HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, KIRBY, HAYNE AND CALLINAN JJ

KENNETH EMMANUEL DYERS APPELLANT

AND

THE QUEEN RESPONDENT

Dyers v The Queen [2002] HCA 45
9 October 2002
S255/2001

ORDER

1. Appeal allowed.

2. Set aside the order of the Court of Criminal Appeal of New South Wales made on 25 August 2000 and, in lieu thereof, order that:

(a) the appellant's appeal to that Court be allowed;

(b) the appellant's conviction be quashed and a new trial be had.

On appeal from the Supreme Court of New South Wales

Representation:

P Byrne SC with N Mikhaiel for the appellant (instructed by Henry Davis York)

R D Ellis with L M B Lamprati for the respondent (instructed by S E O'Connor, Director of Public Prosecutions (New South Wales))

CATCHWORDS

Dyers v The Queen

Criminal law and procedure – Appeal against conviction – Indecent assault of minor – Whether trial judge erred in directions to jury – Failure of defendant to call witnesses – Delay in making complaint – *Longman v The Queen* (1989) 168 CLR 79 considered – Unreasonable verdict – Unsworn statement by defendant – Order for new trial.

Evidence – Inferences – Criminal trial – Whether inferences open from failure to call witnesses – Application of *Jones v Dunkel* (1959) 101 CLR 298 to criminal trials.

1 GAUDRON AND HAYNE JJ. In 1999, the appellant was indicted, in the District Court of New South Wales, on a charge of indecently assaulting a 13 year old girl in 1988 – 11 years earlier. Although the indictment alleged that the offence had occurred between specified dates, by the end of the prosecution case it was clear that it was alleged that the assault had occurred on the morning of 29 July 1988. In an unsworn statement at his trial, the appellant acknowledged that he had seen the complainant that morning, but he said that it was only in the company of her mother, and while he was otherwise engaged in meetings with others. The appellant's appointment diary was tendered in evidence. It recorded a number of appointments for the appellant during the day. No appointment with the complainant was recorded. There were, however, references to a meeting at 9.30 am with two other persons, a meeting between 1.00 pm and 3.00 pm with several other persons, including the complainant's mother, and what was described as a "processing session" with a Ms Tinkler between 9.30 am and 11.30 am in a room called the "energy conversion room". The complainant swore that the appellant had indecently assaulted her in that room at the end of a "processing session" with her in the morning of 29 July 1988.

2 Neither Ms Tinkler nor others who were recorded in the diary as having appointments at 9.30 am and 1.00 pm gave evidence at the trial. The principal issue in the appeal is this. Did the trial judge misdirect the jury by telling them that, if they concluded: first, that any of these persons was one whom the jury would expect one of the parties to have called to support what was asserted by that party, and secondly, that there was no satisfactory explanation for the failure of that party to call the person to give evidence, then "you are entitled to draw the inference that the evidence of that witness would not have assisted the party who you have assessed should have called that witness"?

3 Yet immediately before giving this direction, evidently modelled on what was said in *Jones v Dunkel*[1], the trial judge had told the jury that where it appeared that there was a witness who could be expected to have been able to give some relevant evidence on some aspect of the case, but the witness had not been called, "you are not entitled to speculate upon what that witness might have said if the witness had been called".

4 The respondent submitted that, following this Court's decisions in *RPS v The Queen*[2] and *Azzopardi v The Queen*[3] (both of which were delivered after the

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1 (1959) 101 CLR 298.

2 (2000) 199 CLR 620.

3 (2001) 205 CLR 50.

appellant's trial), the former of these directions (the *Jones v Dunkel* direction) should not have been given, but the latter direction (not to speculate about what evidence might have been given by those who were not called) should have been given. That submission should be accepted.

5 As a general rule a trial judge should not direct the jury in a criminal trial that the accused would be expected to give evidence personally or call others to give evidence. Exceptions to that general rule will be rare. They are referred to in *Azzopardi*[4]. As a general rule, then, a trial judge should not direct the jury that they are entitled to infer that evidence which the accused could have given, or which others, called by the accused, could have given, would not assist the accused. If it is possible that the jury might think that evidence could have been, but was not, given or called by the accused, they should be instructed not to speculate about what might have been said in that evidence.

6 Further, as a general rule, a trial judge should not direct the jury in a criminal trial that the prosecution would be expected to have called persons to give evidence other than those it did call as witnesses. It follows that, as a general rule, the judge should not direct the jury that they are entitled to infer that the evidence of those who were not called would not have assisted the prosecution. A direction not to speculate about what the person might have said should be given. Again, exceptions to these general rules will be rare and will arise only in cases where it is shown that the prosecution's failure to call the person in question was in breach of the prosecution's duty to call all material witnesses.

7 There are three principal reasons for concluding that a *Jones v Dunkel* direction should not have been given against the appellant in this matter.

8 First, the trial judge's direction invited the jury to consider two questions: would one party be expected to have called a witness to support that party's assertions, and was there a satisfactory explanation for the party's failing to call the evidence? The trial judge gave no direction that would have helped the jury in deciding how to answer these questions. In particular, the jury were given no instructions about when a party would be expected to call a witness, or what would be a satisfactory explanation for not calling that person. And, as it happens, there had been little examination of these matters in evidence given at the trial. Reference was made in cross-examination to Ms Tinkler being available to give evidence but there was no reference to whether any of the others mentioned in the appointment diary were available. More importantly, there was no evidence which would have provided the jury with a basis for concluding that

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4 (2001) 205 CLR 50 at 74 [64].

one or more of these witnesses could have been regarded as being in the camp of one party to the matter rather than the other. Rather, the final address for the prosecution asserted (in effect) that there were persons whom it could be expected that the defence would call, but the basis for making that assertion had not been established in evidence. These would be reasons enough to hold that the direction should not have been given in this case. But the problem with the direction (to the extent to which it is properly understood as having been directed at the appellant) is more deep-seated than any deficiency in the evidentiary basis which the direction assumed.

9 As was pointed out in *RPS*[5], it will seldom, if ever, be reasonable to conclude that an accused in a criminal trial would be expected to give evidence. Not only is the accused not bound to give evidence, it is for the prosecution to prove its case beyond reasonable doubt. The mode of reasoning which is spoken of in *R v Burdett*[6] and *Jones v Dunkel*[7] ordinarily, therefore, cannot be applied to a defendant in a criminal trial. That mode of reasoning depends upon a premise that the person concerned not only *could* shed light on the subject but also would ordinarily be *expected* to do so. The conclusion that an accused *could* shed light on the subject-matter of the charge is a conclusion that would ordinarily be reached very easily. But given the accusatorial nature of a criminal trial, it cannot be said that, in such a proceeding, the accused would ordinarily be *expected* to give evidence. So to hold would be to deny that it is for the prosecution to prove its case beyond reasonable doubt. That is why the majority of the Court concluded, in *RPS* and in *Azzopardi*, that it is ordinarily inappropriate to tell the jury that some inference can be drawn from the fact that the accused has not given evidence. To the extent to which earlier decisions of intermediate courts held to the contrary[8] they were overruled[9].

10 The reasoning which underpinned the decisions in *RPS* and in *Azzopardi* cannot be confined to the accused giving evidence personally. It applies with equal force to the accused calling other persons to give evidence. It cannot be said that it would be expected that the accused would call others to give

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5 (2000) 199 CLR 620 at 632-633 [26]-[28] per Gaudron ACJ, Gummow, Kirby and Hayne JJ.

6 (1820) 4 B & Ald 95 at 161-162 per Abbott CJ [106 ER 873 at 898].

7 (1959) 101 CLR 298 at 321 per Windeyer J.

8 *R v OGD* (1997) 45 NSWLR 744; *R v Cengiz* [1998] 3 VR 720.

9 *RPS v The Queen* (2000) 199 CLR 620 at 633 [30].

evidence. To form that expectation denies that it is for the prosecution to prove its case beyond reasonable doubt.

11 The second of the principal reasons for concluding that a *Jones v Dunkel* direction should not have been given is closely connected with the first. Any conclusion about who would be expected to call a person to give evidence must take account of the obligations of the prosecution. If persons are able to give credible evidence about matters directly in issue at the trial, those facts, standing alone, would ordinarily suggest that the prosecution should call them[10]. As has been pointed out in several decisions of this Court, a basic requirement of the adversary system of criminal justice is that the prosecution, representing the State, must act "with fairness and detachment and always with the objectives of establishing the *whole* truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one"[11] (emphasis added). That requires the prosecution to call all available material witnesses unless there is some good reason not to do so. The fact that a witness will give an account inconsistent with the prosecution case is not a sufficient reason for not calling that person[12].

12 If, in a particular case, the prosecution chooses, for good reason, not to call a witness (as, for example, on the basis that the evidence which would be given by that witness would be "unreliable, untrustworthy or otherwise incapable of belief"[13]) it would be quite wrong to invite the jury to conclude that the accused could be expected to have called that person. Yet if the jury are to be invited to draw some conclusion adverse to the accused from the fact that a witness has not been called, it can only be on the basis that it would be expected that the accused would call that person unless the evidence that would be given would not assist the accused. But if the evidence was important and credible, why was it not adduced by the prosecution?

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10 *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 294 per Fullagar J; *Richardson v The Queen* (1974) 131 CLR 116 at 119 per Barwick CJ, McTiernan and Mason JJ; *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664 per Deane J, 674-675 per Dawson J; *R v Apostilides* (1984) 154 CLR 563.

11 *Whitehorn* (1983) 152 CLR 657 at 663-664 per Deane J.

12 *Whitehorn* (1983) 152 CLR 657 at 674 per Dawson J. See also *R v Kneebone* (1999) 47 NSWLR 450 at 462 [57] per Greg James J, 470-471 [102] per Smart AJ; *R v Lucas* [1973] VR 693 at 705-708 per Newton J and Norris AJ.

13 *Whitehorn* (1983) 152 CLR 657 at 674 per Dawson J.

13 The third of the principal reasons, for concluding that a *Jones v Dunkel* direction should not have been given, arises out of the direction that the jury should not speculate about the evidence that might have been given by those who were not called. The reasoning of which Windeyer J spoke in *Jones v Dunkel*[14] was the drawing of inferences from proved facts and the confidence with which such inferences could be drawn. The central issue for the jury in the present matter was whether they were persuaded, to the requisite standard of satisfaction, that the events described by the complainant had happened. To those events there were said to be only two witnesses – the complainant and the accused. It may, therefore, be doubted that the drawing of inferences loomed large in the jury's deliberations in this case. At most, there might have been some questions of inference about peripheral issues.

14 Be this as it may, to tell the jury that they should not speculate about what evidence might have been given, by those who were not called, is an instruction that directly contradicts the instruction that the jury may conclude that the evidence which those persons could have given would not assist the case of the party whom it was expected would call them.

15 The contradiction should, of course, have been avoided but it was to be avoided only by giving one direction (the direction not to speculate). So much follows from the considerations dealt with earlier. But there is a further reason for that conclusion which is a reason founded in the distinction between the role of the judge and the jury in a criminal trial. As was pointed out in *Azzopardi*[15], it is important to distinguish between a judge's *comments* about either the evidence or the facts the jury may find to be proved, and the *directions* a judge gives to the jury. As was said in the joint reasons[16], "[i]t is … not the province of the judge to *direct* the jury about how they may (as opposed to may *not*) reason towards a conclusion of guilt". Because there can be no expectation that an accused should or will go into evidence, the reasoning described in *R v Burdett* and *Jones v Dunkel* will not be available (at least in all but the most unusual circumstances). That being so, lest the jury engage in that form of reasoning, they should be told that they may not. That is why, as was pointed out in *Azzopardi*[17], if the accused does not give evidence it is almost always desirable to warn the jury that the accused's silence in court is not evidence against the accused, does not constitute an admission by the accused, may not be used to fill gaps in the evidence

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14 (1959) 101 CLR 298 at 321.

15 (2001) 205 CLR 50 at 69-70 [50].

16 (2001) 205 CLR 50 at 69-70 [50].

