# HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

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KRM APPELLANT

AND

THE QUEEN RESPONDENT

*KRM v The Queen* [2001] HCA 11
*8 March 2001*
M11/2000

**ORDER**

*Appeal dismissed.*

On appeal from the Supreme Court of Victoria

**Representation:**

P F Tehan QC with C B Boyce for the appellant (instructed by Allan McMonnies)

G R Flatman QC with C M Quin for the respondent (instructed by Solicitor for Public Prosecutions, Victoria)

## CATCHWORDS

## KRM v The Queen

Criminal law – Practice and procedure – Sexual offences – Multiple counts – One count of maintaining relationship with child under 16 pursuant to s 47A *Crimes Act* 1958 (Vic) – Whether propensity warning required when presentment involves multiple counts of sexual offences and relationship count pursuant to s 47A – Whether propensity warning required in respect of individual acts that form basis of a charge under s 47A – Use of "separate consideration" warning – Operation of proviso.

Criminal law – Sexual offences – s 47A *Crimes Act* 1958 (Vic) – Whether legislature can modify the need for particulars of criminal charges – Whether evidence of uncharged sexual acts admissible to prove the nature of the relationship between the accused and the complainant.

Evidence – Propensity evidence – "No rational view" test – Application to relationship evidence.

*Crimes Act* 1958 (Vic), s 47A.

1 McHUGH J. Section 47A of the *Crimes Act* 1958 (Vic) ("the Act")[1] relevantly provided[2]:

> "***Sexual relationship with child under the age of 16***
>
> (1) A person who maintains a sexual relationship with a child under the age of 16 to whom he or she is not married and who is under his or her care, supervision or authority is guilty of an indictable offence.
>
> (2) To prove an offence under sub-section (1) it is necessary to prove –
>
> (a) that the accused during a particular period (while the child was under the age of 16 and under his or her care, supervision or authority) did an act in relation to the child which would constitute an offence under a particular provision of this Subdivision or Subdivision (8A) or (8B); and
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> (b) that such an act also took place between the accused and the child on at least two other occasions during that period.
>
> (3) It is not necessary to prove the dates or the exact circumstances of the alleged occasions."

2 The appellant was tried by a judge and jury in the County Court of Victoria on a presentment that contained a count under s 47A of the Act. The presentment also contained another 17 counts charging him with specific sexual offences against the child with whom he was charged with maintaining an unlawful sexual relationship contrary to s 47A. The trial judge did not direct the jury that, if they found the appellant guilty of maintaining that relationship, they were not to use that finding or the acts constituting the offence to reason that he was the kind of person who was likely to have committed any of the specific sexual offences with which he was charged. Nor did the judge direct the jury that, if they found the appellant guilty of one or more of the 17 counts, they could not use that finding or findings to reason that he was the kind of person who was likely to commit the acts the subject of the s 47A count.

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**1** The section has been amended since the date of the appellant's offence.

**2** Other jurisdictions have created similar offences: *Crimes Act* 1900 (ACT), s 92EA; *Crimes Act* 1900 (NSW), s 66EA; *Criminal Code* (NT), s 131A; *Criminal Code* (Qld), s 229B; *Criminal Law Consolidation Act* 1935 (SA), s 74; *Criminal Code* (WA), s 321A. In Tasmania the offence relates to young people under 17 years: *Criminal Code* (Tas), s 125A.

3 The principal question in the appeal is whether a trial judge must *always* give either or both of those directions (a "propensity warning") when the presentment includes a count under s 47A and counts alleging other sexual offences. If that question is answered in the negative, a further question in the appeal is whether the trial judge erred in not giving a propensity warning, having regard to the evidence and circumstances of the case.

4 In my opinion, there is no absolute rule that a judge must always give a propensity warning when the presentment contains a count under s 47A or its equivalents in other jurisdictions. Nor is a judge always required to give such a warning in respect of the individual acts that form the basis of a charge under s 47A or its equivalents. Ordinarily, no such warning is required. The circumstances of some cases, however, may require the judge to give a propensity warning. But ordinarily, it will be sufficient if the judge directs the jury that they must consider each count and the evidence relating to each count, separately.

The factual background

5 The appellant and the complainant's mother were married when the complainant was two years old[3]. In October 1992, the appellant confessed to his wife that he had been sexually molesting the complainant[4]. He took an overdose of tablets and spent a night in hospital. Five months later he left home, never to return. In 1995, the complainant's mother arranged for the complainant to make a statement to the police about the appellant's conduct. He was later charged with various sexual offences against the complainant.

6 The presentment alleged various acts of penile penetration or other sexual misconduct between June 1984 and February 1986 (counts 1 and 2), between March 1988 and December 1988 (counts 3, 4 and 5), between March 1990 and November 1990 (counts 6, 7 and 8), between March 1991 and October 1991 (counts 9 and 10), between August 1991 and October 1991 (counts 11 and 12), in November 1991 (counts 13 and 14), between September 1991 and March 1992 (counts 15 and 16), and between March 1991 and March 1992 (count 17). Count 18 of the presentment alleged that, between August 1991 and March 1992, the appellant maintained a sexual relationship with the complainant "in that he introduced his penis into the vagina of [the complainant] … on at least [three] occasions during that period".

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**3** *KRM* (1999) 105 A Crim R 437 at 438.

**4** *KRM* (1999) 105 A Crim R 437 at 438.

7 The jury convicted the appellant on all counts[5].

8 He sought leave to appeal against his convictions to the Court of Appeal of the Supreme Court of Victoria (Phillips, Batt and Buchanan JJA). Among the numerous grounds of appeal were grounds alleging that the trial judge had erred in allowing the count of maintaining a sexual relationship to go to the jury and in failing to give a propensity warning to the jury with respect to the relationship between count 18 and the other counts in the presentment.

9 The Court of Appeal dismissed the appellant's application for leave to appeal holding that a propensity warning is not required simply because the presentment contains two or more counts concerning the same victim, even if one of the counts is based on s 47A, a section that the Court thought created "an offence which may offend the sensibilities of an experienced criminal lawyer"[6]. Although the Court acknowledged that the facts of a particular case may require a propensity warning to be given[7], it held that nothing in the present case required that warning to be given[8].

The appeal to this Court

10 By his notice of appeal in this Court, the appellant contended that, where the presentment has a count alleging a breach of s 47A of the Act, the trial judge must direct the jury that, if they find that the accused has engaged in the sexual conduct the subject of that charge, they cannot use that finding to reason that he was the kind of person who was likely to have committed any of the other sexual acts that are the subject of other counts in the presentment. The appellant also contended that the jury must be directed that, if they find that the accused has committed any of the individual acts that are the subject of the s 47A charge, they cannot use that finding to reason that he is the kind of person who is likely to have committed any of the other sexual acts that are the subject of the s 47A offence.

11 Alternatively, the appellant contended in his notice of appeal that, by reason of the general nature of the complainant's evidence, the trial judge erred in law in not giving a propensity warning, even though no directions concerning propensity were sought at the trial. Originally, the complainant's evidence-in-chief was so unspecific that it is highly doubtful that her evidence was capable of

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**5** *KRM* (1999) 105 A Crim R 437 at 438.

**6** *KRM* (1999) 105 A Crim R 437 at 442.

**7** *KRM* (1999) 105 A Crim R 437 at 444.

**8** *KRM* (1999) 105 A Crim R 437 at 444.

proving beyond reasonable doubt that the appellant had maintained a sexual relationship with her during the period alleged in count 18. Near the end of her evidence-in-chief, however, the prosecutor asked her some further questions without objection:

> " ... towards the end of your evidence yesterday you were telling the jury that in the last six months before all sexual activity ceased there were occasions where sexual penetration and digital penetration took place and I think your words were 'on numerous occasions' or 'it was repetitious'? --- Yes.
>
> Do we take it from that, that it occurred on more than three occasions ---? --- Yes.
>
> --- during that period? --- Yes.
>
> And does that relate to the sexual penetration? --- Yes.
>
> The penile penetration? --- Yes."

12 The appellant contended that, because of the general nature of this evidence, the trial judge erred by not giving a propensity warning. This Court did not give the appellant leave to challenge the sufficiency of this evidence to sustain the charge under s 47A. Nevertheless, the appellant's submissions concerning a propensity warning inevitably led to discussion in this Court of the nature of the evidence to support the charge.

13 If counsel had objected to the form that the prosecutor's questions took, the objection must have been upheld. It may be, as counsel for the appellant conceded, that counsel who represented the appellant at the trial did not object to this evidence for tactical reasons. He may have preferred the evidence to be given in this compressed form rather than having a more detailed account of the incidents relied on to support the charge. Or he may have thought the generality of the claims would make a jury reluctant to convict the accused on the s 47A charge.

14 But, whatever the reason for the failure to object, it is a mistake to assume that evidence of the kind and the form in this case is sufficient to support a charge under s 47A. Section 47A(3) provided at the relevant time that it "is not necessary to prove the dates or the exact circumstances of the alleged occasions." But that does not mean that the charge could or now can be proved by a blanket assertion that on three or more occasions the complainant and the accused engaged in an act that falls within a category specified in s 47A(2). This was recognised by the Court of Appeal of the Supreme Court of Queensland when it said of the Queensland equivalent of s 47A that "it stops short of authorising

trials conducted as a contest between generalised assertions which can only be met by generalised denials"[9].

15 Section 47A operates in the context of an adversary system of criminal justice where an accused person is entitled to be given as high a degree of particularity concerning a criminal charge as the subject matter will bear. 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"[10]. These particulars are needed to ensure that the accused person has a fair opportunity to defend the charge.

16 Subject to the operation of Ch III of the Constitution, the legislature of the State of Victoria may modify – even abolish – the need for particulars of criminal charges. But an intention to do so should be imputed to the legislature only when it has enacted words that make its intention unmistakably clear. Courts should not lightly infer that a legislature has intended to abolish or modify fundamental principles of the common law such as the principle that an accused person must have a fair opportunity to defend a criminal charge. Here the legislature has made it clear that the prosecution does not have to prove the date or the *exact* circumstances of the offence. But that is all. It has not said that the prosecution need not give particulars or need not prove the general circumstances of each act constituting an offence.

17 The need for the prosecution to prove that "such an act also took place ... on at least two other occasions" indicates that the prosecution must prove the circumstances or occurrences surrounding each of the acts in sufficient detail to identify each "occasion". Reference to circumstances or occurrences happening at a particular time is the usual way of identifying or describing an "occasion". In the context of s 47A, where it would make no sense to describe the "act" as the occasion and where the date and the exact circumstances need not be proved, the term "occasion" should be understood as referring in a general way to the circumstances accompanying the "act". That this was the construction which the legislature intended to place on s 47A(3) is supported by the amendment to that sub-section which was made by Act No 81 of 1997. The amendment declares:

> "It is not necessary to prove an act referred to in sub-section 2(a) or (b) with the same degree of specificity as to date, time, place, circumstances or occasion as would be required if the accused were charged with an offence constituted by that act instead of an offence against sub-section (1)."

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

**10** *Johnson v Miller* (1937) 59 CLR 467 at 489 per Dixon J (emphasis added).

18 If the prosecution cannot give particulars sufficient to identify each of the three occasions relied on to constitute the charge, absent some special factor, the proper course will be to stay the proceedings on the s 47A charge.

The directions

19 The appellant provided this Court with a document setting out the relevant directions that he contended the trial judge should have given to the jury in this case. The proposed directions were comprehensive and lengthy and they included propensity warnings. In substance, however, the learned trial judge gave all of them, apart from the propensity warnings. In addition, his Honour directed the jurors that they had to consider each count separately, saying[11]:

> "There are, as you well know, 18 different charges ...
>
> The [appellant] is entitled, as is the Crown, to a separate consideration by you of each of the crimes charged. It may be that the same logic applies to some of them or all of them, but it would be quite wrong to say that simply because you found the accused man guilty or not guilty on one count, he must be guilty or not guilty as the case may be, of another.
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> Each count must be considered by you separately, in the light of the evidence that applies to it. You must ask yourselves as to each count separately, 'Am I satisfied beyond reasonable doubt by the evidence, that the accused is guilty of this crime?' If the answer to that question, is 'Yes', then you would find him guilty; if it is 'No', then of course you would find him not guilty."

Propensity evidence

20 To evaluate the appellant's submissions, it is first necessary to understand when and why propensity *evidence* is admitted in a criminal trial. Only then can it be determined whether a propensity *warning* is needed because of the presence of a charge brought under s 47A and similar sections or because of the evidence led in the particular case.

