HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

THE QUEEN APPELLANT

AND

SIPAI SOMA RESPONDENT

The Queen v Soma [2003] HCA 13
13 March 2003
B23/2002

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Queensland

Representation:

L J Clare for the appellant (instructed by Director of Public Prosecutions (Queensland))

R V Hanson QC with A W Moynihan for the respondent (instructed by Legal Aid Queensland)

CATCHWORDS

The Queen v Soma

Criminal law – Evidence – Admissibility – Prior inconsistent statement of accused – Whether prosecution can adduce evidence of prior inconsistent statement in cross-examination of accused – Whether sound recording of applicant's interview wrongly admitted into evidence.

Criminal law – Evidence – Complaints – Failure to object to cross-examination – Whether trial judge required to rule where failure to object.

Criminal law – Procedure – Prosecution case closed – Whether tender of prior inconsistent statement of accused evidence in rebuttal – Prosecution not permitted to split its case.

Evidence – Criminal trial – Prior inconsistent statement of accused – Whether sound recording wrongly admitted into evidence in rebuttal of prosecution case – Whether tender of sound recording impermissible attempt to split prosecution case – Complaints – Failure to object to cross-examination – Whether trial judge required to rule despite failure to object.

Evidence Act 1977 (Q), ss 18, 101, 130.

1 GLEESON CJ, GUMMOW, KIRBY AND HAYNE JJ. The respondent was charged with rape. At his trial in the District Court of Queensland, immediately before the prosecution closed its case, he formally admitted, pursuant to s 644 of the *Criminal Code* (Q), that on the date alleged in the indictment, he had carnal knowledge of the complainant. The only live issue for the jury was whether the prosecution had proved beyond reasonable doubt that the respondent acted without the complainant's consent[1]. The jury returned the verdict "guilty".

2 The offence was alleged to have occurred in a house in Bowen, on or about 6 May 2000. On 19 May 2000, police interviewed the respondent. The interview was tape recorded. In that interview the respondent gave an account of what had happened between him and the complainant on the night of the alleged rape. The answers he gave reflected the fact that English was not his first language. In the course of a long and disjointed answer the respondent said that he had accused the complainant of taking his wallet. While the complainant was sitting in front of the house where the rape was alleged to have occurred, he asked her to give his wallet back and pulled at her hair. He went on to give an account consistent with them then having had consensual sexual intercourse inside the house.

3 The respondent's reference to his pulling at the complainant's hair was of some significance. The complainant alleged that, before taking her inside, the respondent had forced her to the ground outside the house in which intercourse occurred and had pinned her to the ground. A broken necklace which the complainant said was hers was later found outside that house.

4 The police officer who had interviewed the respondent was called by the prosecution to give evidence. The prosecutor asked him no question about interviewing the respondent. Nor did the respondent's counsel. The tape was not tendered. The prosecution closed its case.

5 The respondent chose to give evidence in his defence. The account he gave in his evidence-in-chief was, in many respects, consistent with what he had told police but it did not deal with every matter to which reference was made in the interview. He did say that he had broken the complainant's necklace. In cross-examination, the prosecutor asked the respondent whether the complainant had been crying outside the house and whether he had pushed her onto the ground. The respondent denied both suggestions. The prosecutor then put to him that, in speaking to police on 19 May 2000, he had told police both that the

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1 *Criminal Code* (Q), s 349(2)(a).

complainant had been crying outside the house, and that he had pushed her onto the ground. The respondent denied saying these things to police. The prosecutor then played that part of the tape recording of the respondent's interview with police in which he admitted that the complainant had been crying outside the house, and that he had pushed her onto the ground. The respondent admitted that it was his voice on the tape. The respondent sought to explain what he had told police by saying, in effect, that he was scared and confused when interviewed.

6 The prosecutor then put to the respondent that he had thrown the complainant to the ground and "had held some cloth around her throat tightly". The respondent's answer was "No, I not say that". The prosecutor did not pursue this answer further, even though it was not directly responsive to the question which had been asked. He continued to cross-examine the respondent about whether the complainant had been crying and about why he had told police that she had been. The prosecutor then played a further part of the tape-recorded interview. In the further part that was played, the interviewing officer asked the respondent whether he had put a T-shirt around the complainant's mouth, and the respondent agreed that he had. Although the respondent had been asked whether he had put something around the complainant's throat he had not denied that he had done so; he had said only that he had not told police that he had done so.

7 There was no objection made to the playing of either part of the tape recording. There was no objection to the questions the prosecutor asked the respondent about his police interview. Those parts of the tape-recorded interview which were played were tendered in evidence. Counsel for the respondent foreshadowed the possibility of objecting to their reception on the basis that the tape recording was too indistinct to be useful. That objection was not pressed and no other objection made to the reception in evidence of the two parts of the tape that had been played to the jury.

Appeal to the Court of Appeal

8 The respondent appealed against his conviction. The ground of appeal given in his notice of appeal was not pursued and, by leave of the Court of Appeal, fresh grounds were substituted. One of those grounds related to the reception of the evidence of his statements to police. It was that "the learned trial judge erred in permitting the Crown to split its case".

9 The Court of Appeal (McMurdo P, Cullinane and Jones JJ) allowed the appeal[2], concluding, in effect, that the prosecution had split its case without

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2 *Soma* (2001) 122 A Crim R 537.

sufficient cause. The Court ordered that the conviction be quashed and a new trial had. By special leave the prosecution now appeals to this Court, contending that the Court of Appeal failed to give proper effect to those provisions of the *Evidence Act* 1977 (Q) dealing with prior inconsistent statements – particularly ss 18 and 101. Once again, then, this Court is asked to consider a point which was not taken at trial and which emerged for the first time on appeal to the Court of Appeal.

10 In this Court, the immediate question is whether the Court of Appeal was right to allow the appeal to that Court, quash the conviction and order a new trial. That, in turn, invites attention to the provisions of s 668E of the *Criminal Code* which govern appeals to the Court of Appeal. In particular, it requires identification of the relevant aspect of s 668E which was said to be engaged.

11 Section 668E(1) provides:

> "The Court on any such appeal against conviction shall allow the appeal if it is 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, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal."

There having been no objection at trial to the evidence that was given and received about the respondent's police interview, it cannot be said that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law[3]. The question then must be whether "on any ground whatsoever there was a miscarriage of justice"[4]. If there was not, the Court of Appeal was required to dismiss the appeal.

12 In the Court of Appeal, Cullinane J delivered the reasons of the Court. His Honour recorded that the Court of Appeal was told that the prosecutor did not lead evidence of the interview in the prosecution case because it was anticipated that objection might be taken to it: the interview having taken place while the respondent was in custody and without any warning being administered

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3 *Criminal Code*, s 668E(1).

4 s 668E(1).

to him[5]. It is not immediately apparent why, fearing objection of that kind, the prosecutor thought it appropriate to use the interview as he did, without first seeking some ruling from the trial judge. But no ruling was sought. Be this as it may, it is neither possible nor useful to attempt to explore that aspect of the matter further. It was not suggested in the Court of Appeal, or in this Court, that the respondent's interview with police would not have been admissible if tendered as part of the prosecution's case.

13 The Court of Appeal concluded[6] that the introduction of the tape in the course of cross-examination of the respondent amounted to the prosecution calling evidence in rebuttal. The reason proffered for the prosecutor not attempting to tender it as part of the prosecution's case being thought to be insufficient, the Court concluded that "had objection been taken the evidence ought to have been excluded"[7].

14 The conclusion that if objection had been taken, the evidence ought to have been excluded appears to have been thought sufficient to warrant quashing the conviction. No explicit attention was given by the Court to what limb of s 668E was thereby engaged. In particular, the Court did not consider whether what had happened at trial had led to a miscarriage of justice, beyond the Court saying[8] that:

> "It is impossible to conclude that the introduction of the tape in the circumstances in which this occurred here without the court adverting to the matters which have to be considered before such a course can be taken made no difference to the outcome."

15 The reference to whether the outcome of the trial may have been different appears to have been to invoke the negative test[9] usually applied under "the proviso" to the common form of criminal appeal provision. Section 668E(1A) of the *Criminal Code* provides:

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5 (2001) 122 A Crim R 537 at 540.

6 (2001) 122 A Crim R 537 at 538.

7 (2001) 122 A Crim R 537 at 540.

8 (2001) 122 A Crim R 537 at 540.

9 *Mraz v The Queen* (1955) 93 CLR 493.

> "However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

No question of applying the proviso could arise, however, unless the Court of Appeal was of the opinion that a point raised by the appeal might be decided in favour of the present respondent. That, in this case, required attention to whether "on any ground whatsoever there was a miscarriage of justice".

16 The central submission made by the prosecution on its appeal in this Court was that questions of evidence in rebuttal, or of the prosecution splitting its case, do not arise when a prior inconsistent statement is put to an accused person giving evidence. It was submitted that, if the requirements of s 18 of the *Evidence Act* are met, the prosecutor cross-examining an accused giving evidence is entitled to put a prior inconsistent statement to the accused and then, pursuant to s 101(1) of the Act, tender it in evidence as evidence of the truth of its contents. It was submitted that the only limitation on pursuing this course is to be found in s 130 of the Act and its provision that:

> "Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence."

The *Evidence Act* 1977

17 Before considering s 18 of the *Evidence Act*, it is necessary to put that section in its context, by noticing some other provisions of the Act which were engaged when the respondent gave evidence at his trial. Section 8(1) makes a person charged with an offence competent, but not compellable, to give evidence on behalf of the defence in a criminal proceeding. Section 10(2) provides that, where a person charged gives evidence in a criminal proceeding, "the person's liability to answer any such question shall be governed by section 15". Section 15(1) of the Act provides, in a form evidently based on the *Criminal Evidence Act* 1898 (UK), that a person charged, who gives evidence in a criminal proceeding, is not entitled to refuse to answer a question, or produce a document or thing, on the ground that to do so would tend to prove the commission by the person of the offence charged. Section 15(2) regulates the circumstances in which an accused person giving evidence in a criminal proceeding may be asked questions tending to show that that person has committed, been convicted of, or been charged with, any offence other than that with which he or she is charged in the proceeding, or is of bad character. The questions asked of the respondent at

his trial were not of that kind; the questions asked in cross-examination were directed to demonstrating his guilt of the offence for which he was standing trial.