17 (2001) 205 CLR 50 at 70 [51].

tendered by the prosecution, and may not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt. Likewise, where there is evidence that there may be persons who could have, but have not, given relevant evidence, it is almost always desirable to tell the jury that they may not speculate about what those witnesses might have said but must decide the case only on the evidence that has been led. A direction of that kind, about how the jury should not reason, is a proper form of judicial instruction to the jury. By contrast, if the judge tells the jury how to find the facts which will found a verdict of guilt, the judge comments on the facts of the case in a way that runs obvious risks of detracting from the jury's role as the tribunal of fact.

16 The three reasons we have given are all concerned with giving a *Jones v Dunkel* direction about evidence which the accused might have adduced. The directions given in this matter were described in the Court of Criminal Appeal as having been intended as "bipartisan"[18]. That is, they were understood as permitting, if not inviting, the jury to conclude that there were witnesses whom the prosecution could and should have called. Again, the trial judge having given the jury no guidance about who could be thought to fall into this group, or why that was so, the directions given were either of no assistance to the jury or were apt to mislead. But again, there are more deep-seated reasons for saying that, save in very exceptional circumstances, a direction of this kind should not be given about witnesses whom the prosecution ought to have called.

17 As was held in *R v Apostilides*[19], it is for the prosecution to decide what evidence it will adduce at trial. The trial judge may, but is not obliged to, question the prosecution in order to discover its reasons for declining to call a particular person, but the trial judge is not called upon to adjudicate the sufficiency of the reasons that the prosecution offers. Only if the trial judge has made such an inquiry and has been given answers considered by the judge to be unsatisfactory, would it seem that there would be any sufficient basis for a judge to tell the jury that it would have been reasonable to expect that the prosecution would call an identified person. There would then be real questions about whether, and how, the jury should be given the information put before the judge and then a further question about what directions the jury should be given in deciding for itself whether the prosecution could reasonably have been expected to call the person. Only when those questions had been answered would further directions of the kind contemplated by *Jones v Dunkel* have been open and they are not questions which arise in the present matter. Nor is it necessary to

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18 *R v Dyers* [2000] NSWCCA 335 at [62] per Ireland AJ.

19 (1984) 154 CLR 563 at 575.

consider whether some direction of this kind can be given when a party, who has called a witness, does not ask questions of that witness about a particular topic[20].

18 In this matter, the relevant chain of inquiry stopped at the first of the points identified earlier, there having been no inquiry of the prosecution about why a particular person was not called as part of the prosecution case. In the circumstances of this case there was no occasion to make any such inquiry. The persons to whom reference was made in the appointment diary were not material witnesses. Their evidence was not "necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based"[21]. That is reason enough to conclude that a *Jones v Dunkel* direction aimed at the prosecution should not have been given in this case. Had the direction been aimed only at the prosecution, it may be that its giving would not, in this case, have worked any injustice. But given that the direction would have been understood as aimed also at the appellant, the *Jones v Dunkel* direction was a material misdirection of the jury.

19 Lastly, it is necessary to deal with the suggestion, made in the course of oral argument, that some of the persons named in the appointment diary were properly to be considered to be alibi witnesses and, for that reason, warranted the giving of a *Jones v Dunkel* direction. In his unsworn statement, the appellant said that he was otherwise engaged during the time the complainant said he was alone with her. Whether this is a suggestion of alibi, as that expression is to be understood for the purposes of statutory provisions requiring the giving of notice of alibi evidence[22], is not to the point in considering whether giving a *Jones v Dunkel* direction amounted to a misdirection. Even if the unsworn statement of the appellant was evidence of alibi, the absence of evidence of those whom the statement, or other evidence, revealed might support the applicant's contention that he was engaged otherwise does not lead to some different conclusion about the application of *Jones v Dunkel*. Even in such a case it would be wrong to invite the jury to conclude from the absence of those persons that their evidence would not support some contention of the appellant. The attention of the jury should remain focused upon the central question for their decision – whether they were persuaded beyond reasonable doubt that the appellant had committed the acts described by the complainant. They should not have been distracted by being invited to make what amounted to inquiries about whether the appellant

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20 cf *R v GEC* (2001) 3 VR 334.

21 *Whitehorn* (1983) 152 CLR 657 at 674 per Dawson J.

22 *Criminal Procedure Act* 1986 (NSW), s 48.

had made out a case. The appellant had no case to make[23]; the prosecution did. In assessing that central question the jury had to take into account the appellant's unsworn, and therefore untested, evidence from the dock. They should have been told that they should not speculate about what others may or may not have said had they been called to give evidence. Those conclusions do not depend upon the fact that in this case the appellant was able to, and did, make an unsworn statement. If the appellant had elected to give sworn evidence (but not call those whom it might be thought would have supported his assertions in evidence) a like direction should have been given.

20 As is mentioned at the start of these reasons, the respondent did not dispute that the giving of a *Jones v Dunkel* direction was a misdirection. The respondent did not submit that the proviso[24] was engaged. It follows that the appeal should be allowed and the order of the Court of Criminal Appeal dismissing the appellant's appeal to that Court against his conviction set aside. Whether there should be an order for retrial or an order entering a verdict of acquittal turns upon other aspects of the matter to which it is necessary to turn now.

21 The appellant contended that the direction which the trial judge gave about the difficulties confronting the appellant in responding to an accusation of illegal conduct said to have occurred 11 years before the indictment was filed was insufficient. The relevant principles to be applied are well established and are to be found in *Longman v The Queen*[25]. Given the conclusion that the appeal should be allowed on other grounds, it is not necessary to consider the application of *Longman's Case*.

22 It is, however, necessary to deal with the further contention of the appellant that the evidence led at his trial should have left the jury with a reasonable doubt as to his guilt. Substantially for the reasons given by Callinan J, that contention should be rejected.

23 In these circumstances, it would ordinarily follow that a new trial should be ordered, leaving it to the prosecuting authorities to decide whether to proceed with a new trial. In this case, however, the sentence imposed on the appellant has expired. The decision whether to continue a prosecution is ordinarily a decision for the executive, not the courts. There have, however, been cases

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23 cf *Palmer v The Queen* (1998) 193 CLR 1.

24 *Criminal Appeal Act* 1912 (NSW), s 6.

25 (1989) 168 CLR 79.

where this Court has quashed a conviction, without either ordering a new trial or directing entry of a verdict of acquittal[26]. To make an order that would preclude a new trial would constitute a judicial determination of the proceedings against the appellant otherwise than on trial by jury and in circumstances where it is not held that the evidence adduced at trial required the jury to acquit the appellant. That being so, there should be an order for a new trial despite it being probable that the prosecution will not proceed further.

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26 See, for example, *Callaghan v The Queen* (1952) 87 CLR 115.

24 McHUGH J. Until *RPS v The Queen*[27], many – perhaps nearly all – criminal lawyers believed that a judge could lawfully direct a jury that "the failure of an accused person to contradict on oath evidence that to his knowledge must be true or untrue can logically be regarded as increasing the probability that it is true"[28]. Similarly, criminal lawyers believed that, if the accused failed to contradict or explain evidence of facts, within his or her knowledge, the jury could more readily draw inferences adverse to the accused from that evidence[29]. In *Weissensteiner v The Queen*[30], Mason CJ, Deane and Dawson JJ went so far as to say that these propositions had "never really been doubted". But the first of these propositions was condemned as heresy by a majority of this Court in *RPS v The Queen*[31]. Subsequently in *Azzopardi v The Queen*[32], a majority of the Court re-affirmed the heresy of that proposition. Furthermore, the majority Justices in *Azzopardi* restricted the scope of the second proposition. They held that inferences adverse to the accused can only be drawn from the failure to explain evidence "if there is a basis for concluding that … there are additional facts which would explain or contradict the inference which the prosecution seeks to have the jury draw, and they are facts which (if they exist) would be peculiarly within the knowledge of the accused"[33]. Their Honours went on to say that "cases in which a judge may comment on the failure of an accused to offer an explanation will be both rare and exceptional"[34].

25 Today, a majority of the Court again wields the anathema. They pronounce as heresy a principle that criminal lawyers have preached for nearly 200 years. It is the principle that, if the jury think that the accused should have called a witness and there is no satisfactory explanation for the failure to call the witness, the jury are entitled to draw the inference that the evidence of the witness would not have assisted the accused. It is heresy, the majority hold, because there is no expectation that the accused will either give evidence or call

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27 (2000) 199 CLR 620.

28 *Bridge v The Queen* (1964) 118 CLR 600 at 615 per Windeyer J.

29 *Weissensteiner v The Queen* (1993) 178 CLR 217 at 227-228 per Mason CJ, Deane and Dawson JJ.

30 (1993) 178 CLR 217 at 227.

31 (2000) 199 CLR 620.

32 (2001) 205 CLR 50.

33 (2001) 205 CLR 50 at 74 [64] per Gaudron, Gummow, Kirby and Hayne JJ.

34 (2001) 205 CLR 50 at 75 [68] per Gaudron, Gummow, Kirby and Hayne JJ.

other persons to give evidence. Given the decision in *Azzopardi*, I must accept the premise. But I do not accept the conclusion that the majority draws from that premise.

26 In civil cases, there is no expectation that a defendant will give evidence in respect of any issue upon which the plaintiff bears the onus of proof. Yet, in appropriate cases, judges may direct juries or themselves that an adverse inference may be drawn if a party fails to call evidence that he or she was reasonably expected to call. In such a case, the tribunal of fact may draw the inference that the party feared that calling the evidence would have exposed facts unfavourable to that party[35]. In a civil case, the failure to call the evidence is an admission by conduct, and in certain circumstances the failure to call evidence in a criminal case may also be an admission by conduct. When the accused does more than merely deny the prosecution case and sets up an *affirmative* evidentiary case, the accused's conduct in presenting that case may give rise to an admission adverse to the affirmative case.

27 In a criminal case, there is of course less scope than in a civil case for drawing an inference from the accused's failure to call witnesses or tender documents. First, the prosecution has the duty to call all witnesses who can testify to the *actus reus* or *mens rea* of the charge[36]. Second, leaving aside statutory defences and the defence of insanity, the accused does not bear any onus of proof in a criminal trial. Third, in some jurisdictions – even before *RPS* and *Azzopardi* were decided – there may have been no general expectation that the accused would call or give evidence. Until New South Wales abolished the dock statement, that was not the expectation in that State. Until then, accused persons were expected to give evidence or make a statement from the dock. I doubt if there was ever a case in New South Wales where a person accused of an indictable offence did not give evidence or make a dock statement after the trial judge ruled there was a case to answer. At all events, I never saw or heard of such a case. Even those who just met the fitness-to-plead standard – the punch-drunk, illiterate, ex-travelling-tent boxer, for example – were expected to make a statement, if they did not give evidence. The statement might be as brief as: "I'm not guilty. I didn't do it. I didn't tell the police I did." But a statement would be made, if the accused did not give evidence, which the accused seldom did, usually preferring the safety of the dock to the danger of the witness box.

28 In New South Wales, there was also an expectation that the accused would specifically answer by evidence or statement such parts of the prosecution case as were within his or her knowledge. If the accused failed to do so, the trial judge

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35 *Jones v Dunkel* (1959) 101 CLR 298 at 320-321 per Windeyer J.

36 *R v Apostilides* (1984) 154 CLR 563.

was entitled to tell the jury that "the fact that no explanation or answer is forthcoming, as might be expected if the truth were consistent with innocence, is a matter which the jury may properly consider." The New South Wales Court of Criminal Appeal approved a direction to that effect in *R v Guiren*[37]. While dock statements were permitted, a New South Wales judge would have been astonished to be told that the accused was saying nothing at all in answer to the Crown case. But since *RPS* and *Azzopardi* – even in New South Wales, where this case was tried – there is no longer any general expectation that the accused will answer any part of the prosecution case.

29 Thus, the prosecution's duty to call certain witnesses, the onus of proof and the absence of an expectation that the accused will give evidence limit the circumstances in which a judge may give a failure-to-call-a-witness direction in a criminal trial. But if the accused does more than join issue with the prosecution case, if the accused sets up an affirmative evidentiary case, I think that the judge can still give a failure-to-call-a-witness direction.