21 For more than a century, the common law has insisted, with few exceptions, that proof of a criminal charge cannot rest, in whole or in part, on any inference to be drawn from "the character and tendencies of the accused"[12]. As a result, it has generally excluded evidence that shows that the accused has

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**11** See *KRM* (1999) 105 A Crim R 437 at 443.

**12** *Dawson v The Queen* (1961) 106 CLR 1 at 16 per Dixon CJ.

previous convictions, or is a person of bad character or has committed other crimes or misdemeanours. If the evidence does no more than reveal the criminal or discreditable propensities of the accused or show that he or she is the sort of person who is likely to have committed the crime charged, the common law requires the evidence to be excluded[13]. But propensity evidence may be admissible at common law, according to the prevailing view in this Court, if "the objective improbability of its 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 of the offence charged"[14]. Moreover, according to the prevailing view, in determining whether the evidence is admissible, "the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused"[15]. Only when there is no rational view of the evidence consistent with the innocence of the accused is propensity evidence admissible.

22 In *Pfennig v The Queen*[16], I pointed out that courts have regularly admitted evidence disclosing the criminal propensity or bad character of the accused even though it could not meet the "no rational view" standard laid down in *Hoch v The Queen*[17] and later confirmed by the joint judgment of Mason CJ, Deane and Dawson JJ in *Pfennig*[18]. The clearest example is evidence of bad character led in rebuttal of a claim that the accused is a person of good character[19]. Other categories of evidence disclosing criminal conduct that have been admitted in criminal trials without satisfying the no rational view test include evidence showing an association with the crime scene[20] or the criminal

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**13** *Pfennig v The Queen* (1995) 182 CLR 461 at 480-481.

**14** *Pfennig v The Queen* (1995) 182 CLR 461 at 481-482.

**15** *Pfennig v The Queen* (1995) 182 CLR 461 at 483.

**16** (1995) 182 CLR 461 at 516, 523-528.

**17** (1988) 165 CLR 292 at 294-296.

**18** (1995) 182 CLR 461 at 481.

**19** *BRS v The Queen* (1997) 191 CLR 275.

**20** *R v O'Meally (No 2)* [1953] VLR 30.

venture[21] or possession of equipment which might have been used to commit the crime[22] or motive[23].

23 But one of the best known examples of these categories of evidence is "relationship evidence" – evidence which explains the nature of the relationship between the accused and the complainant[24] and which often tends to show that the accused is guilty of the offence charged[25]. Thus, in *O'Leary v The King*[26], evidence was admitted that, on the day and early evening of the killing, the accused, the victim and others had taken part in a "drunken orgy" at a bush camp and that, during the drinking, the accused had assaulted or threatened to assault persons other than the victim. Although the evidence showed violent and criminal conduct on the part of the accused, this Court held that it was admissible. Dixon J said that "[w]ithout evidence of what, during that time, was done by those men who took any significant part in the matter and especially evidence of the behaviour of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event"[27]. In holding that the evidence was admissible, Latham CJ, Dixon and Williams JJ said that it was admissible because it was "relevant"[28] or "logically probable"[29] or went "to show the probability"[30] that the accused was the killer. They did not require the evidence to be consistent with no rational view other than the guilt of

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**21** *Harriman v The Queen* (1989) 167 CLR 590. However, two of the Justices, Dawson and Gaudron JJ, applied the no rational view test or its equivalent.

**22** *Thompson and Wran v The Queen* (1968) 117 CLR 313.

**23** cf *R v Griffin (No 1)* (1868) 1 QSCR 176.

**24** *R v Bond* [1906] 2 KB 389 at 401; *Wilson v The Queen* (1970) 123 CLR 334 at 338-339, 344.

**25** *R v Ball* [1911] AC 47 at 71; *O'Leary v The King* (1946) 73 CLR 566 at 574, 575, 577-578, 582.

**26** (1946) 73 CLR 566.

**27** (1946) 73 CLR 566 at 577.

**28** (1946) 73 CLR 566 at 577 per Dixon J.

**29** (1946) 73 CLR 566 at 582 per Williams J.

**30** (1946) 73 CLR 566 at 575 per Latham CJ.

the accused. Similarly, in *Wilson v The Queen*[31], this Court held that statements made by the victim in the presence of the accused on two occasions were admissible although they indicated that the victim knew that the accused intended to kill her for her money. The evidence was admissible to show the mutual enmity between the parties and to negate the accused's explanation that the shooting of the victim was accidental. In *R v Garner*[32], where the accused was charged with assault, evidence of uncharged assaults extending over several months was admitted because "it was a connected series of events"[33].

24 In cases concerning sexual offences, evidence of uncharged acts between the accused and the complainant has long been admitted where it tends to explain the relationship of the parties or makes it more probable that the charged acts occurred[34]. Thus, evidence of uncharged acts may explain why, on the occasion or occasions charged, the complainant did not rebuff the accused or showed no distress or resentment. It may also tend to prove that the accused had an unnatural passion for the complainant and thus prove the motive for committing the crime charged[35].

25 No doubt the admission of these various categories of evidence was facilitated by the fact that, until recently, courts admitted evidence that revealed the criminal character of the accused if the evidence was relevant to the charge "for some reason other than that he [or she] has committed crimes in the past or has a criminal disposition"[36]. Subject to exercise of the ordinary discretion to reject evidence in a criminal trial where the prejudice likely to result from the evidence outweighs the probative value of the evidence[37], evidence relevant to an issue for a reason other than proof of the accused's propensity or criminal conduct was admitted almost as of course. But in *Hoch*[38], this Court departed

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**31** (1970) 123 CLR 334.

**32** (1963) 81 WN (Pt 1) (NSW) 120.

**33** (1963) 81 WN (Pt 1) (NSW) 120 at 123.

**34** *R v Ball* [1911] AC 47; *R v Gellin* (1913) 13 SR (NSW) 271; *R v Etherington* (1982) 32 SASR 230; *B v The Queen* (1992) 175 CLR 599 at 601-602, 608, 610, 618.

**35** *B v The Queen* (1992) 175 CLR 599 at 610.

**36** *Markby v The Queen* (1978) 140 CLR 108 at 116.

**37** *Noor Mohamed v The King* [1949] AC 182 at 192-193, 195.

**38** (1988) 165 CLR 292 at 294-296.

from that view of the law, a view that can be traced back to *Makin v Attorney-General for New South Wales*[39].

26 Since *Hoch*, the "for some reason other than" test no longer states the common law of Australia[40]. Because that is so, an important question still to be resolved by this Court is whether the "no rational view" test of admissibility applies to all evidence revealing criminal or discreditable conduct or only to evidence tendered to prove propensity and to evidence proving similar facts. A passage in the judgment of Mason CJ, Deane and Dawson JJ in *Pfennig*[41] is capable of being read as meaning that only similar fact evidence or evidence tendered to prove propensity must meet the "no rational view" test. It is possible to read this passage as meaning that evidence of "past criminal conduct" that is otherwise relevant but incidentally reveals propensity is not governed by such a stringent test. But the matter is far from clear.

27 The judgment of Gaudron J in *Gipp v The Queen*[42] also appears to accept that the "no rational view" test does not apply when evidence, disclosing bad character, is not tendered as similar fact or propensity evidence but is tendered to prove a subsidiary issue. In *BRS*[43], on the other hand, her Honour effectively applied the "no rational view" test in determining the admissibility of evidence tendered to corroborate the complainant's evidence that the accused had used a towel and KY jelly when engaged in sexual activity with the complainant. The corroborating evidence revealed discreditable or criminal conduct on the part of the accused, but it was not tendered as propensity or similar fact evidence. However, her Honour appears to have taken the view that the corroborating evidence in *BRS* could not be distinguished from the similar fact evidence tendered in *R v Boardman*[44] as corroboration and went to the issue of the accused's guilt. For that reason, her Honour appears to have concluded that its admissibility depended upon satisfaction of the "no rational view" test.

28 The reasoning of the majority Justices in *Gipp*[45] has also thrown doubt as to whether evidence of uncharged sexual acts is admissible to prove the nature of

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**39** [1894] AC 57.

**40** *Pfennig v The Queen* (1995) 182 CLR 461 at 481, 485.

**41** (1995) 182 CLR 461 at 483-484.

**42** (1998) 194 CLR 106 at 112-113 [10]-[11].

**43** *BRS v The Queen* (1997) 191 CLR 275 at 298-302.

**44** [1975] AC 421.

**45** (1998) 194 CLR 106.

the relationship between the accused and the complainant. Gaudron J said that general evidence of sexual abuse on occasions other than those charged was not admissible to prove the relationship between the complainant and the accused or generally. Her Honour said that it "does not have that special probative value which renders evidence admissible as 'similar fact' or 'propensity' evidence"[46]. Nor in that case did it have any feature "that made it directly relevant to the question whether the appellant was guilty of the offences charged"[47]. Her Honour accepted that evidence of sexual abuse on other occasions may be admissible to explain lack of surprise or failure to complain, but only if the defence makes either matter an issue in the case[48].

29 In *Gipp*, Kirby J said that evidence "of this kind is only admissible if its probative value outweighs its prejudicial effect"[49]. It is not clear whether in stating this proposition his Honour was applying the "no rational view" test of admissibility or the principles applied before the decision in *Hoch*. Thus, to support the proposition, his Honour cited the dissenting judgment of Dawson and Gaudron JJ in *B v The Queen*[50] which applied the "no rational view" test. On the other hand, his Honour cited both Gibbs CJ and Dawson J in *Sutton v The Queen*[51] to support the proposition. The judgment of Dawson J supports it. But in *Sutton* and in other cases Gibbs CJ applied the pre-*Hoch* principles which often produce results different from that when the "no rational view" test is applied. Kirby J also cited two passages in *Harriman v The Queen*[52] to support the proposition. But both passages are in line with the pre-*Hoch* law. Furthermore, when his Honour came to apply the law, he made no reference to the "no rational view" test, merely saying that "it is doubtful that the probative value of the evidence of the complainant concerning alleged events outside the offences charged outweighed the substantial prejudicial effect of such evidence"[53]. This seems to indicate that his Honour was simply applying the ordinary common law principles concerning the admissibility of evidence in a criminal trial.

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**46** (1998) 194 CLR 106 at 112 [11].

**47** (1998) 194 CLR 106 at 112 [11].

**48** (1998) 194 CLR 106 at 113 [12].

**49** (1998) 194 CLR 106 at 156 [141].

**50** (1992) 175 CLR 599 at 618.

**51** (1984) 152 CLR 528 at 534, 565.

**52** (1989) 167 CLR 590 at 594-595 and 609-610.

**53** (1998) 194 CLR 106 at 157 [142].

30 In Gipp, Callinan J, the other member of the majority, said that the evidence in that case was admissible only as propensity evidence, but did not discuss the test to be applied in admitting it[54]. However, his Honour rejected the proposition formulated by Deane J in B v The Queen[55] that general evidence of sexual conduct on other occasions could be led as "'part of the essential background' against which the other evidence is to be evaluated"[56]. Callinan J said[57]:

> "If such evidence is to be received it must owe its admissibility to some, quite specific, other purpose, including for example, in an appropriate case, proof of a guilty passion, intention, or propensity, or opportunity, or motive. There may also be cases in which a relationship between people may be directly relevant to an issue in a trial and in those circumstances admissible as such."

31 By reason of the divided reasoning of the majority in *Gipp*, it cannot yet be said that evidence of uncharged acts of sexual conduct is no longer admissible to prove the relationship between the parties. Until this Court decides to the contrary, courts in this country should treat evidence of uncharged sexual conduct as admissible to explain the nature of the relationship between the complainant and the accused, just as they have done for the best part of a century. But that said, trial judges will sometimes, perhaps often, need to warn juries of the limited use that can be made of such evidence and will have to give a propensity warning concerning it[58].

Multiplicity of counts

32 What then is the position when the prosecution charges the accused with a number of sexual offences in the one presentment? If propensity evidence on each count is admissible in respect of the other counts in the presentment, a propensity warning could not be given except in some very limited way. But what is the position if the evidence in respect of each count is not admissible in respect of any other count? Must the trial judge give a propensity warning?

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**54** (1998) 194 CLR 106 at 168-169 [182]-[183].

