HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, CALLINAN AND HEYDON JJ

MWJ APPELLANT

AND

THE QUEEN RESPONDENT

MWJ v The Queen
[2005] HCA 74
7 December 2005
A35/2005

ORDER

Appeal dismissed.

On appeal from the Supreme Court of South Australia

Representation:

P J L Rofe QC with S C Ey for the appellant (instructed by Mangan Ey and Associates)

P F Muscat for the respondent (instructed by Director of Public Prosecutions (South Australia))

CATCHWORDS

MWJ v The Queen

Criminal law – Practice and procedure – Trial by judge without a jury – Appellant convicted of three sexual offences against a child – Supposed inconsistencies between the evidence of the complainant and her mother concerning complaints that the complainant made to her mother – Whether the manner in which the trial judge dealt with the supposed inconsistencies involved error.

Criminal law – Practice and procedure – Rule in *Browne v Dunn* – Application of the rule to an accused in a criminal trial – Supposed inconsistencies between the evidence of the complainant and her mother not put to the complainant in cross-examination – Whether the complainant should have been re-called – Consequences for trial judge's decision-making.

1 GLEESON CJ AND HEYDON J. Following a trial before a judge, sitting without a jury, in the District Court of South Australia, the appellant was convicted of three sexual offences against the complainant, who was a child at the time. The three offences allegedly occurred at 10 Jeffries Street, Whyalla Playford, in 1990 or 1991, where the appellant was living with the complainant's mother. There was an alleged earlier offence of a similar nature, said to have occurred at 5 Sutcliffe Street, Whyalla Stuart, between 1986 and 1987. The appellant was acquitted of this charge. The three offences of which the appellant was convicted arose out of a single incident at Jeffries Street. However, evidence was given of other uncharged offences committed earlier at Jeffries Street. The alleged incident at Sutcliffe Street, and the incident at Jeffries Street, which were the subject of the charges, were, according to the complainant, the first and last occasions of sexual abuse to which she was subjected. Where there is alleged to be a history of sexual abuse, it may be that a complainant will find it easiest to remember, and give detailed evidence about, the first and the last occasions on which it occurred.

2 Only three people gave evidence at the trial: the complainant, the complainant's mother and the appellant. The mother gave evidence of complaints made to her. The admissibility of that evidence is not in question in this appeal. The argument in the appeal relates to certain supposed inconsistencies between that evidence and the evidence of the complainant, and to the way those inconsistencies were dealt with at trial.

3 The sequence of complaints was as follows. In 1991, the complainant told her mother that the appellant had tried to have sex with her at Jeffries Street. The complainant's mother gave evidence that she confronted the appellant with the allegation, and he admitted it was true. Many years later, in 2002, the complainant told her mother that, while they lived at Sutcliffe Street, the appellant "used to go into her room at night-time and touch her". The mother gave evidence that she confronted the appellant, who said that the matter had "already [been] worked out between [them]". The appellant in his evidence denied the alleged misconduct and the alleged admissions. The complaints to the mother were said to have been made in general terms. She did not question the complainant in the manner of a police investigator, or a trial lawyer, or seek further particulars as to exactly what happened. In giving evidence about the 2002 complaint, the mother said that she could not remember the exact details of the conversation.

4 The complainant, in her evidence, was asked, and answered, questions about the alleged incident the subject of the charge relating to Sutcliffe Street. She was not asked, either in chief or in cross-examination, whether there were any other instances of sexual abuse at Sutcliffe Street. Counsel for the appellant was aware, from the evidence at committal, that the mother was expected to give

evidence of a 2002 complaint about a course of conduct at Sutcliffe Street. She did not ask the complainant whether there were incidents at Sutcliffe Street in addition to that which was the subject of the charge, and of the evidence in chief. The Crown Prosecutor had said, in his opening address, that the complainant "thinks that this is the only occasion when the accused touched her in this way at Sutcliffe Street", but neither counsel raised the question with the complainant in the course of her evidence. The complainant, it should be added, said she was aged about 8 at the relevant time.