30 The paradigm case for such a direction is the alibi case. If the accused asserts that he was with his friend in another place when the crime occurred, the unexplained failure to call the friend to support the alibi has traditionally given rise to a failure-to-call-a-witness direction. Until *RPS* and *Azzopardi* were decided, the judges and the criminal Bar readily accepted that it was a proper direction. And I do not see how consistently with principle and precedent, those two cases necessarily prevent the judge giving a failure-to-call-a-witness direction when the accused sets up an affirmative evidentiary case.

31 Given the state of the case law and practice when the present charges were heard, the learned trial judge was on solid ground in thinking that he could give the direction that he gave. In fact, the principle that the learned trial judge applied was applied more than 180 years ago in *R v Burdett*[38] to a factual situation that was even weaker from the prosecution view point than the present case. In *Burdett*, the trial judge had directed the jury that there was evidence from which they could infer that the accused had published a seditious libel in the county of Leicester. The judge went on to tell the jury that, in determining whether the accused had published the libel in that county, they could take into account that he had not called evidence to rebut the inference. At the time an accused person was neither a competent nor a compellable witness. But the accused could have rebutted the inference by calling the person who had delivered the libel to a third party. The person who delivered the letter was a

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37 (1962) 79 WN (NSW) 811 at 813 per Herron, Maguire and Ferguson JJ.

38 (1820) 4 B & Ald 95 [106 ER 873].

"professional friend" of the accused. The Kings Bench discharged a rule nisi seeking a new trial on the ground of misdirection. Abbott CJ said[39]:

> "No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends?"

32 *Burdett* was a weaker case than the present case because the accused had not set up an affirmative case. Yet because an inference against him could be drawn from other evidence, the jury could take into account that he had not called his "professional friend" to rebut the inference.

33 In *Weissensteiner* and earlier cases, this Court approved the principles laid down in *Burdett*. They are the jurisprudential foundation for the direction that the learned trial judge gave in the present case. Indeed, in *Weissensteiner*, members of the Court cited lengthy passages from *Burdett* to explain the jurisprudential foundation for such directions. These days, of course, the direction given in *Burdett* could not be given because the prosecution now has a duty to call a witness such as the "professional friend" who delivered the seditious libel to the third party. But that does not affect the principle, only its application. Until *RPS* and *Azzopardi* were decided, the principle, as Mason CJ, Deane and Dawson JJ said in *Weissensteiner*[40], had "never really been doubted". Certainly, counsel who appeared for the appellant at the trial did not doubt it. Not only did he not object to the judge's direction, he acquiesced in the giving of the direction before the judge gave it.

34 In the present case, the appellant did not merely deny that he committed the offences alleged. He asserted that at the relevant time he was at a meeting or undertaking an "energy conversion session" with Ms Wendy Tinkler, another member of the Kenja sect. This affirmative evidentiary case was no different from the ordinary alibi case where the accused asserts that he was in another place – often with others – when the crime occurred. In support of his alibi, the appellant relied on a diary entry purportedly made by Ms Amanda Hamilton. At the trial, the credibility of the diary entries was a large issue. The appellant also called Ms Hamilton to give evidence supporting his unsworn statement that he was with Ms Tinkler at the time when the offences were alleged to have

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39 (1820) 4 B & Ald 95 at 161-162 [106 ER 873 at 898].

40 (1993) 178 CLR 217 at 227.

occurred. But the appellant did not call Ms Tinkler or any of the other persons who were recorded in the diary as having appointments with him between 9.30am and 1.00pm that day.

35 The Crown had no duty to call Ms Tinkler as a witness. She could give no evidence that supported the Crown case. Nor was she a witness to the events that constituted the *actus reus* of any charge. Her evidence became relevant only when the appellant asserted that he was with her at the relevant time. If the appellant was telling the truth and Ms Tinkler had been called as a witness, her evidence would have tended to prove that there was no offence. But that does not mean that the prosecution must call every witness who may support an affirmative case that the prosecution thinks the accused might run. The cards are not yet stacked so heavily against the prosecution that it has a duty to call every witness that might support any affirmative case the accused might put forward. Ms Tinkler was a member of the sect that the appellant appears to have dominated. It is natural to suppose – as the Crown prosecutor, defence counsel and the trial judge evidently believed – that the jury might reasonably think that the appellant should have called her to support his alibi.

36 Contrary to the majority view in this case, it does not undermine the requirement of proof beyond reasonable doubt to hold that the jury might think that the appellant could be expected to call Ms Tinkler. Nor would that holding undermine the adversarial system of criminal justice, the presumption of innocence or the privilege against self-incrimination.

37 After the judge gave the-failure-to-call-a-witness direction, the Crown still had to prove its case beyond reasonable doubt. In the course of doing so, it had to negative beyond reasonable doubt the evidentiary claim that the appellant was with Ms Tinkler at the time of the offences. Once the defence raised the meeting and the purported session with Ms Tinkler as an alibi, the appellant could not be found guilty of the offence unless the Crown proved beyond reasonable doubt that the meeting and the session did not occur. The existence of the alibi was so opposed to the prosecution case that it had to be negatived beyond reasonable doubt. Thus, neither the requirement of proof beyond reasonable doubt nor the adversary system of criminal justice was undermined by the direction of the judge.

38 Nor did giving the direction undermine the presumption of innocence or the privilege against self-incrimination. The presumption of innocence did not change. Until the jury returned its verdict, the appellant continued to have the benefit of that presumption.

39 Nor did the judge's direction breach the privilege against self-incrimination. The appellant was not compelled to give evidence or to make a statement concerning the matters raised by Ms Hamilton in her evidence. Given the decisions in *RPS* and *Azzopardi*, it may be that, if he had made no mention of

the matter in his statement to the jury, the trial judge could not have commented on his failure to do so. However, the appellant did not remain silent. He asserted that he was with Ms Tinkler at the relevant time. Accused persons who make statements before or during a trial may often find that their subsequent silence leaves them open to adverse comments that could not be made if they had remained silent.

40 Thus, if an accused makes a pre-trial assertion that conflicts with his defence at the trial, the prosecution may prove that he failed to withdraw the assertion at the committal or during the trial[41]. The prosecution may rely on the accused's subsequent silence to found an adverse inference that discredits his defence. In *Petty v The Queen*[42], Mason CJ, Deane, Toohey JJ and myself said of such a case:

> "Evidence of a failure, on the committal hearing, to ask a question, make a submission, or advert to a claimed defence is not, of itself, so admissible. The right to remain silent applies to the conduct of a committal proceeding and silence maintained provides no basis for any inference against an accused. What makes the present case different is the fact that Maiden's conduct constituted not an exercise of the right of silence but an adherence, up to the time of trial, to an allegation [made pre-trial] that Petty had murdered White. It was the making and implied maintenance of that admittedly false allegation of murder by another which the jury was entitled to take into account in determining whether the defence advanced on the trial was spurious."

41 Similarly, when an accused elects to put an *affirmative* evidentiary case, the jury is entitled to evaluate that case by all that the accused does or has done including the failure to call a witness who might have been expected to be called to support that affirmative case. Having elected to speak at his trial and assert that he was with Ms Tinkler, the appellant cannot complain if the jurors are permitted to evaluate his claim by his conduct in failing to call the witness that he could reasonably be expected to call.

42 No suggestion was made that anything in the *Evidence Act* 1995 (NSW) precluded the judge from directing the jury as he did. Nor could it be asserted. In fact, s 20 of that Act strongly supports the conclusion that the New South Wales legislature contemplated the giving of directions such as that given by the judge in this case. Section 20(3) of the *Evidence Act* provides:

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41 *Petty v The Queen* (1991) 173 CLR 95.

42 (1991) 173 CLR 95 at 102.

"The judge or any party (other than the prosecutor) may comment on a failure to give evidence by a person who, at the time of the failure, was:

(a) the defendant's spouse or de facto spouse, or

(b) a parent or child of the defendant."

43 The sub-section assumes that it is proper for the judge to comment on the fact that the defendant has not called any of these persons. Indeed, s 20(3) is open to the construction that the judge may make a comment when the accused fails to call any of these persons to answer a relevant part of the prosecution case and is not confined to cases where the accused sets up an affirmative case. As Gaudron J pointed out in *Knight v FP Special Assets Ltd*[43], "[i]t is contrary to long-established principle and wholly inappropriate that the grant of power to a court (including the conferral of jurisdiction) should be construed as subject to a limitation not appearing in the words of that grant." Section 20 provides only one condition on the right of the judge to comment on the failure to call the named persons. Section 20(4) declares that, unless made by another defendant, the comment must not suggest that such a person failed to give evidence because the defendant was guilty or was believed by that person to be guilty.

44 It is hardly to be supposed that the New South Wales legislature intended to confine the judge's or other party's comment to the failure of one of the described persons to give evidence. Read against the common law history of the failure-to-call-a-witness direction, the power conferred by s 20 should be seen as a supplement to the common law right of comment. It makes it clear that comment can be made on the failure of the defendant to call even close relatives to give evidence in circumstances where the failure has evidentiary significance. Indeed the express prohibition in s 20(4) against suggesting guilt arguably indicates that in the case of witnesses, not falling within s 20(3), the judge may suggest that the accused has not called the witness because he was guilty of the offence.

45 Suppose in this case, the appellant had claimed that, instead of being with Ms Tinkler, he was with his wife, his son or his father. Faced with s 20(3), could anyone rationally argue that the trial judge could not comment on the appellant's failure to call the wife, son or father? And if that is so, the common law of Australia should not be changed to exclude comments concerning the absence of witnesses such as Ms Tinkler. The *Evidence Act* of New South Wales has its counterpart in the *Evidence Act* 1995 (Cth).

46 In my opinion, the learned trial judge spoke no heresy when he directed the jury as he did.

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43 (1992) 174 CLR 178 at 205.

47 I agree with the reasons of Kirby J for rejecting the other grounds of appeal raised by the appellant.

Order

48 The appeal should be dismissed.

49 KIRBY J. This is an appeal from a judgment of the New South Wales Court of Criminal Appeal[44]. That Court dismissed an appeal to it by Mr Kenneth Dyers ("the appellant"), in which he challenged his conviction of the indecent assault of a complainant AP, then a girl of thirteen years.

50 The background facts are stated in the joint reasons of Gaudron and Hayne JJ[45] ("the joint reasons") and the reasons of Callinan J[46]. The appellant's conviction followed a jury verdict in the District Court of New South Wales. The trial judge sentenced the appellant to imprisonment for twelve months, with a non-parole period of four months. Service of the custodial punishment was suspended after six days, when the appellant was granted bail pending his appeal to the Court of Criminal Appeal. That Court concluded that he should not be returned to custody, despite its opinion that the sentencing process was not "vitiated by error on the trial Judge's part"[47]. The sentence of twelve months imprisonment was reimposed but suspended upon the appellant's entering into a good behaviour bond[48]. That sentence has now been completed.

Three issues

51 In this Court, three issues were argued:

(1) *The misdirection issue*: Whether the trial judge had misdirected the jury in the instructions that he gave concerning:

   (a) the absence of two possible witnesses and the use that the jury might make of the suggested failure of the appellant to call those witnesses (the *Jones v Dunkel*[49] point); and

   (b) the approach that the jury should take to the significant delay (five years) that had occurred between the alleged offence and the first complaint to the authorities (the *Longman v The Queen*[50] point).

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44 *R v Dyers* [2000] NSWCCA 335 per Stein JA, Smart and Ireland AJJ.

45 Joint reasons at [1]-[3].

46 Reasons of Callinan J at [93]-[101].

47 *R v Dyers* [2000] NSWCCA 335 at [82].

48 Pursuant to the *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 12.

49 (1959) 101 CLR 298.

50 (1989) 168 CLR 79.

(2) *The unreasonable verdict issue*: Whether:

(a) the Court of Criminal Appeal misdirected itself in the performance of its function when considering whether it was "of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence"[51]. Specifically, whether it had erred in taking into account, as adverse to the appellant's submissions, the fact that, in accordance with the then law[52], the appellant had elected not to give evidence but to make an unsworn statement before the jury (the *Gordon and Gordon*[53] point); and

(b) if so, upon reconsideration by this Court of the evidence called at trial, the jury's verdict of guilty was unreasonable (the *M v The Queen*[54] point).

