the jury —

HIS HONOUR: 'Just after you came back from this'.

[PROSECUTOR]: Yes, it was the end of January, the beginning of February. If the jury are satisfied beyond reasonable doubt that the other carnal knowledge which she referred to as occurring

after that took place before 13 or 14 March. then the verdict can stand, but not otherwise.

HIS HONOUR: Well, the jury's reasoning is on record now and I will record the verdict as it was given. It's clear from what the foreman has said that there is no reliance on facts that were alleged with respect to count 4, that there is reliance on other facts in the evidence. Well, thank you. We just wished to clear that circumstance up. It's a matter of fairness, of course, to the accused.

...

HIS HONOUR: I'll treat that as the alternative, really, to a special verdict.

[PROSECUTOR]: Yes, that would - it occurs to me, the way they came back and responded, that that was the other alternative, that Your Honour could have asked them on what basis they found it, whether it was that act or some other act.

[DEFENCE COUNSEL]: Well, with respect, Your Honour, it seems very odd that they can pluck something and when they find it didn't happen in count 4, in my submission, it would be better to ignore the added circumstance of aggravation.

HIS HONOUR: My view, ..., is that it's better not to engage in an unseemly or even a seemly argument with them on that.

[DEFENCE COUNSEL]: Well, quite, Your Honour.

HIS HONOUR: And to leave you and Mr Kemp to any remedies that you have in the Court of Appeal.

[DEFENCE COUNSEL]: Yes, Your Honour.

HIS HONOUR: I have some views about reliance on general unstated and unparticularised and undetailed allegations. I understand that sometimes that is all people can say, but in any event, I think all the facts of their reasoning are now on the record.

[DEFENCE COUNSEL]: That's so, Your Honour.

HIS HONOUR: If we all took the trouble to pore through the record, once again, no doubt we'd find a reference or not be able to find a reference that supports their verdict. Yes. Well, just call on Mr Kemp."

As stated earlier, it was effectively conceded before this Court that the jury's finding that there was an act of intercourse between the appellant and the complainant before her twelfth birthday cannot be sustained. Not surprisingly, this defect in the jury's verdict on count 1 was emphasised in submissions for the appellant.

[1997] 1 Qd R 383 at 392

That aside, the appellant's wide-ranging submissions cannot be easily summarised. Some related to the proper construction of s229B of the Code, or to its legitimate use, consistently with the right of an accused person to a fair trial. In this context, particular reference was made to the difficulties occasioned an accused person when an offence against s229B(1) is not fully particularised or even limited to other offences joined in the indictment pursuant to s229B(2), how those difficulties are magnified when the evidence against the accused includes both specific allegations and generalised evidence, and how the problem is again exacerbated when evidence includes both serious and less serious offences and there is corroboration - or perhaps direct corroboration - only for the less serious offences.

Although sometimes apparently related to the joinder of the charges against the appellant in a single indictment and sometimes to objections to admissibility of evidence (not necessarily taken at trial), these matters can best be considered in relation to the appellant's complaints concerning the trial judge's summing-up, which was one of the two principal bases of appeal; the other, principal contention for the appellant was that his convictions should be quashed and verdicts of acquittal entered because the verdicts are, and any verdicts based on the complainant's evidence would be, unsafe and unsatisfactory.

Counsel for the appellant analysed the evidence in considerable detail, including the evidence in relation to the offences of which the appellant was acquitted, in the course of an attack upon the credibility of the complainant. Attention was drawn to contradictions and other inconsistencies, suggested improbabilities, and conflicts with evidence from other witnesses. Further, it was emphasised that the complainant had exhibited no signs of distress, made no protest and failed to take advantage of many opportunities which she had to complain, instead consistently denying over a considerable period any impropriety by the appellant. Thus, for example, in the period when she was living with the appellant and her sister at Helidon, she had regular contact with her family, including periods when she lived with them, but made no complaint to her father, or gave any indication of any misconduct by the appellant. Nor did she mention what she alleges was occurring to her sister, Pam, or the appellant s daughter, Trish, who lived in the appellant's household, with each of whom she shared a close and affectionate relationship.

It was also emphasised that the jury's verdicts generally corresponded with a division of the offences alleged into two categories. Apart from count 2, on which the jury could not agree, the appellant was acquitted on all counts where there was evidence from other persons which contradicted or was inconsistent with the complainant's testimony. The appellant was convicted if the only evidence in relation to an offence was "word against word"; ie, the complainant's allegation against the appellant's denial. It was submitted that, despite its apparent disbelief of the appellant's evidence, the demonstrated unreliability of the complainant's evidence in relation to the offences of which the appellant was not convicted ought to have raised a reasonable doubt in the jury's mind concerning the reliability of her evidence against the appellant when there were no other witnesses, and no corroboration

(except such corroboration as was provided by Faylene and Christie's evidence of the appellant touching the complainant sexually).

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Some of the appellant's criticisms of the complainant's evidence do not take him very far; thus, for example, the complainant's failure to protest or complain and her initial denials of impropriety by the appellant are quite consistent with her corruption, whether by the appellant or earlier, and her willing participation in sexual activity with the appellant. Further, defects and deficiencies in evidence do not necessarily mean that a witness is untruthful or unreliable: it is a matter of degree. In the end, although there is force in the appellant's submissions and features of the complainant's evidence give cause for concern. I do not consider that a properly instructed jury could not reasonably have arrived at the guilty verdicts against the appellant; the evidence is not such that an appellate court must hold, following convictions on that evidence, that there was a significant possibility that an innocent person had been convicted.

However, the state of the complainant's evidence against the appellant is obviously a matter to be brought to account in considering the sufficiency of the trial judge's summing-up to the jury.

It is unnecessary to discuss each of the many complaints made of the summing-up; a substantial number had not been taken at trial and/or were insignificant. The matters of substance can be discussed by reference to the following three aspects of the summing-up.

1. The trial judge gave considerable emphasis to the importance of the complainant's testimony; it was pointed out that she and the appellant were the "two key witnesses", and she and her credibility were" ... the linchpin upon which the case depends".

2. His Honour informed the jury that he did not propose to canvass the evidence relating to counts 2 to 12 which had been discussed at length by counsel and that "... if you do not accept Estelle as a credible witness ... then it would be dangerous for you to reject counts 2 to 12 as having happened, and yet rely upon [her] general statements ..." concerning offences of which she was unable to give detailed evidence. However, he then proceeded to read to the jury all the "... evidence ... in relation to offences that come within the count 1 charge ..." which had "not been the subject of particular evidence ...", including the evidence of the complainant. Faylene and Christie with respect to the appellant touching the complainant sexually. That generalised evidence assumed importance in the jury's deliberations, as can be seen from the discussion which followed the jury's return of its verdicts.

3. His Honour moved next to the issue of corroboration, which he told the jury "... looms large in this case, and will no doubt loom large in your deliberations". Further, he said:

"Well, that's the evidence in relation to those particular acts ['touching of the complainant's breasts'] subject to what I'm about to say in relation to corroboration. It will be for you to determine whether you accept Estelle beyond reasonable doubt, with respect to those 'touchings', bearing in mind that she did not speak of touching underneath clothing. That she did not complain about the touching on the bottom as Christie suggests, so you can put that completely out of count. The touching that she speaks of was not elaborated upon in the way that Christie or Faylene elaborated by demonstration. In any event, there is that particular body of evidence, all of which, as I say, is denied.

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...
To put it shortly, the evidence that corroborates a complainant's evidence is evidence from a source other than the complainant which supports hers by showing or suggesting that the offence complained of has been committed and that the accused is the person who committed the offence

...
... subject to that ruling with respect to the existence of corroboration of the evidence of the touching of the breasts, I will tell you that, for your purposes, you are to proceed on the basis that there is no evidence other than Estelle's. There is no corroborating evidence. You have to, therefore, bear in mind the dangers of acting on that evidence. That does not mean that you cannot record convictions of guilty, because the law does not make the existence of corroboration essential to a conviction. What it says is I must remind you of the dangers of acting on uncorroborated testimony; I must make you aware of the dangers; I must have you thinking about them at all times.

But if, remaining conscious of that warning that I have given; if, being conscious of the possibility of doing an injustice, then nonetheless you reach the conclusion that Estelle is telling the truth and that the events did occur as she has related them; if you have no doubt about it then you can act upon her evidence. Do you understand what I am saying, that complaints of sexual activity, as I say, sometimes are made for no reason at all, sometimes they are made for a variety of reasons. False stories can be easily fabricated, they can be extremely difficult to refute. None of us wish to do an injustice. If you ponder that warning and come to the conclusion that she is telling the truth, and that you have no real doubt about it you can act on her evidence.

Now that is all that is involved in the law. Of course you will not need to worry yourself about the absence of corroboration if you do not believe Estelle, or if, having looked at all of the evidence and considered the evidence in particular from the defence witnesses, if you are left in some doubt about the accuracy of her evidence, if you are in a position where you do not feel confident at all of acting upon her evidence, of relying upon her evidence, then you will have that reasonable doubt that obliges you to record verdicts of not guilty.

You see you have to be thoroughly convinced of the accuracy of Estelle's evidence before you can act on it. If you are not, there is no need to look for corroboration. In relation to the touching of the breasts, where as I have said, there is evidence capable of being regarded as corroboration, of course you have to be satisfied that Christie and Faylene are being truthful and giving a correct account when they describe what I just read to you. Someone whose evidence is unreliable cannot corroborate another person and if Estelle is regarded as unreliable then there is no need to worry about whether she is corroborated or not."

His Honour later redirected twice with respect to corroboration, once following a request by the jury for clarification and once at the request of counsel for the appellant. It is desirable to quote the latter passage:

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"Well ladies and gentlemen, I have brought you back because counsel have helpfully suggested that I may be able to assist you by putting this matter of corroboration in the form of a simple proposition. There are 12 charges. Counts 2 to 12; the indecent dealing by digital activity and carnal knowledge are counts with respect to which there is no corroboration.

In so far as the facts involved in counts 2 to 12, also for the factual allegations for count 1,

again there is no corroboration, and as I pointed out, that is actually the case, not only with respect to the charged conduct, but with respect to similar conduct referred to in Estelle's evidence. So there is only one area left, and that is the touching of the breasts aspect, which also falls within count 1, and with respect to that, as I have pointed out, there is for your consideration, Christie's and Faylene's evidence.

Now also it's been suggested that in speaking to you of the danger and the warnings and the question of whether you will act on it that I remind you that the guiding light that controls all the proceedings in this case is reasonable doubt. You have to be satisfied beyond reasonable doubt that the accused is guilty of each of the accounts, and when considering Estelle's evidence, you have to be satisfied beyond reasonable doubt that she is telling the truth in respect of the matters relevant to each of the counts.

Well we'll leave it at that, but I hope that way it's perhaps a little clearer. We've come from the other direction with a simple proposition. In the main, no corroboration for counts 2 to 12 and none for count I save with respect to any touching of the breast that you are satisfied beyond reasonable doubt occurred."

In O'Neill [1996] 2 Qd R 326, I discussed, at length, the fundamental right of an accused person not to be tried unfairly. One associated principle is that a trial judge has power to exclude admissible evidence to ensure that a trial is fair to an accused, including evidence made "admissible and probative" by s229B(1) of the Code. A variety of circumstances can give rise to the need to exercise that power; for example, that the accused was not adequately informed of part of the case against him in time to challenge and meet it properly, that evidence lacks the necessary specificity to enable the accused to challenge and meet it, or that the prejudicial effect of evidence is disproportionate to its probative value, etc. Further, and more importantly in the present case, when evidence with a potential for unfairness to the accused is received, the trial judge's summing-up to the jury must include whatever directions are necessary to ensure that the accused's trial is fair. There are many recent authorities which bear out these propositions; see, for example, Bradley (1989) 41 A Crim R 297; Longman v R (1989) 168 CLR 79; S v R (1989) 168 CLR 266: R v Turney (1990) 52 SASR 438; Podirsky v R (1990) 3 WAR 128; R v Butun (WA CCA No 191 of 1990, unreported, judgment delivered 15/2/91); R v Cooper (Vic CCA No 92 of 1991, unreported. judgment delivered 6/12/91); R v Beserick (1993) 30 NSWLR 510; R v O'Brien (NSW CCA No 60483 of 1992, unreported, judgment delivered 5/11/93); R v Fisher (CA 439/1994; Court of Appeal, 12 December 1994, unreported); G v R (SA CCA No 13 of 1995, unreported, judgment delivered 4/4/1995); R v Thorne (Vic CCA No 33 of 1995, unreported, judgment delivered 9/6/95): cf R v Hamzy (1994) 74 A Crim R 341.

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Of course, the right of an accused person not to be tried unfairly is not concerned only with the reception of evidence and the trial judge's responsibility in summing-up to the jury. Thus, for example, s567(2) of the Code permits the joinder in a single indictment of charges for more than one indictable offence "if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose", and specific provision is made in s229B(2) for a single indictment to include charges for an offence against s229B(1) and any other offences "of a sexual nature alleged to have been committed by [the accused person] in the course of the relationship in issue in the ... offence ..." against s229B(1). (Subs229B(2) also states that an accused "... may be convicted of and punished for any or all of the offences so charged ...", although a proviso limits the sentencing discretion.) However, s597A empowers the court to order separate trials in respect of offences joined in the same indictment if "the accused person may be prejudiced or embarrassed in his defence ... or for any other reason it

is desirable ..." that there be separate trials. and the special risk of unfairness to an accused against whom sexual offences are joined in one indictment has been authoritatively recognised: eg, in De Jesus v R (1986) 61 ALJR 1; and R v B [1989] 2 Qd R 343. Separate trials can be ordered if the evidence which the prosecution proposes to adduce in relation to a count alleging an offence against s229B(1) cannot be satisfactorily restricted to prevent unfairness to an accused person in relation to other counts alleging specific sexual offences; often, all the offences will be able to be tried together on the basis that the prosecution will not offer evidence which would make the trial unfair to the accused.

Ultimately, if all offences are tried together and all evidence tendered by the prosecution is received, it remains the trial judge's duty to ensure that the trial is fair to the accused by his or her summing-up to the jury. It is by reference to that consideration that the present matter falls to be decided. S229B of the Code does nothing to lessen a trial judge's responsibility in that regard; on the contrary, it commonly places a significantly increased burden on the trial judge. Thus, for example in a case like the present, the summing-up must take account of the difficulties faced by an accused person when charged not only with specific conduct but with such an inherently broad and imprecise concept as a "relationship" of a particular character; as used in this case, s229B involves a significant departure from the traditional requirement that an accused person "is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act matter or thing alleged as the foundation of the charge": Johnson v Miller (1937) 59 CLR 467 at 489, per Dixon J; see also Briginshaw v Briginshaw (1938) 60 CLR 336 at 362, where his Honour said that a person is not to be convicted on "inexact proofs, indefinite testimony, or indirect inferences".

More generally, an accused in a case such as the present faces all the potential unfairness identified in S, including the risks that he will be convicted on the basis of the jury's conclusion that he has a propensity to commit sexual offences and that his conviction on a charge alleging a breach of s229B(1) might, in part, depend on different conclusions by different jury members in relation to various parts of the complainant's

generalised evidence. Thus, in the present case, it is impossible to determine, for the purpose of sentencing or otherwise, whether the jury was satisfied to the requisite standard of any misconduct by the appellant towards the complainant other than the activities the subject of counts 3, 7, 9, 10 and 12, and, it seems from the trial judge's discussion after the verdict with the jury foreman, an unidentified act of sexual intercourse prior to the complainant's twelfth birthday.

Further, on the approach adopted to s229B by the prosecution in this case, not only may a single act be at the one time an offence and an essential element of a different offence, but the latter offence may also consist of other conduct which is not separately charged, which might be either similar or dissimilar to the act specifically charged and of which the only evidence might be generalised and inexact.

In an attempt to facilitate the prosecution and conviction of child molesters, the legislature has, by s229B, increased the risk of unfair trial and miscarriage of justice; in consequence, trial judges must be astute to ensure that their rulings and directions are scrupulously correct and that accused persons are tried fairly. In my opinion, prosecutors have a similar responsibility in formulating charges and deciding on the evidence to be called; their role is not to seek to take advantage of every opportunity to secure conviction on the maximum number of the most serious charges in a single trial irrespective of the effect on the fair trial of the accused or any prospect that an innocent person may be unfairly convicted.

The critical issue for the jury in the present case was the truth and accuracy of the

complainant's evidence. Preference for her evidence over that of the appellant. and even positive disbelief of his evidence. did not absolve the jury from the duty to acquit the appellant unless satisfied beyond reasonable doubt of the credibility and accuracy of the complainant's evidence, or the trial judge from the obligation to instruct the jury clearly that that was its duty: see liberato v R (1985) 159 CLR 507; eg. per Brennan J at 515 and Deane J at 519.

Further, the trial judge was obliged to tell the jury that. in evaluating the complainant's evidence in order to decide whether it was so credible and reliable that it satisfied the jury that there was no reasonable doubt but that the appellant was guilty, it must take into account in favour of the appellant:

(1) the lack of specificity in parts of the complainant's evidence;

(2) that the complainant's allegations, especially those made in general terms, were difficult for the appellant to test or contest (except by his own testimony) when there was no third person able to give material evidence;

(3) the general conflict between the complainant's allegations and other evidence from third persons whenever that was available;

(4) that the significance of those conflicts was not confined to the particular segments of the complainant's evidence which directly conflicted with evidence from third persons, but the pattern of conflicts incrementally eroded the credibility and reliability of her evidence generally.