18 Section 18 of the *Evidence Act* provides that:

> "(1) If a witness upon cross-examination as to a former statement made by the witness relative to the subject matter of the proceeding and inconsistent with the present testimony of the witness does not distinctly admit that the witness has made such statement, proof may be given that the witness did in fact make it.
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> (2) However, before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and the witness must be asked whether or not the witness has made such statement."

19 It may be observed that s 18 is a provision which, on its face, applies to all witnesses, including accused persons who give evidence at their trial. It is also to be noticed that s 18 deals with former statements made by a witness "relative to the subject matter of the proceeding". It follows that there is no evident basis (textual or otherwise) for concluding that the section can have no application to a prior inconsistent statement made by an accused which may tend to incriminate the accused for the offence which is the subject of the trial.

20 It is necessary to notice some other features of s 18 to which insufficient attention appears to have been given at the respondent's trial. First, s 18 applies only where a former statement made by the witness is inconsistent with the witness's testimony in court. That inconsistency must be demonstrated. In the present case, the respondent gave evidence in court that the complainant had not been crying outside the house and that he had not forced her to the ground. That was evidence inconsistent with what he had told the police. The prosecutor asked him whether he had told the police that the complainant had been crying, and whether he had told the police that he had pushed her onto the ground. To both questions the respondent said "no". Part of the tape recording of the interview was then played and only then did the respondent acknowledge that it was his voice on the tape. Only then did he admit that he had told police that the complainant had been crying.

21 The prosecutor then asked the respondent whether the complainant was crying because he had thrown her down on the ground and had held some cloth around her throat tightly. The respondent answered: "No, I not say that." He did not expressly acknowledge, by this or other answers in cross-examination, that he had told police that he had pushed or thrown the complainant onto the ground.

The prosecutor did not ask again about the cloth being held around the complainant's throat until after he had played to the respondent, and the jury, a further part of the tape recording in which the respondent told the police that he had put a T-shirt around the complainant's mouth and neck.

22 Proof that a witness has made a prior inconsistent statement can be given only if the witness "does not distinctly admit that the witness has made such statement" and only if the former statement is inconsistent with "the present testimony of the witness". In the present case, before the tape recording was played, the respondent denied that the complainant had been crying, he denied that he had pushed her onto the ground and he denied that he had told the police that she had been crying or that he had pushed her onto the ground. What he had told the police was inconsistent with what he had said earlier in the course of the prosecutor's cross-examination and thus was inconsistent with the present testimony of the witness. The circumstances of the prior statement "sufficient to designate the particular occasion" had been mentioned to the respondent. If attention is confined to s 18, as the appellant submitted it should be, the conditions specified in that section for the prosecutor, as cross-examiner, to prove that the respondent had made the prior statements to the police admitting that the complainant had been crying, and that he had pushed her to the ground, were satisfied.

23 Again, confining attention to the provisions dealing with prior inconsistent statements, it was then open to the cross-examiner to pursue alternative courses. The cross-examiner could have handed the witness a transcript of the interview, asked him to read it to himself, and then asked whether the witness adhered to his earlier testimony. If an affirmative answer had been given, the cross-examiner could then later seek to lead evidence of the making of the prior inconsistent statement. Alternatively, as occurred in this case, the cross-examiner could have asked the witness questions designed to establish the authenticity of the record of the prior inconsistent statement and then, in the course of the cross-examination, tender the tape in evidence[10]. (The New South Wales practice of delaying the tender until the opening or reopening of the cross-examiner's case is not followed in other States[11].) In this case, the respondent's admission that his voice was heard on the tape rendered it unnecessary to adopt some other method of proving

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10 *R v Chin* (1985) 157 CLR 671 at 689-691 per Dawson J.

11 *Chin* (1985) 157 CLR 671 at 689-691 per Dawson J.

that he had made the earlier inconsistent statement. Once in evidence, the prior inconsistent statement was admissible as evidence of the facts stated in it[12].

24 Other considerations might have been said to arise in relation to the respondent's statement to police about the use of his T-shirt. The respondent had not given evidence denying that he had put something around the complainant's throat. Although he had denied telling the police that he had done this, he had not given any "present testimony" about the underlying fact with which his prior statement to the police was inconsistent. But no objection was made to the course adopted by the prosecutor.

25 When the tape recording was played in court, the respondent admitted that it was his voice on the tape and that the recorded statements which the prosecutor attributed to him were his words. If, before the tape recording was played, the respondent had admitted making the statements which the prosecutor asked him about, there would have been no occasion for any other proof of his making those earlier statements. But once the respondent failed distinctly to admit that he had made the prior statements, the cross-examiner could embark on proving them. The respondent's later admission to making the statements did not preclude their tender in evidence.

26 Attention cannot be confined, however, to the *Evidence Act* provisions dealing with prior inconsistent statements. Those provisions are to be given operation in the context of a trial, the practices and procedures governing which are found elsewhere than in the *Evidence Act*.

The course of proceedings at a criminal trial

27 Chapter 62 of the *Criminal Code* contains provisions regulating the trial of an accused person charged in Queensland with an indictable offence. So, for example, s 618 speaks of what is to happen "[a]t the close of the evidence for the prosecution" – the accused is to be asked whether he or she intends to adduce evidence. Section 619 regulates speeches by counsel; s 620 provides that the judge shall instruct the jury "as to the law applicable to the case". The provisions of Ch 62 assume the adoption of familiar accusatorial and adversarial procedures. Neither the *Criminal Code*, whether in Ch 62 or elsewhere, nor the *Evidence Act*, modifies the underlying principle of the accusatorial and adversarial system that it is for the prosecution to put its case both fully and fairly before the jury, before the accused is called on to announce the course that will be followed at trial.

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12 *Evidence Act* 1977 (Q), s 101(1).

28 That the prosecution must offer all its proof before an accused is called upon to make his or her defence is a general principle of long standing. There can be departures from that general rule and, as was said in the joint reasons in *Shaw v The Queen*[13], "[i]t seems ... unsafe to adopt a rigid formula [to define those exceptions] in view of the almost infinite variety of difficulties that may arise at a criminal trial". The rule is, as was pointed out in that case, a matter of practice and procedure, rather than substantive law.

29 Understanding the application of the general rule must take account of developments in the principles governing the role of the prosecution and the trial judge at a criminal trial. Thus, in *Shaw*, Fullagar J, who agreed in the orders proposed by the other members of the Court, said[14] that he could not "feel the slightest doubt" that the course taken by Cussen J in *R v Collins*[15], of himself calling a witness called by neither party but in whose evidence the jury expressed interest, was entirely correct and proper. That is a conclusion which may well be thought to be at odds with the principles since described in *R v Apostilides*[16]. Be that as it may, what is now clear is that it is for the prosecution to decide what witnesses will be called and "determine the course which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused"[17]. That power is not unconfined. In particular, if an accused objects to the course which the prosecution takes in presenting its case, the objection must be resolved by applying principles which include the general rule that the prosecution must offer all its proof before the accused is called on to make his or her defence.

30 In the present case, the prosecution had available to it evidence of statements made by the respondent to police. The prosecution called the interviewing police officer. In this Court it was accepted that the statements which the respondent made to police were adverse to his interests; they were not merely and exclusively self-serving denials. If there were doubts about the admissibility of the record of interview, those doubts could have been resolved

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13 (1952) 85 CLR 365 at 380 per Dixon, McTiernan, Webb and Kitto JJ.

14 (1952) 85 CLR 365 at 383.

15 [1907] VLR 292.

16 (1984) 154 CLR 563 at 575.

17 *Richardson v The Queen* (1974) 131 CLR 116 at 119.

on a voir dire. If necessary, the record of interview could have been edited to exclude any objectionable parts. None of these steps was taken.

31 If the prosecution case was to be put fully and fairly, the prosecution had to adduce any admissible evidence of what the respondent had told police when interviewed about the accusation that had been made against him. To the extent to which those statements were admissible and incriminating, the prosecution, if it wished to rely on them at the respondent's trial, was bound to put them in evidence before the respondent was called upon to decide the course he would follow at his trial. To the extent that an otherwise incriminating statement contained exculpatory material, the prosecution, if it wished to rely on it at all, was bound to take the good with the bad and put it all before the jury[18]. And consistent with what is said in *Richardson v The Queen*[19] and *Apostilides* the prosecutor's obligation to put the case *fairly* would, on its face, require the prosecutor to put the interview in evidence unless there were some positive reason for not doing so. The only reason proffered for not doing so in this case was, as the Court of Appeal rightly found, not sufficient.

32 The use to which the prosecution put the interview at the respondent's trial was a matter for objection. That objection, if it were to be made, should have been taken when the prosecutor first asked the respondent questions designed to establish that he had been interviewed by police. In the present case, the respondent's admission that it was his voice that was heard on the tape played to the jury avoided any need for the prosecution to prove the tape by some other means. But that was not to be known when the prosecutor first embarked on the course of asking the respondent about his prior statements to police. At that point it could not be assumed that the prosecutor, were he to follow this path, would not have to seek leave to reopen his case and call the police officer to whom the alleged statement had been made.

33 But no objection was made. If objection had been made, there seems much to be said for the view that, consistent with what was said by this Court in *Niven v The Queen*[20], an objection to its use should have succeeded.

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18 *R v Higgins* (1829) 3 Car & P 603 [172 ER 565]; *Harrison v Turner* (1847) 10 QB 482 [116 ER 184]; *R v Williamson* [1972] 2 NSWLR 281; *R v Cox* [1986] 2 Qd R 55; *R v Karpany* [1937] SASR 377.

19 (1974) 131 CLR 116.

20 (1968) 118 CLR 513.