(3) *The proper order issue*: Having regard to the conclusions on the foregoing issues, what order this Court should make to dispose of the appeal to it:

(a) if it were to conclude that the verdict was unreasonable, it was common ground that the conviction of the appellant would be quashed and a verdict of acquittal entered; but

(b) if one or both of the misdirection points were made good, affecting the legal accuracy of the appellant's trial and the unreasonable verdict issue were decided against him, whether, as the appellant submitted, his conviction should be quashed and a retrial dispensed with in the circumstances.

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51 *Criminal Appeal Act* 1912 (NSW), s 6(1).

52 The right to make an unsworn statement and to address the jury was provided by the *Crimes Act* 1900 (NSW), s 405. Comment by the judge or the prosecutor on the failure of an accused person to give evidence was forbidden by s 407(2) of the same Act. The right to make an unsworn statement in New South Wales has since been abolished: *Criminal Procedure Act* 1986 (NSW), s 95; cf Australian Law Reform Commission, *Evidence*, Report No 38, (1987) at 45-59 [85]-[106].

53 (1991) 57 A Crim R 413.

54 (1994) 181 CLR 487 at 492; cf *Ratten v The Queen* (1974) 131 CLR 510 at 515-516; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 534; *Chidiac v The Queen* (1991) 171 CLR 432 at 442-446.

The misdirection issue

52 *The Jones v Dunkel point*: In relation to this issue I agree with the joint reasons and the reasons of Callinan J. The instruction given by the trial judge had the potential to mislead the jury into believing that the appellant should have called the missing witnesses. It thereby misstated the accusatorial character of the trial. In the state of the evidence in this case, the misdirection could not be regarded as immaterial. That conclusion alone requires that the appeal be allowed and the conviction quashed.

53 The abolition in New South Wales of the facility for the accused to make an unsworn statement to the jury[55] has altered somewhat the balance of the accusatorial criminal trial. In a sense, it has returned the criminal trial, in cases where the accused does not give evidence, to a position similar to that which pertained when the accused was incompetent[56] and not compellable to give evidence on his own behalf. The trial, in such cases, is then starkly presented in its full accusatorial (ie non-adversarial) character. The prosecution is put to the proof. It is important in such circumstances that the reasoning appropriate to an adversarial civil trial should not undermine the accusatorial elements of a criminal trial. Otherwise the cards will be unduly stacked against the accused[57] as the mind of the jury (or judge) is diverted to questions about a failure by the accused to give, or call, particular evidence. Nor do I consider that s 20 of the *Evidence Act* 1995 (NSW) compels, or suggests, a different conclusion[58]. That is a limited provision on a particular subject and nothing in the background materials on the section suggests a contrary assessment or larger implications.

54 *The Longman v The Queen point*: The possibility that a retrial may occur[59] indicates that I should also consider the second misdirection complained

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55 *Criminal Procedure Act* 1986 (NSW), s 95.

56 This was the situation in New South Wales, in relation to indictable offences, before the enactment of the *Criminal Law and Evidence Amendment Act* 1891 (NSW), s 6.

57 cf reasons of McHugh J at [35].

58 cf reasons of McHugh J at [42]-[45].

59 *Jones v The Queen* (1989) 166 CLR 409 at 411-415; *Osland v The Queen* (1998) 197 CLR 316 at 333 [41]; *R v Chai* (2002) 76 ALJR 628 at 629 [3]; 187 ALR 436 at 437.

of, arising from the requirements stated in this Court's decision in *Longman v The Queen* ("*Longman*")[60].

55 I hesitate to embark once again on this territory. I sympathise with the difficulty that trial judges and courts of criminal appeal face in conforming to the various opinions stated in this Court in relation to the *Longman* requirement[61]. Differing emphasis has been placed at different times by different members of this Court upon different parts of the reasoning in *Longman* and in particular the considerations mentioned by Deane J[62] and McHugh J[63] in their separate concurring reasons in that case. However, I believe that it is fair to say that the several appeals (and many more applications for special leave) in which the point has been re-agitated have only come before this Court because of what seems, with respect, to be a reluctance on the part of some judges to conform to the law established in *Longman*. Some judges have even confessed that they find obedience to the *Longman* direction to be "unpalatable"[64]. In my opinion, a correct statement of the present law is set out in the analysis of Sully J, in the New South Wales Court of Criminal Appeal in *R v BWT*[65]. It is, and it is expressed to be, stringent.

56 In *Jones v The Queen* ("*Jones*")[66] the majority, either expressly[67] or, as I read it, implicitly[68], concluded that a delay of four years before complaint after the first alleged act required a *Longman* warning. I dissented on that point, calling attention to the fact that the relevant delays in *Longman* had been much longer – twenty-one and twenty-five years[69]. The trial judge in *Jones* had

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60 (1989) 168 CLR 79.

61 eg *Jones v The Queen* (1997) 191 CLR 439; *Crampton v The Queen* (2000) 206 CLR 161; *Doggett v The Queen* (2001) 75 ALJR 1290; 182 ALR 1.

62 *Longman* (1989) 168 CLR 79 at 101.

63 *Longman* (1989) 168 CLR 79 at 108-109.

64 *R v BWT* [2002] NSWCCA 60 at [97] per Sully J. The appeal was nonetheless allowed.

65 [2002] NSWCCA 60 at [95].

66 (1997) 191 CLR 439.

67 *Jones* (1997) 191 CLR 439 at 445-446 per Brennan CJ.

68 *Jones* (1997) 191 CLR 439 at 453 per Gaudron, McHugh and Gummow JJ.

69 *Longman* (1989) 168 CLR 79 at 83, 91.

referred to the delay in terms that seemed to me to be adequate[70]. But I was in dissent. *Jones* is an indication of the rigour of the requirement adopted by this Court. It supports the analysis by Sully J concerning the more recent decisions and the state of binding authority.

57 There is no mathematical formula applicable to a case of delay so that it can be said with certainty that, for a specified delay, a *Longman* warning must, or need not, be given to a jury. As in all such matters, it is necessary to consider the trial judge's instructions in the context of the contested issues in the trial and all of the evidence.

58 In the present matter there were particular features that made the delay less significant than it might have been in another, more typical, case[71]. The occasion of the alleged assault was, in the end, precisely nominated by the complainant. The appellant had access to detailed written records concerning his whereabouts at that time. The day was a significant one for the appellant and for the complainant and her mother. It would certainly have been open to the trial judge to give a *Longman* warning. Indeed, it would have been prudent for him to have done so. However, in the particular circumstances I, like Callinan J, would not have disturbed the jury's verdict on this complaint of misdirection, had it stood alone.

59 *Conclusion – misdirection shown*: The result is that one ground of appeal relating to the trial judge's directions to the jury has been made good. But it is necessary now to consider more fundamental objections raised by the appellant.

The unreasonable verdict issue

60 *The Gordon and Gordon point*: I agree with Callinan J's conclusion that the Court of Criminal Appeal erred in considering the appellant's failure to give sworn evidence at the trial was a "substantial impediment"[72]. By law, the appellant did not have to say anything in his trial. He should not have been placed in a position of disadvantage by the fact that, in accordance with the then law, he elected to give an unsworn statement. To do so would amount to a form of coercion upon him to give sworn evidence. That would undermine the legal rights of the appellant and the accusatorial character of his trial. The reasoning of the Court of Criminal Appeal in this case, and in *Gordon and Gordon*[73] upon

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70 *Jones* (1997) 191 CLR 439 at 464.

71 Reasons of Callinan J at [128]-[130].

72 *R v Dyers* [2000] NSWCCA 335 at [32]-[33].

73 (1991) 57 A Crim R 413.

which it depended, incorrectly imposed upon the appellant, in effect, an obligation to give sworn evidence that was not required by law, or to suffer a significant burden in the consideration of the reasonableness of the jury's verdict.

61 This conclusion does not, of itself, lead to a reversal of the Court of Criminal Appeal's decision on the unreasonable verdict ground. But it does help to show why that Court's consideration of that ground was extremely brief. It made no significant reference to the conflicts of testimony upon which the appellant relied. Because this ground, if established, entitles a prisoner to a verdict of acquittal, it is important that the duty cast on a court of criminal appeal, onerous although it undoubtedly is, should be discharged with care and by applying the correct approach. I am left with a sense of unease that, in this instance, starting with the error derived from *Gordon and Gordon*, the Court of Criminal Appeal may not have completed its function fully. This being so, there is no alternative but for this Court to do so.

62 *The M v The Queen point*: The proper approach to a decision concerning whether a verdict is "unreasonable, or cannot be supported, having regard to the evidence"[74] is established by this Court's decision in *M v The Queen*[75].

63 The appellate court must pay full respect to the "primary responsibility" of the jury and to the advantages which they enjoy "of having seen and heard the witnesses"[76]. The appellate court is bound to review the evidence in its entirety. Practicalities necessarily oblige reliance upon the assistance of the parties in drawing attention to "discrepancies", "inadequacies", "tainted" evidence or evidence that "otherwise lacks probative force"[77]. If such evidence on the record (or any additional evidence that a court of criminal appeal admits) leaves the appellate court with a feeling that "there is a significant possibility that an innocent person has been convicted"[78], unless that possibility is ultimately expelled by making allowance for the advantages enjoyed by the jury in the particular case, the residual doubt felt by the appellate court will be "a doubt which a jury ought also to have experienced"[79]. In that event, the appellate court will be bound to set aside a verdict based upon that evidence. The test formulated in *M v The Queen* "must now be accepted as the appropriate test" for

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74 *Criminal Appeal Act* 1912 (NSW), s 6(1).

75 (1994) 181 CLR 487. See also *Jones* (1997) 191 CLR 439 at 450-452.

76 *M v The Queen* (1994) 181 CLR 487 at 493.

77 *M v The Queen* (1994) 181 CLR 487 at 494.

78 *M v The Queen* (1994) 181 CLR 487 at 494.

79 *M v The Queen* (1994) 181 CLR 487 at 494.

determining whether a verdict is unreasonable[80]. What did that test require in the present case?

64 *The conflicting evidence*: The appellant relied upon five elements of the evidence:

(a) that the complainant's mother's reaction to the complainant's distress, following the alleged assault, as described, was not credible in the circumstances;

(b) that the significant delay in complaint was not adequately explained, even allowing for the complainant's age and previous relationship with the appellant;

(c) that there were significant inconsistencies in the accounts given by the complainant and her mother concerning what had occurred on the day of the alleged assault;

(d) that the evidence in the nature of an alibi, adduced for the appellant at his trial, gave rise to a reasonable doubt that he could have been present with the complainant when the assault was alleged to have occurred; and

(e) that the complainant and her mother had a motive to accuse the appellant falsely of misconduct because, on the day of the alleged misconduct, the complainant's mother was confronted about, and later dismissed from her employment in the Kenja organisation because of, alleged financial improprieties.

65 As to (a), the mother's reaction, it is true that there was some conflict between the evidence of the mother and daughter as to the latter's apparent distress immediately following the alleged assault. Ordinary experience would suggest that a mother, seeing a daughter aged thirteen in distress, would have asked why she was distressed. However, human reactions are variable. It was common ground that the mother had been virtually summoned to Sydney for an investigation of the finances of the Melbourne Branch of Kenja. The jury might have concluded that her mind had been on other things. It seems odd that the daughter would not have informed her mother, at the latest on the long journey home to Melbourne by road, of what she said had transpired – especially after the mother's employment with Kenja had been terminated. But, as I pointed out in *Jones*, there is a wealth of literature that explains the failure of some young

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80 *Jones* (1997) 191 CLR 439 at 452; see also at 443, 461.

complainants to bring sexual misconduct to family or official notice. The reasons may include (in the case of younger victims)[81]:

> "ignorance about the nature, quality and character of the act performed upon them; a feeling of powerlessness (particularly where, as is usually the case, the offender is a family member or close acquaintance); shame and embarrassment; and fear (often well founded) of discouragement or disbelief on the part of family and of officials".