The generalised evidence which the prosecution led against the accused - generalised allegations of sexual intercourse between the appellant and the complainant and of him penetrating her digitally and otherwise touching her sexually - presented special risks of unfairness to the accused

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which had to be addressed in the summing-up. The relevance of such evidence in relation to an alleged contravention of s229B(1) is clear, and the prosecution submitted that, in any event, the evidence was admissible in relation to all offences alleged against the appellant as evidence of his "guilty passion" for the complainant. Once properly received for any purpose, the evidence was probative of any other matter in relation to which it was also admissible: B v R (1992) 175 CLR 599.

The orthodox view in Queensland is that evidence of "guilty passion" is admissible in prosecutions for sexual offences, subject to the court's discretion to exclude "unnecessary" evidence in fairness to the accused: see Bradley and Beserick. The admissibility of guilty passion evidence has been based on various grounds, and in particular circumstances it might be probative of specific matters which bear a logical relationship with guilt or innocence; for example, motive. However, the general basis for admissibility of guilty passion is that it is evidence of the relationship between the complainant and the accused and part of the background against which evidence of their conduct, or the accused's conduct, falls to be evaluated; this "true and realistic" context is seen to assist the jury to decide whether a complainant's evidence in support of the charges against the accused is true.

While that might well be true in some circumstances even when the only evidence of her relationship with the accused comes from the complainant herself, in other circumstances relationship evidence from the complainant will have little or no legitimate probative value; for example, if the relationship evidence does not logically add to or detract from the

probability that disputed critical matters occurred.

In this case, for example, effectively referred to by the trial judge as primarily a contest of "word for word", the complainant's generalised evidence had no more than minimal, if any, probative value in relation to her specific allegations against the appellant. The credibility and reliability of the complainant's testimony that she had impermissible (even if consensual) sexual contact with the appellant on a number of specific occasions could not rationally be bolstered - or for that matter undermined - to any significant extent merely by her evidence that sexual activity also occurred on a number of other. unspecified occasions; there is nothing in the complainant's wider account of her relationship with the appellant which throws any light - or shadow - on the truth or accuracy of her evidence overall or in relation to particular matters.

Further, there are obvious problems associated with evidence of the relationship between a complainant and an accused which alleges the commission of other offences by the accused and hence, because of his criminal conduct or character, his propensity to offend, leading in turn to an inference that he committed the offence or offences with which he is charged. As a matter of principle, it is difficult to perceive why the admissibility of such evidence should not be subject to the test for propensity evidence established in Hoch v R (1988) 165 CLR 292 and Pfennig v R (1995) 182 CLR 461; however, that need not be decided in this case, which is primarily, at least, concerned with the adequacy of the trial judge's summing-up.

In my opinion, it was incumbent on the trial judge to ensure that the jury fully understood that any process of propensity reasoning was totally wrong.

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Further, the trial judge was required to direct the jury in clear, unequivocal terms that the complainant's generalised evidence could not be used by them in their evaluation of her specific allegations against the appellant except that, if they did not believe, or had a doubt about the credibility or reliability of, her generalised evidence, that was a matter to be brought to account in favour of the appellant in their consideration of the complainant's specific allegations.

It was also necessary for the jury to be told that disbelief or doubt concerning all or any of her specific allegations was a matter to be considered, in favour of the appellant, when evaluating the complainant's generalised evidence.

The evidence with respect to the appellant regularly touching the complainant sexually needs further consideration because evidence of touching was given by Faylene and Christie as well as the complainant.

The complainant's evidence in relation to count 1 consisted of her specific allegations against the appellant and her generalised evidence of sexual intercourse and digital penetration and her evidence that her breasts were regularly touched by the appellant. Faylene and Christie's evidence of sexual touching corroborated the complainant's evidence of touching, allowing the jury to be more comfortably satisfied that the appellant regularly touched the complainant sexually, subject at least to a matter referred to below. In my opinion, particularly in a context in which he had told the jury that corroboration "... looms large in this case and will no doubt loom large in your deliberations", the trial judge was required to spell out in clear terms to the jury what, if any, role their conclusion that the appellant had regularly touched the complainant sexually could play in their consideration of other specific and generalised allegations by the complainant, including the considerably more serious offences involving sexual intercourse and digital penetration.

Further, it was essential for the trial judge to point out to the jury not only the limited support which the complainant's evidence received from the evidence of Faylene and Christie but also the conflicts between the complainant's evidence and that of the other two girls, and to explain to them that regard should be had to that conflict in assessing the credibility and reliability of the complainant's testimony, not only on the touching issue but generally.

While I do not suggest that the trial judge's directions to the jury failed to meet all of the requirements which I have spelt out. in my opinion, in the difficult situation which the prosecution case presented to both the accused and his Honour, his directions were inadequate to ensure that the appellant had the fair trial to which he was entitled. That entitlement is not qualified by notions of fairness to the complainant or the community, and references to such considerations are meaningless unless as qualifications of an accused person's right not to be tried unfairly. It is not open to the judiciary, at least at this level, to introduce a new theory of what is in the public interest into this area of the criminal law. The doctrine that an accused person is not to be tried unfairly is entrenched in the common law, which accepts the paramountcy of that public interest over competing interests in the vindication of victims and the conviction of guilty persons.

I can see no possible basis for the operation of the proviso to s668E(1) of the Code in this case and, in my opinion, the appeal should be allowed and a new trial ordered, If the charge of an offence against s229B of the

Code is pursued, the circumstance of aggravation previously alleged must be omitted.

Davies JA

The facts giving rise to this appeal, and the trial from which it is brought, are set out in the reasons for judgment of the President which I have had the advantage of reading. Subject to what I say below, I am content to adopt his Honour's statement of the facts and of the course which the trial took. The appeal, which is against all six convictions, was substantially on two grounds: the first was that the verdicts were unsafe and unsatisfactory; and the second was on the basis of the inadequacy of the learned trial judge's directions to the jury.

Subject to the verdict on the charge under s229B, I agree with the President that a properly instructed jury could reasonably have arrived at the guilty verdicts which they did. The qualification is made because, as was in effect conceded, a verdict on count 1 with the circumstance of aggravation that the appellant had unlawful carnal knowledge of the complainant when she was under the age of 12, was against the weight of the evidence and was unsafe. Subject to that qualification there is no substance in the ground that the verdicts were unsafe and unsatisfactory except to the extent that misdirections referred to below caused that result.

Charges of multiple sexual offences by an adult against a young child living in the same household may create difficulties for a fair trial, that is one which is fair not only to the accused but also to the complainant and to the State representing the community concerned to see justice done according to law. Often the trial takes place a considerable time after the commission of the offence, a common reason being the conduct of the offender or at least his relationship with the complainant, involving a position of dominance over the complainant. For that reason and also because of the frequency of offences over a prolonged period, the complainant may be unable to specify, with the particularity which is commonly required in criminal offences, the time, place and circumstances of any specific offence. Yet the failure to particularise to that extent may result in a mistrial: S v The Queen (1989) 168 CLR 266.

Those difficulties, together with the need to provide a more substantial penalty for multiple offences of this kind, appear to have been the reasons for the introduction of s229B: Second Reading Speech on The Criminal Code Evidence Act and Other Acts Amendment Bill, 21 April 1988, (1988) 308 Qld Parliamentary Debates 6310; R v Fisher (CA 439/1994; Court of Appeal, 12 December 1994, unreported at 14). However, as this case illustrates, a charge under that section raises additional problems of fairness to an accused in being able to meet it for the very reason that the section appears to permit conviction without the need to particularise the date or exact circumstances of any specific sexual offence. Those problems are increased where, as here, a charge under s229B is joined with charges of specific sexual offences and where, as also occurred here, evidence is admitted of a continuous sexual relationship. There is then a risk that the jury might convict on one or more of the charges on the basis of a general disposition and that they might convict on the charge under s229B although they might not be agreed on which acts constituted the three or more offences of a sexual nature required by that section.

Because s229B plainly envisages that a trial of a charge under it may take place notwithstanding that the evidence does not disclose the dates or the exact circumstances of the occasions and also envisages that a charge

under that section may be joined with one for a specific sexual offence, neither those circumstances, either alone or together with the admission of evidence of the whole of a sexual relationship between the accused and the complainant, without more, make the trial unfair. However they do require the exercise of considerable care by the trial judge in directing the jury.

In this case only one specific event of unlawful carnal knowledge, count 4, was alleged to have occurred before the complainant's 12th birthday and the appellant was acquitted on that count. There was then some general evidence of intercourse though, as the President has pointed out and as was effectively conceded, the better view, and perhaps the only reasonable view, of the complainant's evidence was that, apart from count 4, she did not assert intercourse to have occurred until after she attained 12 years of age.

With hindsight it can now be seen that the learned trial judge should have directed the jury that, if they did not convict on count 4 then they should not convict on count 1 with that circumstance of aggravation. He did not do this. And as appears from the exchange between his Honour and the foreman of the jury after the verdict had been taken, the jury thought themselves entitled to conclude, on the basis of the general evidence to which I have referred, that intercourse had taken place on some occasion or occasions other than that alleged in count 4, before the complainant's 12th birthday. That verdict, it is now conceded, is unsafe. On the retrial which must be ordered that circumstance of aggravation should be deleted.

For the reasons I have given, the case also required a number of other directions to be given which were not given. First the learned trial judge, in my view, should have told the jury what use could be made of evidence of sexual conduct other than those particularised in counts 2 to 12. He should have told them that it was admissible on two bases only: the first as evidence of acts which the jury could conclude were offences for the purpose of deciding whether the appellant was guilty of the offence under s229B; and the second as evidence of similar facts showing the relationship between the appellant and the complainant; S at 271, 275, 279 and 281. His Honour should have emphasised to the jury that that evidence should not be substituted for the evidence on the specific counts 2 to 12 in order to convict the appellant of any of those specific offences; and he should have told them that that evidence should not be used to convict the appellant in respect of any of the offences of which he was charged on the

basis that it showed a general disposition to commit offences of that kind.

Secondly his Honour should have told the jury that, in order to convict the appellant of the offence under s229B, they must be satisfied that on three or more occasions the appellant had done an act of the defined kind; that those acts could but need not include one or more of the acts the subject of counts 2 to 12; but that whether they did or not the jury should be agreed upon at least three of the acts as constituting the offences of a sexual nature for the purpose of s229B whether or not they were acts particularised in the evidence as to dates or exact circumstances.

His Honour's failure to direct the jury on these questions, in my view, caused the trial to miscarry. For the reasons I have given I agree with the order proposed by the President that the appeal should be allowed and a new trial ordered on the counts on which the appellant was convicted subject to the qualification which I made earlier with respect to count 1.

[1997] 1 Qd R 383 at 402

Shepherdson J
I have had the benefit of reading in draft the reasons for judgment of the President. I agree with him that the appeal should be allowed and for the reasons he has given and that a new trial should be ordered.

However, I wish to add the following comments. The decision in Witham [1962] Qd R 49 is regularly relied on by prosecutors in cases of the present type. Its application can cause a trial to become unfair as the present appeal shows. In TJW, ex parte A-G [1988] 2 Qd R 456 the Queensland Court of Criminal Appeal confirmed the authority of Witham. In Bradley (1989) 41 A Crim R 297 the Queensland Court of Criminal Appeal continued to apply Witham.

In TJW, the Court, on an Attorney-General's reference was asked:

"Has the decision in Witham (1962) Qd R 249 where it was held that evidence of acts of indecency by an accused person upon a complainant before and after the alleged sexual offence is admissible been overruled?"

and the Court answered this question: "No".

In the present case the jury had evidence from the complainant of many incidents of sexual contact or intimacy between the appellant and the complainant of which incidents the complainant was unable to give details.

The present case now before this Court and its outcome should give prosecutors and persons drawing charges in indictments cause for concern. I repeat part of my judgment in Bradley (supra) at 302;

"... it is ... not necessary that in every case the whole history of sexual activity between an accused person and the complainant be admitted in evidence. In some cases a trial judge may have to take care to limit that history to what is sufficient to enable the jury to set in its proper perspective and to understand the acts alleged to constitute a particular offence. In other words, in some cases the 'full story' of which Mr Justice Stable spoke [in Witham] may have to be limited. This is so because, as Gibbs CJ said in De Jesus (1986) 22 A Crim R 375 at 378: 'Sexual cases ... are peculiarly likely to arouse prejudice ...'.

In a case such as the present where there are quite a large number of instances of carnal knowledge alleged against the appellant prior to the first of the acts of alleged indecent dealing, the prejudice to an accused person may be so great that the sheer number and weight of those instances may well overbear the jury in its consideration of the evidence in each of the three charges and prevent the jury from considering that evidence impartially. This area of

the criminal law does pose difficulty. On the one hand the trial judge has a discretion to exclude evidence which is unfair to an accused person (s130 Evidence Act 1977 (Qld) (as amended)). As against that, evidence which is relevant but otherwise unfair and prejudicial to an accused is prima facie admissible, eg a confession of guilt. Sometimes a trial judge has to walk a very difficult dividing line in cases such as the present where there are as I have already said 11 instances of carnal knowledge alleged against the appellant before one reaches the first of the acts of alleged indecent dealing. The alleged acts of indecent dealing may seem less serious than the acts of carnal knowledge but the appellant could not be charged with those more serious offences

[1997] 1 Qd R 383 at 403

because the complainant's evidence was uncorroborated (s215 of the Criminal Code (Qld))."

At a trial such as the present when Witham is applied, a deal of evidence is allowed in which shows only propensity in an accused person to commit a particular type of offence, which evidence is not true similar fact evidence in that it does not have a strong degree of probative force sufficient to outweigh its prejudicial effect. (Markby v The Queen (1978) 140 CLR 108; Perry v The Queen (1982) 150 CLR 580 and Sutton v The Queen (1984) 152 CLR 528); see also Harriman v The Queen (1989) 167 CLR 590. Propensity evidence (lacking the strong degree of probative force sufficient to outweigh its prejudicial effect) is generally inadmissible but Witham allows it in as part of the "full story", in cases such as in the present.

The community has a real interest in seeing persons who commit criminal offences being brought to trial and, if the evidence is sufficient, convicted after a fair trial. In my view a prosecutor presenting the evidence in a case such as the present should be astute to ensure when he or she proposes to lead evidence in accordance with the principle of Witham, that only such evidence is led as will be sufficient to enable the jury to have the "full story" of the alleged relationship between the complainant and the accused. In my view a prosecutor must show discernment and commonsense in the quantity of this type of evidence which he proposes to lead in the particular case.

The prosecutor should not, by pressing to include too large a quantity of evidence under the Witham principle, run the risk that the judge, on whom falls the burden of seeing that an accused has a fair trial, may be led erroneously to allow into evidence much more than is needed for the "full story" with the result that an accused does not receive a fair trial and any conviction is later set aside.

The learned President has also discussed problems which can arise when a count based on s229B(1) of the Criminal Code is joined in one indictment with other counts alleging specific sexual offences. I agree with his comments and particularly his comments as to s229B increasing the risk of unfair trial and miscarriage of justice. I should have expected that at committal proceedings the prosecution would have statements from a complainant setting out in detail all relevant evidence - including incidents or conduct of a sexual nature involving the accused and on which the prosecution proposes to rely at trial. If necessary, particulars can later be ordered to be given by the prosecution so that an accused is properly informed of the case he has to meet and in sufficient time to enable him to prepare his defence to the charges or charge.

General allegations of sexual dealings between a complainant and an accused which lack detail and which are sought to be introduced under Witham have the potential to derail an otherwise fair trial

Order
Appeal allowed.

Solicitors: Legal Aid Office (appellant); Director of Public Prosecutions (Crown)

DL BULLOCK

Barrister

KBT ..... APPELLANT;

AND

THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND

Criminal Law — Sexual offences — Maintaining unlawful relationship of sexual nature with child under sixteen years — Requirement of acts constituting offence of sexual nature on three or more occasions — Misdirection — Whether substantial miscarriage of justice — Criminal Code (Q), ss 229B(1), (1A), 668E(1A).

HC of A 1997

Brisbane June 25 1997

Canberra Dec 9 1997

Brennan CJ, Toohey, Gaudron, Gummow and Kirby JJ

Section 229B(1) of the *Criminal Code* (Q) provided: "Any adult who maintains an unlawful relationship of a sexual nature with a child under the age of 16 years is guilty of a crime and is liable to imprisonment for 7 years." Sub-section (1A) provided: "A person shall not be convicted of the offence defined in subsection (1) unless it is shown that the offender, as an adult, has, during the period in which it is alleged that the offender maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child, other than an offence defined in section 210(1)(e) and (f), on 3 or more occasions and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions." The offences defined in s 210(1)(e) and (f) related to the exposure of a child under sixteen to indecent material and the taking of indecent photographs or films of a child under sixteen.

Section 668E(1A) of the Code provided that "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".