34 *Niven* concerned, most immediately, the operation of s 371(i) of the *Criminal Code* (Tas) which provided that in proceedings upon the trial of an indictment "[e]vidence in rebuttal may be called by the Crown if the judge is of opinion that in the circumstances of the particular case it should be allowed". The *Criminal Code* (Q) contains no equivalent provision. In *Niven*, the Court held[21] that the expression "evidence in rebuttal" should be understood as applying to all evidence sought to be adduced by the prosecution after the accused's defence was complete. It therefore extended to evidence given to prove a prior inconsistent statement by the accused. It was against the background of that conclusion that the Court said[22]:

> "It would therefore be advisable, in our opinion, for a trial judge as well as for the prosecutor, to bear in mind at the time the cross-examination [about a prior inconsistent statement] is being entered upon that a serious problem may later arise if the prosecutor seeks to adduce evidence to establish the prior inconsistent statement, particularly if that statement amounts to or includes an admission by the accused of guilt or of some significant fact in relation to its proof."

As the Court went on to say, in exercising the discretion whether to permit the prosecution to adduce evidence of that prior inconsistent statement in rebuttal, consideration would have to be given to "the possibility of prejudice to the accused as well as of prejudice to the prosecutor which could have been avoided by appropriate action taken at an earlier point in the trial"[23].

35 Although what was said in *Niven* was directed to s 371(i) of the *Criminal Code* (Tas), the principles which it states apply equally to this case. Indeed, there is no reason to think that they do not apply generally to the trial of indictable crime in Australia, unless and until this aspect of the practice and procedure in such trials is explicitly modified by statute.

36 What was said in *Niven* reflected a stream of authority which, in this Court, may be thought to begin with the decision in *Shaw* but in fact is much

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21 (1968) 118 CLR 513 at 516.

22 (1968) 118 CLR 513 at 517.

23 (1968) 118 CLR 513 at 517.

older than that[24]. The stream of authority continues through this Court's decisions in *Killick v The Queen*[25], *Lawrence v The Queen*[26] and *R v Chin*[27], in each of which effect was given to the principle that, as a general rule, the prosecution must offer all its proofs during the progress of its case. The principle has been frequently applied by intermediate[28] courts and it has found daily application in trial courts throughout the country.

37 In the present matter, the appellant submitted that those provisions of the *Evidence Act* to which we have referred earlier, namely ss 18, 101 and 130, modified the principles which underpin what was said in *Niven*. Those provisions of the *Evidence Act* do not modify the general principle we have identified. Although there may be circumstances in which it would be within the discretion of a trial judge to permit the prosecution to make a case in rebuttal by tendering evidence to prove a prior inconsistent statement made by an accused relative to the subject matter of the proceeding, those circumstances will be rare. If objection is taken to the prosecution seeking to follow a course of the kind followed here, then, as was said in *Niven*, close attention would be necessary to whether to permit the course proposed would possibly cause prejudice to the accused and to whether any prejudice to the prosecution could have been avoided by tendering the evidence of that prior statement in the course of its case.

38 Counsel for the appellant submitted that if the decisions in *Niven* and *Chin* were inconsistent with the appellant's argument, those cases, and the decisions of intermediate courts applying them[29], should be overruled. That submission was not developed in any detail. No reason was offered for overruling such a well-established and longstanding stream of authority beyond the contention that they did not give proper effect to the provisions of the *Evidence Act*. Once it is recognised that the *Evidence Act* does not deal exhaustively with the practice and

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24 See, for example, *R v Frost* (1839) 9 Car & P 129 at 159 per Tindal CJ [173 ER 771 at 784] referred to in *Shaw*.

25 (1981) 147 CLR 565.

26 (1981) 38 ALR 1.

27 (1985) 157 CLR 671.

28 For example, *R v Ghion* [1982] Qd R 781.

29 *Ghion* [1982] Qd R 781; *R v Neville* [1985] 2 Qd R 398; *R v Kern* [1986] 2 Qd R 209.

procedures to be followed at criminal trials and that the relevant principle is rooted in the nature of such proceedings, the reason proffered by the appellant for overruling such cases is seen to fall away.

39 In *Niven*, reference was made to possible prejudice to the accused that may follow from permitting the prosecutor to cross-examine on prior inconsistent statements which could and should have been proved as part of the prosecution case. The reference to possible prejudice to the accused is not precluded by s 130 of the *Evidence Act*. As that section says, nothing in the Act *derogates* from the power of the court to exclude evidence if satisfied that it would be unfair to the person charged. But s 130 is not to be read as an exhaustive statement of when evidence tendered at a criminal trial can be rejected. Section 130, as its terms suggest, is a legislative denial of intention to take away the power of a court (derived elsewhere than in the Act) to exclude evidence on the ground of unfairness. The principle which could have been engaged in the present case does not find its origin in s 130. It is a principle which governs the conduct of trials for indictable offences.

40 For these reasons, the principal arguments advanced by the appellant on the appeal to this Court should be rejected. The Court of Appeal was right to conclude that the prosecution had split its case.

41 It is necessary, however, to return to the fact that no objection was made at trial to the course pursued by the prosecution. Insufficient attention has been given to that fact. We do not know why no objection was made to the questions which the prosecutor asked or to the reception in evidence of the tape recording of the respondent's interview by police.

42 Because there was no objection, the trial judge was not required to rule on the course that was taken and there was, therefore, no wrong decision at trial on any point of law. The orders made by the Court of Appeal required the conclusion that, in terms of s 668E(1) of the *Criminal Code*, there was a miscarriage of justice.

43 Such a conclusion was not inevitable. If it were to be suggested that the trial judge should have intervened, of his own motion, either to restrict the prosecutor's cross-examination of the respondent, or to reject the tape recording even though there was no objection to its tender, or in some other way to prevent the prosecutor following the course that was taken, then there may be a serious question as to when, and on what basis, the judge should have acted. Furthermore, if trial counsel, by objection or argument, had invited a ruling on the cross-examination of the respondent, or the tender of the tape recording, there would have come into play discretionary considerations requiring attention,

amongst other things, to the probative significance of the evidence. This point was made by Pincus JA in *Burns*[30], in a passage referred to by Cullinane J[31].

44 This aspect of the decision of the Court of Appeal was not challenged in the grounds of appeal before this Court. Perhaps the view was taken that, being so closely bound up with the facts and circumstances of the particular case, it was a point unlikely to have attracted a grant of special leave in a prosecution appeal. However that may be, in the grounds of appeal and the written submissions, the case for the appellant was based upon the questions of general principle dealt with earlier in these reasons, and those questions have been resolved adversely to the appellant.

45 The appeal should be dismissed.

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30 (1999) 107 A Crim R 330 at 343.

31 (2001) 122 A Crim R 537 at 538.

46 McHUGH J. The principal issue in this appeal brought by the Crown is whether, in a criminal trial in Queensland, the Crown can tender an inconsistent statement of the accused only if it establishes exceptional or special circumstances. In my opinion, the Crown may tender an inconsistent statement upon proof of the matters set out in s 18 of the *Evidence Act* 1977 (Q). However, the tender is subject to the discretionary power of the judge to reject it on the ground of unfairness to the accused. It is not necessary for the Crown to prove exceptional or special circumstances. If the statement was admissible in the prosecution's case-in-chief, however, the unfairness discretion is unlikely to be exercised in favour of the prosecution.

Statement of the case

47 The respondent was convicted of rape by a jury in the District Court of Queensland sitting at Bowen. The Court of Appeal of the Supreme Court of Queensland[32] quashed his conviction on the ground that the trial judge had wrongly admitted into evidence a tape recording which purported to contain statements inconsistent with the evidence which the respondent (the accused) had given.

48 At the trial, the complainant alleged the accused had raped her. She testified that before the rape the accused had forced her to the ground outside the house in which the offence was committed. She said that, in the course of doing so, a necklace she was wearing was broken. Later, a broken necklace was found in the area. Although the accused had made a tape-recorded interview with an investigating police officer that contained damaging admissions, the recording was not tendered in the prosecution's case. The reason given by the Crown for not tendering the recording was that the accused's counsel had said he would object to its admission. The objection was apparently on the ground that the interview took place while the accused was in custody and without him being given any warning that he need not make a statement or that any statement made could be used in evidence against him.

49 In evidence at his trial, the accused agreed that he had sexual intercourse with the complainant but asserted that it was by consent and, indeed, initiated by the complainant. At a very early stage of his cross-examination, counsel for the Crown put to him that he had forced the complainant to the ground outside the house. The accused denied it. He also denied that in a conversation at Townsville with Detective Sergeant Inmon he had informed Inmon that he had pushed the complainant onto the ground and that she was crying. Without objection, counsel for the prosecution played parts of a tape recording of the conversation between the accused and Inmon in the presence of the jury and used

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32 *Soma* (2001) 122 A Crim R 537.

it to cross-examine the accused. Upon a fair reading of his evidence, I think that he finally admitted that he had made every statement to Detective Sergeant Inmon that the Crown prosecutor put to him. The Court of Appeal held, correctly in my opinion, that "[h]e acknowledged that it was his voice on the tape and that he had made these statements"[33]. However, the accused claimed that he was confused and that he had problems with English – which was his second language. He also asserted that the statements did not record accurately what happened. He said:

> "Yeah, I'm not say – I not say – the detective say with me, 'Did you push?', but for me, that time, I can't understand real good, *but whatever he say I say, 'Yeah.' Sometime I say, 'Yes,' and it's not right. Sometime I say, 'No,' and it's not right. That's why I answer for that.*" (emphasis added)

50 During the cross-examination of the accused, the Crown tendered a tape containing those parts of the conversation played in court, which was admitted in evidence without objection. In the tape, the accused agreed that he had forced the complainant to the ground in the course of an argument between them. He also said in the interview that the complainant was crying and that he had wrapped a t-shirt around her face.

The legislation

51 Section 8(1) of the *Evidence Act* enacts that a person charged in a criminal proceeding is competent, but not compellable, to give evidence on behalf of the defence. Section 15(1) enacts that where the person charged gives evidence, that person "shall not be entitled to refuse to answer a question or produce a document or thing on the ground that to do so would tend to prove the commission by the person of the offence with which the person is there charged". Section 18 enacts:

> "(1) If a witness upon cross-examination as to a former statement made by the witness relative to the subject matter of the proceeding and inconsistent with the present testimony of the witness does not distinctly admit that the witness has made such statement, proof may be given that the witness did in fact make it.
>
> (2) However, before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and the witness must be asked whether or not the witness has made such statement."