**55** (1992) 175 CLR 599 at 610.

**56** (1998) 194 CLR 106 at 168 [181].

**57** (1998) 194 CLR 106 at 168-169 [182].

**58** *T* (1996) 86 A Crim R 293 at 299.

33 Hitherto, common law courts have accepted that a propensity warning is not required merely because a presentment contains a multiplicity of counts involving similar offences[59]. No propensity warning is required, for example, because the accused is charged with several counts of housebreaking or stealing or murder or sexual offences. Counsel for the appellant accepted that, if the presentment in this trial had not contained count 18, the appellant had no right to a propensity warning.

34 Directions concerning the dangers or the use that can be made of particular categories of evidence are the product of the collective experience or assumptions of the Anglo-Australian judiciary that, without these directions, miscarriages of justice are likely to occur. Directions concerning identification evidence, confessions made in police custody, prisoner-informer evidence and accomplice evidence, for example, are the product of judicial experience that, unless carefully scrutinised, evidence falling within these categories may lead to miscarriages of justice. Consequently, where over a long period courts have refrained from insisting that a class of evidence should always attract a direction, it is a reasonable inference that the experience of the judiciary is that universal directions or warnings concerning that evidence are not required.

35 It seems a reasonable conclusion, therefore, that the experience of the judiciary negates the need for a propensity warning merely because an accused person is charged on a presentment with a number of counts containing the same or similar offences against the same victim and that is so whatever the nature of the charges.

36 It has become the standard practice in cases where there are multiple counts, however, for the judge to direct the jury that they must consider each count separately and to consider it only by reference to the evidence that applies to it (a "separate consideration warning"). The universal giving of a separate consideration warning and the omission of a universal propensity warning indicates that the giving of a separate consideration warning is ordinarily sufficient to avoid miscarriages of justice in cases such as the present. This indication is confirmed by the many cases where juries acquit accused persons of some charges and convict them of others where the presentment contains multiple counts involving the same or similar offences. Indeed, so freely do juries acquit of some charges and convict of others on presentments with multiple counts that appellate courts often hear arguments that there is such an inconsistency in the verdicts that the convictions are unsafe and must be set aside[60].

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**59** *R v J (No 2)* [1998] 3 VR 602 at 638-643 per Callaway JA.

**60** cf *Jones v The Queen* (1997) 191 CLR 439.

37 Thus, although the evidence on one count may show a propensity to commit crime – even crime of the kind the subject of the other charges – the experience of the judiciary is that ordinarily juries do not use propensity reasoning to convict on other counts unless instructed that they can do so. To give the warning when it is not needed may divert the jury from its proper task. The more directions and warnings juries are given the more likely it is that they will forget or misinterpret some directions or warnings. Further, to require that a propensity warning always be given may sometimes be prejudicial to an accused person because it might distract a jury from doing what the trial judge told them to do here, to focus upon the evidence relevant to each charge. It may even suggest the very train of reasoning that a propensity warning is designed to overcome and make it difficult for the jurors, try as they might, to remain uninfluenced by the forbidden chain of reasoning.

38 In some cases of multiple counts, however, some feature of the evidence may create a risk that the jury will use that particular evidence or a conviction in respect of a count to reason that the accused is the kind of person who would commit the crime charged in another count or counts in the presentment. If that risk exists, the judge is bound to direct the jury that they cannot use that evidence or conviction to convict the accused on the other count or counts unless, of course, the evidence is admissible in respect of that count or counts. An example of such a risk is the accused being charged on the one presentment with offences against different victims and the evidence in respect of one or more counts being inadmissible in respect of the other counts[61]. Ordinarily, however, the court should order separate trials where there are different victims, where the evidence in respect of one victim is not relevant to the charge in respect of the other victims and where the joinder of charges creates a risk of prejudice[62]. But in some cases, an application for the trial of separate counts may be refused on the ground that the convenience of trying the charges together far outweighs any risk of prejudice or, more usually, because a separate trial is not sought[63]. If that occurs, a propensity warning will almost certainly be required.

39 In most cases, however, the need for a propensity warning arises from evidence concerned with subsidiary issues rather than the existence of a multiplicity of counts involving the same or similar offences or by reason of the admission of similar fact or propensity evidence in respect of some but not all

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**61** *T* (1996) 86 A Crim R 293.

**62** *Sutton v The Queen* (1984) 152 CLR 528 at 531, 541-542; *De Jesus v The Queen* (1986) 61 ALJR 1 at 3, 7, 8; 68 ALR 1 at 4-5, 12, 13.

**63** See, for example, *T* (1996) 86 A Crim R 293.

counts. If evidence tendered to prove a subsidiary issue (including the relationship between the parties) reveals the criminal or discreditable conduct of the accused, the judge will often, but not always, have to give a propensity warning. In some cases, giving the warning may excite the very prejudice that it purports to eliminate. And if evidence has been admitted generally as *propensity* evidence, it is difficult to see how a propensity direction is ever required. In that class of case, the evidence is tendered to prove that the accused is the type of person who is likely to have committed the crime with which he or she is charged. To require a propensity direction would contradict the basis on which the propensity evidence is admitted. And that is so, whether the propensity evidence consists of uncharged acts or evidence supporting the charge in one count that is also relevant to charges in other counts in the presentment. Conversely, a propensity warning will be required if propensity evidence is admissible in respect of some but not all counts in the presentment and there is a risk of prejudice in respect of those other counts. Ordinarily, there should be a separate trial in respect of those counts. But in practice that does not always occur.

40 It is possible that, in some cases of similar fact evidence, as opposed to propensity evidence, a propensity warning or other warning may be required although the evidence is admissible in respect of all counts. In the true similar fact case, evidence is often admitted to prove that the accused has been associated with so many similar deaths, injuries or losses that it is highly improbable that there is any innocent explanation for the accused's involvement with the series of events. These cases depend on probability reasoning and not propensity reasoning, the propensity of the accused usually being established only by the verdict of guilty[64]. The risk of prejudice, therefore, is not from propensity reasoning but from the danger that "[c]ommon assumptions about improbability of sequences are often wrong"[65]. It may be necessary to warn the jury about too readily making such assumptions rather than giving a propensity warning. In other similar fact cases, the facts of one or more events in the series may be admitted or be the subject of a conviction or convictions. If the evidence is admissible only as true similar fact evidence – evidence which relies on probability reasoning – it may be necessary to give a propensity warning in respect of the facts or convictions admitted or proved.

The presence of a s 47A count does not always require a propensity warning

41 If, as counsel rightly conceded, a propensity warning would not have been required if counts 1 to 17 were the only counts in the presentment, can it make

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**64** See my discussion of this class of case in *Pfennig* (1995) 182 CLR 461 at 530-531.

**65** *Perry v The Queen* (1982) 150 CLR 580 at 594.

any difference that the presentment includes a count based on s 47A? I do not think that it can. The presence of the s 47A charge requires proof of three acts constituting offences. It is proof of those acts, and not the maintaining of the relationship, that constitutes the *actus reus* of the offence in s 47A[66]. If those acts had been charged as three separate counts, no propensity warning would be required either in respect of each of them or generally. It is true that, under s 47A, they can be proved with less specificity than if they were charged as separate offences. But when the jury has found each "act" described in s 47A(2) proved, the finding – "the conviction" – in respect of each act stands in no different position than convictions for the offences in the other counts. It is true that the offence enacted by s 47A is described as "maintain[ing] a sexual relationship with a child under the age of 16 ... ", but the substance of the offence is committing three or more offences of the kind specified in "this Subdivision or Subdivision (8A) or (8B)". If juries can be trusted not to use propensity reasoning in respect of the specific counts, it seems unlikely that they cannot be trusted not to use it because s 47A requires proof of three offences.

42 I would hold, therefore, that the presence of s 47A in a presentment does not necessarily require a propensity warning. I would reject the appellant's first ground of appeal.

43 Nor do I think that the evidence and circumstances of this case required a propensity warning in respect of all counts. It would not have been inappropriate for the trial judge to have given a propensity warning in this case, if counsel for the appellant had asked for it. And it will often be right for a trial judge in a case of multiple sexual offences, including an offence under s 47A, to do so whether or not counsel seeks it. No universal rule should, or indeed may, be laid down in that regard. But no feature of the evidence in this case *required* propensity warnings of the kind that the appellant contends should have been given. In respect of one uncharged matter – requiring the complainant to parade in lingerie – the judge gave a propensity warning. But apart from the lingerie incident, nothing in the evidence suggested that this case should be regarded as an exception to the rule that a propensity warning is not required merely because a person is charged on presentment with a number of similar offences against the same victim.

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**66** *KBT v The Queen* (1997) 191 CLR 417.

44 The second ground of appeal must also fail.

45 I would dismiss the appeal.

46 GUMMOW AND CALLINAN JJ. The question which this appeal raises is whether a propensity direction should ordinarily be given in cases (including this one) in which a person is accused of maintaining an unlawful sexual relationship with a child under the age of sixteen, and of other sexual offences on the one presentment. In this case the charge of maintaining a sexual relationship was brought under s 47A of the *Crimes Act* 1958 (Vic) ("the Act"). Similar offences have been created by legislation in other jurisdictions[67].

47 Section 47A of the Act then relevantly provided:

> ***"Sexual relationship with child under the age of 16***
>
> (1) A person who maintains a sexual relationship with a child under the age of 16 to whom he or she is not married and who is under his or her care, supervision or authority is guilty of an indictable offence.
>
> (2) To prove an offence under sub-section (1) it is necessary to prove -
>
> (a) that the accused during a particular period (while the child was under the age of 16 and under his or her care, supervision or authority) did an act in relation to the child which would constitute an offence under a particular provision of this Subdivision or Subdivision (8A) or (8B); and
>
> (b) that such an act also took place between the accused and the child on at least two other occasions during that period.
>
> (3) It is not necessary to prove the dates or the exact circumstances of the alleged occasions."

Case History

48 The appellant and the complainant's mother were married when the complainant was two years old. The complainant addressed the appellant as "Dad". When the family was living on a farm and the complainant was eight

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**67** *Crimes Act* 1900 (ACT), s 92EA; *Crimes Act* 1900 (NSW), ss 66A-EA; *Criminal Code* (NT), s 131A; *Criminal Code* (Qld), s 229B; *Criminal Law Consolidation Act* 1935 (SA), s 74; *Criminal Code* (WA), s 321A. In Tasmania the offence relates to young people under 17 years: *Criminal Code* (Tas), s 125A.

years old the appellant penetrated the complainant's mouth and vagina with his penis. The complainant's mother confronted the appellant after her daughter had told her what had happened. The appellant at that time denied sexual misconduct of any kind.

49 The allegations in the presentment were of various acts of penile penetration or other sexual misconduct between each of June 1984 and February 1986 (counts 1 and 2), between March 1988 and December 1988 (counts 3, 4 and 5), between March 1990 and November 1990 (counts 6, 7 and 8), between March 1991 and October 1991 (counts 9 and 10), between August 1991 and October 1991 (counts 11 and 12), in November 1991 (counts 13 and 14), between September 1991 and 18 March 1992 (counts 15 and 16), between March 1991 and March 1992 (count 17), and of the maintenance of a sexual relationship between 5 August 1991 and 18 March 1992 (count 18), " … in that he introduced his penis into the vagina [of the complainant] … on at least [three] occasions during that period". Evidence of other and uncharged acts of unlawful sexual activity (including digital penetration) was given at the trial by the complainant.

50 In October 1992 the appellant confessed to his wife that he had been sexually molesting the complainant. He took an overdose of tablets and spent a night in hospital. Five months later he left home never to return. In 1995 the complainant's mother arranged for the complainant to make a statement to the police about the appellant's conduct.

51 The complainant's evidence included this exchange towards the end of her evidence in chief:

> "[Complainant], towards the end of your evidence yesterday you were telling the jury that in the last six months before all sexual activity ceased there were occasions where sexual penetration and digital penetration took place and I think your words were 'on numerous occasions' or 'it was repetitious'? --- Yes
>
> Do we take it from that, that it occurred on more than three occasions …? --- Yes.
>
> … during that period? --- Yes.
>
> And does that relate to the sexual penetration? ---Yes.
>
> The penile penetration? --- Yes."

52 The appellant was tried in the County Court of Victoria. During the course of his summing up to the jury the trial judge said this with respect to the charge of maintaining a sexual relationship:

> "The next element that the Crown must prove beyond reasonable doubt is this; that during the time span alleged, [the appellant] took part in an act of sexual penetration with [the complainant], in that he introduced, in the sense of put his penis, in the girl's vagina, on at least three occasions during the timespan alleged."