A man was convicted of maintaining an unlawful sexual relationship with a child contrary to s 229B(1) of the Code. At the trial, the complainant gave evidence of various incidents which occurred on the farm on which she lived with the accused and his wife. The judge instructed the jury that to convict the accused they must be satisfied beyond reasonable doubt that, on at least three occasions within the period charged, the accused had, for instance, unlawfully and indecently dealt with the child. He did not instruct them that they were required to be of the unanimous opinion that the accused had done the same three acts, each constituting an offence of a sexual nature against the complainant, on the same three occasions. The Court of Appeal held that

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there should have been a direction to that effect but dismissed the appeal pursuant to s 668E(1A). On appeal to the High Court —

Held, (1) that a person cannot be convicted under s 229B(1) unless the jury is agreed as to the commission of the same three or more acts constituting offences of a sexual nature.

(2) That s 668E(1A) should not have been applied as it was impossible to say that the jurors must have been agreed as to the accused's having committed the same three acts. He had therefore been deprived of a chance of acquittal that was fairly open to him.

Mraz v The Queen (1955) 93 CLR 493 at 514; *Wilde v The Queen* (1988) 164 CLR 365 at 371-372, 381; and *Glennon v The Queen* (1994) 179 CLR 1 at 9, 12-13, applied.

Decision of the Supreme Court of Queensland (Court of Appeal): *R v Thompson* (1996) 90 A Crim R 416, reversed.

APPEAL from the Supreme Court of Queensland.

KBT was convicted of maintaining a sexual relationship with a child under sixteen contrary to s 229B(1) of the *Criminal Code* (Q) (count 2 in the indictment). The prosecution alleged that he had maintained a sexual relationship between 3 July 1989 and 30 January 1991 with M, a child who had been raised by the accused and his wife as their daughter. M was aged fourteen in 1989 and sixteen in April 1991. M gave evidence of various incidents which occurred on the tropical fruit farm on which she lived with the accused and his wife. Those incidents fell into six broad categories. The trial judge, Judge Dodds, instructed the jury that, to convict the accused of maintaining a sexual relationship contrary to s 229B(1) of the Code, they "must be satisfied beyond a reasonable doubt that on at least three occasions within the time frame charged, the [accused had], for instance, unlawfully and indecently dealt with the child". The Court of Appeal (Fitzgerald P, Moynihan and Mackenzie JJ) held that the jury ought to have been instructed that they were required to be of the unanimous opinion that the accused had "done the same three acts, each constituting a offence of a sexual nature against the complainant". However, it dismissed the appeal as, in its view, no substantial miscarriage of justice had occurred. That decision was based on two considerations: that no complaint was made at the trial with respect to the failure of the judge; and that the trial was conducted as an "all-or-nothing" contest between M's testimony and the evidence of the accused and, once the jury had accepted M's evidence there was no rational basis on which different members of the jury might have doubted some, different, portions of her account. KBT appealed to the High Court by special leave granted by Brennan CJ, Dawson and Gummow JJ. The Crown conceded that the judge should have directed the jury that they were required to be satisfied as to the commission of the same three

acts constituting offences of a sexual nature before they could convict the appellant of the offence charged under s 229B(1) of the Code.

B W Walker SC (with him *A J Rafter*), for the appellant. The test for the application of the proviso was expressed by Brennan, Dawson and Toohey JJ in *Wilde v The Queen* (1). It will usually be inappropriate to apply the proviso where there has been a fundamental irregularity in the conduct of the trial (2). Where an identified error is not so fundamental as to go to the "root of the proceedings" the Court of Appeal may apply the proviso only if satisfied that the jury would inevitably have convicted (3). [He referred also to *R v Whittaker* (4) and *R v Jones* (5).] Although the failure by counsel to seek a re-direction at the trial is a relevant consideration, if the appellate court is satisfied that there has been a miscarriage of justice, the appeal must be allowed (6). [He referred also to *S v The Queen* (7).]

M J Byrne QC (with him *L J Clare*), for the respondent. Whether the irregularity is a fundamental one cannot be determined by a "mechanical formula or rigid test": each case will depend upon its own circumstances (8). [He referred also to *S v The Queen* (9).]

[The Justices withdrew for a short time to consult.]

BRENNAN CJ. The Court is in the position to make its order instanter and the reasons for this decision will follow in due course. The order of the Court is that the appeal be allowed; that the orders of the Court of Appeal be set aside so far as they relate to count 2 and that in lieu thereof the appeal to that Court be allowed; that the conviction on count 2 be quashed, and that there be an order for a retrial. The question of whether a retrial shall ensue is, of course, a matter for the Director of Public Prosecutions.

(1) (1988) 164 CLR 365 at 372.
(2) *Quartermaine v The Queen* (1980) 143 CLR 595 at 600-602.
(3) *Glennon v The Queen* (1994) 179 CLR 1 at 8-9.
(4) (1993) 68 A Crim R 476.
(5) (1995) 38 NSWLR 652.
(6) *Chamberlain v The Queen* (1983) 72 FLR 1 at 12; *Kural v The Queen* (1987) 162 CLR 502 at 512; *R v Lovet* [1986] 1 Qd R 52 at 56-57; *R v Towner* (1991) 56 A Crim R 221 at 227; *Stirland v Director of Public Prosecutions* [1944] AC 315 at 328.
(7) (1989) 168 CLR 266 at 276, 282, 283, 287-288.
(8) *Glennon v The Queen* (1994) 179 CLR 1 at 8; *Wilde v The Queen* (1988) 164 CLR 365 at 373, 384; *Holland v The Queen* (1993) 67 ALJR 946 at 951; 117 ALR 193 at 200.
(9) (1989) 168 CLR 266 at 271, 276, 283, 288.

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Brennan CJ Toohey J Gaudron J Gummow J

9 December 1997

The following written reasons for judgment were published:—

BRENNAN CJ, TOOHEY, GAUDRON AND GUMMOW JJ. The appellant, KBT, appealed to this Court from a decision of the Court of Appeal of the Supreme Court of Queensland. So far as is presently relevant, that Court dismissed his appeal against a conviction for maintaining a sexual relationship with a child under sixteen contrary to s 229B(1) of the *Criminal Code* (Q) (the Code) (10). At the conclusion of the hearing of his appeal to this Court, the appeal was allowed and orders were made setting aside the orders of the Court of Appeal as they related to the offence under s 229B(1) of the Code (count 2 in the indictment), allowing his appeal to that Court in part, quashing his conviction for that offence and ordering a new trial. The following are our reasons for joining in those orders.

Section 229B(1) of the Code creates an offence of maintaining a sexual relationship with a child. Prior to the amendment of s 229B in 1997 (11), sub-s (1) was in these terms:

> "Any adult who maintains an unlawful relationship of a sexual nature with a child under the age of 16 years is guilty of a crime and is liable to imprisonment for 7 years." (12)

The offence was elaborated by sub-s (1A) which provided:

> "A person shall not be convicted of the offence defined in subsection (1) unless it is shown that the offender, as an adult, has, during the period in which it is alleged that the offender maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child, other than an offence defined in section 210(1)(e) or (f), on 3 or more occasions and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions."

The offences defined in s 210(1)(e) and (f) relate, respectively, to the

(10) *R v Thompson* (1996) 90 A Crim R 416. The appellant also appealed unsuccessfully against his conviction on two other charges, namely, indecent dealing with a girl under the age of fourteen (then s 216, see now s 210(1)(a)) and indecent assault (s 337(1)), and unsuccessfully sought leave to appeal against the severity of his sentence. Those matters were not the subject of appeal to this Court.

(11) See s 33 of the *Criminal Law Amendment Act* 1997 (Q) which took effect on 1 July 1997.

(12) Sub-sections (1B) and (1C) provided for higher maximum penalties if, in the course of the relationship, the offender committed an offence of a sexual nature punishable, respectively, by at least five years and at least fourteen years imprisonment.

exposure of a child under sixteen to indecent material (13) and the taking of indecent photographs or films of a child under sixteen (14).

The conviction in issue in this appeal was for maintaining an unlawful sexual relationship between 3 July 1989 and 30 January 1991 with M, a child who had been raised by the appellant and his wife as their daughter. M was aged fourteen in 1989 and turned sixteen in April 1991. So far as concerns the offence in question (15), M gave evidence of various incidents which occurred on the tropical fruit farm on which she lived with the appellant and his wife. In the main, she gave evidence of a course of sexual misconduct or a pattern of sexual misbehaviour by the appellant, rather than specific sexual acts.

The behaviour of which M gave evidence fell into six broad categories. The first related to incidents which were said to have occurred while M was riding the farm motorcycle with the appellant riding as pillion passenger. They involved the stroking of her breasts and pubic area, with the appellant putting his hands inside her pants. The second group related to afternoon rests when, according to M's evidence, the appellant would make her lie down with him on a bean bag. These incidents also involved the stroking of her pubic area under her clothing, sometimes with digital penetration of her vagina, and playing with her breasts.

The third category of behaviour of which M gave evidence involved the appellant grabbing her bottom or breast when walking past her during fruit picking. The fourth category related to morning tea breaks when, according to her evidence, the appellant would put her on his lap and stroke her breasts and pubic area under her clothing, sometimes penetrating her vagina with his finger.

The fifth and sixth categories of behaviour related to sexual conduct of the kind already described, occurring, respectively, on mornings when the appellant came into M's bedroom before she had risen and on evenings when the appellant would get her to sit on his lap on a lounge chair to watch television. On the latter occasions, according to M's evidence, the appellant's wife was present but was not aware of what was happening as M and the appellant were covered by a blanket.

M gave evidence to the effect that, in 1989, the incidents of which she complained, except those which she said took place in her room of a morning and while she and the appellant were watching television, occurred only on weekends and during school holidays, they being the

(13) In the terms of s 210(1)(e), "without legitimate reason, wilfully expos[ing] a child under the age of 16 years to any indecent object or any indecent film, videotape, audiotape, picture, photograph or printed or written matter".

(14) In the terms of s 210(1)(f), "without legitimate reason tak[ing] any indecent photograph or record[ing] ... any indecent visual image of a child under the age of 16 years".

(15) The other offences in respect of which the appellant was convicted occurred outside the period of the relationship alleged under s 229B(1).

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occasions when she worked on the farm. M was at boarding school in 1990 and 1991 and the incidents which occurred in those years were said to have occurred during school holidays. She gave evidence that the motorcycle incidents occurred "on and off on a ... regular basis, whenever we'd go [fruit] picking" — "[n]ot every time, but some times". The morning tea incidents were said to involve "most of the morning teas" but "not all of them", while the television incidents were said to have occurred a minimum of two times per week, perhaps "five times one week and twice the next week". There was no evidence as to the frequency of the other incidents of which she complained.

The trial judge, Judge Dodds, instructed the jury that, to convict the appellant of maintaining a sexual relationship contrary to s 229B(1) of the Code, they "must be satisfied beyond a reasonable doubt that on at least three occasions within the time frame charged, the [appellant had], for instance, unlawfully and indecently dealt with the child". He did not, however, instruct them that they had to be satisfied of the same three offences on the same three occasions. The Court of Appeal held that there should have been a direction to that effect but dismissed the appeal as it related to the offence under s 229B(1) because, in its view, there was no substantial miscarriage of justice.

The respondent now concedes that the trial judge should have directed the jury that they were required to be satisfied as to the commission of the same three acts constituting offences of a sexual nature before they could convict the appellant of the offence charged under s 229B(1) of the Code. It is necessary to examine that concession because, unless correct, the appeal to this Court could not succeed.

The offence created by s 229B(1) is described in that sub-section in terms of a course of conduct and, to that extent, may be compared with offences like trafficking in drugs or keeping a disorderly house. In the case of each of those latter offences, the actus reus is the course of conduct which the offence describes. However, an examination of sub-s (1A) makes it plain that that is not the case with the offence created by s 229B(1). Rather, it is clear from the terms of sub-s (1A) that the actus reus of that offence is the doing, as an adult, of an act which constitutes an offence of a sexual nature in relation to the child concerned on three or more occasions. Once it is appreciated that the actus reus of the offence is as specified in sub-s (1A) rather than maintaining an unlawful sexual relationship, it follows, as was held by the Court of Appeal, that a person cannot be convicted under s 229B(1) unless the jury is agreed as to the commission of the same three or more illegal acts.

Before turning to the precise issue in this appeal, it is convenient to note one other matter that arises out of the identification of the actus reus of the offence created by s 229B(1). As already indicated, sub-s (1A) of s 229B requires the doing of "an act [which] constitute[s] an offence of a sexual nature ... on 3 or more occasions", albeit that it

does not require proof of "the dates or the exact circumstances of [the] occasions" on which the acts were committed. The sub-section's dispensation with respect to proof applies only to the dates and circumstances relating to the occasions on which the acts were committed. It does not detract from the need to prove the actual commission of acts which constitute offences of a sexual nature.

It should be noted that, quite apart from any question of fairness to the accused, evidence of a general course of sexual misconduct or of a general pattern of sexual misbehaviour is not necessarily evidence of the doing of "an act defined to constitute an offence of a sexual nature ... on 3 or more occasions" for the purposes of s 229B(1A). Moreover, if the prosecution evidence in support of a charge under s 229B(1) is simply evidence of a general course of sexual misconduct or of a general pattern of sexual misbehaviour, it is difficult to see that a jury could ever be satisfied as to the commission of the same three sexual acts as required by s 229B(1A).

The Court of Appeal's decision that there was no substantial miscarriage of justice in relation to the offence created by s 229B(1) of the Code was based on two considerations. First, no complaint was made at the trial with respect to the failure of the trial judge to direct the jury regarding the need to agree as to the commission of the same three acts. The second was that "the trial was conducted as an 'all-or-nothing' contest between [M's] testimony and the evidence of the appellant" and, once the jury had accepted M's evidence, there was "no rational basis upon which different members of the jury might have doubted some, different, portions of her account." (16)

In dismissing the appellant's appeal as it related to his conviction for the offence created by s 229B(1), the Court of Appeal was acting pursuant to s 668E(1A) of the Code. That sub-section allows that an appeal may be dismissed, notwithstanding that the issues in the appeal might be decided in favour of the appellant, if "no substantial miscarriage of justice has actually occurred". It is well settled that the failure to take a point at trial will not necessarily warrant application of a provision such as s 668E(1A) of the Code (17).

There are occasions when a provision such as s 668E(1A) of the Code is properly applied where a point was not taken at the trial because, for example, it was not in issue or there was some forensic advantage to be gained by not raising it. In cases of that kind, the provision is applied because, having regard to the defence case, the accused was not deprived of a chance of acquittal that was fairly open, that being the accepted test for the application of a provision of that-

(16) *R v Thompson* (1996) 90 A Crim R 416 at 434.

(17) See, eg, *Stirland v Director of Public Prosecutions* [1944] AC 315 at 327-328; *De Jesus v The Queen* (1986) 61 ALJR 1 at 3; 68 ALR 1 at 5, per Gibbs CJ; at 6; 10, per Mason and Deane JJ; *Bahri Kural v The Queen* (1987) 162 CLR 502 at 512, per Toohey and Gaudron JJ.

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kind (18). Thus, if the appellant was deprived of a chance of that kind, the fact that no complaint was made at trial is irrelevant.

The question whether, in this case, the appellant was deprived of a chance of acquittal that was fairly open is not answered by describing the trial as an "all-or-nothing" contest. To the extent that it was a contest of that kind, that was in large part the result of the evidence which, as already indicated, dealt with general patterns of sexual misconduct rather than specific sexual acts. But more importantly, the trial cannot properly be described as an "all-or-nothing" contest in which there was "no rational basis upon which different members of the jury might have doubted some, different, portions of [M's] account." (19)

As the trial judge correctly instructed the jury in his summing up, it was open to the jury to accept some parts of M's evidence and to reject others. And given the nature of the offence, which is established by proof of acts of a sexual nature on three occasions, there is no basis on which it can be concluded that the jury did accept all her evidence. Moreover, the evidence in the defence case differed according to the different categories of incident to which M deposed. So far as concerned the incidents which, according to M, occurred on the motorcycle and during fruit picking, the defence evidence consisted, in the main, of the appellant's denial that they occurred. However, in the case of incidents which, according to M, occurred of a morning in her bedroom, after morning tea, during afternoon rests and while watching television, the appellant's wife gave evidence which was to the effect that it was improbable, if not impossible, that those events occurred.

Having regard to the evidence, it is possible that individual jurors reasoned that certain categories of incident did not occur at all but that one or two did, and more than once, thus concluding that the accused did an act constituting an offence of a sexual nature on three or more occasions without directing attention to any specific act. It is, thus, impossible to say that the jurors must have been agreed as to the appellant having committed the same three acts (20). Indeed, it may be that, had the jury been properly instructed, they would have concluded that the nature of the evidence made it impossible to identify precise acts on which they could agree. It follows that the accused was deprived of a chance of acquittal that was fairly open.

Instead of applying s 668E(1A) of the Code, the Court of Appeal should have allowed the appeal to that Court, so far as it concerned the

(18) See *Mraz v The Queen* (1955) 93 CLR 493 at 514, per Fullagar J; *Wilde v The Queen* (1988) 164 CLR 365 at 371-372, per Brennan, Dawson and Toohey JJ; at 381, per Gaudron J; *Glennon v The Queen* (1994) 179 CLR 1 at 9, per Mason CJ, Brennan and Toohey JJ; at 12-13, per Deane and Gaudron JJ.

(19) *R v Thompson* (1996) 90 A Crim R 416 at 434.