5 In brief, the complainant gave no evidence about whether the charged incident at Sutcliffe Street was the only one of its kind at that address. The complainant's mother, who was unclear about the details of the 2002 complaint, described it as a general complaint relating to conduct at Sutcliffe Street, rather than an account of a single and specific incident. There was no direct inconsistency between the complainant's evidence at trial and what, according to her mother, she said in 2002.

6 Counsel for the appellant knew that the mother was going to give evidence of a complaint about a course of conduct at Sutcliffe Street. The fact that she did not cross-examine the complainant about whether there was other abusive conduct at Sutcliffe Street apart from the occasion that was the subject of the charge is hardly surprising. The advantage to be gained from a negative answer was small, and the disadvantage resulting from a positive answer could have been significant.

7 The evidence of the complainant was that the event at Sutcliffe Street was the first occasion on which anything like that had happened. That, perhaps, is why it was the subject of a charge. The complainant was not asked, and she did not say, that nothing like that ever happened again at Sutcliffe Street. In cases of alleged child sexual abuse, where the events allegedly happened many years previously, it may be quite wrong to treat a complainant, who is only asked about a single incident which is the subject of one charge, and who is not asked about other uncharged incidents of a like kind, as intending to imply that the incident about which evidence is given was an isolated incident. Here, the complainant was invited to give evidence, and gave evidence, about uncharged incidents at Jeffries Street. The prosecutor told the judge that the complainant thought that only one incident occurred at Sutcliffe Street. Whether the prosecutor was right or wrong about what the complainant thought is unknown. The complainant did not give evidence, one way or the other, on that topic. To say that the mother's evidence of complaint was inconsistent with the complainant's evidence is incorrect.

8 Indeed, the possibility that, consistently with the complainant's evidence, there might have been a number of incidents at Sutcliffe Street, was part of the reasoning of the trial judge in deciding to acquit the appellant of the charge

relating to Sutcliffe Street. He said that "she was not categorical about it being the only time it happened at Sutcliffe Street". He interpreted one answer she gave as possibly implying "that there may have been other occasions about which she has no memory". In order to make good the charge relating to Sutcliffe Street, the prosecution had to establish the date of the offence with sufficient clarity to satisfy the terms of the charge. The trial judge said:

> "I am convinced ... that the offending did take place and at Sutcliffe Street. However, placing it within the period charged ... is not possible, at least with any conviction, given the necessity to do so beyond reasonable doubt ... If I was convinced that it was a single occasion at Sutcliffe Street, then I would have entertained an application to amend to widen the charge period."

9 The judge said he based his lack of such conviction "on [the complainant's] reserved response to whether there was only the one occasion of improper touching at Sutcliffe Street". He gave a transcript reference. The transcript reference, however, is to the complainant's response to the question whether anything like that had happened *before*. She was being asked about the first time the appellant had touched her improperly. She was not asked whether anything else like that happened later at Sutcliffe Street.

10 The trial judge recorded an argument by defence counsel to the effect that there was such inconsistency between the complainant's evidence, including some aspects of her evidence about what had happened at Jeffries Street, and the mother's evidence of complaint, that the prosecution must fail entirely on the onus of proof. He referred to a legal argument about the status of the evidence of complaint, and also to the fact that no one had asked the complainant about what she had said to her mother in 2002 concerning Sutcliffe Street. The legal argument was about whether the evidence of complaint should be treated as evidence of a prior inconsistent statement. The judge said that to use the mother's evidence as evidence of a prior inconsistent statement would be unfair because the complainant had never been challenged in cross-examination about the supposed inconsistency. He then said:

> "Having said all that, resolving this difficulty is unnecessary in this case because it is my view that this submission [ie the submission based on the supposed inconsistency] is only marginally compelling for the following reasons."