53 His Honour discussed the evidence on this count and drew attention to the fact that the case for the prosecution alleged penile, and not digital penetration over the relevant period. His Honour then said that the jury needed to be satisfied:

> " … beyond reasonable doubt that on three or more unspecified occasions between the timespan alleged, at three or more unspecified places, an act of sexual penetration constituted by the accused putting his penis in the girl's vagina occurred."

In substance his Honour repeated himself by saying:

> "Proof of three such acts of penile penetration - and you must all be satisfied that at least three such acts of sexual penetration occurred in the timespan alleged …"

54 His Honour enlarged upon this topic as follows:

> "Even if you were satisfied beyond reasonable doubt that on three or more unspecified occasions between the timespan alleged, at three or more unspecified places, an act of sexual penetration constituted by the accused putting his penis in the girl's vagina occurred, that in itself is not enough to prove the offence. Proof of three such acts of penile penetration - and you must all be satisfied that at least three such acts of sexual penetration occurred in the timespan alleged - but additional elements have to be proved beyond reasonable doubt, before you could convict a person … of these incidents, of maintaining a sexual relationship. ...
>
> What is alleged here is an offence of a continuing nature, not one that is committed at a specific place, at a specific time on a specific day. Therefore what has to be proved by the Crown is a course of conduct over the relevant period.
>
> The first additional matter which must be proved beyond reasonable doubt is in the circumstances proved, and on the evidence you accept, [the appellant] can be said to have maintained a relationship with

her during the timespan alleged in count 18, that is, what you are satisfied he did, amounts to maintaining a relationship. Now, 'relationship' is a position where one person holds with respect to another, on account of some social or other connection between them, and 'maintain' is to cause to continue, to carry on, or keep up. The Crown must therefore prove an offence of an ongoing nature, and it is a course of conduct.

Then the Crown of course has to establish beyond reasonable doubt that the relationship was a sexual relationship, that is a relationship that is characterised by or given a sexual character by the commission of unlawful sexual acts, namely in this case by the accused taking part in an act of sexual penetration by putting his penis in [the complainant's] vagina on at least three separate occasions during the timespan alleged by count 18 ...

The Crown must also go on and prove that throughout the time span alleged [the appellant] had a particular state of mind, namely that he intended that the unlawful sexual behaviour, which gives the relationship its sexual character, would be ongoing, that is would continue as a course of conduct. … "

55 His Honour was careful to direct the jury that each count should be considered separately:

"There are, as you well know, 18 different charges, or counts as they are technically called, against the accused, both on the - all on the one presentment as the formal document which is headed 'Particulars of Offence', and you have a copy of it - they are all on that one document called the presentment, and that is done for convenience, as it would obviously be highly inconvenient and absurdly expensive to hold a separate trial before a separate judge and jury on each of these counts.

However, you must not allow convenience to usurp justice. The accused man, [the appellant], is entitled, as is the Crown, to a separate consideration by you of each of the crimes charged. It may be that the same logic applies to some of them or all of them, but it would be quite wrong to say that simply because you found the accused man guilty or not guilty on one count, he must be guilty or not guilty as the case may be, of another.

Each count must be considered by you separately, in the light of the evidence that applies to it. You must ask yourselves as to each count separately, 'Am I satisfied beyond reasonable doubt by the evidence, that the accused is guilty of this crime?' If the answer to that question is, 'Yes',

then you would find him guilty; if it is 'No', then of course you would find him not guilty."

56 The trial lasted seven days. No applications for any redirections were made on behalf of the appellant. He was convicted on all counts and sentenced to a term of imprisonment.

57 The appellant sought leave to appeal against his convictions to the Court of Appeal of the Supreme Court of Victoria (Phillips, Batt and Buchanan JJA)[68]. The grounds of appeal to the Court of Appeal were numerous. They included that the trial judge erred, in refusing to allow cross-examination of the complainant on prior inconsistent statements, in rejecting a tape-recording sought to be tendered on behalf of the appellant, in allowing the count of maintaining a sexual relationship to go to the jury, in failing to give a propensity direction to the jury with respect to the relationship between that last count and the other counts, and in his directions in various other respects.

58 Because the only grounds of appeal to this Court relate to the charge of maintaining a sexual relationship it is unnecessary to discuss the disposition by the Court of Appeal of the appellant's other grounds all of which were rejected.

59 Buchanan JA (with whom Phillips and Batt JJA agreed) was of the opinion that a propensity warning is not required simply because there are two or more counts on the one presentment against the same victim. A warning of that kind is only required if some other factor calls for it[69]: the question that was raised by this case was whether the nature of the evidence led to establish count 18 was a factor of itself alone which required the giving of a propensity warning. It was his Honour's opinion that in this case such a warning was not required. His view was that the evidence in support of the offence under s 47A of the Act (which came at the end of the complainant's evidence), was readily distinguishable from the evidence relating to the other counts. In this respect his Honour was referring to the evidence of the complainant that we have quoted.

60 Buchanan JA said that the jury were directed in clear terms that each count and the evidence relating to it had to be considered separately, and they were not to find the appellant guilty on one count because he was guilty of another count. Even though the evidence may have lacked particularity it was

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**68** *KRM* (1999) 105 A Crim R 437.

**69** (1999) 105 A Crim R 437 at 443.

more than the generalised evidence that the appellant claimed it to be. It was, his Honour said, evidence of individual acts which were clearly distinct from the acts founding the other counts[70]. Accordingly, the appellant's appeal to the Court of Appeal on this ground failed also[71]. Indeed, in giving a separate direction on the need for proof beyond reasonable doubt of the maintenance of a sexual relationship as a matter distinct from the proof of three identical acts during the relevant period, the trial judge may have given, Buchanan JA said, a direction that was unduly favourable to the appellant[72].

The Appeal to this Court

61 As we have foreshadowed there are only two grounds of appeal to this Court:

> "1. That the Victorian Court of Appeal erred in law in failing to hold that in every such case involving a presentment including a count pursuant to Section 47A *Crimes Act* 1958 (Vic) that there should have been a propensity direction.
>
> 2. That the Victorian Court of Appeal erred in law by holding that a propensity direction was not necessary in the particular circumstances in this case."

62 In *Pfennig v The Queen*[73] this Court (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) discussed in detail the nature of propensity evidence, the rationale for its reception, and whether in that case the evidence in contention truly answered the description of propensity evidence. All members of the Court were of the opinion that the evidence tendered there was truly propensity evidence and that the trial judge's direction in respect of it was sufficient and appropriate, although there may have been some difference between the members of the Court (which it is unnecessary to resolve here) as to the way in which propensity evidence is to be identified and defined[74].

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**70** (1999) 105 A Crim R 437 at 444.

**71** (1999) 105 A Crim R 437 at 442.

**72** (1999) 105 A Crim R 437 at 442.

**73** (1995) 182 CLR 461.

**74** See *Pfennig v The Queen* (1995) 182 CLR 461 at 487-488 per Mason CJ, Deane and Dawson JJ, 505-506 per Toohey J, 513-514, 520 per McHugh J.

63 There is no dispute as to the general form of a propensity direction when it is to be given, although quite clearly its details will, as the parties to this appeal recognise, vary from case to case. In this case the appellant ventured to submit in precise terms the form of the direction that he contended the trial judge should have given, despite that no request for a redirection of that or any other kind was made at the trial. That proposed form of direction, the paragraphs of which we will number, was as follows:

> "(i) The next count on the presentment is that at Traralgon between 5 August 1991 and 18 March 1992 the accused man maintained a sexual relationship with [the complainant], a child under the age of 16 to whom he was not married and who was under his care, supervision or authority in that he took part in an act of sexual penetration with [the complainant] a person whom he knew to be his stepchild in that he introduced his penis into the vagina of [the complainant] and that such an act took place between the accused man and [the complainant] on at least two other occasions during that period.
>
> (ii) In order to be satisfied beyond reasonable doubt of this offence you must be so satisfied of each of the elements which make up this offence. They are firstly that the accused man maintained a sexual relationship with [the complainant] during the relevant period. The Crown in order to satisfy you of this element rely upon the evidence of [the complainant] that during this time the accused man introduced his penis into the vagina of [the complainant]. The Crown do not have to prove the exact date or circumstances of this incident, but they do have to prove that this act occurred. In addition, in order to prove this element of maintaining a sexual relationship, the Crown must satisfy you that such an act (that is, that the accused introduced his penis into the vagina of [the complainant]) occurred on at least two other occasions during that period. So each of you must be satisfied that the act of penile penetration of the vagina occurred on one occasion and at least two further occasions during that period. Each of you must also be satisfied that, in respect of each occasion, it is the same act of penile penetration which has been proved beyond reasonable doubt.
>
> (iii) It is most important in considering this element of this offence - that is, of maintaining a sexual relationship - to guard against reasoning which may be prejudicial to the accused. First, as I have said the Crown do not have to prove the specific dates and circumstances of the incidents which make up this offence. That places the accused at a particular disadvantage in meeting the charge levelled against him. The nature of the evidence given by

the complainant was of a very general nature, and this makes it difficult for the accused man to test or contest that evidence. Second, the element of maintaining a sexual relationship is made out by proof of one act of penile penetration of the vagina and then two further acts of the same character. You may be satisfied that the first mentioned act took place. And then in considering whether a second or, as the case may be, a third act took place, there is a natural tendency to think that because you are satisfied as to the first act, that the accused man is the sort of person who has a propensity or disposition to commit the second or third acts. It is that reasoning which I warn you not to engage in. I direct you that merely because you find a single act occurred you should not reason that the accused is the type of person who might commit the other acts required to be proved. Evidence of other acts in this case has been introduced for the limited purpose of proving that there were acts of penile penetration of [the complainant's] vagina on at least two other occasions during the relevant period. The evidence concerning those other acts should be considered by you for this limited purpose only.

(iv) Third, in this case there has been generalised evidence given by the complainant of sexual misconduct by the accused. [The complainant] said that there were no specifics she could remember, that it was very repetitious - just the manner of him always inserting his penis inside me. This generalised evidence was given in the context of the complainant being unable to remember specific incidents. But you should not reason from this evidence that the accused was the type of person to commit any of the three acts which as a minimum must be proved to satisfy this offence. You cannot decide whether the accused is guilty of this offence or indeed any of the offences upon the presentment by regard to this generalised evidence.

(v) Finally, there is a special danger in this case which you must guard against which arises by virtue of the fact that the accused man is charged with 17 other offences of a sexual character against the same complainant and the time periods in respect of some of these offences and that alleged in Count 18 overlap. *That danger is to reason that because you find the accused engaged in sexual conduct the subject of Count 18, he was the kind of person to have done so on the other occasions charged. Such a process of reasoning would be quite wrong. And I direct you not to engage in it.* You must not use the evidence you have heard in relation to Count 18 in your evaluation of the evidence concerning the other counts on the presentment.

(vi) The other elements of this offence - that [the complainant] was a child under the age of 16 to whom the accused was not married and who was under his care, supervision or authority at the relevant time are not in dispute in this case." (emphasis added)

64 It is convenient to deal with the appellant's submission by reference to that suggested form of directions. Its terms may be compared with the directions that the trial judge gave, relevant parts of which we have quoted. There can be no question that the trial judge told the jury in the clearest language that they needed to be satisfied in respect of the charge under s 47A of the Act that during the relevant period the appellant on no fewer than three occasions introduced his penis into the complainant's vagina. He emphasised that it was important that it be proved that these three sexual acts had taken place during the period of the sexual relationship alleged. He did this four times in the course of his summing up. In short, everything for which the appellant contends in the first four paragraphs of his suggested summing up was in fact put by his Honour in appropriate language.

65 The appellant's argument in respect of ground 1 of the notice of appeal involves, among other things, what is in substance a complaint about the creation of an offence of the kind which s 47A defines, that it is, itself, an offence, in effect, of propensity. That may be so. But that it may permit, as the appellant also complains, the reception of generalized and non-specific evidence as to times and circumstances of the occurrence of the same three acts constituting a relevant offence under s 47A, and required in combination to constitute it, would not justify a departure from the plain meaning of its language. As Buchanan JA said in the Court of Appeal[75], s 47A does create an offence which may offend the sensibilities of an experienced criminal lawyer.

66 Propensity evidence may ordinarily be received, and will often have very considerable probative value even though the evidence of what has occurred on occasions other than the occasion of the charged offence, is not identical with the act constituting the offence with which the accused person is charged. Striking similarity, or an underlying unity falling short of precise coincidence of acts or offences may suffice.