(20) See *S v The Queen* (1989) 168 CLR 266 at 287-288, where this problem was considered in relation to the application of the proviso to s 689(1) of the *Criminal Code* (WA), a provision not materially different from s 668E(1A) of the Code.

appellant's conviction for the offence created by s 229B(1), and should have quashed his conviction for that offence and ordered a new trial.

KIRBY J. At the conclusion of argument in this appeal the Court announced its decision allowing the appeal and setting aside the orders of the Court of Appeal of Queensland (21) so far as they related to count 2 of the indictment. In lieu of those orders, it was ordered that the appeal to the Court of Appeal be allowed, the conviction on count 2 be quashed and there be an order for a retrial. This Court indicated that its reasons would follow in due course. I now state my reasons.

The appeal concerns the need for accuracy and particularity in the directions given to a jury with respect to a count charging sexual misconduct where that count appears with others relating to separate sexual offences. There are two particular elements which attracted the attention of this Court. The first concerns the judicial warnings necessary with respect to a new offence provided by the *Criminal Code* (Q) (the Code), s 229B (22). That section creates an offence of maintaining an unlawful relationship of a sexual nature with a child under the age of sixteen years. The second arises from the decision of the Court of Appeal, having found an error of law in the directions to the jury of the trial judge as to the elements of this new offence, to excuse the error on the basis that no substantial miscarriage of justice had occurred in the result (23).

Allegations by an adopted daughter of sexual abuse

The complainant in this case is a young woman who was born in April 1975. When she was aged about two years she came under the care of KBT (the appellant) and his wife. Thereafter, she was effectively treated as their daughter. She was their only child. They lived on a property which the couple owned at Woombye in Queensland. The complainant regarded the appellant and his wife as her father and mother, although she knew that they were not her natural parents.

The first event giving rise to these proceedings was found to have occurred between 1 February 1988 and 3 April 1988, just prior to the complainant's thirteenth birthday. She gave evidence that she was in a shed on the parent's farm with her back to the appellant. He was leaning against a four-wheel motorcycle. She was leaning against him. He then touched and stroked her on the inside of her sports briefs in the pubic area. The complainant said that she was upset and confused

(21) *R v Thompson* (1996) 90 A Crim R 416 at 434.

(22) The offence was inserted in the Code by the *Criminal Code, Evidence Act and other Acts Amendment Act* 1989 (Q). It commenced on a date appointed by proclamation, namely 3 July 1989. There is a like offence in Tasmania, where the child is under the age of seventeen years. See *Criminal Code* (Tas), s 125A.

(23) Code, s 668E(1A).

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and cried as a result of this conduct. However, at that stage she made no complaint to anyone. This incident gave rise to the first count of the indictment by which the appellant was charged with indecent dealing with a girl under the age of fourteen years (24). The appellant denied that the event or anything like it had occurred. However, upon this count he was convicted by the jury. Although the conviction was originally challenged, the challenge was not prosecuted in the Court of Appeal. It has not concerned this Court.

It is count 2 which concerns the charge of maintaining an unlawful relationship of a sexual nature with a child. In support of this charge, the Crown relied upon the evidence of the complainant. The count referred to the period between 3 July 1989 and 30 January 1991. The commencement date was fixed not by reference to any incident described by the complainant but by the date upon which the amendment to the Code, inserting the offence, took effect. The complainant's testimony was not specific as to dates. However, it was clear as to six separate and identifiable circumstances in which, she claimed, the appellant had subjected her to acts constituting offences of a sexual nature. These were:

(a) *Motor bike incidents*: The complainant stated that sometimes at fruit-picking time she rode her motorbike with the appellant riding as a pillion passenger. She claimed that, on such occasions, the appellant would stroke the inside of her shorts in the pubic area. Sometimes he would also stroke her breasts.

(b) *Lunch rest time*: These incidents allegedly occurred when the complainant was helping the appellant to pick fruit on the farm. In the hot part of the day, after lunch, he would allegedly call the complainant to lie beside him on a beanbag to rest. He would then place his hands inside her pants, stroke her pubic area, digitally penetrate her vagina and play with her breasts.

(c) *Fruit picking*: The complainant also gave evidence that whilst she was helping with the harvesting of fruit the appellant would pinch her bottom and grab her breast as he walked past her.

(d) *Morning-tea incidents*: According to the complainant when she would return home from school in a neighbouring town at weekends she would be subjected to similar conduct after morning tea. The appellant's wife would resume work picking fruit before her husband. He would remain behind and repeat the offences comprising stroking and touching of the complainant's vagina and breasts.

(e) *Morning call*: The complainant also stated that the appellant would come into her bedroom to wake her up. He would there stroke, touch and digitally penetrate her vagina and play with her breasts. In an attempt to avoid this conduct, the complainant said

(24) Under what was then s 216 of the Code. Such conduct is now dealt with by s 210.

that she endeavoured to rise early so that she would be out of bed before the appellant called.

(f) *Evening television*: The complainant also stated that whilst watching television in the evenings, the appellant would get her to sit on his lap whilst he was seated on a lounge. He would then put a blanket over both of them and proceed to the same conduct of feeling, stroking and digitally penetrating the complainant's vagina. The complainant said that, in an endeavour to prevent this she began wearing a jumpsuit, even in hot weather. She conceded that sometime later the family began to watch television from chairs in the kitchen where such activity could not occur.

The jury found the appellant guilty of the maintenance of an unlawful sexual relationship with the complainant. She was aged fourteen and fifteen years at the time of the offences alleged in this count. Following the jury's verdict the appellant was convicted. It is against that conviction that he appealed to this Court.

There was a third count by which the appellant was charged with indecent assault of the complainant (25). This offence was alleged to have occurred on a date somewhere between 7 June 1991 and 2 July 1991, when the complainant was sixteen years of age. This period was fixed by reference to a time when the appellant, his wife and the complainant were staying with relatives for a family wedding which took place in June 1991. The complainant said that, on this occasion, the appellant grabbed her from behind in the vicinity of the crotch whilst she was using a vacuum cleaner. She stated that the appellant touched her on the outside of her shorts and desisted when she protested. The incident was denied by the appellant. He stated that he had never seen the complainant with a vacuum cleaner during the family holiday. The appellant's wife gave evidence that she did not see the complainant using a vacuum cleaner and that she did not use a vacuum cleaner at all. This evidence was substantially confirmed by the appellant's sister-in-law who owned the house where the incident allegedly occurred. Nevertheless, the jury found the appellant guilty of the charge contained in the third count. The appellant was convicted. As with the first count, this Court has not been concerned with that conviction.

Following the trial of the appellant, which took place at Maroochydore, the jury verdicts and the convictions which followed, the appellant was sentenced by the trial judge (Judge Dodds). The judge imposed concurrent terms of imprisonment for one year in respect of each of the offences of indecent dealing and indecent assault and three years imprisonment for the offence of maintaining an unlawful sexual relationship with a child. By the time the hearing of the appeal to this Court took place, the appellant had completed serving the sentences imposed in respect of counts 1 and 3. In respect

(25) Code, s 337(1)(a).

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of count 2, he would have completed the non-parole period of that sentence in September 1997. He would then have been eligible to apply for parole (26).

An application for leave to appeal against the severity of his sentence was refused by the Court of Appeal. That question has also not troubled this Court.

Provisions of the Code

It is useful at this point to set out the provisions of the Code which were relevant to the decision by the Court of Appeal. Count 2, which is in issue, was based upon s 229B (27) of the Code which read as follows:

> "(1) Any adult who maintains an unlawful relationship of a sexual nature with a child under the age of 16 years is guilty of a crime and is liable to imprisonment for 7 years.
> (1A) A person shall not be convicted of the offence defined in subsection (1) unless it is shown that the offender, as an adult, has, during the period in which it is alleged that the offender maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child, ... on 3 or more occasions and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions."

It will be observed that the offence provided by s 229B(1) is of a somewhat unusual character. It relates not to a particular act, matter or thing (28) happening upon a specified date at an identified place. It is inherent in the nature of a "relationship" that it will extend over a period of time and be of a continuous nature. The provisions of s 229B(1A) are clearly intended to strike a balance between the need for a measure of precision in the proof of the offence, on the one hand, and, on the other, the need to recognise that it may not be possible for a complainant to identify exactly the dates and circumstances of the events said to prove the maintenance of the relationship.

As will appear, the Court of Appeal found that the trial judge had erred in his directions to the jury. But it held that the case was one appropriate for the application of the "proviso". Under the Code, the

(26) *Corrective Services Act* 1988 (Q), s 166(1)(b) which provides that a prisoner is eligible to apply for parole after serving half of the term of imprisonment to which the prisoner was sentenced.

(27) This provision was amended by the *Criminal Law Amendment Act* 1997 (Q), s 33, which took effect on 1 July 1997.

(28) *Johnson v Miller* (1937) 59 CLR 467 at 489.

relevant provision in this regard is found in s 668E of the Code. It is similar to provisions in the legislation of other States (29). It reads:

> "(1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion ... 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 ...
> (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."

Decision of the Court of Appeal

The original notice of appeal to the Court of Appeal raised three grounds for the appeal against the convictions. The first concerned a complaint that the trial judge should have ordered further particulars of the matters which constituted the evidence in respect of count 2. That ground took that Court to an examination of the requirements of particularity in the pleading and prosecution of criminal offences. Reference was made to the line of authority of this Court up to and including *Walsh v Tattersall* (30). The Court of Appeal recognised the particular dangers which general allegations of sexual dealings, lacking in detail, could present for the fair trial of a person accused of an offence against s 229B of the Code (31). It accepted the over-riding obligation of a trial judge to warn the jury about the dangers inherent in imprecise evidence (32). It therefore determined that the appellant was entitled to particulars of the offence against s 229B(1) of the Code (33), although having regard to the terms of s 229B(1A), he was not entitled to have specific dates or exact circumstances. The Court of Appeal concluded (34):

> "Although s 229B of the Code was undoubtedly intended to avoid the degree of specificity which might otherwise have been required, necessitating a number of separate, fully detailed allegations, it stops short of authorising trials conducted as a contest between generalised assertions which can only be met by generalised denials."

(29) *Criminal Appeal Act* 1912 (NSW), s 6(1); *Crimes Act* 1958 (Vict), s 568(1); *Criminal Law Consolidation Act* 1935 (SA), s 353(1); *Criminal Code* (WA), s 689(1); *Criminal Code* (Tas), s 402(2).

(30) (1996) 188 CLR 77. The Court of Appeal also referred to *Johnson v Miller* (1937) 59 CLR 467 and *S v The Queen* (1989) 168 CLR 266.

(31) *R v Thompson* (1996) 90 A Crim R 416 at 431.

(32) *R v Thompson* (1996) 90 A Crim R 416 at 432.

(33) *R v Thompson* (1996) 90 A Crim R 416 at 433-citing *R v Kemp* [1977] 1 Qd R 383 at 397-398.

(34) *R v Thompson* (1996) 90 A Crim R 416 at 433-434.

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Nevertheless, the Court of Appeal determined that the failure to provide proper particulars had not occasioned a substantial miscarriage of justice. That determination was not re-agitated in this Court. Nor was the second ground of appeal pressed which concerned the refusal of the trial judge to order the production to the Court, for inspection by the defence, of a diary kept by the complainant. That issue, likewise, has not been agitated.

The sole remaining ground was a complaint that the verdict on count 2 was unsafe and unsatisfactory. It was upon this basis that, before the Court of Appeal, the appellant was permitted to argue his submissions about the suggested misdirection of the jury on one of the elements of s 229B(1).

The issue was whether the trial judge had erred in failing to instruct the jury that it was necessary for them to be satisfied beyond reasonable doubt that at least three of the acts alleged to constitute the offences of a sexual nature had been established and to reach unanimous verdicts upon the same three offences. The Court expressed the issue thus (35):

> "To establish an offence against s 229B, even if it proves a course of sexual conduct, the prosecution must prove that the accused person 'as an adult, has ... done an act defined to constitute an offence of a sexual nature in relation to the child, ... on three or more occasions ...'. That requirement raises the question whether the section can be only satisfied by proof that the accused did an act of the kind described on at least three specific occasions, or whether proof of a course of conduct from which it can be concluded that the accused did such an act at least three times is sufficient, even though the jury might not be unanimous with respect to the occasions of the material acts."

By reference to an earlier decision of the Court of Appeal in *R v Kemp* (36), the Court held that the jury ought to have been informed that they were required to be of the unanimous opinion that the accused had "done the same three acts, each constituting an offence of a sexual nature against the complainant" (37). No such instruction had been given to the jury in this case. Accordingly, the Court of Appeal concluded that an error had occurred at the trial in this respect. That error enlivened consideration of the provisions of s 668E.

The Court of Appeal disposed of the appeal, invoking sub-s (1A) of that section in the following passage (38):

> "The inadequacy in the trial judge's directions raises the question whether a different verdict might have resulted but for the error. In

(35) *R v Thompson* (1996) 90 A Crim R 416 at 430-431.
(36) [1977] 1 Qd R 383.
(37) *R v Thompson* (1996) 90 A Crim R 416 at 434.
(38) *R v Thompson* (1996) 90 A Crim R 416 at 434.

considering this issue, two related matters seem to us of particular importance. One is the failure of the appellant to raise the present complaint at his trial. The other is that there was no significant attempt by the appellant at his trial to differentiate between the various aspects of the complainant's testimony concerning the sexual misconduct she alleged against him; the trial was conducted as an 'all-or-nothing' contest between the complainant's testimony and the evidence of the appellant. It is plain that the jury believed the complainant, and there is no rational basis upon which different members of the jury might have doubted some, different, portions of her account. In the circumstances, we cannot identify a foundation for a conclusion that there is a possibility that an innocent person might have been convicted by reason of error by the trial judge.

Accordingly, despite error at the trial, we would dismiss the appeal."

It is from the orders of the Court of Appeal which followed this conclusion that the appeal came to this Court.

Applicable legal principles

The principles of law which govern the outcome of this appeal are clear enough. They relate both to the operation of s 229B and to the application of s 668E(1A) of the Code.

It is unnecessary to elaborate the principles at great length. So far as s 229B is concerned, before this Court the Crown did not dispute the correctness of the Court of Appeal's holding that it was necessary, in order to constitute the offence, for the jury to be agreed that the prosecution had established offences of a sexual nature on three or more occasions. Where more than three occasions were alleged, it was necessary for the jury to be unanimously agreed that the same three occasions had been proved beyond reasonable doubt. That being an ingredient of the offence, it was a matter upon which the judge should have given directions to the jury. The failure to do so had established an error in the conduct of the trial.

These concessions, which I consider to have been rightly made, render it unnecessary to elaborate in this appeal in much detail the requirements of s 229B of the Code. However, it will be useful, in approaching the Court of Appeal's ultimate decision, to make further reference to the section and its ingredients. They are relevant to the consideration of the basis which finally led the Court of Appeal, notwithstanding the established error, to dismiss the appeal for want of a demonstrated miscarriage of justice in the circumstances.

The following points may be noted:

1. As was recognised by the Court of Appeal, an accused facing a charge under the novel provisions of s 229B of the Code necessarily confronts a number of difficulties. They include the danger that generalised evidence, tendered by the prosecution to establish a s 229B "relationship", will be used by the jury as propensity evidence. There

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is a risk that, once satisfied that a single "act" has been committed, a jury might conclude that an accused has a propensity to guilt of the type of crime charged, and hence is guilty of an offence under s 229B (39). The terms of s 229B(1) are inherently broad and imprecise in so far as they refer to the concept of a "relationship" of the given character (40). To that extent, the offence created by the section involves a departure from the offences of particularity found elsewhere in the Code with which our criminal law is more familiar. Nevertheless, Parliament has provided the new offence. Clearly, it has done so to respond to community concern about the problem of child sexual abuse. It is the duty of courts to give effect to the will of Parliament. But they must do so in a trial process which ensures, so far as they can, fairness to the accused. The obligation of the courts to ensure that a fair trial is had imposes upon judges the duty of explaining the elements of the offence created by s 229B of the Code with precision and accuracy. The greater the danger of prejudice contaminating a fair trial, the greater must be the vigilance of appellate courts to ensure that the trial is had strictly as the law requires.

2. There is a special danger of unfairness where, as here, a crime which permits imprecise and general evidence to be proved is coupled in the indictment with other sexual offences specified with particularity. This Court has noted the special risks of unfairness where a number of sexual offences are charged together (41). Although, as a matter of procedure, that course is permitted by the Code (42), the dangers inherent in the possibility that a jury may infer guilt of several offences from the proof of guilt of one or some, requires care in the joinder of counts, attention to the possible need to order separate trials (43), appropriate judicial warnings against the dangers of propensity reasoning and vigilant consideration of complaints of unfairness when these are brought on appeal following conviction.

3. Section 229B(1A) provides that the prosecution must prove that the offender has done an act constituting an offence of a sexual nature on three or more occasions. This statutory prerequisite must be given full effect. This is because it amounts to a parliamentary recognition of the risks involved in the offence. Those risks include the exposure of a person to conviction upon generalised evidence which it may be difficult or impossible to disprove, which need not be confirmed by testimony other than that of the complainant and which may result in a trial involving little more than accusation and denial. These risks

(39) *S v The Queen* (1989) 168 CLR 266 at 282; *BRS v The Queen* (1997) 191 CLR 275 at 291-292, 302-303, 304-306, 326-332.