11 In substance, the judge concluded, for cogent reasons, that the supposed inconsistencies, including that to which particular attention has so far been directed, did not in truth exist. He said, in that context:

> "As to the 2002 complaint, I consider that [the mother] was, in recounting that episode, concerned not so much with the details of what was alleged to have happened, but the place where it happened, namely Sutcliffe Street. Further, to find that the Crown case was fundamentally flawed in the way contended for would be to give to the evidence fuelling the submission a cogency which is simply not warranted by the hesitant way in which it was treated by both Crown and Defence counsel."

The trial judge's reasoning on this factual issue contains no error.

12 That should be sufficient to dispose of the present appeal, were it not for an argument prompted by some observations made in the South Australian Court of Criminal Appeal in dealing with the appellant's appeal to that Court against his conviction[1].

13 In the Court of Criminal Appeal, counsel for the appellant again relied upon the supposed inconsistency concerning what happened at Sutcliffe Street, and upon certain other suggested inconsistencies between the complainant's evidence about what happened at Jeffries Street and the mother's evidence of the complaints concerning conduct at Jeffries Street. Upon analysis of the evidence, and the reasoning of the trial judge, Doyle CJ (with whom Besanko J and White J agreed) concluded that the suggested inconsistencies "were explicable in a manner that did not provide a basis for them to reflect on [the complainant's] credit". There is no error in the reasoning upon which the Court of Criminal Appeal based its decision.

14 However, before expressing that conclusion, Doyle CJ attributed to the trial judge a certain view of the law, which he then corrected. It was what was said in that regard that gave rise to much of the argument in this appeal. In fact, as has already been noted, the trial judge found it unnecessary to resolve what he described as a legal difficulty resulting from the fact that the complainant had not been cross-examined about the suggested inconsistencies, including whether she maintained that there had been only a single incident at Sutcliffe Street. The judge had said that if there had been such an inconsistency, it would have been unfair to use it to impugn the credit of the complainant. She had never been given an opportunity to explain any inconsistency between her evidence and her complaints. The judge said:

> "I think if the Defence wish to impugn [the complainant] in this way then what is put to the tribunal of fact as achieving this should also have been put to her. I say this conscious that the accused bears no overall

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1 *R v M,WJ* [2004] SASC 345.

> onus. However, serious unfairness to the complainant arises if the technical view of the rules of evidence [is] applied as I have suggested."

15 Having said that, the judge went on immediately to say that "resolving this difficulty is unnecessary" for the reasons earlier mentioned, that is to say, that the suggestion of significant inconsistencies was without substance.

16 Doyle CJ said that the trial judge "wrongly treated the failure to cross-examine [the complainant] as precluding the use of the inconsistencies to impugn her evidence". That might have been the trial judge's tentative view, but it was a matter that he concluded he did not have to resolve. Nevertheless, Doyle CJ felt he should not let the matter pass without comment. He said:

> "The fact that the inconsistencies were not put to [the complainant] was something to be taken into account in assessing the weight to be given to the inconsistencies. It was open to [counsel for the appellant] to have [the complainant] recalled for further cross-examination. She did not do that. The consequence is not that the inconsistency should be ignored, it is that the failure to put the inconsistency to [the complainant] that has to be taken into account[2]."

17 The comments of Doyle CJ did not go either to the actual basis upon which the trial judge decided the case, or to the ultimate ground of decision of the Court of Criminal Appeal. Neither the trial judge nor Doyle CJ made specific reference in their reasons to the "rule of professional practice" discussed by the House of Lords in *Browne v Dunn*[3]. Nevertheless, the comments of Doyle CJ, made as they were in passing, became the foundation of an argument directed to the scope of that rule in criminal cases generally.

18 The principle of fair conduct on the part of an advocate, stated in *Browne v Dunn*, is an important aspect of the adversarial system of justice. It has been held in England[4], New South Wales[5], South Australia[6], Queensland[7], and New

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2 *R v Foley* [2000] 1 Qd R 290 at 291.