66 As to (b), the delay of five years before complaint was made to the authorities, this led to an instruction to the jury, as required by the *Criminal Procedure Act* 1986 (NSW), that "[t]here may be good reasons why the complainant did not speak about what she says occurred"[82]. Quite apart from the general considerations that I have mentioned, in this case there was a special factor – the complainant's family and friends were closely involved in Kenja. Although the mother ceased involvement in that organisation following her dismissal, the complainant's friends continued to be active members. There was evidence, upon which the appellant relied, that the complainant attended an eisteddfod organised by Kenja in 1988. The judge instructed the jury that delay in complaint "may indicate fabrication". He left to the jury the assessment of the delay, although without a *Longman* warning.

67 As to (c), the suggested inconsistencies in the evidence of the complainant, the appellant submitted that there was an "inherent implausibility" in the complainant's statement that she had removed most of her clothing and sat with her legs over the appellant's legs in the middle of winter in an unheated building. On the other hand, the appellant was a person of authority within Kenja. The complainant was a young girl. It would have been open to the jury, if they believed the complainant, to conclude that she did not complain of the cold, even after three hours, because of her submission to the appellant's authority.

68 The appellant also pointed to inconsistencies between the evidence of the complainant and of her mother. It is true that there were such inconsistencies. Indeed, there were some differences between the prosecutor's opening to the jury, presumably based on the statements in his brief, and the complainant's actual testimony. The parties made differing submissions to the jury about the inconsistencies. The appellant submitted that the inconsistencies indicated that the complainant was an unreliable witness who had given false evidence. The prosecution submitted that the inconsistencies were explained by the passage of

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81 *Jones* (1997) 191 CLR 439 at 463.

82 See *Criminal Procedure Act* 1986 (NSW), s 107.

time since the alleged events occurred. The trial judge noted these differences. He specifically told the jury that it was for them "to determine whether if [the evidence] is at odds does it reflect adversely upon [the complainant's] evidence as to what she says occurred on this day". Thus, the inconsistencies were clearly called to notice. They afforded a fruitful subject for addresses to the jury. Evaluating their significance was part of the jury's function.

69 As to (d), the appellant's alibi, it is true that cogent evidence of alibi can "engender in any reasonable mind a doubt of the accused's guilt"[83]. The evidence of alibi in this case was an entry in the appellant's diary indicating that, at the time of the alleged "energy conversion session" when the offence was said to have taken place, the appellant was undertaking such a session with Ms Wendy Tinkler (a witness who was not called in the subject trial although apparently called by the prosecution in an earlier trial). The author of the diary entry was Ms Amanda Hamilton, who gave evidence supporting the appellant's statement that he had been with Ms Tinkler at the relevant time. Another witness, Ms Diana Moore, gave evidence that she had been present at a meeting in the afternoon of that day when the complainant's mother was dismissed. She also said the complainant was present at that meeting. The complainant and her mother both gave evidence that the mother had been dismissed during a confrontation that ensued with the appellant immediately following the "energy conversion session" allegedly involving the complainant.

70 Neither Ms Hamilton nor Ms Moore was completely independent of the appellant. Both had been extensively involved in Kenja. Ms Moore was a director. Ms Hamilton was the appellant's secretary and sister-in-law. The jury might reasonably have discounted the evidence of those witnesses, preferring the version of events given by the complainant and her mother.

71 As to (e), the suggestion that the complainant's mother might have had a motive to accuse the appellant falsely of misconduct immediately following her termination, it is true that such a motive for dislike might have existed. However, the complainant did not complain to her mother at that time. The jury might therefore have concluded that any such motivation had worn thin following the passage of five years.

72 *Conclusion – error but same result*: There are aspects of the evidence in this case that are discordant. But this is so in many cases where there is sharply conflicting evidence. In her original statement to the police, the complainant said that the assault by the appellant had happened to her on a Friday night. She stated that the appellant had telephoned her in Melbourne on a Thursday and had recommended that she come to Sydney to have an "energy conversion session"

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83 *Palmer v The Queen* (1998) 193 CLR 1 at 12 [14].

with him on the following night. At the trial, the complainant said that the incident had occurred some time shortly after 7 am on the Friday when she arrived with her mother at the Sydney premises of Kenja. In cross-examination she admitted that her statements to police had been untrue.

73 In the circumstances of the termination of her mother's employment, allegedly at the time of, or very soon after, the confrontation between the appellant and the complainant, it seems even more extraordinary than usual that the complainant would not have said to her mother words to the effect that "You've been dismissed because I just rebuffed his improper conduct".

74 Obviously, the case for the prosecution had distinct evidentiary weaknesses. Nevertheless, the accusation by the complainant of improper behaviour on the part of the appellant was ultimately consistent, adhered to in sworn testimony and, in one sense, more believable because it was relatively confined. It would have been open to the jury to reason that, if the complainant were truly minded to make a false accusation, she could have embellished the complaints that she actually made. A great deal depended upon the impression that the complainant made upon the jury. If the trial was conducted fairly and accurately, I could not conclude that this was a case where the jury ought to have experienced a reasonable doubt[84] about the guilt of the appellant.

75 The role of a court of criminal appeal in reviewing the evidence and considering an appeal on the unreasonable verdict ground is one that must be conducted with due respect for the "constitutional" function performed by juries in the Australian system of criminal justice[85]. The Court of Criminal Appeal was here undertaking its role as a safeguard against any significant possibility of a miscarriage of justice because of the conviction of an innocent person. Although, in the present case, there is a risk that a miscarriage of justice occurred, I do not believe that the risk is such that this Court, scrutinising for itself the evidence in the court below, should substitute its decision for that which the jury reached, with the significant advantages that they enjoyed.

76 The result is that the Court of Criminal Appeal erred in its consideration of this ground of the appellant's challenge to his conviction. But when the task of consideration is properly performed, this Court should reach the same conclusion as that Court did.

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84 *M v The Queen* (1994) 181 CLR 487 at 494; cf *Jones* (1997) 191 CLR 439 at 446, 455.

85 *M v The Queen* (1994) 181 CLR 487 at 502; *Jones* (1997) 191 CLR 439 at 456.

The appropriate order issue

77 *The power to make the order*: The appellant had already served the amended sentence imposed upon him by the Court of Criminal Appeal and no application was made by the respondent to cross-appeal against that order varying the sentence imposed at trial. The real concern of the appellant in bringing his appeal to this Court was not to secure a retrial but to obtain an acquittal, or freedom from the risk of retrial, of the offence that he has always denied.

78 The starting point, as in any judgment or order of this Court, is the Constitution. By s 73, this Court has the jurisdiction to hear and determine appeals, relevantly, from all judgments, decrees, orders and sentences of the Supreme Court of any State. For this purpose, the Court of Criminal Appeal is the Supreme Court of New South Wales[86]. However, the foregoing constitutional mandate is expressed to be "with such exceptions and subject to such regulations as the Parliament prescribes". In the *Judiciary Act* 1903 (Cth), the Parliament has prescribed certain regulations[87]. These include that special leave to appeal be first obtained[88]. So it was in this case. Amongst the powers of the Court, in the exercise of its appellate jurisdiction, is the power "to grant a new trial in any cause in which there has been a trial whether with or without a jury"[89]. The word "cause" is defined to include "any suit, and also includes criminal proceedings"[90].

79 This Court is empowered to give "such judgment as ought to have been given in the first instance"[91]. Accordingly, this Court has the power to grant a new trial of a criminal proceeding. It is not obliged to do so. Necessarily, its order is a judicial order. The Court has a discretion. The discretion is one that must be exercised, like any other granted to a court by or under legislation, in a principled fashion, so as to fulfil the purposes of the grant. The existence of discretion is unsurprising, given that the repository of the power is a court

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86 *Stewart v The King* (1921) 29 CLR 234.

87 *Judiciary Act* 1903 (Cth), s 35(1).

88 *Judiciary Act* 1903 (Cth), s 35(2).

89 *Judiciary Act* 1903 (Cth), s 36.

90 *Judiciary Act* 1903 (Cth), s 2.

91 *Judiciary Act* 1903 (Cth), s 37; cf *Australian Iron & Steel Ltd v Greenwood* (1962) 107 CLR 308 at 316; *Quinn v Rocla Concrete Pipes Ltd* (1986) 6 NSWLR 586 at 601.

comprised of judges[92] having the constitutional duty to perform their functions by reference to applicable legal principles and the interests of justice[93].

80 Given the great variety of circumstances that can arise in different cases, it is undesirable, indeed impossible, to lay down fixed rules to govern the exercise of the Court's power to order, or refrain from ordering, a new trial where the Court concludes that an earlier trial has miscarried by reason of misdirection on the part of the trial judge.

81 An important consideration favouring the ordering of a new trial in such circumstances is the fact that, by doing so, the Court discharges its principal functions as an appellate court. It identifies any legal error. It quashes the judgment or orders infected by that error. It vindicates the law by its order permitting a retrial when the error will not presumably be repeated. Such order also respects the proper functions of the trial court, including the jury (where applicable), as the decision-maker resolving disputed matters of fact in serious criminal cases where guilt is contested. It leaves that decision-maker, properly instructed, to bring in the verdict that leads to conviction or acquittal. It avoids overreaching the functions of the appellate court. It maintains the divide between the respective powers and responsibilities of the Executive Government, to decide upon the prosecution of criminal offences (including by way of a repeated prosecution at a second trial)[94], and of a court, whose functions ordinarily arise in criminal matters only after the decision to prosecute (or reprosecute) is taken.

82 *Instances where a new trial is not ordered*: There are certain instances where this Court, in the exercise of its judicial power, has refrained from ordering a retrial. The cases include:

- where the evidence adduced at the first trial did not, and could not, as a matter of law, prove the offence charged against the appellant[95];

- where the only basis upon which the prosecution could succeed at a new trial would be by propounding a different case from that presented at the first trial, permitting which would constitute a serious injustice to the

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92 *Knight v F P Special Assets Ltd* (1992) 174 CLR 178 at 205; cf reasons of McHugh J at [43].

93 cf *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627 at 630; *King v The Queen* (1986) 161 CLR 423 at 426-427; *Gerlach v Clifton Bricks Pty Ltd* (2002) 76 ALJR 828 at 841 [70]; 188 ALR 353 at 371-372.

94 cf *Stanoevski v The Queen* (2001) 202 CLR 115 at 130 [61].

95 *Crampton v The Queen* (2000) 206 CLR 161.

accused. This Court has said "it would be wrong by making an order for a new trial to give the prosecution an opportunity to supplement a defective case"[96];

- where the length of time that has elapsed since the events giving rise to the charges is great. That consideration, together with others, may be determinative against an order for a new trial[97];

- where it is shown that the appellant, who succeeds in the appeal, has served the custodial part of his sentence[98] and *a fortiori* where an appeal has been brought by the prosecution against that sentence but has been rejected[99]. Even more powerful will be the case where the successful appellant can show that he or she has served the entire sentence so that, if a second trial were had, it could not result in the practical imposition of any additional, or other, punishment upon the appellant. Sometimes this latter consideration will be subject to a possible countervailing need to order a new trial to vindicate reasons in addition to the punishment of the appellant. Thus, where the successful appellant is a legal practitioner, or some other person for whom a conviction is critical for legal reasons, an order for a retrial may be made, so as to allow the prosecuting authority to decide whether larger considerations of the public interest require a fresh determination of the guilt of the appellant of the charge that miscarried for legal error at the first trial[100].

83 Other considerations that may be relevant include:

- whether there has already been more than one earlier trial;

- whether, having regard to the venue, publicity and errors in the first trial it would be impossible to secure a fair retrial of the accused in any venue actually available[101];

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96 *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627 at 630.

97 *Parker v The Queen* (1997) 186 CLR 494 at 520, 538.

98 *Parker v The Queen* (1997) 186 CLR 494 at 520.

99 *Parker v The Queen* (1997) 186 CLR 494 at 538-539.

100 *MacKenzie v The Queen* (1996) 190 CLR 348 at 376-377; *Stanoevski v The Queen* (2001) 202 CLR 115 at 128 [51], 130 [61].

101 *Tuckiar v The King* (1934) 52 CLR 335 at 347, 355.