(40) cf *R v Kemp* [1997] 1 Qd R 383 at 396, per Fitzgerald P.

(41) *De Jesus v The Queen* (1986) 61 ALJR 1; 68 ALR 1; cf *R v B* [1989] 2 Qd R 343.

(42) Code, s 567(2).

(43) See Code, s 597A(1).

provide reasons, quite apart from the general rule of construction ordinarily applied to a criminal statute, for adopting an approach to the preconditions laid down by Parliament which is rigorous and defensive of the fair trial of the accused. It is in this context that the previous holding of the Court of Appeal (44) and its holding in this case (45) must be understood. The jury may find offences of a sexual nature in relation to the child on more than three occasions. But to warrant a verdict of guilty of an offence against the section, the jurors must identify to themselves at least three occasions, reach unanimous agreement that the offences on those occasions are of a sexual nature, that they relate to the child and are such as to show the maintenance of the relationship charged and have been proved beyond reasonable doubt. All of these elements must be made out. It is the duty of the judge to explain to the jury the need for each one of them to be proved to their unanimous satisfaction. In default of such an explanation there will have been an error in the conduct of the trial.

4. Provisions such as s 668E of the Code have the purpose of recognising the imperfections which arise in any system for the trial of criminal charges. Some errors are purely formal. They do not involve a matter which was truly in issue at the trial (46). They do not bear upon proof by the prosecution of the guilt of the accused. They do not raise, as a reasonable possibility, a risk that the error might have cost the accused a real chance of acquittal (47). As with any statutory provision, it is the duty of courts to give effect to the terms of the "proviso" or equivalent provision such as s 668E. In doing so, it is appropriate to have regard to the strengths and weaknesses of the prosecution case and of the defence case in order to assess the significance (if any) of the error which has been demonstrated (48). This Court has repeatedly insisted that such statutory provisions invoke no mechanical formula or rigid test (49). Each case turns upon its own facts and circumstances. The error must be considered in the context of the conduct of the trial as a whole.

5. Nevertheless, the provisions of statutory powers to excuse demonstrated errors in the conduct of a criminal trial must themselves be applied having regard to the ordinary presumption that an accused person is entitled to have a trial which conforms to the law, to have a jury properly instructed on the elements of the offences charged, to

(44) *R v Kemp* [1997] 1 Qd R 383 at 401, per Davies JA; cf at 395-397, per Fitzgerald P.
(45) *R v Thompson* (1996) 90 A Crim R 416 at 433-434.
(46) *Wilde v The Queen* (1988) 164 CLR 365 at 384.
(47) *R v Storey* (1978) 140 CLR 364 at 376; *Simic v The Queen* (1980) 144 CLR 319 at 332; cf *Davis v The Queen* (1990) 5 WAR 269 at 282-283.
(48) *Glennon v The Queen* (1994) 179 CLR 1 at 8; cf *R v Jones* (1995) 38 NSWLR 652 at 659.
(49) *Glennon v The Queen* (1994) 179 CLR 1 at 8; cf *Wilde v The Queen* (1988) 164 CLR 365 at 373.

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have fair procedures followed and not to suffer the stigma of conviction and the burden of punishment where these basic requirements are unfulfilled. Where error is shown, it is for the Crown to establish that no substantial miscarriage of justice has occurred (50). It must satisfy the appellate court that it can safely eliminate the possibility that the accused has thereby lost a real chance of acquittal (51). The emphatic language of s 668E(1) of the Code makes it plain, as does the long tradition of an insistence upon accuracy and fairness in the conduct of criminal trials, that ordinarily proof of an error of law will require that the Court "shall allow the appeal". This is all the more so where the error in question has involved a failure on the part of the judge to direct the jury, accurately or at all, upon a relevant element of the offence. An accused person is entitled to have all such elements explained, and correctly explained, to the jury. Otherwise there is no means of knowing whether the jury properly understood their task and approached that task with a correct understanding of the applicable law (52). Because an appellate court (special verdicts apart) has no real means of knowing the reasoning of a jury, it will often be inappropriate, where misdirection is shown, to invoke a provision such as s 668E(1A) of the Code, even in a strong prosecution case (53). For all the appellate court knows, the jury might have been unimpressed with the strengths of the case that attract the appellate court. They might have been affected in their conclusion by the misdirection. This possibility, which cannot be excluded logically, has led courts of criminal appeal to remark that the application of the "proviso", to sustain criminal convictions notwithstanding judicial misdirection, is less common now than it was in the past (54).

6. Where the irregularity in the conduct of the trial (55) or the misdirection can be described as fundamental, such as to go to the root of the proceedings, the question of the hypothetical verdict of a jury, properly directed, does not arise. In *Wilde v The Queen* (56), Brennan, Dawson and Toohey JJ said:

> "The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon

(50) *Mraz v The Queen* (1955) 93 CLR 493 at 514, per Fullagar J. His Honour was considering the *Criminal Appeal Act* 1912 (NSW), s 6(1) but the same principles apply to the present case.

(51) cf *R v Jones* (1995) 38 NSWLR 652 at 659.

(52) *Mraz v The Queen* (1955) 93 CLR 493 at 514.

(53) *Domican v The Queen* (1992) 173 CLR 555 at 570-571; cf *Wilson v The Queen* (1992) 174 CLR 313 at 334-335.

(54) *Whittaker v The Queen* (1993) 68 A Crim R 476 at 484.

(55) *Quartermaine v The Queen* (1980) 143 CLR 595 at 600-601.

(56) (1988) 164 CLR 365 at 373 (citations omitted); cf *Glennon v The Queen* (1994) 179 CLR 1 at 8; *Green v The Queen* (1997) 191 CLR 334 at 346-347.

the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice. Errors of that kind may be so radical or fundamental that by their very nature they exclude the application of the proviso."

A failure to explain to the jury, or explain accurately, the elements of the offence may sometimes constitute such a fundamental irregularity. There have been cases where such omissions have been held not to undermine the integrity of the trial (57). Nevertheless, in such cases the proviso may not be applicable both because of the importance to the accused of having the jury's attention directed to the ingredients of the offence charged and the equal importance of satisfying the community that the trial has been conducted with legal accuracy and manifest fairness.

An unsuitable case for the "proviso"

When the foregoing principles are applied to the facts of this case it is clear, with respect, that it was not one proper for the application of s 668E(1A) of the Code. The Court of Appeal correctly recognised the dangers of unfairness which s 229B of the Code presented for the trial of the appellant. It correctly accepted the need to adopt a strict approach to the preconditions for a conviction laid down by s 229B(1A). And it correctly held that one of those preconditions was that the jury should be satisfied that the prosecution had proved that an offence of a sexual nature had occurred on three or more occasions and that they were unanimous as to the acts constituting such offences and as to the three occasions, at least, which they accepted to ground conviction for the offences. The Court of Appeal was also right to discern the distinction between this case and the circumstances in *R v Kemp* (58). There, by reason of separate guilty verdicts taken on more than three specific sexual offences, it could safely be concluded that the jury had unanimously agreed that the accused had committed at least three specific acts each constituting the same offence of a sexual nature.

Two reasons were nominated by the Court of Appeal to justify the application of s 668E(1A) in this case. The first was the failure of counsel to seek a redirection at the trial. Clearly, that was a consideration relevant to the exercise of the discretion provided by s 668E(1A). But it has never been treated as a conclusive consideration (59). If a miscarriage of justice is shown, the obligation of the judge who has charge of the trial to ensure that accurate and

(57) *Holland v The Queen* (1993) 67 ALJR 946 at 950-953; 117 ALR 193 at 199-202, per Mason CJ, Brennan, Deane and Toohey JJ But see *Holland v The Queen* (1993) 67 ALJR 946 at 954; 117 ALR 193 at 204-205, per Dawson, Gaudron and McHugh JJ dissenting.

(58) [1997] 1 Qd R 383.

(59) *Stirland v Director of Public Prosecutions* [1944] AC 315 at 327-328.

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complete directions of the law are given to the jury is not removed because counsel, appearing for the accused, failed to assist the judge to avoid error (60).

The second ground mentioned by the Court of Appeal was that this was an "all-or-nothing" trial. The appellant's defence was one of absolute denial. It was therefore submitted that no significant attempt had been made to differentiate between the various aspects of the complainant's testimony. Accordingly, it was reasoned, the proper inference to be drawn from the juror's verdicts, understood in the light of the trial, was that the complainant was wholly accepted and the appellant's denials wholly rejected. For the Crown it was argued that, in the light of the conduct of the trial, it would have been perverse for the jury to have rejected particular incidents alleged to involve sexual offences constituting the unlawful relationship whilst still convicting the appellant on that charge. It was common ground that the judge had given proper instructions on the onus of proof and on the need for unanimity as well as on their right to accept or reject the testimony of each witness in whole or in part.

The difficulty with these submissions (as with the conclusion of the Court of Appeal) is that the only way that it was open to the appellant to meet the accusations made against him was such a denial. If he be presumed innocent, as the law requires, that was his appropriate defence. Where possible, he could seek support from the evidence of his wife. In this latter respect, there were important differentiations between the evidence which the appellant's wife gave on the particular offences which were relied upon to constitute the precondition for a conviction of the offence against s 229B of the Code.

Thus, in relation to the alleged motorbike incidents or fruit-picking incidents, the wife could give no relevant evidence as she was not present, or alleged to be present, when they occurred. But in respect of the lunch rest-time incidents, morning-tea incidents, morning wake-up incidents, and evening television incidents, the wife was present or close nearby. She gave apparently honest and measured evidence which it would have been open to the jury, or particular jurors, to accept.

Thus, in relation to the lunch rest-time incidents, there was a dispute concerning how long the appellant typically slept and whether he did so on the beanbag as alleged by the complainant. The wife gave evidence that she ordinarily slept upstairs and did not know where the complainant went at lunch-time. She stated her impression that her

(60) *Giannarelli v The Queen* (1983) 154 CLR 212 at 230; *De Jesus v The Queen* (1986) 61 ALJR 1 at 3; 68 ALR 1 at 5; *Bahri Kural v The Queen* (1987) 162 CLR 502 at 512-513; cf *R v Lovet* [1986] 1 Qd R 52 at 56-58; *Robinson v The Queen* (1991) 180 CLR 531 noted *Criminal Law Journal*, vol 16 (1992) 59, at p 60 (where the point was not raised either at trial or in the Queensland Court of Criminal Appeal); *Towner v The Queen* (1991) 56 A Crim R 221 at 227-228.

husband did not take a nap on the beanbag but could go no further. In relation to the morning-tea incidents, the appellant's evidence was that he and his wife returned to work together and that she never returned to work before he did. The wife confirmed that this was ordinarily so. She conceded that he "rarely" stayed back after she had resumed work. So far as the morning call, the appellant's wife stated that the appellant never went into the complainant's room early in the mornings. She affirmed the appellant's evidence in that regard. So far as the evening television incidents were concerned, the appellant's wife stated that the family rarely watched television and then only from the kitchen. On infrequent occasions when the appellant and the complainant had sat together on the lounge, they had never, so far as she could recall, shared a blanket. She stated that the complainant had rarely worn a jumpsuit.

The foregoing evidence presented distinct conflicts of testimony which it was the jury's province to unravel. If the jury, or members of the jury, were impressed with the wife's evidence, it is possible that they, or some of them, may have had doubts about the lunch rest-time incidents, the morning-tea incidents, the wake-up call and evening television incidents. The possibilities of various combinations of juror resolution of the accusations and denials about such incidents are such that it cannot be affirmatively determined that upon any of the categories of incident, the requisite juror unanimity was obtained. Logically, it is equally possible that particular jurors were convinced of some, but not all, of the categories of incident. Each one of them may have been convinced as to three offences. They were properly instructed that three were required. But not having been instructed that the *same* three were required, it cannot be denied that the jurors may have severally reached their conclusions upon the basis of *different* offences. If they did so, that would not have conformed to the correct application of s 229B(1A) of the Code. Because the juror's verdicts in this case give no clue as to their reasoning, it is impossible to say either that they settled upon the same three or more offences or that their conclusions, reflected in their verdicts on count 2, necessarily implied unanimous agreement about the same three or more offences so as to sustain the verdicts, notwithstanding the error in the judicial direction.

The fact that the main issue at the trial was the complainant's veracity did not relieve the prosecution of the obligation to make out all of the ingredients of the offence. On the contrary, the terms of the Code and the risks of injustice to the accused made it essential that the elements of the offence be accurately explained by the trial judge. This did not occur. Whether this was a fundamental irregularity in the conduct of the trial or not, it was certainly a very important defect. The possibility that it affected the jury's reasoning cannot be eliminated. Upon that footing the appellant lost a chance, fairly open to him, of acquittal.

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Orders

It was for these reasons that I joined in the orders made by the Court on 25 June 1997. Having regard to the fact that any retrial would subject the complainant, as well as the appellant, to a significant further ordeal and to the fact that the appellant had almost completed serving the non-parole part of his sentence, it may not be appropriate for the retrial which was ordered to take place. However, that is a matter which the Court left to the Director of Public Prosecutions to determine (61). An order for costs was sought by the appellant but this was not a case where such an order would have been appropriate (62). Accordingly, no cost order was made.

1. *Appeal allowed.*
2. *Set aside the orders of the Court of Appeal so far as they relate to count 2 in the indictment and in lieu thereof order that:*
   (a) the appeal to that Court be allowed in part;
   (b) the conviction on count 2 in the indictment be quashed; and
   (c) there be a retrial on count 2 in the indictment.

Solicitors for the appellant, *Boe & Callaghan.*

Solicitor for the respondent, *Director of Public Prosecutions (Q).*

MKM

(61) *Crofts v The Queen* (1996) 186 CLR 427 at 452, citing McHugh J's closing comment in *Longman v The Queen* (1989) 168 CLR 79 at 109.

(62) cf *R v Whitworth* (1988) 164 CLR 500 at 501.

R v KEMP (No 2) — [1998] 2 Qd R 510

SUPREME COURT OF QUEENSLAND — COURT OF APPEAL

MACROSSAN CJ, PINCUS JA and MACKENZIE J

CA 82/1996

9 August; 13 December 1996

20 Pages

Criminal law — Evidence — Relevance — Particular cases — Maintaining unlawful sexual relationship with child — Uncharged acts of sexual familiarity — Criminal Code s229B(1), s229B(1A). (A Dig 3rd [419]).

S229B of the Criminal Code relevantly provides:

"Maintaining a sexual relationship with a child under 16

229B.(1) Any adult who maintains an unlawful relationship of a sexual nature with a child under the age of 16 cars is guilty of a crime ...

(1A) A person shall not be convicted of the offence defined in subs(1) unless it is shown that the offender, as an adult, has, during the period in which it is alleged that the offender maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child ... on 3 or more occasions and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions."

Held:

(1) That on a charge under s229B(1) of maintaining an unlawful sexual relationship, evidence of uncharged acts of sexual familiarity by the accused towards the complainant during the period in question was admissible as direct proof of the alleged relationship. There was no requirement that the relationship be proved exclusively by proof of three or more specific sexual offences of the requisite kind.

Per Macrossan CJ: Conduct that is direct evidence of part of the pattern which has to be shown namely a prevailing relationship of a sexual nature is admissible and if it goes so far as to reveal a sexual offence it will be direct evidence of a further part of what has to be shown, namely an unlawful relationship. In either case with other similar evidence, it will go in proof of the element of continuity which is involved in maintaining a relationship.

(2) That such evidence was not similar fact evidence or propensity evidence and was therefore not subject to the rules governing the admissibility of evidence of that kind.

R v Hamzy (1994) 74 A Crim R 341, 347 applied.
Hoch v The Queen (1988) 165 CLR 292; Pfennig v The Queen (1995) 182 CLR 461 distinguished.

CASES CITED

The following cases are cited in the judgments:

Hoch v The Queen (1988) 165 CLR 292.
M v The Queen (1994) 181 CLR 487.
Pfennig v The Queen (1995) 182 CLR 461.
R v Beserick (1993) 30 NSWLR 510.
R v Ciseau (CA 470/1993. Court of Appeal, 8 November 1994, unreported).
R v Hamzy (1994) 74 A Crim R 341.
R v Kemp [1997] 1 Qd R 383.
R v Kerim [1988] 1 Qd R 426.
R v Morris, ex parte Attorney-General [1996] 2 Qd R 68.
R v Thompson (1996) 90 A Crim R 416.
R v Wackerow [1998] 1 Qd R 197.

The following additional cases were cited in argument:

Barca v The Queen (1975) 133 CLR 82.
Knight v The Queen (1992) 175 CLR 495.
Plomp v The Queen (1963) 110 CLR 234.
R v Bradley (1989) 41 A Crim R 297.
R v Crnjanin [1965] Qd R 324.
R v Heath [1991] 2 Qd R 182.
R v Ireland (1970) 126 CLR 321.
R v Massey [1997] 1 Qd R 404.
R v TJW, ex parte Attorney-General [1988] 2 Qd R 456.
R v Witham [1962] Qd R 49.
Wilde v The Queen (1988) 164 CLR 365.

CRIMINAL APPEAL

Appeal from convictions before Robin DCJ and a jury.

F G Connolly for the appellant.