3 (1893) 6 R 67.

4 *Fenlon* (1980) 71 Cr App R 307; *R v Lovelock* noted in (1997) *Criminal Law Review* 821.

5 *R v Birks* (1990) 19 NSWLR 677.

6 *R v Manunta* (1989) 54 SASR 17.

7 *R v Foley* [2000] 1 Qd R 290.

Zealand[8], to apply in the administration of criminal justice, which, as well as being accusatorial, is adversarial. Murphy J, in this Court, even applied it to the conduct of an unrepresented accused[9]. However, for reasons explained, for example, in *R v Birks*[10], and *R v Manunta*[11], it is a principle that may need to be applied with some care when considering the conduct of the defence at criminal trial. Fairness ordinarily requires that if a challenge is to be made to the evidence of a witness, the ground of the challenge be put to the witness in cross-examination. This requirement is accepted, and applied day by day, in criminal trials. However, the consequences of a failure to cross-examine on a certain issue may need to be considered in the light of the nature and course of the proceedings.

19 In the present case, there was no obligation on trial counsel for the appellant to question the complainant about whether there had been more than one incident of sexual abuse at Sutcliffe Street, and there was no obligation to seek to have the complainant recalled for that purpose. Why would counsel for the appellant want to run the risk of eliciting further evidence of uncharged criminal acts by her client? That, no doubt, left the trial judge in a difficult position when he came to evaluate a criticism (in final address) of the complainant's credibility based on the supposed (although, in truth, non-existent) inconsistencies. It did not mean that counsel could not put her argument to the judge. As Doyle CJ said, it was a matter to be taken into account in assessing the weight to be given to the supposed inconsistencies. In the event, it was the fact that counsel chose (with reason) to leave the evidence in a state of uncertainty that undermined her submission about inconsistency. That was a forensic choice for counsel to make.

20 The appeal should be dismissed.

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8 *Gutierrez v The Queen* [1997] 1 NZLR 192.

9 *McInnis v The Queen* (1979) 143 CLR 575 at 590-591.

10 (1990) 19 NSWLR 677 at 686-691.

11 (1989) 54 SASR 17 at 23.

21 GUMMOW, KIRBY AND CALLINAN JJ. This appeal raises questions as to the obligations of the prosecution and the defence with respect to the calling and cross-examination of witnesses.

The charges

22 The appellant was charged with several offences of sexual misconduct: on one count, of unlawful sexual intercourse between 7 July 1986 and 31 December 1987 at Sutcliffe Street at Whyalla Stuart, and, on three others, of unlawful sexual intercourse, indecent assault and attempted unlawful sexual intercourse between 1 January 1990 and 31 December 1991 at Jeffries Street, Whyalla Playford. As will appear, the specification of the address in each instance is of particular relevance to the issues raised by the appeal.

Facts and previous proceedings

23 The complainant was born on 6 July 1978, and at the time of the trial was 25 years old. In 1986 her mother, and the man whom she had married in 1981, separated. They were then living at Sutcliffe Street, Whyalla Stuart. In 1987 the appellant met the complainant's mother and moved into the house at that address. In May 1989, the appellant, the complainant and two of her siblings and her mother moved into a house at Jeffries Street, Whyalla Playford.

24 Although the offences constituting three of the counts were alleged to have occurred on the same day at 10 Jeffries Street, the last occasion of the appellant's alleged offending, numerous other allegations were made by the complainant of sexual abuse, not the subject of any of the charges, at that address. Because the complainant's mother worked as a cook at a restaurant, sometimes during the day and sometimes at night, the complainant was often left in the care of the appellant.