67 But s 47A is not concerned with mere propensity. Proof of a propensity will not suffice to prove an offence under it. The section requires proof of three relevant acts. The question is, what more, if anything does the section demand by way of proof. We read the negative reference to "dates" and "exact

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**75** (1999) 105 A Crim R 437 at 442.

circumstances" in sub-s (3) to mean that proof of no more than the actual occurrence of the three acts is necessary. If neither the dates nor the exact circumstances must be proved it is difficult to see what "inexact" circumstances should be.

68 There are further questions to be considered. Does the use of the word "occasions" signify a requirement of proof of circumstances and places sufficient to enable the accused to know precisely how, when and where the accused did the three unlawful acts? Would the prosecution be obliged to provide an accused with particulars of these? In our opinion the use of the word "occasions" does not produce those consequences. The discernible intent of the section was to create an offence, the component parts of which by their very nature may have occurred over a long period, in the past, and in circumstances in which precise recall of detail will not only be difficult for a complainant, but also may provide fertile ground for cross-examination of him or her on behalf of an accused. If a legislature intends that the circumstances of an occasion be identified, we would expect that the legislation would give an indication accordingly as it did in s 35 of the *Evidence Act* 1958 (Vic)[76]. That section obliges a cross-examiner to put to a witness the circumstances of a prior inconsistent statement "sufficient to designate the particular occasion" of it as a condition of its proof if the witness denies making it. And indeed this is what the legislature subsequently chose to do when it enacted an amendment of sub-s 47A(3)[77] in 1997 to refer to, and thereby to require some degree of specificity as to date, time, place, circumstances or occasion of each relevant act.

69 It is for these reasons that if explicit directions are given as to what must be proved in order for a conviction under s 47A to be entered, there will not

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**76** "**Evidence of previous statement of witness**

If a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the cause or prosecution and inconsistent with his present testimony does not distinctly admit that he has made such statement, proof may be given that he did in fact make it. But before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and he must be asked whether or not he has made such statement."

**77** "(3) It is not necessary to prove an act referred to in sub-section (2)(a) or (b) with the same degree of specificity as to date, time, place, circumstances or occasion as would be required if the accused were charged with an offence constituted by that act instead of an offence against sub-section (1)."

always be a need to give a propensity direction. To give it in some circumstances might be prejudicial to an appellant because it might distract a jury from doing what the trial judge told them to do here, to focus upon the occurrence of no fewer than three of the same acts during the specified period. The presence of a risk of this kind may provide reason for the absence of any request on behalf of the appellant at the trial for a redirection in this case.

70 It should also be pointed out that simply because the section does not require the proof of the dates or the exact circumstances of the alleged occasions of the three acts does not mean that a trial judge should not point out the difficulties confronting an accused person in meeting allegations which are vague as to these matters. Such a warning was given here by the trial judge in the context of the appellant's categoric denial of any sexual misconduct at any time, place or in any circumstances. The direction which was given here was adequate on the facts of the case, and must have been thought to have been so by the appellant and those who represented him at the trial.

71 It is necessary however to say something more about the appellant's submissions. As he developed his argument on the second ground of appeal it emerged that the only complaint that he had with the trial judge's direction on the possible use by the jury of the evidence (and their finding of guilt, if any) on the charge under s 47A was that it omitted the words that we have placed in italics in par (v) of the proposed form of directions, or some like formulation. The appellant accepted that the substance of what is contained elsewhere in that par (v) was conveyed to the jury by the trial judge at various times during the summing up.

72 It certainly would not have been inappropriate for the trial judge to direct the jury in terms of the italicized words in par (v) of the appellant's formulation or like language. It will often be right for a trial judge in a case of multiple sexual offences, as it might have been for an offence under s 47A in its unamended form, to do so. No universal rule should, or indeed, may be laid down in that regard. In this case, an unsolicited propensity direction was given by the trial judge in relation to some other conduct by the appellant. His Honour repeatedly emphasised the need for satisfaction on the part of the jury in respect of, and their careful examination of each charge separately. The case against the appellant of prolonged sexual misconduct with the complainant was a very strong one and included evidence of the confession that he made to his wife. In our opinion the trial judge did not fall into error in the circumstances of this case in not directing the jury in terms of the passage which the appellant now submits should have been put to them. Even if we did think that such a direction might, out of prudence, have been given, we would nonetheless dismiss the appeal

because no miscarriage of justice[78] could have been occasioned by its omission in the compelling circumstances of the case.

73 We would dismiss the appeal.

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**78** *Crimes Act* 1958 (Vic), s 568.

74 KIRBY J. This appeal[79] concerns the law governing judicial warnings to a jury about the dangers of propensity reasoning in a criminal trial.

75 The problem arises in a particular context. The accused was charged with a large number of specific sexual offences against his stepdaughter. He was also charged with the offence of maintaining a sexual relationship with her, she being a child under the age of 16 years[80]. In such circumstances, the accused submits that a judicial warning against propensity reasoning ("a propensity warning") is always required (ground 1). Alternatively, he argues that a propensity warning was required in the particular circumstances of his case (ground 2).

76 No propensity warning was sought or given at the trial. A proper warning had been given that the jury should consider each count separately and should not reason from a finding of guilt on one count to guilt on another[81]. The Victorian Court of Appeal concluded that, in the circumstances of the case, no error occasioning a miscarriage of justice had been established. Other grounds of appeal, which do not concern this Court, were dismissed[82].

77 Offences of maintaining a sexual relationship with a child have been enacted in most Australian jurisdictions[83]. The questions raised by this appeal are therefore of importance for the conduct of trials involving this class of offence. In order to clarify the applicable law and practice, special leave was granted by this Court upon the two grounds stated.

The facts, legislation and history of the proceedings

78 The background facts are stated in the reasons of McHugh J[84] and of Gummow and Callinan JJ[85]. So are the terms of the applicable Victorian

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**79** From a judgment of the Court of Appeal of the Supreme Court of Victoria: *KRM* (1999) 105 A Crim R 437.

**80** *Crimes Act* 1958 (Vic), s 47A ("the Act").

**81** Direction to the jury by the trial judge as quoted in *KRM* (1999) 105 A Crim R 437 at 443.

**82** Including a complaint concerning the admission of evidence about a tape recording: *KRM* (1999) 105 A Crim R 437 at 444-445; and that the instruction given by the trial judge as to the elements of the offence was inadequate: *KRM* (1999) 105 A Crim R 437 at 441.

**83** Reasons of Gummow and Callinan JJ at [46] n 67.

**84** Reasons of McHugh J at [5]-[6].

legislation, contained in s 47A of the *Crimes Act* 1958 (Vic)[86]. So too are the history of the proceedings in the County Court of Victoria, the evidence given by the complainant concerning the relationship offence[87] and the relevant portions of the trial judge's charge to the jury[88].

79 The appellant accepted that a warning of the requirement that the jury should consider separately each of the 18 different offences specified in the counts of the presentment was given in appropriate terms. The jury were instructed that they should not allow "convenience to usurp justice" and that they must give "separate consideration [to] each of the crimes charged"[89]. The jury were also warned that it "would be quite wrong to say that simply because you found the accused man guilty or not guilty on one count, he must be guilty or not guilty as the case may be, of another. ... Each count must be considered by you separately, in the light of the evidence that applies to it"[90]. This was the "separate consideration" direction. It was impeccable. The question in this appeal is whether a propensity warning was required in addition to the "separate consideration" direction.

The appellant's submissions

80 *The relationship offence*: In Australia, the offence of maintaining a sexual relationship with a child (the "relationship offence") is a comparatively recent invention of statute law. Its appearance followed, and was said to be a response to, general community concern about the problem of sexual abuse of children[91]. The formulation of the offence was influenced by a desire, in appropriate cases, to relieve the prosecution of the necessity to prove the dates, or the exact circumstances, of the alleged occasions of sexual activity[92]. The common law,

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**85** Reasons of Gummow and Callinan JJ at [48]-[50].

**86** Reasons of McHugh J at [1]; reasons of Gummow and Callinan JJ at [47].

**87** Reasons of McHugh J at [11]; reasons of Gummow and Callinan JJ at [51].

**88** Reasons of McHugh J at [19]; reasons of Gummow and Callinan JJ at [52]-[55]. See also below at [87]-[88].

**89** Directions of the trial judge as quoted in *KRM* (1999) 105 A Crim R 437 at 443.

**90** Directions of the trial judge as quoted in *KRM* (1999) 105 A Crim R 437 at 443.

**91** *KBT v The Queen* (1997) 191 CLR 417 at 432 ("*KBT*").

**92** The Act, s 47A(3).

and the decisions of this Court[93], have insisted upon a high level of specificity in the proof of criminal offences generally, including sexual offences. The new statutory offence was apparently designed, in the cases to which it applied, to modify these requirements. The modification was doubtless based upon the particular difficulty, even impossibility, in most cases of repeated sexual offences committed by an adult against a person when a child, for the victim of such offences to remember, and to be able to particularise, the dates or exact circumstances involved.

81 The appellant accepted that the only decision of this Court of direct relevance to the requirements of the relationship offence was that of *KBT v The Queen*[94]. That decision concerned the elements of an offence against the law of Queensland[95] similar to that in the present case. The language of the two offences is not identical. However, it was not suggested that the elements of the Victorian offence were relevantly different from those considered by this Court in *KBT*.

82 *A universal warning*: The matter decided by this Court in *KBT* concerned the content of the judicial charge to be given to a jury in respect of the relationship offence. *KBT* stands for the proposition, upon which the Court was unanimous, that the elements constituting the offence involve the commission by the accused of the same three or more acts comprising offences of a sexual nature, where the accused is an adult and the offences relate to a child[96]. In *KBT*, this Court held that it was mandatory for a trial judge to instruct a jury that they must be agreed as to the commission of the *same three* or more acts. In default of such an instruction, the offence would not have been explained accurately to the jury. Because the appellate court in that case could not be certain that the jurors had reached unanimous agreement, to the requisite standard, of the commission of the *same three* or more offences (but might have separately agreed that the prosecution had proved three offences, although different ones) the conviction could not stand. It was set aside. The rule in *KBT* is simple and clear. It has been applied both by trial judges and by courts of criminal appeal ever since[97]. No one contested that rule in this appeal.

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**93** eg *S v The Queen* (1989) 168 CLR 266.

**94** (1997) 191 CLR 417.

**95** *Criminal Code* (Q), ss 229B(1), 229B(1A).

**96** *KBT* (1997) 191 CLR 417 at 422, 433.

**97** eg *Emery* (1999) 110 A Crim R 221 at 223-224 citing the charge of the trial judge to the jury.

83 The appellant accepted that, in *KBT*, neither in the joint reasons[98], nor in my own concurring reasons[99], was a rule of law or practice laid down requiring the universal provision to the jury of a propensity warning in any trial in which (as here) an accused faced accusations of specific sexual offences, expressed in multiple counts, as well as a single count alleging the relationship offence. Therefore, the decision in *KBT* does not stand for the first proposition urged by the appellant.

84 In my concurring reasons in *KBT*, I added some general comments about the dangers of propensity reasoning in this class of offence. I did so in response to comments made by the Court of Appeal of Queensland in *Thompson* [100]. I referred to possible dangers, for the fair trial of an accused, that generalised evidence which was tendered to establish the relationship offence might be misused by the jury. Misuse of such evidence, if admitted, could arise in a case where the jury reasoned from a conclusion of guilt of specific offences to a conclusion that the accused, therefore, necessarily had a propensity towards maintaining the relationship illustrated by such offences, and was thus guilty of the relationship offence[101].

85 Building on these comments, the present appellant submitted that the question of providing a propensity warning should be determined and that this Court should accept the "special danger of unfairness"[102] inherent in a trial where the relationship crime – one which "permits imprecise and general evidence to be proved"[103] – is coupled with "other sexual offences specified with particularity"[104]. The appellant argued that, whatever the advantages of generally maintaining judicial flexibility in directions to juries and avoiding the needless expansion of compulsory warnings, the very nature of the relationship offence was such as to oblige the provision of a propensity warning. Otherwise, as it was

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**98** Of Brennan CJ, Toohey, Gaudron and Gummow JJ: *KBT* (1997) 191 CLR 417 at 420.