- whether the intervening death of witnesses could make an order for a retrial manifestly unjust or oppressive to the appellant;

- whether a retrial would, in the circumstances, impose unacceptable trauma and distress on witnesses, unwarranted by the alleged offence and the prospects of conviction[102];

- whether a supervening change of the criminal law, abolishing the offence with which the appellant was charged, might make a retrial seriously unjust or oppressive[103];

- whether the age, mental or physical condition of the appellant are such that they would make a retrial clearly unjust in the circumstances; and

- whether the prosecution indicates that it does not seek an order for a retrial[104].

84 *Arguments of the parties*: The appellant drew attention to his age (now eighty years), his medical condition referred to by the Court of Criminal Appeal[105], the length of time that had elapsed since the offence was alleged to have occurred (now fourteen years), the completion of the sentence imposed on the appeal, the absence of any prosecution challenge to that sentence in this Court and the comparatively limited character of the offence alleged. In support of the submission that no new trial should be ordered, the appellant also relied on his arguments relating to the inconsistencies in the evidence offered against him. Even if those arguments were insufficient to warrant the entry of a verdict of acquittal, it was submitted that they were such as to indicate, with other considerations, that a further trial (the appellant's third) would represent a serious injustice to him. It was argued that a conviction would be unlikely in a trial properly conducted and, thus, that a new trial should not be ordered[106].

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102 cf *Longman* (1989) 168 CLR 79 at 109; *Crofts v The Queen* (1996) 186 CLR 427 at 452-453; *KBT v The Queen* (1997) 191 CLR 417 at 438.

103 cf *Stringer* (2000) 116 A Crim R 198 at 221-222 [89]-[91], 226 [108], 228-229 [116]-[118] (a case of an application for a permanent stay on the basis of a supervening change of the law).

104 *Griffiths v The Queen* (1994) 69 ALJR 77; 125 ALR 545.

105 *R v Dyers* [2000] NSWCCA 335 at [79]-[81].

106 *Hoch v The Queen* (1988) 165 CLR 292 at 297 per Mason CJ, Wilson and Gaudron JJ, 305 per Brennan and Dawson JJ.

85 Against these considerations the respondent relied on the fact that, in the trial the subject of this appeal, although flawed, a jury had accepted the evidence of the complainant and her mother and found the appellant guilty. Save in exceptional circumstances, this Court has ordinarily left decisions about whether a retrial should take place to the prosecutor in the Executive Government[107]. The Director of Public Prosecutions would be obliged to take into account all the considerations pressed upon this Court as reasons why it would be inappropriate for a new trial in the appellant's case. He would have the capacity to consider many factors, perhaps some not considered by the Court, and to ensure a decision consistent with the treatment of other like cases.

86 *Conclusion – no new trial*: The view has sometimes been expressed in this Court that, following a finding of a material misdirection of law there is only one order that may be made, namely the order quashing the original conviction and providing for a new trial[108]. However, that opinion is incompatible with the sources of this Court's powers, its character as a court[109] and with the practice of the Court in particular cases, some of which I have mentioned[110].

87 An order for a retrial must be sustained, in the particular case, by the applicable facts and law and by a judicial consideration of justice. If an order for retrial may be withheld because it would permit the prosecution to present a different case, it may be withheld in other circumstances where justice equally requires that course. In disposing of an appeal such as this, this Court is not confined to correcting errors of law. More than eighty years ago, in *Hargan v The King*[111], Isaacs J pointed out that the "greatest innovation" made by the *Criminal Appeal Act* 1912 (NSW) was to permit scrutiny of criminal convictions by a broader standard than "error in strict law". This is not, therefore, a case

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107 *Longman* (1989) 168 CLR 79 at 91, 102, 109; *B v The Queen* (1992) 175 CLR 599 at 620; *Crofts v The Queen* (1996) 186 CLR 427 at 452-453; *BRS v The Queen* (1997) 191 CLR 275 at 332-333; *KBT v The Queen* (1997) 191 CLR 417 at 438; *Gipp v The Queen* (1998) 194 CLR 106 at 170 [189]; *Graham v The Queen* (1998) 195 CLR 606 at 617 [47]; *Fleming v The Queen* (1998) 197 CLR 250 at 267 [47]; *Doggett v The Queen* (2001) 75 ALJR 1290 at 1315 [160]; 182 ALR 1 at 35-36.

108 *Stanoevski v The Queen* (2001) 202 CLR 115 at 130 [61] per McHugh J.

109 *Foster v The Queen* (1993) 67 ALJR 550 at 557 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ, 560 per Brennan J, 565 per McHugh J; 113 ALR 1 at 11, 14, 22.

110 Above at [82]-[83].

111 (1919) 27 CLR 13 at 23.

analogous to appellate correction confined to error of law alone[112]. The Court has the whole matter before it. It has large powers under the Constitution and the *Judiciary Act* 1903 (Cth) that include the ordering of a new trial, where the discretionary considerations suggest that that be done.

88 Where an appellate court has not accepted an argument that a verdict is unreasonable, but has found a material error of law, the proper order is normally to provide for a retrial. Where the prosecutor's discretion is exercised in favour of a retrial, such an order permits a verdict to be taken from a jury accepted as representing the community. This is why, normally, it is left to the Director of Public Prosecutions to evaluate the competing considerations for and against a retrial.

89 This said, an order for a new trial remains "within limits, a discretionary remedy"[113]. It is no less so in criminal appeals, although the considerations of the public interest involved in criminal proceedings are somewhat different to those in civil cases. It is a judicial act and therefore not an automatic or unthinking one.

90 In the special circumstances of this case, I have concluded that a new trial of the appellant should not be ordered. The most telling circumstances are: (1) the age of the appellant and his proved medical condition that moved the Court of Criminal Appeal to substitute a non-custodial sentence; (2) the absence of any challenge by the prosecutor to that substituted sentence; (3) the fact that the appellant has fully served that sentence and that principles of double jeopardy would restrain any increase in the sentence following conviction after a retrial; (4) the absence of any reason to require a retrial in the appellant's case and the fact that the appellant does not ask for a retrial[114]; (5) the relatively confined nature of the assault alleged; (6) the undesirability of subjecting the complainant and her mother to the ordeal of giving evidence on a further trial; (7) the fact that a further trial would be the third occasion on which the appellant had been put on trial for the offence; and (8) the public costs and inconvenience of a further trial so many years after the alleged events and the likelihood that the prosecution might, on a new trial, be obliged to call the witnesses upon whose absence it commented in the second trial, thereby presenting its case in a different way.

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112 cf *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.

113 *Balenzuela v De Gail* (1959) 101 CLR 226 at 243-244; cf *Hocking v Bell* (1945) 71 CLR 430 at 499; *Gerlach v Clifton Bricks Pty Ltd* (2002) 76 ALJR 828 at 838 [55]; 188 ALR 353 at 367-368.

114 Such as existed in *MacKenzie v The Queen* (1996) 190 CLR 348 at 376-377 and *Stanoevski v The Queen* (2001) 202 CLR 115 at 128 [51], 130 [61].

Orders

91 The appeal should be allowed. The judgment of the New South Wales Court of Criminal Appeal should be set aside. In lieu thereof, the appeal to that Court should be allowed and the appellant's conviction quashed.

92 CALLINAN J. The important question that this appeal raises is whether a trial judge may comment on the failure of an accused to call as witnesses persons who might be able to give evidence relevant to guilt or innocence.

Facts and previous proceedings

93 In the early 1980s the appellant and Jan Hamilton promoted a sect known as "Kenja". Its membership increased over the years. By 1988 several hundred people attended its centres in Sydney, Melbourne, Canberra and Brisbane. The complainant's mother was a member of the sect, and she and the complainant participated in its activities in Canberra and later in Sydney and Melbourne. The appellant was then about 66 years old.

94 Some members of the sect, including the complainant's mother, charged fees for sessions conducted with people who attended the centres. It is unnecessary for the purposes of this appeal to explore just precisely what services were provided during the sessions, who might charge for them, and the financial relationship between the appellant and other members apparently authorized by him to charge fees.

95 In 1986 the complainant turned 11 years old. In the latter part of that year, the complainant, her mother and sisters were living at Point Piper in Sydney. After school, the complainant was driven in a small bus provided by the sect to a Kenja centre to do her homework and take classes before going home. Thereafter, at other places and on other occasions the complainant attended other Kenja centres.

96 In July 1988 the complainant and her mother travelled from Melbourne where they were then living to Sydney. By this time the complainant's mother was a director of the Melbourne branch of the sect. On the 29th of that month, after a discussion between the appellant and the complainant's mother, the complainant participated in an "energy conversion session" with the appellant in a room adjoining his office. Such a session involves the engagement of the participants in eye contact for long periods for the purpose of expelling "negative thoughts" and improving self-esteem. Her mother was not present.

The complainant's account

97 The complainant gave this account of the session. The appellant told her that she needed to "clear" on certain energies, including "sex", as they sat opposite each other. The complainant then placed her legs on the appellant's chair on either side of his legs. The appellant asked the complainant to remove her shirt because she needed to "clear" on the energies on her stomach and chest. The appellant told her that it would be easier if there were no obstructions to her energy centres. He then put his hand on the complainant's stomach and touched her breasts. His hand remained there for about five minutes. He then fondled her

breasts and kissed her on the head and cheeks before pulling her towards him by her arms. The appellant requested her to remove her skirt. She complied but refused his further request that she remove her underwear. The appellant then became abusive: he pushed the complainant's chair back, swore at her and called her a "bitch". He told her to dress and stormed out of the room. The complainant was shaken and very upset by what had happened. The session had lasted about three hours.

98 Immediately after it there was an acrimonious conversation between the appellant, the complainant and her mother. Subsequently the appellant asked the complainant whether she wanted to have another session. She said not. The appellant then told the complainant that she and her family could stay for the rest of the weekend but that they would then have to leave the sect. That was not however the end of contact between the complainant and the appellant. The complainant subsequently attended eisteddfods, a lecture and a gymnastics competition conducted by the sect. On one of these occasions the complainant sought out the appellant.

99 The complainant explained that she did not tell anyone about what had occurred during the session until 1993 because the appellant had told her not to discuss with anyone what took place during energy conversion sessions.

The complainant's mother's evidence

100 The complainant's mother who was a proprietor of the sect's Melbourne branch said that in July 1988 the profits at that branch had been declining. She said that she had spoken to Jan Hamilton and her partner, Diana Moore, by telephone in the week of 29 July 1988. Diana Moore had claimed that it was the complainant's fault that the profits were falling. Jan Hamilton suggested that both the complainant's mother and the complainant should travel to Sydney for an energy conversion session with the appellant. The complainant's mother agreed with the suggestion. At the appellant's Sydney centre on 29 July 1988 the complainant's mother left the complainant with the appellant at approximately 9am for an energy conversion session. When she returned at about 11:30am the complainant's mother saw the appellant and the complainant in the corridor. The appellant was yelling at the complainant and began yelling at her mother. The appellant said that both the complainant and her mother would have to leave the sect.

101 The appellant was charged, and subsequently tried by Kinchington DCJ QC with a jury at the District Court of New South Wales on 5 July 1999, that "between 22 July 1988 and 6 August 1988 at Sydney he did assault the complainant, a person then under the age of 16 years, namely 13 years, and at the time of such assault, did commit an act of indecency upon her, she then being under his authority", contrary to s 61E(1A) of the *Crimes Act* 1900 (NSW). Such an offence carries a maximum penalty of imprisonment for 6 years.

The appellant's case

102 The appellant made an unsworn statement from the dock at his trial. He denied that he had had any personal contact with the complainant on the day that he had dismissed her mother from the sect. Michelle Ring, Diana Moore, Amanda Hamilton and Michael Strang gave evidence on his behalf.

103 In his unsworn statement (which was supported by evidence called on his behalf) the appellant claimed that the cause of the acrimony between him and the complainant's mother was money, and in particular the latter's failure to account for a sum received by her in respect of a forthcoming eisteddfod.

104 The appellant's case was that there had been no session between him and the complainant of the kind alleged by the complainant. Rather, there had been a meeting of a number of the members of the sect, including the complainant with himself at 1pm on 29 July 1988. The appellant also said that he was in an "energy conversion session" with Wendy Tinkler at the time that the complainant said she was being assaulted by him. Ms Tinkler was not called as a witness.