25 The appellant elected to be tried by a judge (Smith DCJ) sitting alone pursuant to s 7(1) of the *Juries Act* 1927 (SA)[12]. The prosecutor, in opening the

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12 Section 7(1) provides:

"**7 Trial without jury**

(1) Subject to this section, where, in a criminal trial before the Supreme Court or the District Court –

(a) the accused elects, in accordance with the rules of court, to be tried by the judge alone; and

(Footnote continues on next page)

case on the first of the counts said that the complainant, "thinks that this is the only occasion when the accused touched her in this way at Sutcliffe Street". When she came to give her evidence on this count the complainant confined her complaint fairly clearly to one event:

"Q. At Sutcliffe Street, did anything unusual occur between you and [the appellant]?

A. Yes.

Q. Whereabouts were you when that occurred?

A. I was in bed at the time.

Q. Do you recall whether anybody else was in the bedroom?

A. I think K, but no-one else. [K was a sister of the complainant.]

Q. At what time of the day or night did something unusual occur?

A. I don't know the time I was awoken. It was night-time. It was definitely night-time.

Q. Are you able to say whether it was light or dark outside?

A. It was dark.

Q. Do you know whether K was awake or asleep?

A. She was asleep.

Q. What about you; do you remember what you had done that night before you went to bed?

A. No,

Q. How old were you?

A. Around eight.

(b) the presiding judge is satisfied that the accused, before making the election, sought and received advice in relation to the election from a legal practitioner,

the trial will proceed without a jury."

Q. Can you tell us what happened?

A. I woke up and somebody was laying in my bed. I was facing the wall and I rolled over – because I had been awoken, I thought my mum must have got home from work, so I said her name. It was [the appellant] there. I felt him remove his finger from inside me and he told me that mum would be home soon and he left.

Q. *Had anything like this happened before?*

A. *No, not that I know of.*" (Emphasis added)

26 By contrast, in relation to the appellant's conduct at Jeffries Street, the complainant spoke of a multiplicity of acts of sexual misconduct over a long period:

"Q. Can you describe what happened at Jeffries Street? Take your time. It might help if I ask you this: at Jeffries Street, was there one occasion or more than one occasion where something unusual went on?

A. There was more.

Q. You've described sexual touching occurring at Sutcliffe Street. Was there more sexual touching at Jeffries?

A. Yes.

Q. Are you able to say on how many occasions [the appellant] touched you at Jeffries Street?

A. No. It happened too often.

Q. How regularly did it occur at Jeffries Street?

A. At the start, not as many, but sort of as time went on, it became a more regular thing; at least a couple of times a week.

Q. This occurred when you were aged about 11, do you think?

A. Up until then, yes. Like I said, a regular thing.

Q. Over what period of time did this occur regularly?

A. Like I said, it started – I don't know when it was that it started. We moved, I just sort of noticed it started to happen more and more.

Q. Can I just check your school year. I think you said you moved to Jeffries Street at the beginning of '89; that's right, from your memory?

A. Yes.

Q. You commenced grade 6 in '89.

A. Yes.

Q. You turned 11 in the middle of 1989.

A. Yes.

Q. Either by referring to your grade or your age, can you tell us how old you were while this occurred regularly, or what grades you were in at school?

A. Through year 6 and 7.

Q. Year 6 and 7 were in 1989 and 1990.

A. Yes.

Q. Can you give us some detail about the things that happened to you at Jeffries Street?

A. That happened on a regular basis?

Q. Yes."

27 The complainant's mother who was called by the prosecutor gave evidence, over objection by the appellant, of statements made by her daughter to her with respect to the appellant's conduct at Sutcliffe Street. The statements were readily capable of being construed as inconsistent with the complainant's own evidence that only one offence had occurred at that address. That an inconsistency would arise once the mother's evidence as to her daughter's statements was received, was apparent to all. This was relevantly the mother's evidence:

"Q. Do you remember what she told you about what happened at Sutcliffe Street. You have used the words 'interfered with'; do you remember her words?