**99** *KBT* (1997) 191 CLR 417 at 425.

**100** (1996) 90 A Crim R 416 at 430-434.

**101** *KBT* (1997) 191 CLR 417 at 431-432 citing *S v The Queen* (1989) 168 CLR 266 at 282 and *BRS v The Queen* (1997) 191 CLR 275 at 291-292, 302-303, 304-306, 326-332.

**102** *KBT* (1997) 191 CLR 417 at 432.

**103** *KBT* (1997) 191 CLR 417 at 432.

**104** *KBT* (1997) 191 CLR 417 at 432.

put, there would always be a substantial risk that a jury, considering such a general count in the context of specific counts, would proceed directly to the relationship count and, finding it established, presume that each of the more particular counts was therefore made out, simply as specific instances of the general propensity demonstrated by maintaining the relationship. Alternatively, the jury might, finding the accused guilty of some particular offences, proceed to infer guilt of the relationship offence, without adequate attention to the *same three* or more sexual acts necessary to constitute proof of the essential ingredients of that offence as defined. To justify the requirement of a mandatory warning, the appellant laid emphasis on the statutory elements of the relationship offence and the inherent dangers of illicit reasoning in a trial involving multiple counts.

86 *A particular warning*: As an alternative, the appellant submitted that, in the particular circumstances of his trial, it was necessary that a warning should have been given and that the Court of Appeal had erred in holding that it was not required.

87 In advancing this alternative argument, the appellant sought, indirectly, to resuscitate a matter of specific complaint which he had raised, and lost, in the Court of Appeal. This concerned his objection to the form of the charge given to the jury by the trial judge. He argued that this had fallen into the precise error identified by this Court in *KBT*. Specifically, the trial judge had not told the jury, as *KBT* mandates, that the three acts required to prove an offence of the relationship type[105] were not only performed during a particular period while the child in question was under the age of 16 years but must amount to acts of the same kind, which took place on at least three separate occasions during the period in question and that the jury must be unanimous at least as to the *same three* acts.

88 Although the appellant lost this point in the Court of Appeal, and although neither of the grounds of appeal upon which he was granted special leave expresses the particular complaint, he argued that the adequacy of the directions given to the jury about the dangers of propensity reasoning had to be evaluated in the context of his trial. This was a context (so it was put) of the most unspecific, generalised and vague testimony of the complainant with, at best, an unemphatic and limited direction by the trial judge concerning the elements of the offence about which the jury had to be unanimously agreed.

89 There is merit in this last complaint. So far as the evidence of the complainant was concerned, she was originally not at all specific when, in examination-in-chief, she was asked, in connection with the relationship offence,

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**105** The Act, s 47A(2)(a) and (b).

whether in the period of six months prior to her attaining the age of 15 years (being the "particular period" to which the Victorian provision referred in this case)[106] anything else occurred "other than what you've told us about in relation to sexual activities with [the appellant]"[107]. Her answer lacked particularity. There were "a lot of them" (that is, offences). The conduct was "very repetitious". It involved the appellant "always inserting his penis inside me" and "continually having sex with me; inserting his fingers". It was "very routine and very frequent"[108]. I agree with McHugh J[109] that, had the evidence been left in that state, it would have been highly doubtful that it would have been capable of proving, to the necessary standard, that the appellant had maintained a relationship in terms of the Act.

90 Apparently realising that this testimony could fall short of proving the three "act[s]" during the particular period required by the section[110], the prosecutor, after an overnight adjournment, returned to the issue and reminded the complainant of her earlier evidence. Without objection, the complainant was asked[111]:

> "Do we take it from that, that it occurred on more than three occasions ... ? – Yes.
>
> ... during that period? – Yes.
>
> And does that relate to the sexual penetration? – Yes.
>
> The penile penetration? – Yes."

91 Notwithstanding the otherwise careful charge to the jury of the trial judge, including the separate consideration warning previously referred to, he did not expressly tell the jury that it was necessary for them to be unanimously agreed about the *same three* identified acts of a sexual nature done to the complainant in the circumstances envisaged by the Act.

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**106** The Act, s 47A(2)(a).

**107** Transcript cited in *KRM* (1999) 105 A Crim R 437 at 439.

**108** Transcript cited in *KRM* (1999) 105 A Crim R 437 at 439.

**109** Reasons of McHugh J at [11].

**110** The Act, s 47A(2)(a) and (b).

**111** Transcript cited in *KRM* (1999) 105 A Crim R 437 at 439.

92 It is true that the Act relieves the complainant of the need, or the prosecution of the requirement, to prove the "dates or the exact circumstances of the alleged occasions"[112]. But "occasions" there must still be. There was no specific evidence of any such "occasions" tendered in support of the relationship offence. There was at most an allusion back to the evidence that had been given in support of the 17 specific counts, with the assertion by the complainant that the same thing was "always happening" and was "very routine" and "very frequent". Again, I agree with what McHugh J has written about the purpose and extent of the relief from particularity that provisions such as s 47A(3) of the Act provide[113]. The prosecution does not have to prove the date or exact circumstances of an alleged offence; but that is all. The complaint that the judge, as in *KBT*, failed to explain the elements of the offence is not before this Court. However, it is against this background that the appellant submitted that, whatever the necessity of a universal rule, a propensity warning was required in his particular case.

The prosecution's submissions

93 The prosecution argued against the expansion of obligatory warnings in general and a universal warning about propensity reasoning in trials such as the present. It submitted that the authority of this Court had held back from imposing a universal obligation to give such a warning. Moreover, Courts of Criminal Appeal had done the same[114]. Far from it being undesirable to include the relationship offence count in a presentment containing many specific counts, policy considerations supported such inclusion, at least where the same complainant was involved. It permitted a single jury to hear "the full story before deciding upon the acceptability of a complainant's allegations"[115]. Adopting this course helped to avoid the risk of convictions in such cases founded upon unspecific testimony relevant to uncharged events.

94 The prosecution also pointed out that the evidence relevant to the relationship offence in the present trial had been given separately and at the end of the other evidence tendered against the appellant. It was therefore clearly distinguishable in this trial from the evidence proffered on the earlier 17 counts. In such circumstances, the risks of propensity reasoning, which might sometimes arise from counts or testimony concerning other complainants and different

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**112** The Act, s 47A(3).

**113** Reasons of McHugh J at [14]-[18].

**114** *R v Beserick* (1993) 30 NSWLR 510 at 516; *R v Grech* [1997] 2 VR 609 at 612-613.

**115** *R v Wackerow* [1998] 1 Qd R 197 at 201.

circumstances, were not present in this case. By relieving the prosecution of the need to prove "dates or the exact circumstances" of the offences, the Victorian Parliament had addressed realistically the enormous difficulties which a complainant faced in particularising such offences years, even decades, after they were said to have occurred.

95 This Court was told that, in Victoria, counts charging the relationship offence were, in practice, relatively rare. They required the approval of the Director of Public Prosecutions before they could be added to a presentment. In the matters actually litigated in this trial, it was suggested, the fundamental question for the jury's decision was whether they accepted the evidence of the complainant and her mother or the evidence of the appellant. Nice distinctions about propensity reasoning were unlikely to have influenced this trial's outcome. Mentioning the matter, unasked, might even have planted in the jury's mind the very mode of reasoning which the warning was aimed to deter. If any error or inadequacy in the trial judge's charge was shown, there was no miscarriage of justice and the case was therefore one for the application of the proviso[116].

Matters of approach

96 *The rule of particularity*: Because there is no relevant authority of this Court, it is necessary to approach the submissions of the parties keeping in mind the applicable general principles. The first is that the essential character of our criminal justice system is accusatorial[117]. The normal rule is that a person, accused of a criminal offence, is entitled to be informed 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"[118]. Unlike some other systems of criminal trial, that of the common law is disinclined to permit the conviction of an accused person upon "inexact proofs, indefinite testimony, or indirect inferences"[119]. In harmony with this fundamental postulate, the rule established for criminal trials in Australia is ordinarily one which requires a high degree of specificity in the accusations, charges and evidence proffered by the prosecution[120]. Because these are principles of the common law, they may,

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**116** The Act, s 568(1).

**117** cf *RPS v The Queen* (2000) 74 ALJR 449 at 455-456 [27]-[29], 468 [101]; 168 ALR 729 at 737-738, 754.

**118** *Johnson v Miller* (1937) 59 CLR 467 at 489 per Dixon J.

**119** *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 per Dixon J.

**120** *Walsh v Tattersall* (1996) 188 CLR 77; cf *Thompson* (1996) 90 A Crim R 416 at 419; *BRS v The Queen* (1997) 191 CLR 275 at 320-321; *KBT* (1997) 191 CLR 417 at 429.

subject to the requirements of Ch III of the Constitution[121], be modified by legislation. However, any derogation from such fundamental rules has to be very clearly expressed. Otherwise, it will be presumed that no departure from them is included in the legislation concerned.

97 *Judicial obligations of fairness*: In cases involving accusations of sexual offences, courts[122] and prosecutors[123] must exercise particular vigilance, so far as they can, to ensure that the fairness of the trial is maintained because the circumstances are peculiarly likely to arouse feelings of prejudice and revulsion. This duty imposes special difficulties for judges presiding at such trials where they are conducted before a jury[124]. Those difficulties increase substantially where there are multiple counts involving numerous events and especially where there is more than one complainant. Statute apart, such circumstances oblige judges to act affirmatively to protect the accused against the risks of unfairness in the trial.

98 Such protection against unfairness may require the ordering of particulars and the provision of evidence before a trial, whether at committal or otherwise. It may require consideration of an order that separate trials be had of particular charges[125]. At the trial, it may require the judge to exclude evidence in given circumstances[126] and to instruct the jury as to evidence that is relevant to particular counts only[127]. Where applicable, it may require the judge to inform the jury that they may accept some parts of the evidence of a witness and reject the evidence in other respects and with what consequences[128]. Once again, I

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**121** *Leeth v The Commonwealth* (1992) 174 CLR 455 at 483-487, 501-503; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 112-114 per Gaudron J; reasons of McHugh J at [16]; cf Parker, "Protection of Judicial Process as an Implied Constitutional Principle", (1994) 16 *Adelaide Law Review* 341 at 350-355.

**122** *De Jesus* (1986) 61 ALJR 1 at 3 per Gibbs CJ; 68 ALR 1 at 4-5.

**123** *R v M* [1991] 2 Qd R 68 at 83.

**124** *R v Kemp* [1997] 1 Qd R 383 at 402.

**125** *R v Kemp* [1997] 1 Qd R 383 at 396.

**126** *R v Kemp* [1997] 1 Qd R 383 at 395.

**127** *R v Kemp* [1997] 1 Qd R 383 at 399; cf *B v The Queen* (1992) 175 CLR 599; *T* (1996) 86 A Crim R 293 at 299.

**128** *KBT* (1997) 191 CLR 417 at 424.

agree with what McHugh J has written about this subject[129]. The judge's charge to the jury requires, amongst other things, the accurate instruction of the jury concerning the legal elements of the offences charged, an indication of the evidence relevant to such offences and the provision of warnings that are required by law or otherwise necessary to ensure that a fair trial is had[130].

99 *Relationship offences and basic rights*: Where a legislature, acting within power, enacts an offence and the prosecution charges the accused with that offence, it is no part of the function of a court to frustrate the will of the lawmaker by unduly narrowing the operation of the offence because it is conceived to be a departure from the ordinary principles of the law.

100 In the present case, the relationship offence was enacted by the Victorian Parliament in 1991[131]. Unless considerable care were taken in identifying, as being after 1991, the three or more "occurrences" relied upon to constitute the relationship offence, the prosecution could be purporting to subject the appellant to punishment for an offence that did not, in law, exist at the time of the occurrence of the acts in question. No submission was presented, on constitutional or other grounds, suggesting that the relationship offence with which the appellant was charged, and of which he was convicted, was otherwise than constitutionally valid and applicable to his case. I shall assume that that was so. But the general presumptions of the law, grounded in principles of fundamental human rights[132], against the imposition of criminal liability for crimes of retrospective operation, constitutes a reason, additional to those previously stated, for insisting upon the accurate explanation to a jury of the elements of the offence and the provision of such warnings as are necessary to ensure that a trial of the person charged with the offence avoids unfairness.

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**129** Reasons of McHugh J at [38].

**130** *Longman v The Queen* (1989) 168 CLR 79 at 86; *S v The Queen* (1989) 168 CLR 266; *Zoneff v The Queen* (2000) 74 ALJR 895 at 906-907 [55]; 172 ALR 1 at 16-17.