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33 (2001) 122 A Crim R 537 at 538 [12].

52 Section 101(1) provides that where a previous inconsistent or contradictory statement made by a person called as a witness in a proceeding is proved by virtue of s 18, "that statement shall be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible".

53 The power to admit evidence under s 18 of the Act is subject to the provisions of s 130 of the Act which provides:

> "Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence."

54 Section 18 has analogues in many common law jurisdictions, including all Australian jurisdictions[34]. It regulates the admissibility of evidence arising out of a common method of impeaching the credit of an opponent, or that person's witness, in forensic contests – by proving a self-contradiction from that person's prior inconsistent statement[35]. Bryant suggests that the policy underlying the section is that a party should be permitted to prove the statement when such proof would aid the trier of fact to assess credibility of, and would not cause undue prejudice to, the witness or the calling party[36]. At common law, the effect of the statement was to neutralise the effect of contrary evidence given by the witness[37]. But the statement, when admitted, was not evidence of the truth of its contents[38]. However, its admission gave rise to the inference that, because the witness had made "one specific error", he or she had "a capacity to make other errors"[39].

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34 *Evidence Act* 1906 (WA), s 21; *Evidence Act* 1929 (SA), s 28; *Evidence Act* 1939 (NT), s 19; *Evidence Act* 1958 (Vic), s 35; *Evidence Act* 1971 (ACT), s 61 (now replaced for the time being by *Evidence Act* 1995 (Cth), s 43; see also s 44); *Evidence Act* 1995 (NSW), s 43; *Evidence Act* 1995 (Cth), s 43; *Evidence Act* 2001 (Tas), s 43.

35 Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, (1992) at 868.

36 Bryant, "The Adversary's Witness: Cross-Examination and Proof of Prior Inconsistent Statements", (1984) 62 *Canadian Bar Review* 43.

37 Taylor, *A Treatise on the Law of Evidence*, 12th ed (1931), vol 2, §1445.

38 *R v Hall* [1986] 1 Qd R 462 at 463 per McPherson J.

39 Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1970), vol 3A, §1017.

55 A condition of the admissibility of an inconsistent statement under s 18 of the Act is that the witness "does not distinctly admit" making the statement. A previous inconsistent statement cannot be proved where the witness admits making the statement: if the witness admits it, the purpose of discrediting the witness has been achieved[40]. In the interests of trial efficiency, "[i]f the witness, on the cross-examination, [unequivocally] admits the conversation imputed to him, there is no necessity for giving other evidence of it"[41]. In *North Australian Territory Co v Goldsborough, Mort & Co*[42] Lord Esher MR said:

> "When a witness is asked as to what he said on a previous occasion, he is bound to answer the question; he cannot insist on seeing what he previously said before he answers it; he must answer. If his answer does not contradict what he said before, it is no use pursuing the topic further; he adopts his previous answer and it becomes part of his evidence; if he does contradict it, he can be contradicted in turn by shewing him what he said before."

The tape recording was not admissible

56 In the present case, although the accused sought to explain his statements and maintained that the complainant did not cry, he agreed in cross-examination that it was his voice on the tape and that he had made the statements contained in it. Although views might differ as to whether he "distinctly" admitted the out-of-court statements put to him, I think the better view of his cross-examination is that he did. Because that is so, the statement was not admissible under s 18. Once the accused distinctly admitted making the statement, the Crown was not entitled to lead evidence to prove the prior statement[43]. The section does not say that an inconsistent statement is admissible if the witness does not distinctly admit making the statement when first asked to admit making the statement. Once the opponent has the benefit of the admission, that is the end of the matter.

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40 *North Australian Territory Co v Goldsborough, Mort & Co* [1893] 2 Ch 381 at 386; *Alchin v Commissioner for Railways* (1935) 35 SR (NSW) 498 at 509; *Cotton v Commissioner for Road Transport and Tramways* (1942) 43 SR (NSW) 66; *R v Thynne* [1977] VR 98 at 100.

41 *Crowley v Page* (1837) 7 Car & P 789 at 792 [173 ER 344 at 345].

42 [1893] 2 Ch 381 at 386.

43 Nothing in the section would prevent the previous statement of a witness inconsistent with the witness's testimony being put to the witness to challenge the witness's credibility, even where the section does not allow the evidence of the making of the inconsistent statement being given: *R v Funderburk* [1990] 1 WLR 587; [1990] 2 All ER 482.

The statements made by the accused could not be tendered because he had admitted making those statements. But that was not the ground upon which the Court of Appeal quashed the conviction of the accused. Cullinane J (with McMurdo P and Jones J agreeing) said[44]:

> "[O]nce a witness has his/her attention sufficiently drawn to the relevant occasion in a way that adequately identifies it and the witness does not admit the statement, the statement can be proved. It is not necessary that the witness persist in the denial after seeing a document or, as here, hearing the tape. In my view the requirements of the section were satisfied."

57 In this Court, the appellant raised no point about this holding of the Court of Appeal. But, for the reasons I have given, the Court of Appeal erred in so holding. Once a witness distinctly admits that he or she has made the inconsistent statement, the condition on which the admissibility of the statement rests disappears. It does not matter that the distinct admission was made reluctantly or as the result of a persistent cross-examination. Accordingly, once the accused distinctly admitted – even after a series of questions – that he made the statement put to him, the recording of that statement was not admissible under s 18. If the tape was admissible, it must be on a ground other than that permitted by s 18. Accordingly, the Court of Appeal should have held that, as a matter of law, the inconsistent statements of the accused were not admissible under s 18.

Inconsistent statements and the *Shaw* principle

58 The Court of Appeal quashed the conviction on a different basis. It held that the case was one where the admissibility of the evidence under s 18 "amounts to evidence in rebuttal"[45]. The Court said, correctly, that it "is a general and fundamental principle governing the conduct of criminal trials that the evidence for the prosecution must be presented before an accused is called upon"[46]. In support of this proposition, the Court of Appeal relied on the well-known statements of principle of this Court in *Shaw v The Queen*[47], *Lawrence v*

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44 (2001) 122 A Crim R 537 at 540 [32].

45 (2001) 122 A Crim R 537 at 538 [19].

46 (2001) 122 A Crim R 537 at 538 [20].

47 (1952) 85 CLR 365.

The Queen[48] and *R v Chin*[49]. In *Lawrence*, Chief Justice Gibbs said[50] that the principle applies "whether the Crown seeks to introduce evidence during the course of the case for the defence or after the close of the case for the defence". His Honour said[51]:

> "The rule that the prosecution may not split its case, but must *offer all its proofs* before the prisoner is called upon for his defence, is not merely technical but is an important rule of fairness." (emphasis added)

59 To obtain leave, the prosecution must point to some exceptional circumstance that justifies it being given leave to re-open its case.

60 But I do not think the principle laid down in *Shaw* and similar cases is itself decisive in a case where the prosecution seeks to tender an inconsistent statement in rebuttal of the accused's case. The rationale of the *Shaw* principle is that the prosecution may not split its case[52]. Speaking generally, after the accused has commenced his or her case, the prosecution cannot lead evidence that was admissible in the prosecution case-in-chief. When the prosecution tenders a statement *as an inconsistent statement*, the occasion for the tender only arises after the prosecution has closed its case. In the case of a defence witness, the statement cannot possibly be admissible until that time. In the case of the accused, it may be that the statement could have been tendered during the prosecution case – not as an inconsistent statement, but as an admission. If the prosecution then seeks to tender a statement on the ground of inconsistency when it was admissible as an admission, s 130 empowers the trial judge to reject the tender on the ground of "unfairness".

61 In determining the question of unfairness in a case where the statement was admissible as part of the Crown case, the general considerations that animated the *Shaw* principle are relevant. But in my view, it is not the law that the tender of an inconsistent statement will be rejected unless the prosecution proves "exceptional circumstances". That seems in accord with the view of this Court in *Niven v The Queen*[53], where the Court had to consider legislation that

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48 (1981) 38 ALR 1.

49 (1985) 157 CLR 671.

50 (1981) 38 ALR 1 at 3.

51 (1981) 38 ALR 1 at 3.

52 (1952) 85 CLR 365 at 380.

53 (1968) 118 CLR 513 at 516.

permitted the Crown to call evidence in rebuttal "if the judge is of opinion that in the circumstances of the particular case it should be allowed". The Court said[54]:

> "It would therefore be advisable, in our opinion, for a trial judge as well as for the prosecutor, to bear in mind at the time the cross-examination is being entered upon that a serious problem may later arise if the prosecutor seeks to adduce evidence to establish the prior inconsistent statement, particularly if that statement amounts to or includes an admission by the accused of guilt or of some significant fact in relation to its proof. We would add that the exercise by the trial judge of the discretion given him under s 371 [of the *Criminal Code* (Tas)] is a substantial matter and should follow upon a full consideration by the judge of the possibility of prejudice to the accused as well as of prejudice to the prosecutor which could have been avoided by appropriate action taken at an earlier point in the trial. Further, the matters pointed out by this Court in *Shaw v The Queen*[55] should be borne in mind in a case in which they are apposite."

62 This passage does not suggest that the Court thought that the *Shaw* principle of "exceptional circumstances" was decisive in exercising the discretion. Rather, it suggests that the matters constituting the rationale of *Shaw* are relevant in determining questions of prejudice to the prosecution and to the accused, and how the discretion should be exercised. In Queensland, the discretion of the trial judge under s 130 of the *Evidence Act* is certainly no narrower than that of a trial judge in Tasmania[56].

63 In any event, the *Shaw* principle is only relevant if the evidence was admissible in the prosecution's case-in-chief. If an inconsistent statement of the accused is not admissible in chief as part of the prosecution case, it can only be tendered after the accused has given evidence. In that situation, *Shaw* has no application. According to the practice in some jurisdictions, if I understand it correctly, this means that the prosecution has to apply for leave to re-open its case. Why these jurisdictions require the re-opening of the case-in-chief and do not permit the statement to be tendered in a prosecution case-in-reply is something I have never understood. In principle, there is no reason why the prosecution cannot have a case-in-reply. The fundamental rule is that the prosecution cannot split its case – it cannot, apart from exceptional cases, adduce evidence that should have been led in its case-in-chief. But if the defence raises a new legal or factual issue, there is no reason, in principle, why the prosecution cannot have a case-in-reply.