105 Amanda Hamilton gave evidence that she had worked as the appellant's personal assistant. By reference to a diary which was tendered in evidence, she was able to say that she had arranged a meeting between the appellant and Wendy Tinkler at 9:30am on 29 July 1988, and a further meeting of several members of the sect from 1pm to 3pm, including the complainant and her mother. Diana Moore gave evidence that she had attended the meeting at 1pm, and named the people present as being Wendy and Denise Louth, the complainant's mother, the complainant, Bernard Price, John McCrae, the appellant, his wife Jan and herself. In his unsworn statement the appellant said that the people at the meeting included his wife and Wendy Tinkler, as well as "the directors and [the complainant's mother]". The appellant said that the complainant was also present at the meeting.

Submissions and the summing-up

106 At the conclusion of the evidence, the Crown Prosecutor addressed the jury and referred to a number of people who had attended the meeting at 1pm. He then said:

> "My friends haven't called Wendy Tinkler, Denise Louth, Bernard Price or John McCrae. And I suggest to you the reason why those people haven't been called is because they would not [be of] assistance [to] the defence case."

107 Later the prosecutor addressed the jury in these terms:

"[W]ho's Wendy? We haven't heard from Wendy. You may think that whoever Wendy is, that person cannot assist the defence case".

108 In the course of his closing address counsel for the appellant at his trial said:

"You see what the Crown says to you is that we didn't call all the witnesses that might have been called at that meeting and probably his Honour will say in the direction that you could infer from that, that maybe it wouldn't have assisted our case, but there are other inferences available to you. One inference is that you've seen how the Crown cross-examines and we would have been here for another six days and I would have violated my promise which was that the case would end on a Wednesday … but the other inference that's equally available is that the defence case is there. Nothing more would be added and all that would happen would be all the same kind of cross-examination about a non issue".

109 In his directions to the jury the trial judge said this:

"Now, in his address to you, Mr di Suvero [the appellant's counsel] referred to the failure of the Crown to call the man Ralph and Rebecca and Renae. In his address to you, the Crown Prosecutor also – and I omitted to say this when I was talking you through the Crown's address – referred you to the failure of the accused to call, I think it was Denise and Wendy and Peter and Mariata (?) and Bernie, or some of those people that are mentioned in the diary, as to what occurred on the day, if they were present. He said they have not been called, they are of no assistance, all we have heard is from Diana and the accused. Diana Moore and the accused have told you what occurred there. He says, therefore, the only conclusion you can draw from their failure to attend is like the defence asked you to draw that they could not help. They would not help what the defence version of events is if they had been called.

Where it appears to you, as judges of the fact, that there is a witness who could be expected to have been able to give relevant evidence on some aspect of the case, but that witness has not been called, you are not entitled to speculate upon what that witness might have said if the witness had been called.

But where the witness is a person, who, in the ordinary course, you would expect one of the parties to have called to support what they are asserting in their evidence and there is no satisfactory explanation for the failure of that party to call that witness, you are entitled to draw the inference that the evidence of that witness would not have assisted the party who you have assessed should have called that witness.

> In this case, I do not think there has been any explanation given by anyone as to why those particular persons were not called, but you will remember if there is, it is in the evidence if there is.
>
> However, even if there is no such explanation, you do not have to draw the inference that I have suggested. You judge this case on the evidence that is placed before you. It may be that in the circumstances of this case you will decide that you will draw such an inference; maybe you will decide that it is not relevant to the issues you have to determine and you will not draw such an inference. You are the judges of the fact, whether you draw such an inference or not is entirely a matter for you to determine."

110 Counsel for the appellant not only made no objection to this direction, but had, before his Honour summed up, stated his acquiescence in it.

111 The trial judge gave a direction regarding the long period between the offence and the charge in these terms:

> "In the light of her evidence there you will have no difficulty, I would think, in determining that she made no complaint to anyone, or spoke to anyone about these events until 1993. That seems to be common ground in these proceedings. It may be that you might reasonably have expected that after such an event she would have spoken to somebody, and she would have spoken fairly quickly, and Mr di Suvero has addressed you on that aspect of the case.
>
> She says that she did not speak to anyone until 1993 because – and that is when she spoke to the police and made her statement because she was told by the accused in one of these sessions that she had with him, that she must not disclose what occurred in the course of that session.
>
> In these circumstances you might infer there has been no complaint made by the – I think the only conclusion you could come to that she did not make any complaint to anyone. She spoke to the police in 1993 but that is hardly a complaint to anyone, from which you can get any comfort in this case.
>
> The absence of such a complaint does not necessarily indicate that the allegation that the offence was committed was false. There may be good reason why a victim of a sexual assault may refrain from making a complaint about such an assault. You may think that is perfectly obvious that there may be good reason for not complaining at all. The question for you to consider is whether in this case the complainant and the circumstances which existed establish that the absence of complaint is consistent with the allegation, or whether it throw[s] doubt upon the allegation made by [the complainant] in these proceedings.

The Crown contends that you would accept her explanation bearing in mind she was then aged 13, bearing in mind the nature of these energy conversion sessions, bearing in mind that her position in Kenja as opposed to the position of the accused in Kenja at that time. And the Crown says that what else would a 13 year old girl do at that time.

The accused, on the other hand, has argued, through his counsel, that the absence of any such complaint to anyone to whom she might reasonably have been expected to complain, is inconsistent with the conduct of a truthful person who has been sexually assaulted. Mr di Suvero went on to say that you should therefore regard the complainant's evidence that she was sexually assaulted by the accused as false.

That is a matter which you may consider, but I must warn you that the absence of making a complaint, because no complaint was made (speaking to the police would not justify you coming to a conclusion that a complaint was made) does not necessarily indicate that the evidence of the complaint is false. It may indicate fabrication as has been suggested in this case on the part of the complainant, but it does not necessarily do so.

There may be good reasons why the complainant did not speak about what she says occurred on 29 July 1988 until 1993. You have heard her evidence in that regard, it is a matter for you in your role as judges of the facts what you make of the evidence, whether you accept it as being reliable or whether you reject it.

The direction that I have just given you about this absence of complaint is given in every case in which there has been an absence of complaint. It is not given because of any particular view that I may have formed concerning the reliability of the complainant's evidence in this case. The weight to be given to that evidence is a matter for you, and you alone, to determine in your role as judges of the facts.

…

As both counsel have referred to, the Crown relies solely upon the evidence of [the complainant] to prove its case against the accused in these proceedings. If you do not accept [the complainant's] evidence as being reliable, either wholly or on this particular issue as to what she says occur[red] there, well that of course would be the end of the matter because if you do not accept her as reliable on that evidence then it would not establish the essential element, that is that an indecent assault took place, or that any assault took place.

…

> The fact that [the complainant] has no memory now, eleven years later, of certain events is not fatal to the Crown case and shows that she is an honest and reliable witness and the fact that she is in some disagreement with her mother's evidence again negatives any assertion that she and her mother, or she alone fabricated her evidence, because if she did fabricate her evidence, if she was that sort of witness she would have ensured that her evidence was closer to her mother's.
>
> …
>
> The alleged events which give rise to this charge occurred according to [the complainant] and her mother at the end of July 1988, that is some eleven years ago. It is clear from the evidentiary material that has been placed before you in these proceedings that the accused was charged some time about September 1993, and it would seem that prior to that he was not aware of any allegation being made against him by [the complainant].
>
> In those circumstances you may think that those facts place him in a very difficult and disadvantageous position in the sense that after the passage of five years, without an inkling that such an allegation would be made, it may be difficult for him to reflect back on what he was doing at that particular time to prepare material so that questions could be asked of [the complainant], or to account for his actions on that day and what he was doing to rebut any assertion that he had been involved with [the complainant] in the way she described. Even bearing in mind there is no onus on him to prove anything, but still he is placed, you may think, at a disadvantage because five years have elapsed before he hears about the allegations made by [the complainant].
>
> That might affect the memory of people that might be able to support him as to what occurred at that time. It might affect him obtaining any information about the events of that day about which he could question [the complainant], or her mother.
>
> So the time that has elapsed without him becoming aware of these allegations is a factor for you to take into consideration, both on the issue of the reliability of [the complainant's] evidence and also on this question of whether the accused has been disadvantaged in any way by such a delay in him receiving notice of [the complainant's] allegations. In any event you must always keep in mind that the Crown, having brought the charge, it is for the Crown to prove it and to do so beyond reasonable doubt. And that there is no onus on the accused to prove anything."

112 The appellant was convicted and sentenced to a term of imprisonment of 12 months with a non-parole period of four months.

The appeal to the Court of Criminal Appeal

113 The appellant appealed to the Court of Criminal Appeal against both conviction and sentence. The appeal against sentence succeeded but against conviction failed. Ireland AJ, with whom Stein JA and Smart AJ agreed, gave the judgment of the Court. With regard to the ground, that the trial judge should not have directed the jury that they might draw inferences adverse to the appellant by reason of his failure to call witnesses, his Honour stated his conclusion in these paragraphs[115]:

> "In the present case, a reading of the transcript makes plain that the witnesses referred to by the Crown Prosecutor in his address were not witnesses whom the Crown, in fairness, would be expected to call to give evidence. No complaint was made, nor could it have been, that the trial Judge did not make abundantly clear the onus which the Crown at all times bore. *RPS v The Queen* does not proscribe the giving of a *Jones v Dunkel* direction in a criminal trial. What is, however, essential is that, consideration be given to questions of fairness, including the need to make clear to the jury that an accused person is not bound to give evidence and that it is for the Crown to prove its case beyond reasonable doubt.
>
> In the present case, the direction given was neither inappropriate nor unfair. There was no miscarriage of justice. This ground of appeal is not made out."

114 The appellant also argued in the Court of Criminal Appeal that the verdict was unreasonable and not supported by the evidence. As to that, Ireland AJ said this[116]:

> "This was a case in which the question of guilt turned upon an acceptance of the jury of the evidence of the complainant.
>
> The fact that this Court does not have the advantage of seeing the witness themselves, necessarily imposes a restriction on its ability to judge whether the jury ought to have had a reasonable doubt as to guilt: see *M v The Queen* (1994) 181 CLR 487 at 493. In both *Jones v The Queen* (1997) 191 CLR 439 and in *M v The Queen*, the High Court emphasised the need to give full regard to the fact that the jury is the body entrusted with the primary responsibility of determining guilt or innocence and that the jury has the benefit of having seen and heard the witnesses.

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115 *R v Dyers* [2000] NSWCCA 335 at [67]-[68] per Ireland AJ.

116 *R v Dyers* [2000] NSWCCA 335 at [30]-[32] per Ireland AJ.

> As pointed out by counsel for the respondent, the failure of the appellant to give sworn evidence contradicting the version of events given by the complainant represents a substantial impediment to the success of this ground of appeal: see *Gordon and Gordon* (1991) 57 A Crim R 413. See also *R v Blade* (NSWCCA, 1 May 1991, unreported)."

115 It was also contended in the Court of Criminal Appeal that the trial judge had erred in failing to direct the jury in accordance with the decision of this Court in *Longman v The Queen*[117]. The Court of Criminal Appeal, in rejecting that contention placed reliance on its earlier decision in *R v Johnston*[118].

The appeal to this Court

116 The appellant repeats the grounds and arguments in this Court upon which he relied and failed in the Court of Criminal Appeal with some additions and adaptations including this one:

> "that the Court of Criminal Appeal erred in determining that the failure of the appellant to give sworn evidence was an impediment to the ground of appeal that the verdict of the jury was unreasonable."

117 In dealing with the appellant's first submission, that the trial judge should not have commented upon the appellant's failure to call witnesses whom he might have been expected to call, I would first refer to the observations on the obligations of the prosecution made by five Justices[119] of this Court in *R v Apostilides*[120]:

> "A decision whether or not to call a person whose name appears on the indictment and from whom the defence wish to lead evidence must be made with due sensitivity to the dictates of fairness towards an accused person. A refusal to call the witness will be justified only by reference to the overriding interests of justice. Such occasions are likely to be rare. The unreliability of the evidence will only suffice where there are identifiable circumstances which clearly establish it; it will not be enough that the prosecutor merely has a suspicion about the unreliability of the evidence. In most cases where a prosecutor does not wish to lead evidence from a person named on the indictment but the defence wishes

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117 (1989) 168 CLR 79.