A. She told me that he used to go into her room at night-time and touch her.

Q. Did you infer from that that it was sexual touching?

A. Yes.

Q. Did you speak to [the appellant] about that in early 2002?

A. Yes.

Q. How did that come about?

A. When [the complainant] told me, [the appellant] wasn't home at the time. I was very upset, so I phoned him. I was yelling at him over the phone. He told me not to scream because he was sitting near people in a bar and they could hear what I was saying, so I said 'You'd better come home', which he did. He came home.

Q. What did you say to [the appellant] when he came home?

A. I asked him about all the things that [the complainant] had told me. He said 'We've already gone through all this' and I said 'No, not' – 'I didn't know about all this previous'.

Q. Do you remember whether or not you mentioned Sutcliffe Street to [the appellant]?

A. Yes.

Q. What did he say about events at Sutcliffe Street?

A. He told me that he'd already – that it was already sorted out and worked out between us, that I'd already known about that, and I said 'No, I only knew about the incident in Jeffries Street', and he said 'No', he said 'It's already discussed', and I said 'Well, [the complainant] can't get over this', and he said 'Tell her to come around any time she likes and I'll talk it through with her and I'll try to help her through it'."

28 The appellant submitted at the trial that the complainant's evidence of an instance of sexual abuse only at Sutcliffe Street was so different from the evidence of her mother of the complainant's assertions to her of several such instances at that address, that the conflict between them "constituted such a fundamental inconsistency that the Crown case simply could not discharge its onus". The trial judge dealt with the submission in this way[13]:

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13 *R v WJM* [2004] SADC 75 at [80]-[85].

> "In grappling with this submission I need to remind myself about the admissibility of the evidence here involved. [The complainant] said in evidence that in 1991 she complained to her mother in the following terms:
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> 'I told her that [the appellant] had been touching me'.
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> She explained that she told her mother it was sexual touching. She was not cross examined about this. What she said, on its face, cuts across [the submission of counsel for the appellant at trial] ... because it implies more than one incident of sexual impropriety at Jeffries Street. As to the content of the second complaint to her mother concerning what happened at Sutcliffe Street in early 2002, there was no evidence directly from [the complainant].
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> As a matter of strict principle the content of [the complainant's] complaints to her mother, both as to the truth of them and also as to the fact of them, are inadmissible. Firstly, the fact of what was said by [the complainant], either from her or from her mother, cannot be received by me as evidence going to her consistency and credibility because the complaint is not a 'recent complaint'. Further, the contents of the complaints, as deposed to either by [the complainant] or her mother, cannot be received for their truth because to do so would offend against, respectively, the rule against self corroboration and hearsay.
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> So is it the case that in weighing up the submission I am confined to considering only what [the complainant's mother] says was the content of the complaint?
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> In my view, this is unfair to the witness whose credit is being impugned, namely [the complainant]. The submission is effectively a plea that I should use the statements made by [the complainant] as deposed to by her mother as prior inconsistent statements without the witness whose credit is impugned thereby, namely [the complainant] being given an opportunity to address the alleged inconsistency.
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> Further, I was told by counsel for the Crown ... that the content of the statements of complaint were before me only to make sense of the alleged admissions of the accused."

There then followed this paragraph which betrays a misapprehension as to an accused's position and obligations in a criminal trial[14]:

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14 [2004] SADC 75 at [86].

"I think if the Defence wish to impugn [the complainant] in this way then what is put to the tribunal of fact as achieving this should also have been put to her. I say this conscious that the accused bears no overall onus. However, serious unfairness to the complainant arises if the technical view of the rules of evidence are applied as I have suggested."

The trial judge continued[15]:

"Having said all that, resolving this difficulty is unnecessary in this case because it is my view that this submission is only marginally compelling for the following reasons.