**131** The amendment was introduced into the Act by the *Crimes (Sexual Offences) Act* 1991 (Vic), s 3. The section was amended in 1997 by the *Crimes (Amendment) Act* 1997 (Vic), s 5.

**132** Expressed in the maxim "Nullum crimen sine lege, nulla poena sine lege"; cf Steiner and Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd ed (2000) at 119-125 and materials there cited concerning the reasons and sentences of the International Military Tribunal (Nuremberg) (1947) 41 *American Journal of International Law* 172.

101 Accordingly, the enactment by Parliament of an offence such as the relationship offence does not relieve a judge, presiding at a jury trial, of the duty to ensure, so far as is reasonably practicable, that the risk of unfairness to the accused is avoided or at least minimised as far as the judge can achieve. Because of the variability of the representation of accused persons at criminal trials and the near total dependence of the accused in such matters upon his or her legal representative, the trial judge is not exempt from duties to provide a warning to a jury, even if not expressly requested to do so. The omission to seek such a warning might be tactical[133] and may have been so here. However, commonly, I suspect, it arises from mistake, oversight, ignorance or inexperience on the part of an accused's legal representative.

102 *Relationship offences and particularity*: Although I have called the offence with which the appellant was charged in count 18 of the presentment a "relationship offence", this Court made it plain in *KBT*[134] that proof of the elements of the offence requires the jury to be agreed as to the commission of the same three or more acts constituting offences of a sexual nature committed against the child in question. Beyond proof of these elements, necessary to establish the offence[135], it is also essential that the jury be agreed, to the requisite standard, that the accused has maintained a "sexual relationship with a child under the age of 16"[136].

103 As Pincus JA pointed out in *R v Kemp (No 2)*[137], the very nature of a "relationship" tends to open up, as relevant, evidence of a general kind concerning the behaviour of the accused towards the complainant alleged to be in the "relationship". Where the relationship in question is a criminal one, involving a child of the specified age, proof of its existence will depend, in large part, upon acceptance of the evidence of the complainant. But it may also depend, as in this case, upon evidence from the complainant's mother or other family member or proof of facts from which a "guilty passion" can be inferred and from which the existence of the "relationship", as contemplated by the Act, may be deduced.

104 Before the enactment of the relationship offence, it was possible, in some circumstances, for the prosecution to adduce evidence as to a relationship

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**133** As explained in the reasons of McHugh J at [13].

**134** (1997) 191 CLR 417 at 422, 432-433.

**135** As set out in the Act, s 47A(2)(a) and (b).

**136** The Act, s 47A(1).

**137** [1998] 2 Qd R 510 at 512.

between the accused and the complainant[138]. However, because it was obvious that such evidence could be highly prejudicial to the accused[139], it was usually necessary, in such a case, for such evidence to be admissible, that it should be relevant to an issue apart from that of the propensity of the accused to commit offences of that kind. Commonly, such evidence had to satisfy the test established for the admission of "similar fact" evidence[140]. I will resist the temptation to respond to McHugh J's discussion[141] of the decision in *Gipp v The Queen* and specifically of my own reasoning in that case[142]. That controversy can safely await an appeal in which its resolution is essential. It is not essential here.

105 So far as the relationship offence such as that charged against the appellant is concerned, there are a number of particular risks of illicit reasoning that are relevant to whether a universal duty to give a jury a propensity warning should now be imposed by this Court. They include the fact that evidence in such cases often comprises nothing more than the accusation of the complainant and the denial of the accused. Typically, many years after the alleged acts, it is not only the complainant who is at a disadvantage in providing details of dates and circumstances. The accused, who stands in peril of a conviction and who, if convicted, will almost certainly be deprived of liberty, cannot, without such specificity, easily present an effective defence. Considerations such as this have, in the past, convinced this Court of the need for clear judicial directions to the jury[143].

106 The specific dangers for the fair trial of an accused, presented by the relationship offence, include the additional risk that, without clear directions, the jury may confuse the evidence relevant to any particular charges with that relevant to the relationship offence; that they may impermissibly use evidence of uncharged acts tendered to support the relationship offence[144]; or that they may

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**138** See eg *B v The Queen* (1992) 175 CLR 599 at 610 per Deane J.

**139** *R v Vonarx* [1999] 3 VR 618 at 622.

**140** cf *Hoch v The Queen* (1988) 165 CLR 292 at 299-302; *Pfennig v The Queen* (1995) 182 CLR 461 at 513-515; *BRS v The Queen* (1997) 191 CLR 275 at 329.

**141** See reasons of McHugh J at [27]-[31].

**142** (1998) 194 CLR 106 at 156 [141].

**143** See eg *Liberato v The Queen* (1985) 159 CLR 507 at 515, 519; cf *Crampton v The Queen* (2000) 75 ALJR 133 at 157 [131]-[132]; 176 ALR 369 at 402.

**144** cf *R v Pearce* [1999] 3 VR 287 at 296-297.

reason that, because the accused is guilty of one or more of the specified offences, that therefore he or she is guilty of the relationship offence or from such proof might reason that he or she is the kind of person who would conduct the relationship the subject of the offence and therefore did so as charged.

107 The separate consideration direction, given in this case, substantially meets the foregoing dangers. But there is, then, an additional danger of what might be called pure propensity reasoning. This is reasoning from a conclusion that a person may be classified as a particular type, or with particular inclinations or a particular disposition (perhaps based on decisions made concerning specific charges) to the conclusion that, therefore, that person is guilty of the relationship offence. Such a mode of reasoning might more readily occur in the case of the relationship offence because of the very generality of its components, the ongoing character of the "relationship" contemplated and the legislative relief expressly afforded from the necessity to "prove the dates or the exact circumstances" of the occurrences essential to establish the offence[145].

108 *Comprehensibility and relevance of directions*: The extent of the duty to give directions and warnings to a jury, if not laid down by statute, is determined by judicial authority. Where it is suggested that a new direction or warning should be added to the list of those that are compulsory, it is essential for parties who propound such an obligation to show very good reasons for imposing it.

109 Restraint in adding to compulsory warnings exists because of the general desirability of leaving it to a trial judge to mould the charge to the jury to the real issues in the trial; to enhance the comprehensibility of what is said; and to escape unmerited objections on appeal where a compulsory warning has, by oversight, been omitted or misstated[146].

110 Sometimes, to avoid unnecessary appeals, it will be wise to add to the judicial obligations a duty to give instruction of a particular kind so that there will be an end to disputes as to how such issues are to be handled at the trial. This was the view taken in England[147] and in New Zealand[148] concerning the provision to juries of a judicial direction on the way in which evidence of good

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**145** The Act, s 47A(3).

**146** Discussed in *Zoneff v The Queen* (2000) 74 ALJR 895 at 906-907 [54]-[56], 909 [65]; 172 ALR 1 at 16-17, 20.

**147** *R v Aziz* [1996] AC 41 at 53.

**148** *R v Falealili* [1996] 3 NZLR 664 at 666-667.

character might be used by a jury. In this Court, however, it was held[149], by majority, that no such universal rule should be established for Australia.

111 Having regard to the actual issues contested in the present trial, the prosecution argued that a direction about the dangers of propensity reasoning would have been more likely to confuse than to assist the jury. The direction to give separate consideration to each count was therefore sufficient[150]. It was suggested that this would be so in most trials. The assumption that jurors comprehend judicial instructions, and warnings as to modes of reasoning, may not always be supported by empirical evidence. Yet the presumption that jurors understand, and act upon, judicial directions about the law is deeply entrenched in the law. It is based on pragmatic considerations rather than psychological proof[151].

The propensity warning proposed

112 *Draft proposed direction*: It was against this background that the appellant submitted that the Court of Appeal had erred in rejecting his argument that a propensity warning was universally required. To give focus to his submissions, the appellant contended that an additional warning should have been given to the jury. The full text of the proposed warning is set out in other reasons[152]. The essence is this:

> "That danger is to reason that because you find the accused engaged in sexual conduct the subject of Count 18, he was the kind of person to have done so on the other occasions charged. Such a process of reasoning would be quite wrong. And I direct you not to engage [in] it."

113 *Omitting the word "propensity"*: This warning omits the use of the word "propensity". Correctly, in my view, the Victorian Court of Appeal has suggested that, where such a warning is appropriate, that word should be avoided[153]. It is not likely to be a word of common use amongst jurors. It might

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**149** *Melbourne v The Queen* (1999) 198 CLR 1 at 14-15 [30]-[32], 28-30 [75]-[79], 56-57 [154]-[157].

**150** *Zoneff v The Queen* (2000) 74 ALJR 895 at 909-910 [66]-[67]; 172 ALR 1 at 20-21.

**151** cf *Richardson v Marsh* 481 US 200 at 211 (1987) cited in *Zoneff v The Queen* (2000) 74 ALJR 895 at 909 [65]; 172 ALR 1 at 20.

**152** Reasons of Gummow and Callinan JJ at [63].

**153** *R v Vonarx* [1999] 3 VR 618 at 624-625.

have perjorative overtones. The charge actually given to the jury in the appellant's trial lasted almost a day and a half. The appellant submitted that the additional time taken to give the proposed warning was minimal. It was warranted by the risks that it was aimed to curtail.

A universal propensity warning is not required

114 I am not convinced that this Court should now lay down a universal rule. In *Melbourne v The Queen*[154], the Court evidenced a general disinclination to add to the list of universally applicable directions and warnings. Its basic reason was explained by Hayne J. Directing a jury in a criminal case is never easy. It will be more difficult, without commensurate benefit, "if trial judges were bound to give more, and more complicated, directions than the particular case requires"[155].

115 In *Emery*[156], an appeal which concerned the Tasmanian equivalent of the relationship offence[157], a universal obligation to give a propensity warning was rejected on the basis that, in the circumstances of that case, it would have amounted to "an artificial exercise". Slicer J pointed out that there was only one complainant at the subject trial; the acts constituting the crime were discrete and identified; there was no general evidence outside the matters specified; the events occurred over a relatively short time; the jury were given the separate consideration direction; the case did not involve circumstantial or inferential reasoning but word against word; and there was little, if any, evidence used as corroboration[158].

116 These circumstances, which will vary from case to case, illustrate the fact that, in some cases, the risks of propensity reasoning may be minimal. The trial judge and the representatives of the parties might even conclude that giving such a warning could, in particular circumstances, be disadvantageous to the accused. Accordingly, the suggested universal rule should be rejected. This conclusion has the added advantage of avoiding risks of immaterial mistakes in obligatory judicial directions and of adding to extraneous directions to juries where they are

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**154** (1999) 198 CLR 1. See also *R v S* [1999] 2 Qd R 89 at 95.

**155** *Melbourne v The Queen* (1999) 198 CLR 1 at 52 [142] per Hayne J. See also at 52-53 [143] citing *Alford v Magee* (1952) 85 CLR 437 at 466; cf *BRS v The Queen* (1997) 191 CLR 275 at 330.

**156** (1999) 110 A Crim R 221 at 230.

**157** *Criminal Code* (Tas), s 125A.

**158** *Emery* (1999) 110 A Crim R 221 at 230-231 per Slicer J.

not needed. It also promotes a trend towards abbreviation of jury directions which I regard as generally desirable.

A propensity warning should have been given in this case

117 *Propensity warnings in proper cases*: This said, the particular risks presented by the relationship offence will, in some circumstances, be such that it will become the duty of the trial judge to give the jury a warning of the kind suggested by the appellant. I remain of the view, expressed in *KBT*[159], that there can be special risks of unfairness in cases where a count charging a relationship offence is included with other counts charging a number (especially many) of specific sexual offences. Such risks will, in some cases, necessitate "appropriate judicial warnings against the dangers of propensity reasoning"[160]. In my view, the present was such a case.

118 In explaining my conclusion in this regard, it is necessary to start with a reminder that the separate consideration direction is different from the propensity warning. The first focuses the jury's attention on the need to consider each count individually. The second constitutes a warning against elision, that is, the running together of the separate counts. The purpose of the propensity warning is not, as such, to ensure that each count is individually weighed but that proof of one count is not taken, as such, as proof of another. The distinction is important. It is recognised by authority[161].