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54 (1968) 118 CLR 513 at 517.

55 (1952) 85 CLR 365.

56 cf *R v Hall* [1986] 1 Qd R 462 at 468 per McPherson J.

64 In New South Wales, the jurisdiction with which I am most familiar, a prosecution case-in-reply or rebuttal is a common event. Where the accused raises a defence by way of confession and avoidance such as insanity, for example, logically the prosecution can deal with the matter only by way of a case-in-reply. The rebuttal evidence does not go to any issue in the prosecution case. Similarly, when the accused raises new matters such as character evidence, the prosecution can only rebut the evidence by a case-in-reply[57]. Likewise, when the accused raises fresh factual material, such as an alibi, the prosecution is entitled to a case-in-reply on that issue unless legislation has required the accused to give notice of the alibi. So, also, the prosecution is entitled to a case-in-reply where the prosecution alleges bias on the part of a defence witness, or that the witness has a general reputation for untruthfulness or has refused to admit a prior conviction. And the same principle must apply in the case of a statement that is admissible as an inconsistent statement. In *Shaw*[58], Dixon, McTiernan, Webb and Kitto JJ said:

> "Clearly the principle is that the prosecution must present its case completely before the prisoner's answer is made. There are issues the proof of which do not lie upon the prosecution and in such cases it may have a rebutting case, as when the defence is insanity. When the prisoner seeks to prove good character evidence may be allowed in reply. But the prosecution may not split its case on any issue."

65 Nothing in the history of s 18, or the common law principle on which it is based, affords any ground for holding that the *Shaw* principle applies, or is relevant, to the tender of an inconsistent statement that was not admissible as part of the Crown case. Indeed, history points the other way. After all, it is only in comparatively recent times, as the result of legislative intervention, that an inconsistent statement has been admissible to prove the truth of its contents as well as the inconsistency of the witness's evidence.

The history of the provision

66 The historical source of s 18 is *The Queen's Case*[59] where Chief Justice Abbott said of the tender of an inconsistent statement:

> "The legitimate object of the proposed proof is to discredit the witness. Now the usual practice of the courts below, and a practice, to

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57 *R v Rowton* (1865) Le & Ca 520 [169 ER 1497]; *R v Butterwasser* [1948] 1 KB 4.

58 (1952) 85 CLR 365 at 379-380.

59 (1820) 2 Brod & B 284 at 313 [129 ER 976 at 988].

> which we are not aware of any exception, is this; if it be intended to bring the credit of a witness into question by proof of any thing that he may have said or declared, touching the cause, the witness is first asked, upon cross-examination, whether or no he has said or declared, that which is intended to be proved. If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary; and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there may be, as the particular circumstances of the transaction may happen to furnish; and thus the whole matter is brought before the court at once, which, in our opinion, is the most convenient course."

Chief Justice Abbott went on to say that if the witness denied making the statement "proof in contradiction will be received at the proper season"[60].

67 Thirty years later, the decision in *The Queen's Case* was given statutory effect as the result of the work of the Common Law Commissioners. In 1853 they produced three reports reviewing "The Process, Practice, and System of Pleading in the Superior Courts of Common Law"[61]. The Second Report reviewed "the proceedings on the trial of questions of fact, as well as the important subject of evidence receivable on such trial"[62]. It specifically dealt with the law relating to cross-examination and proof of prior inconsistent verbal statements. The Commissioners said[63]:

> "We recommend that a party should … be permitted not only as at present to contradict the testimony of the witness by other evidence, but also to prove that such witness has made opposite statements. But we think that a party having presented a witness to the jury as worthy of credit ought not to be allowed to impeach his character by general evidence.
>
> In the cross-examination of an adverse witness, it, in like manner, frequently becomes material, with a view of impeaching his credit, to show that the witness has made statements relative to the subject matter of the cause different from those to which he has deposed in court. If these

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60 (1820) 2 Brod & B 284 at 313 [129 ER 976 at 988].

61 British Parliament, *Second Report of Her Majesty's Commissioners for Inquiring into the Process, Practice, and System of Pleading in the Superior Courts of Common Law*, (1853) ("The Second Report"), reprinted in *British Parliamentary Papers, Legal Administration General*, vol 9, 1851-1860, (1971) 165.

62 The Second Report at 169.

63 The Second Report at 184.

> statements were verbal, and the witness, having been cross-examined concerning them, so as to afford him an opportunity of explanation, denies having made them, there is no doubt that evidence may be adduced to prove the alleged statements to which the witness has been cross-examined."

68 As the result of the Second Report, the Parliament of the United Kingdom enacted s 24 of the *Common Law Procedure Act* 1854 (UK), but that section only applied to civil cases[64]. At that stage, I do not think that there can be any doubt that a plaintiff could tender the inconsistent statement in his or her case-in-reply. The inconsistent statement did not go to prove the plaintiff's case because it was not admitted as evidence of the truth of its contents.

69 Section 24 was re-enacted and extended to the criminal jurisdiction by s 4 of the *Criminal Procedure Act* 1865 (UK)[65] which declared:

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

70 Section 1 of that Act provided that this and other sections "apply to all courts of judicature, as well criminal as all others". There is no reason to suppose that the Parliament intended to change the circumstances, manner or time when the inconsistent statement was tendered.

71 In *The Queen's Case*[66], Chief Justice Abbott had said "proof in contradiction will be received at the proper season". That must have meant after the close of the case for the defence. The statutory provisions were largely declaratory of the common law[67], although Wigmore has said that the rule

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64 Stone and Wells, *Evidence – Its History and Policies*, (1991) at 675; Holdsworth, *A History of English Law*, (1965), vol 15 at 140.

65 Holdsworth, *A History of English Law*, (1965), vol 15 at 141.

66 (1820) 2 Brod & B 284 at 313 [129 ER 976 at 988].

67 Stone and Wells, *Evidence – Its History and Policies*, (1991) at 675; *Cross on Evidence*, 6th Aust ed (2000), §17535; see *Crowley v Page* (1837) 7 Car & P 789 [173 ER 344].

embodied in the statutes was not an "immemorial tradition"[68] of the common law. Wigmore said[69]:

> "The rule, as a rule, may be said to have had its birth with the response of the judges in *The Queen's Case* … in 1820. This utterance is said to have come as a surprise to the Bar; and up to that time no established requirement of the kind existed. None of the treatises by practitioners, English or American, published prior to *The Queen's Case* mentions such a proviso." (footnote omitted)

72 Devlin J has said of the history of the provisions[70]:

> "Before [the *Common Law Procedure Act* 1854] it had probably been the common law that, quite apart from any statute, questions were admissible – certainly in the ordinary common law courts – whereby if a witness gave evidence of a fact that was relevant to the issue (and that is important, because if the question merely goes to credit, he cannot be contradicted) it could be put to him that on some earlier occasion he had made a contrary statement to somebody else and, if he denied it, that somebody else could be called. What was probably the common law was certainly made statutory by the Common Law Procedure Act, 1854, and then by Denman's Act, the Criminal Procedure Act, 1865, which is somewhat misnamed, because it applies not only to all courts of criminal judicature, but also to all other courts too."

73 By the late 17th century[71], an accused person was permitted to call witnesses in his or her defence. But the accused was an incompetent witness in criminal proceedings in England until 1898 when s 1 of the *Criminal Evidence Act* 1898 (UK) provided that "[e]very person charged with an offence … shall be a competent witness ... at every stage of the proceedings". While the accused was declared competent, "from a well-grounded sense of fair play he could not be compelled to testify by the other side"[72].

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68 Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1970), vol 3A, §1026.

69 Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1970), vol 3A, §1026.

70 *Hart* (1957) 42 Cr App R 47 at 50.

71 Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 195.

72 Stone and Wells, *Evidence – Its History and Policies*, (1991) at 40 referring to s 1(a) of the *Criminal Evidence Act* 1898 (UK).

74 Thus, when s 4 of the *Criminal Procedure Act* 1865 (UK) was enacted, it related to witnesses for the prosecution and to witnesses called by the defence. It had no application to an accused person giving evidence. And since, *ex hypothesi*, the inconsistent statement of a defence witness was not admissible in the prosecution's case, it could only be tendered after the accused had closed his or her case. Thus, until the close of the 19th century, the only time that the prosecution could tender an inconsistent statement was after the close of its case.

75 The principle for which *Shaw* stands has been recognised by the common law for almost as long as the principle that an inconsistent statement is admissible to rebut a sworn statement made in curial proceedings[73]. I have not seen any suggestion in the early cases that it is only in "exceptional circumstances" that an inconsistent statement is admissible in a criminal trial after the close of the prosecution case. Until legislative reforms – such as that contained in s 101 of the *Evidence Act* – made inconsistent statements "admissible as evidence of any fact stated therein", the only effect of the tender was to neutralise the witness's inconsistent evidence and provide grounds for an inference of general unreliability.

76 It is true that an accused person can now give evidence and that s 18, and its analogues, make an accused person's inconsistent statements admissible. It is also true that under s 101 the inconsistent statement is evidence of the facts that it contains. But, as long as the statement was not admissible in proof of the prosecution case, these legislative reforms cannot affect the proposition that the *Shaw* principle is inapplicable.

The parties' conduct and its consequences

77 The present case is complicated by the fact that the taped statement was admissible as part of the prosecution case, subject to the judge exercising his discretion to reject it on the ground that the accused had not been warned that anything that he said might be used in evidence. However, the prosecution did not seek to tender the tape in its case-in-chief. For all we know the trial judge may have admitted the evidence. If he had, the present argument could not have arisen. The accused could not have complained of any prejudice or breach of the law of evidence. However, there is a significant chance that the judge may have rejected the tape in the prosecution's case-in-chief. Because that is so, it would not be fair to the accused to decide the case on the basis that the tape was admissible in the prosecution's case-in-chief and that the accused has suffered no real prejudice by its admission.