That [the complainant] conveyed to her mother in 1991 only that the accused attempted to have sexual intercourse with her at Jeffries Street when her evidence alleged other sexual activity, whilst inconsistent is neither inexplicable nor alarming. After all, [the complainant] was then only 12 or 13 years old. She had on her evidence tolerated an ongoing regime of sexual touching commencing in 1987 and increasing in frequency. However, the single activity which immediately preceded the complaint was the first time she had been hurt by the accused when he attempted to insert his penis into her vagina. It was the last time on [the complainant's] evidence that the accused had sexually abused her. She said it 'hurt a lot' so much so, for the first time in her encounters with the accused, she cried and pushed him away. So it is little wonder she reported that to her mother. Indeed, [the complainant's mother] said that [the complainant] was 'scared' when she came to her. The fact that [the complainant] volunteered no further information about the alleged long history of abuse is again not surprising. It is not unreasonable to infer that she could not tolerate this new hurtful abuse. Further, her mother did not seek further detail from her. In my view, there would be an understandable reluctance on the part of the child to volunteer the long history of distasteful happenings to her mother who plainly liked the accused. As to the 2002 complaint, I consider that the witness [the complainant's mother] was, in recounting that episode, concerned not so much with the details of what was alleged to have happened, but the place where it happened, namely Sutcliffe Street. Further, to find that the Crown case was fundamentally flawed in the way contended for would be to give to the evidence fuelling the submission a cogency which is simply

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15 [2004] SADC 75 at [87]-[89].

not warranted by the hesitant way in which it was treated by both Crown and Defence counsel.

Then [counsel for the appellant] asked why in 1991 the 13-year-old [complainant] did not make *full disclosure* to her mother but only complained of attempted sexual intercourse. Again, I do not regard that as a compelling indication of unreliability. I repeat that [the complainant's mother] neither sought nor waited for any detail but immediately went to confront the accused. It is probably not without significance that the last offence on [the complainant's] evidence hurt her. [The complainant's mother], I accept, was in love with the accused. This was plainly not welcome news to her and [the complainant] must have been aware of that." (Original emphasis)

29 The trial judge nonetheless acquitted the appellant on the count relating to Sutcliffe Street[16]:

"I am convinced, based on my acceptance of [the complainant's] evidence, and the evidence of her mother, that the offending did take place and at Sutcliffe Street. However, placing it within the period charged, namely 7th July 1986 and 31st December 1987, is not possible, at least with any conviction, given the necessity to do so beyond reasonable doubt and bearing in mind the warning. If I was convinced that it was a single occasion at Sutcliffe Street, then I would have entertained an application to amend to widen the charge period; but I am *not* so convinced, based on [the complainant's] reserved response to whether there was only the one occasion of improper touching at Sutcliffe Street. So, Count 3 is not proved beyond reasonable doubt." (Original emphasis)

30 His Honour however convicted the appellant on the other three counts[17]:

"I am satisfied that the Crown have proved beyond reasonable doubt Counts 4, 5 and 6. Necessarily I am convinced that there is no reasonable possibility that the accused's denials of the offending are true.

It is not incumbent upon me to identify the central evidence upon which I act and the basis upon which I prefer the evidence of [the complainant] and [the complainant's mother] to that of the accused[18].

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16 [2004] SADC 75 at [99].

17 [2004] SADC 75 at [104]-[106].