P Ridgway for the Crown.

C A V

Macrossan CJ

In his reasons Mackenzie J has dealt with the circumstances involved in this appeal and concluded, after due consideration of all of the grounds raised, that none of them is entitled to succeed. The trial judge's summing up was full and careful and free of what I would regard as material error. The evidence provided a satisfactory basis for the verdicts. I agree with Mackenzie J's conclusions and generally with his reasons and only wish to add to them by making the observations which follow.

The offence of maintaining a sexual relationship under s229B of the Criminal Code was a charge of a more general nature joined in this case with charges of a number of specific offences of a sexual nature. The general charge could not, under the section. be proved without proof of at least three specific sexual offences within the category referred to: see subs(1A). The trial judge directed the jury that only the offences charged could be considered for the purpose of providing proof of the required three or more offences which were a necessary ingredient in proof of the general charge. There was, therefore, no unfairness in the way the trial was conducted stemming from any lack of particularity. In other circumstances in which the general offence under s229B is charged, adequate particulars of the Crown case appearing from the course of proceedings on committal together with a sufficient intimation whether by formal particular or otherwise will need to be given if fair trials are to be had and injustice is to be avoided.

Dealing with the matter more broadly, the central element of the general offence is the proof of the existence of an unlawful relationship of a sexual nature during the period alleged. The relationship does not have to be proved exclusively by independent proof of three or more specific sexual offences of the requisite kind. That last requirement is, in effect, made an additional element of the offence.

In the general aspect of its case, the Crown will have to prove that between the complainant and the accused there existed a relationship which had an unlawful sexual nature. Use of the term "relationship" implies a continuity of contact in which both parties are involved; the sexual element will be the particular character of the relationship which will appear. Evidence of conduct occurring between the two parties, if it pointed to the existence of a sexual character in their relationship during the specified period, would be direct evidence of an aspect of this offence. Of course, in the end, it has to be an unlawful relationship which is shown and that must be a relationship which includes unlawful sexual acts. But the conduct to be relevant and admissible does not have to be restricted to specific sexual offences. Proof of conduct going to show in a more general way the sexual nature of the relationship or the continuity of such a relationship will be a step along the path of proof by the Crown. Such evidence is not propensity evidence or similar fact evidence subject to the particular rules of exclusion which apply to evidence of that kind, although it could be fair to describe it as context evidence which assists in proof of the necessary sexual element.

Conduct that is direct evidence of part of the pattern which has to be

shown namely a prevailing relationship of a sexual nature is admissible and if it goes so far as to reveal a sexual offence it will be direct evidence of a further part of what has to be shown, namely an unlawful relationship. In either case, with other similar evidence, it will go in proof of the element of continuity which is involved in maintaining a relationship.

The trial judge was not in error in admitting the evidence of further conduct referred to by Mackenzie J although it was not part of the specific offences charged.

The appeal should be dismissed.

Pincus JA

I have read the reasons of Mackenzie J and gratefully adopt his Honour's explanation of the issues arising. Subject to what follows. I am in agreement with those reasons. The principal charge was one under s229B of the Code, that of maintaining an unlawful relationship of a sexual nature with a child under the age of 16 years. There was some discussion before us of s229B(1A), the effect of which is to require that a person charged with an offence under the section be acquitted unless there is proof of certain acts. The subsection does not say, nor imply, that the offence of maintaining an unlawful relationship must necessarily be held proved if the three acts mentioned in subs(1A) are proved; it is easy to imagine circumstances in which those three acts could be proved without necessitating the conclusion that there was such a relationship as the section contemplates. It is equally clear that the Crown is not confined, in attempting to prove the relationship, to adducing evidence of acts such as are mentioned in subs(1A); evidence of various kinds may go towards the requisite proof. A simple example is evidence of a statement by the accused tending to show a sexual passion for the child.

As to the latter point, I note that in Kemp (No 1) [1997] 1 Qd R 383 the President accepts the relevance of evidence of sexual contacts between the accused and the complainant other than evidence of acts under (1A): see 398. A question arises, however, as to the use which may be made of such evidence. Where, as here, there is evidence from the complainant and others of acts of sexual familiarity, they go directly to proof of the relationship alleged. As is pointed out by the President in Kemp (No 1) the orthodox view in Queensland is that evidence of guilty passion is generally admissible in prosecutions for sexual offences. Where what has to be proved is not just a single incident, or three incidents, but a s229B relationship - a situation subsisting over a period of time - acts of the accused tending to show a "guilty passion" at relevant times are directly relevant; in court as in ordinary life, one deduces that two people have a sexual relationship with one another, wholly or in part from evidence that they engage in acts characteristic of such a relationship.

A question was raised before us as to the relevance of the notion of propensity evidence to charges under s229B. If a man is charged with having the relationship prohibited by s229B, then evidence that, for example, he used from time to time touch the complainant in a sexual way does not get in as propensity evidence: it is simply evidence going to prove the case sought to be made - that there was a sexual relationship. Such evidence is relevant whether or not, were an offence other than one under s229B in issue, the evidence would pass the tests for admission of propensity evidence, now authoritatively laid down in Pfennig (1995) 182 CLR 461. I have set out views about the effect of that decision in Wackerow [1998] 1 Qd R 197. In essence, what Pfennig decides is that

[1998] 2 Qd R 510 at 513

propensity evidence may be admitted if "... the objective improbability of [the evidence] having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty...". The test for admission of propensity evidence (including what is usually called similar fact evidence) is the same as that for admission of circumstantial evidence. These tests are inapplicable where the Crown proffers evidence of the prohibited relationship, in a s229B case, other than evidence of the acts alleged under subs(1A); it is repetitive to say so, but evidence of such other sexual acts may be admitted in direct proof of the relationship alleged.

As Mackenzie J explains, complaint was made before us of admission of what were claimed to be touchings having sexual implications, at unspecified times. In my opinion none of the grounds of objection to the evidence had any substance. It was said that this was propensity evidence; for the reasons I have given, it was not. It was said that there was a "reasonable possibility" of concoction by the three girls; assuming that doctrine, underlying Hoch (1988)

165 CLR 292, has survived the restatement of the relevant principles in Pfennig, it has nothing to do with the evidence in question. which was not tendered as or admissible as similar fact evidence.

Complaint was also made, with respect to the evidence just mentioned, of the judge's directions. To some extent what his Honour told the jury appears to me to be erroneous, in the light of Pfennig; the jury was simply told, as Mackenzie J has pointed out, that propensity reasoning is wrong, whereas Pfennig explains the circumstances in which propensity reasoning is permissible. But apart from that point, of which no complaint is, or could sensibly be, made on behalf of the appellant, I can see no ground on which the judge's directions with respect to the evidence under consideration could be criticised.

Complaint was made of the judge not having drawn to the jury's attention factual considerations favourable to the defence. With all due respect to those who hold a contrary view, I have seen little, in the cases which have come before this Court, to suggest that s229B has produced unfairness; it appears to me that this legislative innovation has worked reasonably well. Nor do I hold the opinion that in cases under the section the judge has a special responsibility to draw to the jury's attention any factual considerations which could weaken the Crown case. My impression is that directions given in s229B trials, as in other District Court criminal matters, are generally fair and balanced. A trial judge's responsibility, in commenting objectively on the facts, is a heavy one and it is important that the judge not seem to the jury to be merely an additional advocate for either side. The judge will be careful to draw the jury's attention to any particular weaknesses in the Crown case which might otherwise be overlooked, whatever the charge may be, but I am far from convinced that the law requires the judge, in s229B cases, to give special directions on the facts in favour of the accused; such directions may or may not be necessary, or appropriate, in particular cases.

An example of the criticisms with which we were confronted, at great length, in the present case had to do with ground 6, as to a possible motive suggested by the defence which might have induced the complainant to make false allegations. It is not the law that every submission on the facts, emanating from counsel for the Crown or counsel for the defence, must be

reiterated in the summing-up. Indeed, factual directions which consist largely of comprehensive summaries of counsel's addresses will not always help or indeed interest the jury much. I agree with Mackenzie J, as to ground 6, that the essential point made by the defence was put to the jury; but in so saying, I do not by any means imply that a failure to do so, or indeed a failure to mention the point at all, would have vitiated the trial.

The only other aspect of the case which I propose to deal with specifically is the admission of the medical evidence; this is complained of in ground 1. It is difficult to see how the admission of that evidence could have helped the Crown case. The medical examination showed that the complainant's condition was consistent with her having had sexual intercourse on a few occasions. The reason why this did not help is that the complainant swore that she had had sexual intercourse with persons other than the appellant, on a few occasions. In Kerim [1988] 1 Qd R 426, it appears that there was no evidence of any other sexual activity on the part of the complainant, likely to have broken her hymen; that distinguishes Kerim from this case. It is difficult to generalise, because circumstances can be imagined in which, despite there being evidence suggesting sexual activity (other than with the accused) likely to have ruptured the hymen, medical evidence of a ruptured hymen might be material. But I can see no basis on which, in the present case, it could have influenced a rational jury for or against the Crown case. It appears to me to have been merely irrelevant.

It was argued for the appellant that the medical evidence might have influenced the jury against the appellant, but I do not understand how that could be. In determining whether by a wrong admission of evidence a chance of acquittal might have been lost, one does not proceed from the assumption that totally innocuous evidence will move a jury towards conviction. It is my opinion that the medical evidence should not have been admitted, but it seems to me plain that it could have made no difference to the verdict.

I would dismiss the appeal.

Mackenzie

The appellant was convicted of maintaining an unlawful relationship of a sexual nature with a child under the age of 16 years between 1 November 1990 and 7 February 1993 (count 1), two offences of indecently dealing with a child under 12 with the circumstance of aggravation that the child was in his care (on unknown dates between 1 November 1990 and 1 February 1991) (counts 2 and 3) and three counts of unlawful carnal knowledge with the circumstance of aggravation that the child was in his care (counts 5, 6 and 7). Counts 5 and 6 were alleged to have occurred on an unknown date between 31 May 1992 and 1 July 1992 and count 7 on an unknown date between 7 and 29 January 1993. The specific offences were therefore committed within the period during which the maintenance of the unlawful sexual relationship was alleged, satisfying the requirement that three or more acts defined to constitute an offence of a sexual nature were done in relation to the child during the period alleged. The jury was unable to reach a verdict on count 4, an alleged offence of aggravated unlawful carnal knowledge at Murphy's Creek between 31 January and 31 March 1992.

The indecently dealing counts related to digital penetrations while the complainant and the appellant were members of a household at Helidon. The appellant was at that time living with the complainant's sister Pam

who was four years older than she was. The complainant who was born on 14 March 1979 and had been a difficult child had been sent by her father to live in the appellant's household when she was about 12 years of age. The first incident of indecently dealing was alleged to have occurred on the first night the complainant spent in the household and the second a few nights later. The complainant had also given evidence of "a few more" unparticularized occasions of digital penetration at Helidon. The first conviction of unlawful carnal knowledge related to an occasion when the appellant and the complainant stayed at a motel in Rockhampton while travelling to Mt Morgan where the appellant was buying a house. The second conviction of unlawful carnal knowledge related to the night the appellant and the complainant arrived in Mt Morgan, a few days in advance of the rest of the household. The remaining conviction of unlawful carnal knowledge related to an incident when the complainant had returned to the appellant's household for a period of about a month on holidays. It was alleged to have occurred when she accompanied the appellant to check the house of an absent friend of the appellant. She also gave evidence of four or five other incidents of sexual intercourse at Mt Morgan between herself and the appellant without being able to better particularize the occasions. She also gave evidence, without being able to better particularize the occasions, that the appellant frequently touched and grabbed her breasts and touched her buttocks. There was no evidence of fresh complaint and indeed the complainant had denied, on three occasions when she was interviewed by the police, that there had been any impropriety between herself and the appellant. There was no corroboration of any of the offences and the jury was so directed in strong and appropriate terms.

The first ground of appeal relates to admission of medical evidence tending to prove that the

complainant had had previous sexual experience. The examination occurred about eight months after the date of the last act of sexual intercourse alleged. The complainant had given evidence that she had had sexual intercourse with her elder brother when she was seven and he 13 on one or two occasions and twice with a boyfriend after she had left Mt Morgan. The effect of the medical evidence was that the girl's condition was consistent with having had intercourse probably on more than one occasion but only a small number of times. It was submitted that this evidence should not have been given because it had no probative value.

While it did not establish the precise extent of the interference it was consistent with the three or four occasions to which the girl admitted. It was submitted that the leading of the evidence invited the jury to speculate that there might have been other occasions which included those involving the appellant. It was submitted that being expert evidence without probative value the evidence was dangerous and highly prejudicial. The learned trial judge told the jury that the evidence did not implicate the appellant and that they "must not take too much from it". He told them, in effect, that at the highest it showed only that the complainant was sexually experienced at 14 years of age. He said that if the jury accepted that interpretation of the medical examination the evidence removed the possibility that the jury might have thought that examination of the girl showed nothing relevant to the case and might have speculated that she had no sexual experience. The Crown relied on R v Morris, ex parte Attorney-General [1996] 2 Qd R 68, 72 and R v Kerim [1988] 1 Qd R 426, 431, 449 in support of the admission of the evidence. As the appellant's counsel

[1998] 2 Qd R 510 at 516

pointed out those cases involved examinations at closer points in time to the alleged offences. He also submitted that in Morris the purpose of admission of the evidence was different because, as well as eliminating the risk that the jury might have speculated upon the reason for the absence of the results of an examination of the condition of the girl's sexual organ, it established that the age of the rupture of the seven year old complainant's hymen was consistent with the alleged time of the offence. It was further submitted that because the complainant in the present case had admitted sexual intercourse with other persons, evidence of the medical examination was unnecessary for the purpose of removing the risk of speculation. It was submitted that the risk was that because the evidence was before them the jury might speculate in an unauthorized way as to the purpose the evidence served and that they might use it in some way to make up for the absence of corroboration.

In my opinion the learned trial judge did not err in exercising his discretion in favour of admitting the evidence. He dealt with the evidence appropriately in his summing-up. He told the jury that it was not corrobration. He warned the jury of the limited purpose for which the evidence was admitted. He told the jury of the reason for its admission. In my view this ground is not made out. Even if the evidence was wrongly admitted, the direction given was such as to limit the use of the evidence in a way which could not have led to a miscarriage of justice.

Grounds two and three are concerned with wrongful admission of evidence that the appellant had touched the complainant in inappropriate ways at unspecified times. This category of evidence came from the complainant, her sister Faylene, and Kristy Ranita Campeanu who was living with the appellant's son Shane in the household at Murphy's Creek and Mount Morgan. By the time of the trial, her relationship with Shane had come to an end.

It is important in considering these grounds to keep in mind that the evidence of other acts of a sexual nature was admitted only in respect of the offence of maintaining a sexual relationship under s229B(1). The jury was told that the evidence was not admissible on the other counts which related to specific identified acts. S229B(1A) provides that for a

conviction of the offence under s229B(1) there must be evidence of the commission of an offence of a sexual nature on three or more occasions. The jury was told that proof of those acts must be found in the specific offences charged in counts 2 to 7 and could not be found in the generalized evidence of other acts.

The accused's case, which he gave evidence to support, included denials that any of the specific acts charged had occurred and that any other physical contacts were non-sexual in character and occurred as part of ordinary family life. He gave evidence that on occasions he gave the complainant and his other children "a peck on the cheek" and "patted (the complainant) on the backside" when saying goodnight and that on occasions he could have touched her breasts in a non-sexual way while "brushing past her, fitting clothes to her, adjusting her clothes near her breast, giving her a hug". He agreed that he made remarks about her breasts but said that in doing so he was only teasing her in the same way that he teased his other daughters. The commission of the specifically charged acts, the existence of a sexual relationship and whether any generalised physical contact which was found by the jury to have occurred was of a

sexual or an innocent nature were in issue. The last category became an issue because of the learned trial Judge's decision to admit the evidence of the complainant and two other girls about acts of sexual familiarity other than those specifically charged.

The present appeal is from a retrial following the decision of this court in R v Kemp [1997] 1 Qd R 383 (Kemp (No 1)). In that decision the judgments emphasised the heightened risk that a trial may prove to be unfair because of the "inherently broad and imprecise concept" (Fitzgerald P) of maintaining a relationship, the difficulty of meeting generalised evidence and the failure to give precise and careful directions as to the use that can be made of the evidence. However, while emphasising those matters and the need to limit evidence of generalised sexual conduct to that which is necessary to provide the background within which the charge is to be considered, it was not suggested that evidence of unparticularized sexual conduct was inadmissible merely because it is unparticularized in a case where the evidence is merely part of the context of adequately particularised specific offences.

In arguing grounds two and three Mr Connolly developed four specific areas of complaint. The first was that generalised evidence amounted to evidence of propensity and was highly prejudicial and that the evidence led exceeded what was necessary to provide sufficient context for the jury to consider count 1. If it was admissible the learned trial judge should have excluded it in the exercise of his discretion.

The second was that the admission of the evidence was calculated to erode the direction that there was no corroboration of the complainant's evidence of the specific acts charged in counts 2 to 7. The third was that the evidence was inadmissible because there was a "reasonable possibility" that it was the product of concoction by the three girls acting in collusion. The fourth was that the learned trial judge had wrongly directed the jury as to the use they could make of the evidence.