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73 See *R v Frost* (1839) 9 Car & P 129 [173 ER 771].

78 If the prosecution had tendered the tape in its case-in-chief and the trial judge had rejected it on discretionary grounds, questions would have arisen as to whether it could or ought to be admitted in rebuttal as an inconsistent statement. In my view, the tape was admissible in rebuttal as an inconsistent statement. But its admissibility was subject to the unfairness discretion conferred by s 130 of the Act. If the tape had been rejected in the prosecution's case-in-chief on discretionary grounds, there must have been a strong chance that the judge would have exercised the s 130 "unfairness" discretion in favour of the prosecution. On the other hand, the judge may have exercised his discretion in favour of the accused. But at no stage did the accused object to the admission of the tape, and, as I have mentioned, the prosecution did not attempt to tender the evidence in chief, as it should have.

79 These failures of the prosecution and the accused to take the steps that each should have taken make it difficult to dispose of the case in a way that gives effect to the law and justice. That difficulty is increased because the appellant does not allege, as it might have done, that the tender of the tape did not constitute a miscarriage of justice within the meaning of s 668E(1) of the *Criminal Code* (Q). Under that sub-section, the Court of Appeal is relevantly empowered to set aside a conviction "on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice". Because the accused did not object to the tender of the tape, the trial judge did not make a wrong decision on any question of law in admitting it. In allowing the accused's appeal, the Court of Appeal must have found that the admission of the tape constituted a "miscarriage of justice". The Court did not explain how it did. Not only did the accused not object to the tender of the tape, but he had already admitted that he made the statements on the tape, which had been played to the jury during his cross-examination. In these circumstances, I am not convinced that there was a "miscarriage of justice" within the meaning of s 668E(1) of the Code. But the appellant's notice of appeal does not raise this point.

80 The notice of appeal raises two grounds of appeal. First, the Court of Appeal erred in holding that the tape "was wrongly admitted into evidence in spite of that Court's determination that the requirements of section 18 of the *Evidence Act 1977* (Qld) were satisfied". It is true that the Court so held and that its reasons for doing so were erroneous. But this error does not entitle the appellant to an order restoring the accused's conviction. For reasons that I have already given, the tape should not have been admitted in any event. Quite apart from those reasons, even if the tape was admissible as a matter of law, the unfairness discretion under s 130 had to be exercised. Complying with the conditions of s 18 is not an automatic passport to admissibility. The error identified in the first ground of appeal does not entitle the appellant to have the accused's conviction restored.

81 The second ground of appeal alleges that the Court "erred in finding that the tender of the tape ... amounted to evidence in rebuttal". This ground fails for the reason that, tendered as an inconsistent statement, it was evidence in rebuttal or, at all events, evidence, properly admitted, in a case-in-reply.

82 The two grounds in the notice of appeal do not require the conviction of the accused to be restored. It follows that, because the Crown's grounds of appeal in this Court do not contend that the Court of Appeal erred in impliedly finding that there had been a miscarriage of justice within the meaning of s 668E(1), the appeal must be dismissed.

Order

83 The appeal should be dismissed.

84 CALLINAN J. This appeal is concerned with the law governing the adducing by the Crown of evidence of out of court statements.

Facts and previous proceedings

85 The respondent was accused of rape. The complainant said that the respondent, on the evening of 5 May 2000, had forced and pinned her to the ground outside the house where the offence was shortly afterwards committed.

86 The respondent was interviewed by Detective Sergeant Inmon in Townsville on 19 May 2000. He told the officer that he had pushed the complainant to the ground and that she had been crying. It is necessary to set out some material parts of the transcript of the interview which was recorded.

> "SOMA [indistinct] yep. Because sometimes I'll come sleep at my Aunty's place
>
> INMON Mmm
>
> SOMA [indistinct] everything like that, and I will open the windows because the air come in because this smell no good. Sometimes no air go in.
>
> INMON So you went to your Aunty's place and you opened the windows up to let the air come in except for the smells no good sometimes?
>
> SOMA Yeah. Yep. And I go inside of the house [indistinct] is outside. Just sitting in front of the house. And I come out. Said please give my wallet [indistinct]. And he tried get up … maybe feel that I do something for her. And that's why I pulled at the hair and said no I won't do something for you. I want my wallet back and will leave you alone. And [indistinct]. Yep. For that time I hold down the … the hair. I turned away, turned around and go inside the house and he follow me. He follow me he said please please Michael I don't have your wallet … I said please I want my wallet you take my wallet [indistinct] I know you take my wallet. Said look I lost my stuff [indistinct]. He lost my stuff [indistinct]. I said what's your stuff. He said he lost my marijuana. I said [indistinct] he said he wanted to come with me go find it. Said Nah-ah. I not smoke marijuana. I don't like it at all. But if you want to go find it give my wallet and you go find it … and get inside house … I go back inside house [indistinct] and he [indistinct] up inside and he cried and cried I said don't be cry I'm gonna do something for you. And he said please I don't know your

wallet … I don't know anything. I said he tell me he lost your stuff he lost your marijuana and when … when you said [indistinct]. And after that … uh … after that he's coming in and said this is for [indistinct] your wallet. Said what [indistinct] my wallet. I said … and open … he open her clothes. I not open. I not do anything. He open her clothes. Put down [indistinct] and he lay down her bed. And … yep. I said [indistinct] please please Michael I don't know anything [indistinct] for your wallet. Yeah and do that and after that I said you want to go shower, and said yeah said go for shower [indistinct] go shower I go bring a towel [indistinct] and [indistinct] everything like that. I said if you want change your clothes anything like that … I do. Said nah I'm all right. And I said what do you want … I said you want to sleep here you all right … If you want to go home, I pay the taxi for you. And he said please I want to go home because of my dad, he go … he go to work, go somewhere like that. I said all right, what can I do. I want to ring up a taxi. Said yep all right for [indistinct] you ring up taxi and he … he'll ring up the taxi and after that [indistinct] … he say to me [indistinct] go stay in front of the house or wait for the taxi. I say yeah I do, and I [indistinct] money to pay the taxi. Said only five dollar. I said here because the change fall out [indistinct] my put it inside my wallet he put inside … [indistinct] uh what do you call this [indistinct] …

INMON Pocket?

SOMA Pocket. And I'm go outside and said here this is a ten dollar for paying your taxi. And taxi come and he … he … he still hold on me … give a big hug … give a kiss for me and taxi comes [indistinct] here … I said all right you go and said yeah make sure you ring up me next day because he'd give to me the phone number. I said all right. [indistinct]. He go. That's all.

INMON She ... how come her beads have broken … around her neck?

SOMA Right. That's what time I go hold down the … the hair and I go down together

INMON You hold the beads and the hair together?

SOMA Yeah … hold together for the … for the … the … that one

INMON Behind the head? You're holding … you're … you're actually putting your hand here, uh just on where your collar is … underneath your collar at the back of your hairs

SOMA Yeah

INMON Back of your neck … so … is that where you grabbed hold of this girl?

SOMA That's … that's where I hold [indistinct]

INMON Did you push her on the ground?

SOMA Yeah. That was down on the ground

INMON Did you put anything around her mouth? A t-shirt?

SOMA The … yeah. Yeah. Because he … he … crying for tell everyone I rape and for that time I not rape … I'm angry for because I want my wallet back. I want to go to sleep with my girlfriend or I want to go to sleep inside my house. And he [indistinct]. And he … he … he tell … he say with me everything. I said I don't want you tell me your story, I want my wallet back, and I don't know why you jump on inside the taxi and come home.

INMON Well what … what where were you going … what."

87 The complainant's evidence at the trial was that she had never met the respondent before the night of the alleged rape. She said that when she had left an hotel in Bowen at about 1 am she was "pretty intoxicated". It was her intention to attend a party nearby. She became lost and was attacked in the street outside the respondent's aunt's house by the respondent. The complainant said that the respondent pushed her to the ground. He pinned her down, and, as she yelled for help, muzzled her by tightening something soft, which she thought was a shirt, around her mouth and neck. She later realized that a shell necklace that she had been wearing was broken in the struggle. She said she was forced into the house, raped, made to shower and to write down her telephone number. No one else was in the house at the time.

88 The defence case, as put to the complainant, was that she had left the hotel with the respondent and had lured him into having consensual sexual relations with her.

89 The appellant led evidence in support of the complainant's account: of the presence of fragments of shell, and the thread of the complainant's necklace on the driveway outside the house, and of another piece of shell, similar to, or the

same as the shell in the necklace, under the bed where the rape was alleged to have occurred. There were other objective pieces of evidence: vegetable matter was found on the bedspread where the rape was alleged to have occurred. Marks were observed on the complainant's back consistent with her version. A neighbour had heard a scream for help. And an envelope was found in the house with a false name and telephone number on it which the complainant said she had given to the respondent when he demanded that information to enable him to contact her in the future.

90 The Crown closed its case without attempting to lead evidence of the recorded interview with the respondent. The appellant told the Court of Appeal that "the prosecutor did not lead the evidence in the prosecution case ... because it was anticipated that objection might be taken to it because the interview took place whilst the [respondent] was in custody and without any warning having been administered to him."[74]

91 The respondent gave evidence on his own behalf at the trial. He admitted intercourse but alleged that it was consensual following the complainant's seduction of him. His explanation for the broken necklace was that the complainant had stolen his wallet. He had clutched at her to stop her leaving and it was then that the necklace broke. He said that he had apologized, and that she had followed him into the house. At the beginning of his cross-examination the respondent denied that the complainant had cried, or that the respondent had forced her to the ground. It is important to notice exactly what the respondent was asked and his responses:

> "MR COLLINS: You say she never screamed out?-- Yes
>
> But she was crying, wasn't she?-- No
>
> She wasn't?-- She not cry.
>
> She was crying, wasn't she?-- No.
>
> She was crying inside the house, wasn't she?-- No. She not cry.
>
> You forced her down on to the ground outside the house, didn't you?-- No.
>
> You didn't?-- No.
>
> You forced her on to the ground outside the house with sufficient force to leave marks on her back of the ground underneath?-- No.