119 Judicial authority in Australia undoubtedly accepts that a propensity warning should be given in "proper cases"[162]. The cases where it will tend to be required are the reverse of those in the list collected by Slicer J in *Emery*[163]. Specifically, it will ordinarily be "proper" to give such a warning where there is more than one complainant. It may be necessary where the acts constituting the crime are not discrete and clearly identified. Or where general evidence is given that lacks specificity, of the very kind that the relationship offence may tend to permit. In such circumstances, in my view, a propensity warning should be given. Whether it would be needed in cases of multiple counts involving specific offences (such as murder, armed robbery or other crimes of violence) would depend on the circumstances. But where the offences charged invite, and permit,

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**159** (1997) 191 CLR 417 at 432.

**160** (1997) 191 CLR 417 at 432.

**161** *R v J (No 2)* [1998] 3 VR 602 at 641 per Callaway JA.

**162** *R v Arundell* [1999] 2 VR 228 at 250.

**163** (1999) 110 A Crim R 221 at 230-231.

evidence of a continuing association, or evidence of a more general character (for example, crimes such as drug trafficking[164] or the relationship offence in question here) there should be a greater judicial willingness to provide the warning against propensity reasoning than elsewhere. Given properly, and followed by the jury, it would help avoid a danger of unfairness to the accused. Given with emphasis, it would escape the risk of promoting the forbidden line of reasoning that it is designed to prevent.

120 In a sense, the propensity warning is a warning of the danger of reasoning from stereotypes. Because a person has been shown to have committed a sexual offence against a young child on one occasion does not necessarily mean that that person has committed every offence against such a child that is alleged. Specifically, it does not mean that the prosecution has proved that the accused had committed the relationship offence as defined by law[165].

121 *Reasons for a warning in this case*: My conclusion that the warning was required in the present case is reinforced by the extremely general and unspecific evidence of the complainant, proffered to make out the preconditions of the relationship offence in this case. Assuming that, by the belated question and evidence that reopened the issue, the complainant's testimony rose to the point of establishing three or more separate "occurrences" of the same act within the identified period of time, as required by law, the testimony was still extremely general and unspecific. The explanation of what was required by law to constitute the offence omitted in this trial the precise direction (unanimity on the *same three* or more offences) required by the holding of this Court in *KBT*. In the context of a relatively weak evidentiary foundation for the relationship offence, it became all the more important, in this case, for a propensity warning to be given. Otherwise, the stream (in the form of the conviction of the offence) would truly rise higher than the source (established by the evidence). This Court has drawn the distinction, which is relevant here, between instructing a jury on how they may reason towards a verdict of guilt and providing warnings about impermissible forms of reasoning[166]. It was the latter that should have been given in the circumstances of this case.

122 Subject to what follows, the appellant has therefore made out the entitlement for which, alternatively, he argued in the Court of Appeal. The

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**164** *Giretti and Giretti* (1986) 24 A Crim R 112.

**165** cf *R v Vonarx* [1999] 3 VR 618 at 625 cited in *Gipp v The Queen* (1998) 194 CLR 106 at 156-157 [141].

**166** *RPS v The Queen* (2000) 74 ALJR 449 at 458 [43]; 168 ALR 729 at 741-742.

omission to give the warning was an error in the conduct of the trial. In my view, the Court of Appeal erred in failing to correct it.

The "proviso" should be applied

123 *The primary rule of a lawful trial*: This conclusion brings me to the question of whether, notwithstanding this error, the conviction should be affirmed. Ordinarily, a judicial misdirection, or failure to provide a direction required for a fair trial, will constitute a miscarriage of justice. Either of these errors would necessitate the setting aside of the resulting conviction. In the present case, it would not be possible to excise and quash only the conviction upon count 18 and order a retrial limited to that count. This is because, in default of a propensity warning, it could not be said with certainty whether the jury reasoned from guilt of the particular offences to guilt of the relationship offence or vice versa.

124 But can it be said, as the prosecution finally argued, that the present appellant did not lose a real chance, fairly belonging to him, of acquittal by reason of such misdirection? Upon this question, this Court has adopted, in my view correctly, a strict rule. It is a rule regularly enforced[167]. It is one defensive of the right of an accused to have a trial according to law. The only exception is where an affirmative conclusion is reached by the appellate court that the error was immaterial.

125 The other members of this Court have concluded that there was no sufficient error. The result will be that the appeal will be dismissed. Not without a passing hesitation, I will not dissent from that order. My ultimate conclusion is not entirely dissimilar to that finally stated by Gummow and Callinan JJ[168].

126 *Disregarding immaterial considerations*: What I regard as arguably the most serious mistake at the trial (the apparent departure in the judicial charge from the strict requirements of *KBT*[169]) is not, as such, before this Court on a specific ground of appeal. At most, that error is therefore a consideration that lends colour and weight to the complaint about the lack of a propensity warning in this case. I must not, therefore, make the mistake of disposing of this appeal on a footing which is not before us. Accordingly, this is not a case, as *Crofts v*

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**167** *Gipp v The Queen* (1998) 194 CLR 106 at 154 [136]-[137].

**168** See reasons of Gummow and Callinan JJ at [72].

**169** *KBT* (1997) 191 CLR 417 at 422, 432-433. The reference is to the need for the jury to be unanimous concerning the *same three* offences.

*The Queen*[170] and *KBT*[171] were, where it may be held that the jury were misdirected, as such, as to the elements of the offence. Such a misdirection, if made good, will almost always be fatal to the validity of the conviction. Nor is it a case, as *Gilbert v The Queen*[172] was, where the jury were misdirected about a verdict on an alternative, less serious offence that it was open to them to return.

127 As in so many of these cases, the point argued on appeal was not reserved at the trial. No request was made to the trial judge to give a propensity warning. As the prosecution properly conceded, this omission was not fatal to the appellant's reliance on the defect. However, it is a consideration to be weighed when the question presented by "the proviso" is considered. Those representing the appellant at the trial did not perceive any applicable defect in the judge's warnings, considered in their context.

128 *No loss of real chance of acquittal*: It seems unlikely in the extreme that the lack of a specific warning against propensity reasoning would have had much impact on the present jury's deliberations. The prosecution alleged a very large number of individual offences upon which the appellant was convicted. It tendered evidence in relation to all of them. In the context, the relationship charge was separate from, but obviously related to, the matters which the appellant met with an emphatic denial and counteraccusation. I am therefore ultimately convinced that the appellant did not lose a real chance of acquittal because of the failure of the trial judge to give the propensity warning which I think he should have given[173].

129 It may be hoped that this decision, and the earlier decision in *KBT*, will direct the attention of judges and legal representatives in such cases to the special features of, and the dangers inherent in, the relationship offence. Those features and dangers require that all of the elements, and preconditions, should be proved to the unanimous satisfaction of the jury according to the criminal standard. This includes the precondition of three "occurrences" as well as agreement by the jury on "the same three acts"[174]. It also involves, where multiple charges of specific sexual offences are included in the same presentment[175], a decision on whether,

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**170** (1996) 186 CLR 427 at 433-434.

**171** *KBT* (1997) 191 CLR 417.

**172** (2000) 74 ALJR 676; 170 ALR 88.

**173** *Wilde v The Queen* (1988) 164 CLR 365 at 371-372.

**174** *KBT* (1997) 191 CLR 417 at 422, 433.

**175** Or indictment or information, depending on State or Territory practice.

in addition to a separate consideration warning, a warning is required about the dangers of propensity reasoning. To the extent that the evidence called to support the relationship offence is specific, limited, particular, concerns only one complainant, and is within a short compass, such a warning may not be required. But to the extent (as here) that, although concerning one complainant, the evidence is general and lacking in particularity, the warning may be required. In a different case, the absence of such a warning, where it was required, would oblige the quashing of the conviction. But it does not do so in this case.

Order

130 The appeal should be dismissed.

131 HAYNE J. I agree with McHugh J that this appeal should be dismissed. I agree that there is no absolute rule that the judge must always give a warning against "propensity" reasoning when the presentment contains a count of maintaining a sexual relationship with a young person contrary to s 47A of the *Crimes Act* 1958 (Vic) or its equivalents in other jurisdictions. I further agree that there is no absolute rule that the judge is always required to give such a direction in respect of the individual acts that form the basis of the charge under s 47A or its equivalents. Ordinarily, no such direction is required.

132 The trial judge, in this matter, gave a direction that each count on the presentment must be considered separately in the light of the evidence which applied to it and that it would be quite wrong to say that simply because the jury find the accused guilty or not guilty of one count that the accused must be guilty or not guilty (as the case may be) of another count. These directions, which ordinarily must be given in any trial where there are multiple counts before the jury, will usually suffice to warn the jury against reasoning of the kind described as "propensity" reasoning. No further elaboration or emphasis of that warning was called for in this case.

133 As McHugh J points out in his reasons, the circumstances in which propensity evidence may be adduced are limited, and the use to which a jury may properly put propensity evidence is also limited. If evidence is led of misconduct by an accused which does not form the subject of a charge being tried, a warning against the danger of propensity reasoning will ordinarily be required. By contrast, the fact that there are multiple counts included in the one presentment does not necessarily give rise to a requirement that a propensity direction be given. Generally, the separate consideration direction is sufficient warning against misusing evidence of other charged acts.

134 Evidence of uncharged acts, in cases about sexual offences, does present some particular difficulties. Often enough, if evidence of uncharged acts were not admitted, each of the several transactions constituting the charged acts could only be presented as an unreal and not very intelligible event[176]. In particular, knowing that a complainant alleged that a particular act occurred as one in an otherwise undifferentiated course of offending by an accused may throw an altogether different light upon what otherwise may seem to be an inexplicable course of behaviour by the complainant in submitting, without protest, to what is alleged to have occurred. I therefore agree with McHugh J that until this Court decides to the contrary, courts should treat evidence of uncharged sexual conduct as admissible to explain the nature of the relationship between the complainant and the accused, just as they have in the past. I agree that this may well mean that trial judges must warn juries of the limited use that can be made of evidence

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**176** cf *O'Leary v The King* (1946) 73 CLR 566 at 577 per Dixon J.

of that kind and that sometimes, perhaps often, they will have to give warnings about propensity reasoning.

135 As McHugh J points out, the evidence which was given at the trial of the appellant in relation to the charge under s 47A was elicited by leading questions. No objection was made to the evidence being led in this way. I agree that the fact that no objection was taken may well represent a sound tactical judgment by trial counsel. To have the complainant elaborate on her account of events may well have been thought to be more damaging than permitting the evidence in the form in which it was given.

136 Where I differ from McHugh J is that I do not accept that the evidence which was given at trial was insufficient to support the conviction of the appellant on this count. It is true that, as a matter of broad characterisation, provisions like s 47A "[stop] short of authorising trials conducted as a contest between generalised assertions which can only be met by generalised denials"[177]. It is also true that s 47A and its equivalents must be understood as operating in a context where an accused is entitled to be given as much particularity of the charge brought against him or her as the subject-matter will admit[178]. Nevertheless, it is important to recognise that s 47A(3), in the form in which it stood at the time of the offence alleged in this matter, provided that it "is not necessary to prove the dates or the exact circumstances of the alleged occasions" that form the subject-matter of the charge.

137 Accepting, as I do, that proof of an offence under s 47A requires proof of three acts of the kind specified in sub-section (2) of that section, it will suffice to specify those acts in the indictment by identifying the kind of conduct alleged (as, for example, digital or penile penetration of the mouth, vagina or anus), the dates between which the acts are alleged to have occurred, and the place or places at which the acts are alleged to have occurred. If particulars of the charge are sought or provided, the prosecution should give the best particulars it can. If the place or places of commission or the time of commission of separate acts can be more precisely identified, that should be done. But if those particulars cannot be given the indictment will stand. An indictment in the form I have described would provide sufficient information of the general circumstances or "occasions" on which the relevant acts are alleged to have occurred. There is, as the Act says, no need "to prove the dates or the exact circumstances of the alleged occasions".

138 Separate questions may then arise about the sufficiency of the evidence which a complainant gives at trial to establish the commission of the three acts in

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

**178** *Johnson v Miller* (1937) 59 CLR 467 at 489 per Dixon J.

question. There may well be cases where the evidence is so general and vague as not to be capable of persuading a jury beyond reasonable doubt that the accused committed the acts. But, unless the evidence is such that the trial judge could properly take the question of guilt away from the jury (as, for example, for want of proof of one of the acts constituting the offence) the sufficiency of the evidence is a matter for the jury. In the context of s 47A, which explicitly recognises that exact evidence may not be available, the fact that a complainant gives evidence which does nothing more than rehearse the elements alleged in the indictment is not reason enough to withdraw the matter from the jury.