The jury was warned in respect of the charges relating to individual acts (counts 2 to 7) of the risk of a jury reasoning that the accused person has a propensity or inclination to offend and using that process of reasoning to reach a verdict of guilty on a specific charge more easily. The jury was told firmly and unequivocally that "propensity reasoning is totally wrong" and that they could not be assisted towards reaching a verdict of guilty on counts 2 to 7 by using evidence about incidents other than the alleged facts of the particular charge under consideration to conclude that the accused was prone to or likely to act in a certain way.

S229B, to which count 1 relates, recognises that where repetitive acts of a sexual nature are committed upon children. it will often be difficult to give the degree of particularity usually demanded when a charge is brought. S229B has as one of its purposes attempting to ensure that, in an area where repetitive conduct of a similar kind is not infrequent in respect of a vulnerable segment of society and where, because of the repetitive and secretive nature of the conduct, precise particularity of the occasion is often lacking, offenders do not escape punishment merely because the degree of particularity that would ordinarily be required cannot be given. S229B is an attempt to create a legislative compromise which strikes at the element of repetitious conduct (by employing the concept of maintaining a sexual relationship) while requiring the jury to be unanimously satisfied beyond reasonable doubt that three or more acts of a

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sexual nature occurred in the period alleged.

The offence created by s229B is unusual in that it combines the requirements of proving at least some degree of habituality (maintaining a sexual relationship) and of proving at least three acts constituting an offence of a sexual nature, committed during the period over which it is alleged that the sexual relationship was maintained. Both these elements must be proved beyond reasonable doubt. The offence is neither an offence completed upon the commission of three discrete acts of a sexual nature, nor an offence defined solely in terms of a course of conduct or state of affairs. It combines elements of both.

The evidentiary provision in s229B(1A) provides that notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions the evidence is, firstly, admissible in evidence and, secondly, probative of the maintenance of the relationship. The first assistance given by the evidentiary provision is to declare that evidence of an act constituting an offence of a sexual nature is admissible notwithstanding the absence of evidence of the date of the occasion or the "exact circumstances" of the occasion. The second is that such evidence is probative of the maintenance of the relationship notwithstanding the absence of evidence of the date of the occasion or "exact circumstances" of the occasion.

S229B(1A) does not do more than make the evidence probative. It does not ascribe any particular weight to the evidence. In that respect it may be contrasted with provisions which make a particular form of evidence prima facie evidence and conclusive in the absence of evidence to the contrary. Nor does the section deem proof of an offence of a sexual nature on three occasions to be sufficient evidence of the maintenance of a relationship.

Although the exceptions will be factually uncommon, there seems to be no reason to suppose that s229B(1A) was intended to have the effect that proof of three acts of a sexual nature over a period alleged in the indictment would be automatically sufficient to establish the element of maintenance of a relationship. Circumstances where proof of only three acts might be sufficient can be suggested. For example, if an adult and a child were proved by clear evidence to have arranged to meet for the purpose of having sexual intercourse on each occasion when she was allowed out on leave from boarding school, but their arrangement and evidence of their intention to continue with it was discovered after only three such occasions, such evidence may be sufficient to satisfy a jury beyond reasonable doubt that the adult was maintaining a sexual relationship with the child. On the other hand there is no reason to think that the section was intended to apply if what is proved are three random or opportunistic incidents such as a case where, over a period of time, an adult and a child meet unexpectedly and without arrangement at a place of entertainment and on each occasion decide to have sexual intercourse during the course of the evening.

While both of these examples relate to mutually agreed relationships, a sexual relationship,

for the purpose of the section, does not need to have that characteristic. The "relationship" with which the section is concerned is some kind of connection with the child. having sufficient habituality and having a sexual content, whether or not the complainant's attitude towards the relationship is favourable or not. S229B(1A) is negative in form

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in the sense that it does not say what is sufficient to prove the offence but says that a conviction cannot occur without proof of a minimum of three occasions. The words following "and" are not a statement that proof of three occasions is sufficient to establish the offence. The words, are an evidentiary provision directed to the problem of sufficiency of particularisation, the effect of which is to make evidence admissible and to give probative effect to evidence of doing an act of a sexual nature notwithstanding that the evidence does not disclose dates or exact circumstances of those occasions. What it achieves is to allow the threshold issue of three occasions to be proved by evidence which does not particularise the date or exact circumstances of the incident. The principles relating to the sufficiency of particularisation in light of this provision are discussed at length in R v Thompson (1996) 90 A Crim R 416 and do not require further elaboration in this case.

Because of the structure of s229B sufficient evidence must be led to prove the maintenance of a relationship. Often, of necessity, it will include evidence of a particular kind or particular kinds of conduct occurring on multiple occasions without the complainant being able to specify the precise occasion and without the complainant being able to be precise about the details of individual occurrences other than to say that particular kinds of conduct occurred on frequent occasions. This lack of detail creates some potential for unfairness to the accused, as was pointed out by Fitzgerald R in Kemp (No 1). As Kemp (No 1) also indicates, in such cases it is important that the trial judge's summing-up include whatever directions are necessary to ensure that the accused's trial is fair. In particular it must address the special risk of unfairness arising from the generalised nature of the allegations.

The kinds of considerations to be taken into account in determining the limits of "context" evidence where specific offences alleging single acts are charged are succinctly set out in R v Beserick (1993) 30 NSWLR 510, 522-523 in the judgment of Hunt CJ at CL. The passage is as follows:

"So far as concerns the second of the balancing operations (the discretion to reject the evidence upon the basis that its probative weight is outweighed by its prejudicial effect), the stage will inevitably be reached where the evidence of other sexual activity between the complainant and the accused will no longer reasonably be required either to establish the guilty passion (or the sexual desire or feelings) of the accused for the complainant or to place the evidence of the offence charged into a true and realistic context, and it does little or no more than emphasise that the accused has a propensity for committing crimes of the nature charged or crimes of a similar nature. When that stage has been reached, trial judges should be firm in excluding the evidence tendered.

.....

Obviously enough, no hard and fast rules could be laid down as to how this difficult discretion should be exercised. To some extent, it may depend upon the nature of the issues raised by the accused. Usually, however, it will depend to a very large extent upon how the Crown has framed its case.

Where the sexual activity between the complainant and the accused has taken place over a long period, it is the usual practice of the

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Crown to charge the accused in relation to a number of 'representative' incidents which sufficiently reflect the total criminality involved, spread over the whole of that period. Provided that each such incident is sufficiently specified (S v The Queen (1989) 168 CLR 266), there could be little doubt that in most cases the whole of the sexual activity between them over that period would quite properly be admitted in order both to establish the desire or feelings of the accused for the complainant at the time of each incident giving rise to an offence charged and to place such incident into its true and realistic context. Once evidence is given that the accused has committed a number of the offences charged, the additional prejudice created by evidence showing that he has committed other offences as well will be much the same whether those other offences be few or many in number. But, even in such a situation, there will be cases where the jury may be distracted by the multiplicity of such other offences from impartially considering the evidence related to the offences charged, and there will be other cases where the offences charged are so far separated in time that evidence of all other sexual activity between the complainant and the accused is no longer reasonably required for either of the two purposes for which it is ordinarily admitted."

Where acts described in general terms are said to be direct evidence of the existence of and nature of a relationship as in a charge under s229B it is difficult to see why such evidence would ordinarily be excluded in the exercise of discretion. Hunt CJ at CL's observation that once evidence is given that the accused has committed a number of the offences charged, the additional prejudice created by evidence showing that he has committed other offences as well will be much the same whether those other offences are few or many in number has particular force in this context as well. If the Crown were to attempt to lead evidence of acts outside the period alleged as the period of the relationship the question of exclusion in the discretion of the trial judge would plainly be enlivened. It may be unlikely that the Crown would seek to lead evidence of events of that kind. However, if it were to attempt to do so not only the question of discretionary factors but also the question of relevance would need to be addressed in deciding whether the evidence should be admitted. In the first instance the question is whether it is reasonably necessary to call it. If not the evidence ought to be excluded. In the second instance the question is whether it is admissible at all.

Mr Connolly submitted that generalised evidence of touching should not have been admitted on count 1 as it was "evidence of propensity" and was seriously prejudicial and unnecessary. He submitted that the substance of the relationship alleged was to be found in the acts charged in counts 2 to 7. He submitted that those acts provided ample evidence of the relationship without the need to introduce "minor acts". The Crown's leading of the generalised evidence undermined the accused's fair trial. This argument was linked with the submission that the admission of the evidence was calculated to erode the direction that there was no corroboration of the complainant's evidence with respect to counts 2 to 7. In considering this argument it is necessary to deal first with what is in my view a misapprehension in the appellant's submissions of the operation of s229B.

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Mr Connolly submitted that s229B defined a "statutory relationship" constituted by three acts of the kind defined. He submitted that the requirements of the section were fulfilled by proof of three such acts. He submitted that the section should be read as providing that "an act ... on three or more occasions ... shall be ... probative of ... the relationship". I have explained earlier in these reasons my view of the proper construction of s229B. Mr Connolly's submission was that the learned trial Judge had erred in concluding that while proof of three acts of a sexual nature was a minimum requirement the jury may look at other acts not

specifically charged. Mr Connolly's submission was essentially that evidence of the acts of touching was unnecessary because the requirement of the section had already been satisfied and that, being propensity evidence, it was dangerous to admit it. He further submitted that the jury would have been confused by the learned trial judge's references to the generalised evidence of the other women of touching as being supportive of the complainant's evidence of touching while saying there was no corroboration of counts 2 to 7. He submitted that the direction relation to support for the allegations of touching detracted from the force of the direction about the lack of corroboration in respect of the individual offences in counts 2 to 7.

In my view it was not correct that proof of count 1 was necessarily achieved by proof only of three of the specific acts charged in counts 2 to 7. It was in my view open to the Crown to lead evidence of other acts of sexual familiarity which the accused denied or explained as innocent contacts in the ordinary course of family life. I should mention the argument put by Mr Connolly to the effect that the learned trial judge misstated in his summing-up that it was common ground that there were touchings. This turned on an analysis of the evidence in which it was submitted there were two separate categories. The first included accidental touchings, horseplay and legitimate manifestations of affection, as to which there was a measure of agreement. The second was a range of illicit touchings, varying descriptions of which were given by Crown witnesses, which were denied by the accused. In directing the jury on this matter the learned trial judge told the jury the evidence of Kristy Campeanu went beyond that of the others. He told them to consider any conflicts detected between the complainant's evidence and that of the other women, reminding them that if they did that might lead to doubting the complainant's evidence on the points of conflict or generally. He told them that if they accepted the evidence of one or both of the other women it may allow them to be more comfortably satisfied that the complainant was right in claiming that the appellant had touched her sexually. He reminded the jury that there was no corroboration on counts 2 to 7 and that only the complainant gave evidence about them. He told them that the evidence of touchings was limited to count 1 and that they were not to use it in determining guilt on counts 2 to 7. In my view the direction is adequate. It follows from what has been said that in my opinion the learned trial judge did not err in admitting the generalised evidence of touchings on count 1. The direction given on corroboration and the use that could be made of the evidence of the touchings were, in combination, adequate to ensure that the jury understood that the evidence on counts 2 to 7 was uncorroborated and that any support found in the evidence of the other women for the complainant was only related to count 1. The direction as to the use that the jury could make of the evidence of the other girls was in my view

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adequate. The remaining question is the submission that the evidence of the touchings was inadmissible because there was a "reasonable possibility" that it was the product of concoction by the three girls acting in collusion.

Reliance was placed on the discussion of similar fact evidence and propensity evidence in Hoch v The Queen (1988) 165 CLR 292 and Pfennig v The Queen (1995) 182 CLR 461 and on dicta in the judgment of Fitzgerald R in Kemp (No 1) at 398 to the following effect:

"... there are obvious problems associated with evidence of the relationship between a complainant and an accused which alleges the commission of other offences by the accused and hence, because of his criminal conduct or character, his propensity to offend, leading in turn to an inference that he committed the offence or offences with which he is charged. As a matter of principle, it is difficult to perceive why the admissibility of such evidence should not be subject to the test for propensity evidence established in Hoch v R (1988) 165 CLR 292 and Pfennig v R (1995) 182 CLR 461; however, that need not be decided in this case,

which is primarily, at least, concerned with the adequacy of the trial judge's summing-up."

S229B is an unusual offence in that it requires proof of at least an habitual course of conduct of a sexual nature in respect of a person under 16. It is an element of an offence that the conduct is of a sexual nature. In the present case that element was disputed by the appellant. When such an element is in dispute it is incumbent upon the Crown to lead evidence from which the jury may conclude that the relationship had a sexual character. In the present case the evidence included evidence of the complainant as to generalized acts of sexual familiarity and evidence of two other girls that they had seen acts fitting that description done by the appellant to the complainant even though they were not identifiable as relating to the same instances described by the complainant. In my view the evidence of each of the girls was of primary facts from which the jury was asked to find that the relationship between the appellant and the complainant alleged in the count 1 had a sexual character. The evidence was in my view admissible as being directly relevant to that issue or to that element of the offence. It was not admitted as evidence of similar facts, or of propensity or relationship in the sense that those words were used in Hoch and Pfennig. The following passage from Hamzy (1994) 74 A Crim R 341, 347, a drug case, makes this point succinctly.

Speaking of the principle relied on by the Crown that individual acts of supply which could be properly identified as part of the same enterprise could be charged in one count. Hunt CJ at CL, with whom Abadee and Simpson JJ agreed, said:

"Next, it is said that proof of an activity or enterprise in accordance with this principle permits the Crown to call what is in effect propensity evidence without the protection of proper directions as to the use which may legitimately be made of that evidence. But the evidence is not of mere propensity to commit this particular crime. Each individual act of supply is directly relevant to the issue which the Crown seeks to prove - namely, in the present case, that the appellant was engaged in the criminal enterprise of dealing in heroin. There is nothing said in either Hoch (1988) 165 CLR 292; 35 A Crim R 47 or Harriman (1989) 167 CLR 590; 43 A Crim R

221 which would prevent such a course being followed. If it is thought that a direction is needed in the particular case in order to avoid any misuse by the jury of such evidence, such a direction should be given: cf Marley (1932) 47 CLR 618 at 621; Harriman (at 609, 235); Martin (1990) 48 A Crim R 208 at 212."

The fact that the possibility of collusion exists does not affect the basis of admissibility in the same way that evidence of similar facts or propensity is affected by the possibility of collusion. In the case of similar fact or propensity evidence, the basis of its admission is that it can be used to prove the charge under consideration by revealing that it is an instance of a pattern of activity proved by witnesses who were unlikely to give similar accounts unless the happenings sworn to occurred. Once the factor of unlikeliness is removed from that kind of case because of the possibility of collaboration or collusion, the capacity to infer to the requisite standard that the only reasonable explanation of the evidence that similar events occurred is that the witnesses have independently observed them occurring is destroyed. The basis of admissibility of similar fact or propensity evidence to prove a count relating to a specific event on a specific occasion is different from that of evidence tending to prove the nature of a relationship between two people where the relationship is alleged on one hand to be innocent and on the other, illicit. That result follows from the unusual nature of the offence which requires proof of at least a sufficient degree of habituality to be properly described as a relationship (as opposed to several isolated acts), and that it is sexual in character. The possibility of collusion goes only to credibility, not admissibility.

It may be accepted as Fitzgerald P and Shepherdson J said in Kemp (No 1), that the nature of the offence in s229B imposes a heavy responsibility on the trial judge to ensure that the inherent disadvantages in the conduct of the defence case in a charge of that kind are neutralised by careful consideration of the extent of the evidence that should be admitted and by directions that explain properly the use to which evidence of generalized acts can be put. However, because the legislature has created an offence of this kind with its inherent difficulties for an accused person the scope of the evidence which may be led to prove its elements cannot be restricted by considerations which might apply to similar fact or propensity evidence in cases of offences constituted by single individual identifiable acts. In my view the appellant cannot succeed on the argument made.

Ground four alleges that the learned trial judge failed to properly direct concerning the importance of evidence corroborating the appellant in testing the complainant's allegations. The complaint is that in the case of the specific incidents charged in counts 6 and 7 there was other evidence which may have had a bearing on the acceptability of the complainant's evidence. It was submitted that it was therefore necessary to explain to the jury that this evidence was important, firstly, in deciding the issue of guilt on counts 6 and 7 and secondly, as a test of the complainant's credit in relation to the other counts.

With respect to count 6 the complainant's evidence was that an act of sexual intercourse occurred in front of a heater in the living room on an occasion before the other members of the household arrived at Mt Morgan. She also gave evidence that after the other members of the household had arrived another four or five acts of sexual intercourse occurred in the living room late at night at times when Kristy Campeanu and Shane were not

present. The complainant was at Mt Morgan for about one month. Kristy Campeanu gave evidence that in the period after she arrived at Mt Morgan and while the complainant and Faylene were living there, she and Shane slept in front of the heater. The complainant agreed that Kristy and Shane slept in front of the heater after they arrived but she did not recall that they slept there all the time. There was some uncertainty whether Kristy and Shane had departed from the premises before the complainant left. She agreed that she had said on a previous occasion that they had, but she was cross-examined on the basis which was supported by other evidence that Kristy and Shane had moved into the bedroom vacated by the complainant and Faylene when they departed.