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74 *Soma* (2001) 122 A Crim R 537 at 540 [26].

You didn't do that?-- No, I not do that.

Never, ever did it?-- No.

You -----

HIS HONOUR: Was she ever lying on the ground?-- No. Only the time – inside the cab, outside. The time she stand up and take my wallet and smoke and she walk away, these the time she fall down a couple of time.

So, you say at no stage was she on the ground out in front of the house?-- That's – out from the gate?

I am saying out the front of the house you threw her on the ground, didn't you?-- No, no.

You did that because you were angry, didn't you, and you forced her onto the ground because you were angry?-- No.

Well, you see, you remember talking with Sergeant Inmon at Townsville on 19 May 2000. On that occasion you told him that she was crying, didn't you?-- No.

And you also told him that you pushed her onto the ground, didn't you?-- No.

Your Honour, can I have the tape recorder attached, please? Just have a listen to this."

92 The prosecutor then played part of the recording of the interview. In his subsequent questioning however, he went beyond the matters which he had put before the recording was played. He asked whether the respondent had said in the interview that he had pulled the complainant's hair. At one point the prosecutor asked whether the respondent (but not whether the respondent had said in the interview that he) had held some cloth tightly around the complainant's mouth. The prosecutor again interrupted his cross-examination to play some more of the tape recording. Following that he asked the respondent whether *he had admitted to Detective Sergeant Inmon* that he had put a t-shirt around the complainant's mouth. This was not a matter which in terms he had previously put to him. Some other matters such as what the respondent had said about his wallet to the complainant, and the stages at which he had claimed to talk about it to the complainant were also recorded during the interview and were played in court even though they had not earlier been put to the respondent. At no stage was the whole of the recording played. It was edited before it was admitted into evidence so as to contain only those parts of it which had been played in court.

93 During the course of the cross-examination the respondent eventually conceded that it was his voice on the tape. He claimed that he was confused when he was interviewed. He maintained the version of events that he had given in his evidence in chief. Defence counsel foreshadowed a possible objection to the tender of the recording but later abandoned it.

94 The respondent was convicted.

The appeal to the Court of Appeal

95 The respondent appealed to the Court of Appeal of Queensland (McMurdo P, Cullinane and Jones JJ). Cullinane J gave the leading judgment with which the other members of the Court agreed.

96 After reciting the facts and summarizing the course of the trial, Cullinane J said this[75]:

> "The introduction of the tape in the course of cross-examination of the accused amounts to evidence in rebuttal: see Pincus JA in *Burns*[76]. *Lawrence*[77] was also a case in which the relevant evidence was led during the case for the defence.
>
> It is a general and fundamental principle governing the conduct of criminal trials that the evidence for the prosecution must be presented before an accused is called upon. In *Shaw*[78] the principle was stated succinctly in the joint judgment of Dixon, McTiernan, Webb and Kitto JJ in the following way: 'Clearly the principle is that the prosecution must present its case completely before the prisoner's answer is made.'
>
> Per Gibbs CJ in *Lawrence*[79]:
>
> 'The principle, authoritatively stated in *Shaw*, that the prosecution must present its case completely before the prisoner's answer is made, applies with equal force whether the Crown seeks to introduce evidence during the course of the case for the defence or

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75 *Soma* (2001) 122 A Crim R 537 at 538-539 [19]-[21].

76 (1999) 107 A Crim R 330 at 343.

77 *Lawrence v The Queen* (1981) 38 ALR 1.

78 *Shaw v The Queen* (1952) 85 CLR 365 at 379.

79 (1981) 38 ALR 1 at 3.

> after the close of the case for the defence. The rule that the prosecution may not split its case, but must offer all its proofs before the prisoner is called upon for his defence, is not merely technical but is an important rule of fairness.'"

97 Cullinane J[80] then quoted at length with approval from a statement by Pincus JA in *Burns*[81]:

> "Complaint was made of the tender of a tape-recording of a telephone conversation to prove that in April 1997 the appellant, during the course of a long telephone conversation, the critical part of which is set out in the reasons of Muir J, threatened his wife. The appellant's outline says that the tape should not have been admitted. That is in my opinion correct. It is clear from the five authorities mentioned below that the judge had a discretion to exercise, since the proffered evidence constituted rebuttal and was therefore only admissible subject to the tests in *Killick*[82] and *Chin*[83]; the five cases are *Niven*[84], *Ghion*[85], *Neville*[86], *Hall*[87] and *Kern*[88]. This does not appear to have been recognised at the trial, where admission of the tape was not objected to. Had objection been made, in my opinion the evidence should have been excluded; the circumstance that the evidence was proffered during cross-examination of the appellant, rather than at the conclusion of his evidence, does not make the principle I have mentioned inapplicable. Rationally, the evidence proved little more than that the appellant, some six months before the occurrence of the alleged offences, had become very angry with his wife and used extravagant language towards her. If it had proved anything more specific an attempt might have been made to have it admitted in

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80 (2001) 122 A Crim R 537 at 539-540 [22].

81 (1999) 107 A Crim R 330 at 343-344 [69]-[70].

82 *Killick v The Queen* (1981) 147 CLR 565 at 571.

83 *R v Chin* (1985) 157 CLR 671.

84 *Niven v The Queen* (1968) 118 CLR 513.

85 *R v Ghion* [1982] Qd R 781.

86 *R v Neville* [1985] 2 Qd R 398.

87 *R v Hall* [1986] 1 Qd R 462.

88 *R v Kern* [1986] 2 Qd R 209.

> chief, on the principles discussed above in relation to the evidence of Michael.
>
> In *Killick* the main judgment drew attention to the general rule that the evidence on which the Crown relies should be presented before it closes its case and to the fact that evidence tendered by the Crown after the close of the defence case 'may assume an inflated importance in the eyes of the jury'[89]. The evidence in question here was given before the defence case closed; but nevertheless it came in at a stage when its impact upon the jury's view of the appellant's credibility might have been considerable. Altogether different considerations would arise, as to the exercise of the discretion to admit evidence of a prior inconsistent statement made by an accused, where the point of inconsistency is one of central importance, although not one on which evidence could necessarily have been led in chief. An example of that would be a case where the accused, having told the police he knew absolutely nothing of the matter in question, gives evidence at his trial that he was indeed involved but in an innocent way."

98 His Honour concluded that the evidence of the contents of, and the edited record of the interview ought to have been, and would have been excluded had objection been made to the tender[90].

99 His Honour then went on to reject a submission by the respondent that the appellant had failed in any event to satisfy the formal requirements of s 18 of the *Evidence Act* 1977 (Q) ("the Act"), holding that the attention of the respondent had been sufficiently drawn to the relevant occasion "in a way that adequately identifies it"[91]. (That submission was not advanced in this Court.)

100 The reasons for judgment make no reference to s 18 of the Act other than for the purpose of dealing with the last mentioned submission. No attempt was made to explain its operation and meaning by reference to ss 101 and 130 of the Act. This is understandable for, with one exception, the earlier decisions of the Full Court and Court of Appeal of Queensland which are referred to in the passage from the judgment of Pincus JA in *Burns*[92], and *Burns* itself tend simply to apply, without discussing its current relevance, *Niven v The Queen*[93], a case in

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89 (1981) 147 CLR 565 at 569.

90 *Soma* (2001) 122 A Crim R 537 at 540 [29].

91 *Soma* (2001) 122 A Crim R 537 at 540 [32].

92 (1999) 107 A Crim R 330.

93 (1968) 118 CLR 513.

which the Tasmanian *Evidence Act* 1910, s 98 of which was in substantially the same form as s 18 of the Queensland Act[94], was discussed, but in which there was no equivalent of either s 101 or s 130 of the Act. Another significant difference between the statutory regime in Tasmania at that time and Queensland now is that in the latter there is no analogue of s 371(i) of the Tasmanian *Criminal Code*.

The appeal to this Court

101 The appellant appeals to this Court on the following grounds:

> "(a) The Court of Appeal erred in finding that the tape of the [respondent's] interview was wrongly admitted into evidence in spite of that Court's determination that the requirements of section 18 of the *Evidence Act 1977* (Qld) were satisfied; and
>
> (b) The Court of Appeal erred in finding that the tender of the tape of the [respondent's] interview amounted to evidence in rebuttal."

102 Some further reference to *Niven*[95] is required. There the Court was concerned with s 371(i) of the Tasmanian *Criminal Code* and s 98 of the Tasmanian *Evidence Act* 1910. The former provided that evidence in rebuttal might be called by the Crown if the judge is of the opinion that in the circumstances of the particular case it should be allowed. The Court[96] held that the Tasmanian Code provision applied to the calling of any evidence by the prosecution after the closure of the case for the accused, including evidence otherwise admissible under s 98 of the Tasmanian *Evidence Act*. Their Honours said[97]:

> "Whilst perhaps it may be that evidence made admissible by s 98 in strictness does not always rebut the case made by the accused, yet the policy evidently expressed in s 371(i) would require a wide construction of the expression 'evidence in rebuttal'. It calls, in our opinion, for the exercise of the trial judge's discretion in relation to all evidence sought to

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94 See also *Evidence Act* 1995 (NSW), s 43, *Evidence Act* 1958 (Vic), s 35, *Evidence Act* 1906 (WA), s 21, *Evidence Act* 1929 (SA), ss 28 and 29, *Evidence Act* (NT), ss 19 and 20, *Evidence Act* 1971 (ACT), ss 61 and 62 (now replaced for the time being by *Evidence Act* 1995 (Cth), ss 43 and 44).

95 (1968) 118 CLR 513.

96 Barwick CJ, McTiernan, Kitto, Windeyer and Owen JJ.

97 (1968) 118 CLR 513 at 516.

> be adduced by the Crown after the accused's defence is complete, that is to say, in what could be called a case in reply."