118 (1998) 45 NSWLR 362.

119 Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ.

120 (1984) 154 CLR 563 at 576.

> that person to be called, it will be sufficient for the prosecutor simply to call the person so that he may be cross-examined by the defence and then, if necessary, be re-examined."

118 There is no universal current practice with respect to the nomination of witnesses on an indictment. The reference to it in the joint judgment should be taken to be a reference to reasonably available material witnesses. The obligation of the prosecution is to call all material witnesses. Whilst counsel and judges should be vigilant to ensure that trials are not needlessly prolonged, "material" in this field of discourse should not be given any narrow meaning. A witness will not cease to be a material witness merely because he or she is a witness to a relevant circumstantial matter or event. The persons whom it was implied by the trial judge that the appellant should have called were material witnesses, because evidence from them could have borne upon the movements and activities of the complainant and the appellant at about the time of the alleged commission of the offence. A broad practical view of materiality should be taken. All the available admissible evidence which could reasonably influence a jury on the question of the guilt or otherwise of an accused is capable of answering the description "material".

119 The fact that the prosecution here saw fit to comment on the absence of the possible witnesses forecloses any argument by the respondent that they were not material witnesses or were not available, and provides a clear indication that if it was for anyone to call them, it was, as indicated by *Apostilides*, for the prosecution to do so. *Apostilides* does not hold that such a failure necessarily causes a trial to miscarry. Indeed the appellant in this case did not argue that it did on that account. But *Apostilides* has a relevant and important bearing on the case because it serves to throw into relief that whilst the onus lies upon the Crown to prove guilt, it is not entitled to do so at any, and all costs; that the prosecutor is a minister of justice bound to call all material witnesses: and that there is no obligation of any kind upon the accused to prove, or bring forward anything.

120 The statement in the joint judgment in *RPS v The Queen* (Gaudron ACJ, Gummow, Kirby and Hayne JJ) is applicable to the appellant in this case[121]:

> "By contrast, however, it will seldom, if ever, be reasonable to conclude that an accused in a criminal trial would be expected to give evidence. The most that can be said in criminal matters is that there are some cases in which evidence (or an explanation) contradicting an apparently damning inference to be drawn from proven facts could come only from the accused. In the absence of such evidence or explanation,

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121 (2000) 199 CLR 620 at 632-633 [27]-[29].

the jury may more readily draw the conclusion which the prosecution seeks. As was said in *Weissensteiner v The Queen*[122]:

> '[I]n a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them *when that evidence, if it exists at all, must be within the knowledge of the accused*.' (Emphasis added.)

In a criminal trial, not only is an accused person not bound to give evidence, it is for the prosecution to prove its case beyond reasonable doubt. The observations by the Court in *Jones v Dunkel* must not be applied in criminal cases without taking account of those considerations.

If the question concerns the calling by the defence of a witness other than the accused, it will also be necessary to recall that the prosecutor 'has the responsibility of ensuring that the Crown case is presented with fairness to the accused'[123] and in many cases would be expected to call the witness in question as part of the case for the prosecution. And, if the question concerns the failure of the prosecution to call a witness whom it might have been expected to call, the issue is not whether the jury may properly reach conclusions about issues of fact but whether, in the circumstances, the jury should entertain a reasonable doubt about the guilt of the accused."

121 The principles stated in *Jones v Dunkel*[124] presuppose that there is occasion for the calling of evidence by an accused. Such a presupposition is incompatible with the presumption of innocence, and the right of the accused neither to give, nor to call evidence at trial. This is not an exceptional case of the kind referred to by their Honours in *RPS*. There is no feature of it that takes it outside the general rule.

122 The first ground of appeal should therefore be upheld.

123 In almost all cases a trial judge should say nothing about an absent material witness whom an accused might supposedly have called. At most, a trial judge might in some circumstances have occasion to say that the jury should act on the evidence, and only the evidence that has been called. As, save for exceptional cases, the Crown Prosecutor may not address or comment on the

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122 (1993) 178 CLR 217 at 227-228, per Mason CJ, Deane and Dawson JJ.

123 *Richardson v The Queen* (1974) 131 CLR 116 at 119, per Barwick CJ, McTiernan and Mason JJ. See also *R v Apostilides* (1984) 154 CLR 563.

124 (1959) 101 CLR 298.

non-attendance of witnesses for the defence, the reason, and therefore the occasion, for a trial judge to comment, should also be very rare. I need mention in relation to this ground one other matter only, and that is the appellant's counsel's acquiescence in the trial judge's observations about the people who did not give evidence for the appellant. The trial took place before the decision of this Court in *RPS*. The appellant in any event takes no point about that acquiescence. It does not therefore stand as an obstacle to the upholding of ground one. Because the upholding of the first does not entitle the appellant to an acquittal it is necessary to consider the appellant's other arguments.

124 The second ground that the appellant argued is that the Court of Criminal Appeal erred in holding that the failure of the appellant to give sworn evidence was an impediment to the success of any submission that the verdict of the jury was unreasonable. The appellant points out that if such a failure is relevant in the way in which the Court of Criminal Appeal said it was, then, if an accused elects not to give evidence but is nonetheless convicted, in a very weak case his chances of success on appeal will be considerably diminished. It was said that the source of the proposition upon which the Court relied was a statement of Hunt CJ at CL in *Gordon and Gordon*[125]. In that case his Honour said that the absence of evidence by or on behalf of an appellant would be not merely an obstacle but a serious obstacle to the success of "the increasingly popular 'unsafe and unsatisfactory'" ground of appeal.

125 I would also uphold this ground of appeal. What Hunt CJ at CL said suffers from the same defect as a comment of the kind which was made here by the trial judge with respect to what might, or might not be inferred from the absence of apparently material witnesses on behalf of the appellant. The principle that an accused is neither obliged to give evidence nor to call it is not to be eroded. The statement which was made by Hunt CJ at CL is no less erroneous because it was made on appeal as a reason for rejecting the appeal, than if it were made by a judge to a jury. In criminal cases the absence from the witness box of the accused, does not provide a basis for the justification of a conviction. Furthermore, the increasing popularity of a ground of appeal provides no foundation for the invention of a new principle of law in criminal cases contrary to the settled principle upon which the criminal law rests, that from beginning to end the onus of proving guilt lies upon the Crown.

126 This ground is not however one which would lead to an acquittal, and I therefore need to deal with the other grounds relied upon by the appellant.

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125 (1991) 57 A Crim R 413 at 418.

127 The third argument of the appellant was that the trial judge's directions fell short of what was required by the decision of this Court in *Longman v The Queen*[126].

128 The appeal to the Court of Criminal Appeal in this matter was heard before the decision of this Court in *Crampton v The Queen*[127]. There, three Justices of this Court (Gaudron Gummow and Callinan JJ) reaffirmed what was said in *Longman* and added this[128]:

> "The trial judge should have instructed the jury that the appellant was, by reason of the very great delay, unable adequately to test and meet the evidence of the complainant. Her Honour should not have offered the qualification that she did in relation to the remarks she did make about the delay. An accused's defence will frequently be an outright denial of the allegations. That is not a reason for disparaging the relevance and importance of a timely opportunity to test the evidence of a complainant, to locate other witnesses, and to try to recollect precisely what the accused was doing on the occasion in question. In short, the denial to an accused of the forensic weapons that reasonable contemporaneity provides, constitutes a significant disadvantage which a judge must recognise and to which an unmistakable and firm voice must be given by appropriate directions. Almost all of the passage of the majority in *Longman* to which we have referred (with appropriate adaptations to the circumstances of this case, including that because of the passage of so many years, it would be dangerous to convict on the complainant's evidence alone without the closest scrutiny of the complainant's evidence), should have been put to the jury. Additionally, this was, in our opinion, a case in which the trial judge should, again with appropriate adaptation, when summing up, have drawn attention to the additional considerations mentioned by Deane and McHugh JJ in *Longman*: the abstention, by the prosecutor, from questioning each co-complainant about the respective charges, the fragility of youthful recollection, the absence of a timely complaint (subject to any reasonable explanation therefor) and the possibility of distortion."

129 Not all, however, of what was said in the paragraph that I have just quoted may be applied without qualification in the current case. The facts in this case were: that the occasion of the alleged assault was clearly identified; that the appellant claimed to have a clear recollection of the occasion; and that he was not

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126 (1989) 168 CLR 79.

127 (2001) 206 CLR 161.

128 (2001) 206 CLR 161 at 181-182 [45].

deprived of the forensic weapons to which reference was made in the passage quoted. That is not to say that there was no disadvantage by reason of the lateness of the complaint. The inevitable fading of memory with the passage of time would have been bound to be of some disadvantage at least.

130 But I am unable to say that in this case the trial judge's directions with respect to the delay were insufficient or erroneous. His Honour referred to the considerable time that had elapsed, and that had the events occurred as the complainant alleged, the jury might reasonably have expected that she would have spoken quickly to somebody. His Honour then referred to her explanation, and said that there might be good reason why a victim of a sexual assault might refrain from making a complaint. His Honour again mentioned her age and drew attention to her inferior position in the sect, as opposed to the position of the appellant. The trial judge pointed out that the Crown case relied solely upon the evidence of the complainant, and said that if her evidence were not accepted, that would be the end of the matter. And, quite properly, his Honour emphasized that the delay in making the complaint and the bringing of the charge might well have placed the appellant "in a very difficult and disadvantageous position … without an inkling that such an allegation would be made". In the same context his Honour referred to difficulties of recall that witnesses generally might have because of the time that had passed. It was not erroneous for his Honour to say, as he also did, that some gaps in the complainant's memory might similarly be explained.

131 I would reject the third ground of appeal.

132 The appellant's fourth ground is that the Court of Criminal Appeal erred in holding that the verdict was not unreasonable or not supported by the evidence. The fact that the Crown case did depend essentially upon one witness does not mean that the verdict cannot be sustained. There are many such cases, particularly of sexual assault in which the only witness will be the complainant. The appellant's argument in respect of this fourth ground depended in part upon the second ground. That part proceeded upon the basis that because the Court of Criminal Appeal erred in treating as an obstacle to the success of the appeal, the appellant's failure to give sworn evidence, that it failed to evaluate for itself the evidence and the respective strengths and weaknesses of the Crown and defence cases, and accordingly undertook no proper examination of the evidence as the authorities require it to do.

133 It is relevant to point out that in the Court of Criminal Appeal the appellant advanced arguments with respect to the appeal against conviction on eleven grounds. Necessarily, in order to deal with all of those, the Court had to review the evidence and the way in which the case was conducted closely. But in any event, the Court of Criminal Appeal did consider this ground (for which leave was needed in this Court and which I would allow to be added). Relevant authority of this Court was referred to in the Court of Criminal Appeal and

applied[129]. And although the Court erred, in my opinion, in considering this ground, in apparently adopting the statement of Hunt CJ at CL in *Gordon and Gordon* to which I have referred, it still does appear to have reviewed the evidence as required.

134 Nonetheless I will give separate consideration to the ground as it was argued in this Court. The appellant submits that the Crown case was a weak one because of the very limited corroboration provided by the complainant's mother only, and the delay in making the complaint. It was also suggested that the complainant was induced to make the complaint as a result of political controversy about the sexual activities of the sect which received a deal of attention in the media. The complainant's evidence contained some major inconsistencies. It departed from the way in which the prosecutor opened it, both by omission and addition. The appellant contends that the complainant's account was implausible, particularly her claim to have maintained such an uncomfortable posture during the session, and to be practically unclothed for so long on a cold day. Instances of inconsistency in the mother's evidence were also demonstrated. The mother had, it was also put, an animus against the appellant. These are, it may be accepted, arguable points and ones which a jury might well find persuasive. They do not however entitle this Court to enter a verdict of acquittal.

135 I would allow the appeal, quash the verdict and order that there be a new trial. It will be for the Director to decide whether in all of the circumstances there should be a retrial or not.

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129 *M v The Queen* (1994) 181 CLR 487; *Jones v The Queen* (1997) 191 CLR 439.