There was a lack of precision in Kristy's evidence about the date of her arrival. She and Shane had travelled independently of the balance of the household. The evidence ranged between "about two weeks" after the complainant and the appellant to "shortly after the family". There was other evidence suggesting that they had arrived four or five days after the complainant and the appellant. Kristy said that she and Shane had spent every night at home except one when they arrived home at about 11pm. She agreed there may have been other occasions when they went to the local hotel but said that all members of the household went together.

Mr Connolly's address, which was recorded, occupies about six pages of transcript on this question. It includes verbatim quotations of relevant parts of the evidence and its effect was similar to what he says the learned trial judge should have said to the jury. Mr Connolly's submission in this Court is that the learned trial judge should have told the jury that the credit worthiness of the complainant's evidence on the specific counts may be diminished by a doubt about her evidence of generalised acts and, in that regard, the evidence of Kristy Campeanu may have that effect because of the inconsistencies between her evidence and the complainant's as to the opportunity for the unparticularized offences at Mt Morgan to be committed. A trial judge must be given some latitude in constructing his summing-up. In

particular he is not obliged to repeat in full detail the submissions of counsel. However, any individual factors relating to a particular count must be adequately put in respect of that count even if directions generally applicable to all counts have been put in a more general or global way. The summing-up shows that the learned trial judge substantially reproduced a passage from Fitzgerald P's judgment in Kemp (No 1) in his general directions. He said that if the jury disbelieved the complainant's general evidence and if they thought that damaged her credit they could take that into account in considering specific allegations on counts 2 to 7. The fact that the complainant's credit was impaired might disincline them to accept the specific allegations. He also told them that if they disbelieved or doubted what the complainant said about specific allegations, that may tend to weaken or destroy her generalised evidence or her evidence about the other specific acts.

In discussing propensity evidence he invited the jury to consider any conflicts detected between the complainant's evidence and the evidence of Faylene and Kristy. He told them that if they found any discrepancies, that might lead them to doubt the complainant on the points of conflict or generally. In respect of count 6, he told the jury that defence counsel had invited them to doubt the complainant's evidence of similar performances happening a number of times in front of the heater after the family

members had arrived. He reminded them of Mr Connolly's submission that nothing had happened because Kristy would have seen it.

With respect to count 7, the conflict in the evidence was concerned with the time the appellant's vehicle spent at Whybrow's house where the offence was alleged to have occurred. The complainant said that there was only one occasion when they went to the house. She said that she was sitting in the car when the neighbour, Mrs Hanson, came over and after Mrs Hanson left she and the appellant went into the house. She said that there was sexual activity in the house for about 25 minutes after that. The evidence of Mrs Hanson was that she heard a car pull up at the Whybrow house from which she had just come after watering the garden. She went over and spoke to the appellant who told her he was checking the answering machine. She then went home. She said it was about three minutes from when she heard the car arrive until she heard it leave. The appellant gave evidence that the complainant sat in the car while he spoke to Mrs Hanson, following which he went into the house to check the answering machine. He said they left after about five minutes.

In relation to count 7 the learned trial judge reminded the jury that the effect of the defence evidence was that the whole visit took only five minutes or so. He reminded the jury of Mr Connolly's submission that the whole incident was not believable especially because the complainant described a far longer sexual encounter than Mrs Hanson's estimate of the time allowed for. He then said "they are obviously questions for you as to the reliability of Mrs Hanson's estimate. You heard evidence about when she first made it". The last comment is a reference to Mrs Hanson's evidence that she was first asked to recall the incident about two years after it happened. There was an application for redirection but it appears to have been on the basis of a misapprehension that the learned trial judge had said "if it is the same incident" during the course of the summing-up, whereas the transcript of the summing-up actually records that the learned trial judge said that Mr Connolly's submission was that "it is the same visit being talked about". Mr Connolly submitted that a request by the jury for redirection in respect of count 7, in which the jury asked for a reading of the evidence about what happened at the Whybrow house indicated they had problems with count 7 and submitted that a proper direction of the importance of the contradictory accounts would have been most important to their deliberations.

The issue of the conflicting evidence as to the time spent at the house was the paramount issue in respect of count 7. The learned trial judge in his summing-up focused upon it and the reading of the relevant evidence at the request of the jury would have again brought it clearly to the jury's minds.

In my view the learned trial judge followed the statement of principle in the judgment of Fitzgerald P in Kemp (No 1). The jury was told of the way in which they should use any discrepancies they found in considering the complainant's creditworthiness. The learned trial judge also drew the jury's attention to the particular factors affecting the credibility of the complaints in respect of counts 6 and 7. In my view the directions, in the context of the summing-up, were adequate to focus the jury's minds upon how they should approach the question of credibility. This ground is not made out.

Ground 5 alleges that the learned trial judge failed to direct the jury properly about the lack of specificity in the complainant's generalised accounts of the sexual acts alleged. Essentially the complaint is that while

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the learned trial Judge explained the relevant principle developed in Kemp (No 1) in general terms it was necessary also to give the jury guidance as to how they were to apply it to the facts in issue in the case. The submission is really that the conflicts in the evidence relied on by the defence in relation to ground 4 should have been used to give examples of the operation of the principle at the time when the general direction was given. The learned trial judge's statement of general principle must be read in the context of the summing-up as a whole. The general statement is not the only reference to the application of the principle. Once it is found that the defence has been sufficiently put (as it has been in respect of ground 4) the ground cannot succeed. Ground 6 alleges a failure to properly direct the jury as to the importance of possible motive in assessing the complainant's allegations. In his address defence counsel had developed an argument that the complainant had been sent by her father to live with the appellant and her sister because of the complainant's uncontrollable behaviour while living with her father. The complainant had returned to her father on a few occasions and had expressed a wish to resume living with him but he had said she would be better off living in the appellant's household. The defence submitted that this rejection by her father may have triggered a false complaint against the appellant because of other circumstances operating on her mind at that time. There was evidence that she had told a friend, Ms Barnes, who was said to have formed an instant dislike of the appellant, that she had been sexually molested by her mother's de facto husband. It was submitted that when Ms Barnes was pressing her to make a complaint against that person, the complainant in her overwrought state suddenly made allegations against the appellant. The defence argument was that she may not have consciously realised the emotional reason for the outburst, which was directed against a person she had professed to like and in regard to whom she had denied on three occasions that there had been any impropriety. The complaint is that the learned trial judge put this aspect of the defence case to the jury in a disjointed and inadequate fashion. While there was evidence that she was overwrought, that she had ambivalent feelings towards her father and was under pressure to make the complaint of molestation by the other man there was nothing in the evidence suggesting that the explanation offered by defence counsel was any more than speculation. In dealing with the defence submissions about the complainant, the learned trial judge referred to an allegation that the complaint was fomented by Ms Barnes who knew of the allegations of molestation by the other man and who had a "child molesting mania". He referred to evidence that the complainant had been in touch regularly with her father and that he had noticed nothing strange or troubled about her. He also referred to a submission that the complainant was happy living with the appellant but unhappy and unruly when she returned to her father. Reference was also made to the complainant's denials of

impropriety on the part of the appellant. The learned trial judge directed the jury in relation to the suggested explanation in the following terms:

"I do not think I need go into it in detail, it would be fresh in your minds, but as I understood it it centred on the repeated rejection of Estelle by her own father and a curious way of dealing with that by making and persisting in serious complaints against Mr Kemp. Perhaps the reasoning is that if this complaint appeared to have anything in it Mr Ivins would simply be forced to take the daughter

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back. Mr Connolly was quite correct in saying to you it is not his responsibility to prove to you exactly why false complaints might be made and persisted in. He has offered that suggestion to you as one which might be of assistance."

It was apparent from the transcript that the learned trial judge had a problem with his notes at one point in this part of his summing-up. A redirection was sought and given. After referring to the problem with his notes the learned trial judge reminded the jury of Ms Barnes' concern and the question of the other molestation. He then told the jury that the complainant was a "very upset" girl. He then referred, in terms which at least on paper do not appear all that clear, to a passage of evidence illustrating this. He then said:

"That evidence which bears on Estelle's state at the time she made the complaint you may take into account in considering Mr Connolly's suggestion to you as to what the processes might have been whereby she made a complaint against his client which the defence say is completely baseless."

The complaint really is that because most of the direction was contained in the summing-up itself but one accidentally omitted factor from the appellant's submission was contained in a redirection, the learned trial judge's duty to explain an important part of the defence coherently had not been discharged adequately. In my view the directions together dealt with the essential elements of the explanation offered for the making of the complaint which the defence said was false. Therefore the ground is not made up.

Ground 7 is concerned with the way in which the learned trial judge dealt with submissions made by the Crown Prosecutor that certain of defence counsel's submissions were improper. To put the argument in context, defence counsel addressed first, followed by the Crown Prosecutor. At the conclusion of the Crown Prosecutor's address Mr Connolly complained to the learned trial judge in the absence of the jury about the content of the Crown Prosecutor's address. The trial judge indicated that he would not be endorsing any charge of impropriety. The summing-up commenced but on the resumption of proceedings the following morning, prior to the summing-up being resumed and again in the absence of the jury, Mr Connolly again raised the issue. The learned trial judge indicated that he proposed to direct the jury that Mr Connolly had not done anything improper, unethical or beyond what was done by counsel in criminal trials. The second last topic dealt with the summing-up was this matter. The learned trial judge told the jury that the Crown Prosecutor had prosecuted the case fairly and that defence counsel had "put up a proper and vigorous defence of the kind which any accused person would expect". He then faced the question of impropriety squarely and told the jury that defence counsel's conduct of the case did not go beyond the bounds of what is properly or usually encountered in the court and that he had not done anything outlandish or unethical. He warned the jury against visiting any annoyance they might have with counsel upon the accused or the Crown. The thrust of the submission in support of this ground was that the fact that those directions had not been given at an early stage of the summing-up would have conditioned the jury to assume that there was some substance in the allegations and to discount the defence arguments. It was submitted that by the time the trial judge dealt

with the matter the jury

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would have little memory of the defence arguments because the Crown Prosecutor's comments would have diverted their attention from those arguments and devalued them. It was submitted that it was incumbent on the learned trial judge to redress the effect of the remarks at the beginning of his summing-up and that he had failed to do so.

The first of the specific matters of complaint is that the prosecutor told the jury that the defence was asking them to believe that the complainant was telling "a pack of lies". Mr Connolly said that he had been careful to avoid any allegation of lying. The defence hypothesis was that she, for deep-seated psychological reasons, may have convinced herself that the complaint was true. The second was that the Crown Prosecutor had alleged that the defence was using, "tactics of rumour, suspicion and smear" in suggesting to the jury that they might attribute to the girl greater sexual experience with persons other than the accused person than she had admitted to. Defence counsel had invited the jury to infer that because of her uncontrollable behaviour at times including an occasion where she had gone travelling with some youths without parental consent she may have had sexual intercourse on more occasions with persons other than the accused. It was also submitted that because the appellant had had a vasectomy and it was unnecessary for him to use contraception, the jury might infer that she had acquired knowledge of the withdrawal method of contraception from someone else. The complainant was not cross-examined on any of these matters notwithstanding that she was under cross-examination for the equivalent of a whole sitting day.

The failure to cross-examine the girl on these issues was explained in the appellant's submissions before this Court as a tactical approach to avoid alienating the jury by attacking the girl. It was submitted that the defence had chosen to rely on what it said were legitimate inferences from the evidence of unruliness and the girl's knowledge of the withdrawal method that she must have wider sexual experience than she was prepared to admit in evidence-in-chief. The defence submitted that this was a matter that went to the issue of her credit, which was paramount in the case. At the end of the evidence, there was neither evidence of other sexual conduct nor evidence that she had learnt the withdrawal method in any other way than she had said. In my opinion, in the circumstances, the comments are robust but do not exceed proper limits.

It was also submitted that the Crown Prosecutor's reference to certain defence submissions as being improper went beyond proper bounds. The Crown Prosecutor focused on comments made by defence counsel to the effect that the jurors would have seen in the press that accusations of child molestation were often made and were sometimes true and sometimes not. Defence counsel had asked the jury not to be brainwashed into equating suspicion with proof. In the context of criminal advocacy, I do not think that the defence submission went beyond what was legitimate.

The third aspect of the matter is concerned with a comment that improper submissions had been made from the bar table in connection with the evidence of Mrs Hanson. This arose from a submission by defence counsel that, being a resident in a small country town, Mrs Hanson would have begun to fix relevant events in her memory as soon as a person was charged with an offence, if she knew anything concerning the offence. In connection with this aspect, it is to be inferred from defence counsel's address that counsel and the instructing solicitor had conferred with the

witness prior to the trial. The opportunity existed at the trial to ask the witness at what point of time she first became aware that the appellant had been charged in respect of the act of sexual intercourse alleged to have been committed at Whybrow's house (count 7). This was not done. The only evidence given or sought on the issue of lapse of time between the incident and recall was that Mrs Hanson had first been asked to recall the incident about two years after it happened. It was amply established that Mt Morgan is a small country town. However, the difficulty from the defence's point of view in complaining about a vigorous comment by the Crown Prosecutor is that the inference that the defence asked the jury to draw was inconsistent with the evidence. If, for tactical reasons, the defence chooses not to confront the issue directly there can hardly be a legitimate complaint if it is pointed out vigorously that the evidence does not support the inference.

Mr Connolly's submissions reflected a concern that certain aspects of his address to the jury had been described as improper. The learned trial judge's directions, which expressly denied any impropriety by either counsel, have been referred to above. Because of the ambiguity of the word "improper", some care must be taken in its use in addresses to the jury. At the top end of the scale, it may convey that what was done was unethical, reprehensible and deserving of censure. At the low end of the scale, it may mean no more than that conduct has transgressed limits that are ordinarily observed without any implication of lack of morality. It is therefore better, if it is felt by opposing counsel that a submission has gone beyond what is justifiable, to choose a more precise expression to convey that notion to the jury.

Having said that, intemperate use of language in an address by a Crown Prosecutor can result in a miscarriage of justice and lead to the setting aside of the conviction. It is also important that the Crown Prosecutor address in such a way that the jury is not distracted from the true issues. Where other words can be used to express a submission which may be properly made it is better if potentially inflammatory words are avoided. In a case where complaint is made about the content or tenor of the Crown Prosecutor's address the issue is whether there has been a real risk that the remarks wrongly influenced the verdict, thus resulting in an unfair trial. (R v Ciseau (CA 470/1993; Court of Appeal, 8 November 1994, unreported.) In my view the learned trial judge adopted a course which meant that almost the last thing that they heard from him in his summing-up was a refutation of the suggestion that defence counsel had acted improperly and that the conduct of the defence had not gone beyond the bounds of what was properly or usually encountered in the court. The approach adopted by the learned trial judge of ensuring that it was uppermost in the minds of the jury as they retired that the conduct of the defence was not open to question in any way was calculated to ensure that any of the concerns which Mr Connolly expressed were dissipated. In my view it is not established that there was a real risk that the remarks of the Crown Prosecutor wrongly influenced the verdict or resulted in an unfair trial.

The final ground, ground 8, was that it was dangerous to convict the appellant and that the conviction should be set aside. Mr Connolly adopted the categories referred to in M v The Queen (1994) 181 CLR 487, 493 to the effect that this ground could be availed of where there was some feature of the case raising a substantial possibility that the conclusion itself was

wrong or that the jury may have been mistaken or misled in the manner in which it reached the conclusion. To the extent that the ground relies upon wrongful admission of "propensity evidence" and the medical evidence, for the reasons that have been given in connection with those specific grounds there is no sustainable basis for complaint.

The other aspect of the submission was that the jury failed to give proper weight to defects in

the uncorroborated evidence of the complainant which should have raised a reasonable doubt in their minds. In this connection it was submitted that the complainant's account of the acts in counts 2 and 3 was unlikely because the specific acts alleged and other similar unspecified acts were alleged to have occurred in a place in the family dwelling where others may well have been in a position to observe them. With respect to counts 4 and 5 it was submitted that while there was opportunity for the acts to be committed without observation by others there was no evidence other than that of the complainant. Further in respect of counts 6 and 7 it was submitted that they were improbable in view of the evidence of Kristy Campeanu and Mrs Hanson. It was submitted that these defects were compounded by the lack of any indication by the complainant at the time that such acts were occurring and her three denials to the police of any misconduct by the appellant. It was further submitted that it was unlikely that the appellant, knowing that the police had suspicions, would persist in a course of conduct of the kind alleged. It was submitted that because of these matters the verdicts must be set aside. The jury was directed in terms which I consider adequate about the issue of discrepancies and what use could be made of them. It had the advantage of seeing the complainant and the appellant giving evidence in respect of counts 2 to 7 and, on count 1, the other girls as well. Reading the transcript does not create the impression that the verdict reached was not reasonably open to the jury and in my opinion the verdict should not be set aside on this ground.

The ground, to the extent that it relies on misdirections alleged under grounds 5, 6 and 7, cannot succeed because for reasons developed in respect of each of those grounds the directions were adequate and it cannot be therefore established that the jury were misled as to the process by which they could reach their decision.

None of the grounds of appeal are therefore made out. The appeal is dismissed.

Order
Appeal dismissed.

Solicitors: Legal Aid Office (appellant); Director of Prosecutions (Crown).

D L BULLOCK,
Barrister