103 In my opinion, evidence that is admissible under a provision such as s 98 of the Tasmanian Act or s 18 of the Queensland Act would frequently not be such as would rebut the case made by the accused, and therefore would not be rebuttal evidence properly so called. With respect, so to describe it in *Niven* was to misdescribe it, even though its reception might ultimately depend upon the application of common law rules, or principles analogous thereto. The example given by Pincus JA in *Burns* towards the end of the extract from his Honour's judgment which was quoted by the Court of Appeal in this case, and which I have already set out, provides an example of evidence potentially admissible under s 18 of the Act, but not as rebuttal evidence properly so called, or otherwise. The words used in s 18, "relative to the subject matter of the proceeding" contemplate evidence going beyond, or not directly relevant to the issues. Rebuttal evidence generally is evidence other than evidence going to credit. It is ordinarily evidence which, unlike evidence admissible under s 18, might have been called in chief to prove or tending to prove a fact in issue. Phipson[98] discusses the occasions for its reception in the following passage:

> "Evidence may be called by the prosecution in rebuttal whenever the defendant gives evidence of fresh matter which the prosecution could not foresee. Thus, in an old case on a charge of theft, the defendant gave evidence that he had bought the property from A; A, called as a witness in rebuttal, was allowed to deny that he had sold the property to the defendant, but not to add that 'he had seen the defendant steal it' for this was merely confirmatory of the original charge.[99]"

104 The strictness of the rule appears to have been relaxed subsequently to some extent in the United Kingdom. *Killick v The Queen*[100], which holds that the prosecution may only call evidence not foreseen and not reasonably foreseeable in rebuttal, continues to state the law in Australia on the topic[101]. A clear rule is desirable because of the disproportionate impact that evidence for the prosecution called after the defence case is likely to have on the jury.

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98 *Phipson on Evidence*, 15th ed (2000), par 11-36.

99 *R v Stimpson* (1826) 2 Car & P 415 [172 ER 188].

100 (1981) 147 CLR 565.

101 (1981) 147 CLR 565 at 570-571 per Gibbs CJ, Murphy and Aickin JJ, 576-577 per Wilson and Brennan JJ.

105 In this appeal the appellant argued that *Niven* was wrongly decided and should be overruled. As will appear, it is unnecessary to decide whether that is so, because, in my opinion the position in Queensland is now governed not only by s 18 of the Act but also other provisions of it not in force in Tasmania when *Niven* was decided, and not referred to in the Court of Appeal in this case.

106 The first Queensland case in which there is a comprehensive discussion of the Act and the other provisions bearing upon s 18 appears to be *R v Hall*[102].

107 There, McPherson J first summarized the law in Queensland as it was before the enactment of the Act. He said[103]:

> "A witness may be cross-examined about a former statement made by him which is inconsistent with the evidence he gives at the trial. Under ss 17 and 18 of the *Evidence Act* 1977-1981, proof that he made such a statement may be given[104]. Before proof of it may be given the circumstance of his making it must be so designated to the witness as to identify the particular occasion on which it was made so as to enable him to explain it if he can[105]. Once the prior statement is proved in this fashion its contents necessarily form part of the evidence at the trial; but they are available only for the purpose of discrediting the witness by demonstrating that he is not worthy of belief. They are not available to prove, and they may not be relied upon as proving, the truth of facts in issue, even if (as s 18 requires that they must be) the contents of the prior statement relate to facts in issue. The jury in a criminal trial must be directed accordingly[106]. It is therefore plainly quite improper for counsel to adduce evidence of a prior inconsistent statement with a view to, or in the hope of, inducing a jury to act on that statement as evidence of facts in issue. Particularly is that so in criminal trials, where the statement, if acted upon by the jury for the illegitimate purpose of establishing the facts in issue, is potentially prejudicial to the accused. Hence the remark of Philp J, in giving judgment in the Court of Criminal Appeal in *R v Thompson*[107], that the

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102 [1986] 1 Qd R 462.

103 [1986] 1 Qd R 462 at 463-464.

104 See *R v Hunter* [1956] VLR 31 at 35-37.

105 *Savanoff v Re-Car Pty Ltd* [1983] 2 Qd R 219.

106 See *R v Pearson* [1964] Qd R 471, following *Golder* (1960) 45 Cr App R 5; and see *R v Cox* [1972] Qd R 366.

107 [1964] QWN 25.

'calling of a witness known to be hostile solely with the motive of using him as a conduit pipe as it were to get in inadmissible evidence would be improper, and we should interfere if such a thing occurred.'

I have so far been speaking of the law as it was in Queensland before 1977. Whether juries were able to appreciate, and in practice observed, the distinction between evidence going only to credit and evidence going to the issue may be doubted. The legislature was evidently not confident they did because, in the *Evidence Act* in 1977, it altered the law governing the use to which a prior inconsistent statement might be put."

108 His Honour then set out s 101 and stated its effect[108]:

"Section 101 has changed the law. Prior inconsistent statements proved by virtue of s 17 or s 18 are no longer relevant only to credit. They are now also evidence of any facts they contain provided only that direct oral evidence of those facts would be admissible if given by the maker of the statement. That means that the direction, required by *R v Pearson*[109] and other cases to be given to the jury, is no longer appropriate. Indeed, to give it now would be incorrect if the statement in question satisfied the requirements of s 101."

109 After some further observations, his Honour turned to the decision of the Court of Criminal Appeal in *R v Neville*[110], pointing out that some remarks of Williams J in that case were not strictly necessary for its decision.

110 McPherson J said this[111]:

"The source of the discretion invoked … is to be found in s 130 of the *Evidence Act*, or at any rate in the general power conferred by the common law, to exclude evidence that it would be unfair to the person charged to admit[112]. Section 130 expressly provides that nothing in the Act is to derogate from that power. Before the power under s 130 is called

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108 [1986] 1 Qd R 462 at 464.

109 [1964] Qd R 471.

110 [1985] 2 Qd R 398.

111 [1986] 1 Qd R 462 at 468.

112 cf *Harris v Director of Public Prosecutions* [1952] AC 694 at 707; *Markby v The Queen* (1978) 140 CLR 108 at 117.

> into operation two requirements must be fulfilled. It must be 'unfair' to the person charged to admit the evidence; and the Court must be 'satisfied' that it is unfair."

111 I agree with his Honour's observations with one minor qualification. Section 130 of the Act which is in the following form may well do other than restate, recognize, or invite the exercise of the power under the common law to exclude evidence on the basis of unfairness:

> "Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence."

112 The power of the court in a criminal case from which the Act must not derogate could only have been, before the enactment of s 130, such power as existed under other provisions of the Act, other statutes, or at common law, but the section in my opinion confers an even more ample discretion on the court in a criminal case to exclude evidence which, although perhaps not within a currently recognized head of exclusion at common law, it would be unfair to an accused to admit. In short the test became one simply of unfairness, and not necessarily of unfairness according to contemporary common law principles.

113 I return now to this case. In my opinion, the contents of the interview and the recording of it were admissible and could have been tendered by the prosecutor in the Crown case. Any doubts that the prosecutor might have had as to their admissibility could and should have been resolved following argument in the absence of the jury. It is the responsibility of the Crown to call all relevant available evidence, both favourable and unfavourable to an accused[113]. If an inculpatory statement by an accused also contains self-serving or exculpatory matter then the Crown must take the exculpatory with the inculpatory, and tender the whole statement. This is the course which should have been followed here. So too, the respondent could have insisted that the whole of the recording be tendered if he wished. To that extent the trial miscarried.

114 It also probably miscarried in another respect which was not touched upon in argument in this Court although it was in the Court of Appeal. It is important that the requirements of s 18 be carefully and fully satisfied. Any prior statement which a party wishes to adduce must clearly and substantially be put to its maker before the evidence of it is adduced. That did not happen here in at least one respect: as to the complainant's hair being pulled by the respondent. A cross-examiner is not obliged to put all of the statements in the same sequence as they

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113 *Dyers v The Queen* (2002) 76 ALJR 1552 at 1574-1575 [118]-[120]; 192 ALR 181 at 212-213.

were originally made, or to abstain from questioning about other matters including the actual issues themselves, in the course of putting the prior statements, but a full and proper opportunity to admit distinctly each statement must be given to the witness before any attempt is made to prove the earlier inconsistent statement. And further, it must be kept in mind that if the witness does distinctly admit to the making of a statement, that is the end of the matter. The occasion for other proof of the making of the statement simply does not arise.

115 The question is, the trial having miscarried, in the two respects to which I have referred, should this Court hold that the Court of Appeal ought not to have intervened as it did.

116 The appellant relies on the respondent's failure to object to the reception of the recording at the trial. It was also submitted that the prosecution case was a strong one. Furthermore, the second respect in which the trial miscarried was not the subject of argument in this Court.

117 These are relevant matters. I do not think however that the third matter requires that the appeal be upheld. It is a matter that is closely related to the unsatisfactory way generally in which the recording was dealt with at the trial. The facts surrounding it appear fully from the transcript and are beyond dispute. The first of the matters might be decisive if the other error, of not putting properly and sequentially before proving each of them, the prior statements, had not occurred.

118 I have in the result formed the opinion that this Court should not interfere with the decision of the Court of Appeal for these reasons.

119 The prosecution should have sought to tender the statement, both the inculpatory and the exculpatory parts of it in the prosecution case. Each prior statement was not properly and fully put as it should have been in cross-examination of the respondent before it was proved. This was an appeal by the prosecution. The respondent has had a success in the Court of Appeal. To uphold the prosecution appeal to this Court would not be to place the respondent in double jeopardy as that expression is commonly understood[114], but it would be to place him in a position in some respects not unlike it, as a casualty of an appeal by the prosecution. As this is not a convicted person's appeal, I do not think that I should review the evidence as it would need to be reviewed in deciding as it would be, on an accused's appeal, whether a substantial miscarriage of justice has actually occurred so that the proviso should be applied within the

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114 *Pearce v The Queen* (1998) 194 CLR 610 at 614 [9]-[10] per McHugh, Hayne and Callinan JJ.

meaning of s 668E(1A) of the *Criminal Code* (Q). In any event, as the Court of Appeal did not apply that provision, I too would not do so. In the circumstances I am not prepared to differ from what I take to be the basis of the decision in the Court of Appeal, that there has been a miscarriage of justice within the meaning of s 668E(1) of the *Criminal Code*.

120 I would accordingly dismiss the appeal.