18 See *R v Keyte* (2000) 78 SASR 68 at 80, 81 per Doyle CJ.

> What I have said of the Defence contentions indicates some of my views. Further to that, I indicate that the evidence of [the complainant] and [the complainant's mother] had a cohesive consistency about it and a clear ring of truth to it. The admissions by the accused were an important part of the Crown case and were important to my considerations. [The complainant's mother's] evidence of the 1991 admission was not only itself convincing but also it was supported by the fact of and the circumstances surrounding the aborted trip to Mildura. The accused was driven, falsely, to claim that the trip to Mildura was motivated by [the complainant's mother's] wish to review their relationship, rather than a conviction, given the admission that her daughter's complaints were justified. I accept [the complainant's mother's] retort that the relationship was otherwise good in 1991. The engagement supports all that. She said there had been previous talk of marriage. Again the accused denied, falsely, that the confrontation in about March 2002 was about [the complainant's] further allegations of sexual misconduct at Sutcliffe Street but claimed it was about [the complainant's mother's] disenchantment with the property settlement. Again, I accept the evidence of [the complainant's mother] that such was not the case. The sudden angry summonsing of the accused from the hotel does not fit in with this. [The complainant's mother] said, and I accept it, that whilst the break up was not pleasant she left on 'good terms'. Certainly, whilst the understandable anger provoked by the accused's infidelity and perhaps even the property settlement was capable of providing a motive for a false accusation, what emerged from the accused's evidence and the cross-examination of [the complainant] and [the complainant's mother] failed to establish as a reasonable possibility that provoked by such matters [the complainant] and her mother fabricated the allegations. Indeed, the responses of [the complainant] and [the complainant's mother] to the penetrating cross-examination served to reinforce my views about the cogency of the Crown case, given the need for careful scrutiny.
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> Finally, I accept that a witness's demeanour can be an elusive aid to credibility and reliability. However, after the most careful scrutiny I am satisfied that both [the complainant] and [the complainant's mother] were patently credible and save for the matters addressed by me in relation to Count 3 they were reliable."

The appeal to the Court of Criminal Appeal of South Australia

31 The appellant unsuccessfully appealed to the Court of Criminal Appeal of South Australia (Doyle CJ, Besanko and White JJ). Their Honours' reasons for dismissing the appeal were given by Doyle CJ (Besanko and White JJ agreeing).

32 In that Court the appellant repeated the submission first made at the trial, that the inconsistency between the complainant's and her mother's evidence about the occasions of sexual abuse at Sutcliffe Street, was a fundamental one and of such significance as to undermine the foundation for all of the convictions.

33 The Chief Justice accepted that the complainant's evidence was of the commission of one offence only at Sutcliffe Street. His Honour did not doubt that, by contrast, the complainant had sworn to a multiplicity of occasions of sexual misconduct at Jeffries Street. His Honour also accepted that the complainant's mother's evidence at the trial was of several complaints to her by the complainant of numerous acts of sexual abuse at Sutcliffe Street[19]:

> "I agree with [counsel for the appellant's] submission that the defence was entitled to rely on the inconsistency between [the complainant's] evidence about [the appellant's] conduct and her complaints, and [the complainant's mother's] evidence about the complaints. The fact that the evidence of the complaints was led from [the complainant] merely to explain [the complainant's mother's] response does not mean that the evidence of [the complainant's mother] cannot be used to weaken [the complainant's] evidence, or [the complainant's mother's] evidence.
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> The evidence by [the complainant's mother] about [the complainant's] complaints is evidence of statements by [the complainant] inconsistent with her evidence about [the appellant's] conduct. The defence was entitled to rely on those inconsistencies to attack [the complainant's] credit.
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> The fact that the inconsistencies were not put to [the complainant] was something to be taken into account in assessing the weight to be given to the inconsistencies. It was open to [counsel for the appellant] to have [the complainant] recalled for further cross-examination. She did not do that. The consequence is not that the inconsistency should be ignored, it is that the failure to put the inconsistency to [the complainant] that has to be taken into account[20].
>
> I consider that the Judge erred in deciding that [the complainant's mother's] evidence could not be used as evidence of statements by [the complainant] inconsistent with her evidence at trial."

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19 *R v M,WJ* [2004] SASC 345 at [66]-[69].

20 *R v Foley* [2000] 1 Qd R 290.

34 His Honour summarised the position in this way[21]:

> "In the end the challenge to the Judge's verdicts comes down to the fact that in deciding that the inconsistencies between [the complainant's] evidence at trial about [the appellant's] conduct and her evidence and that of [the complainant's mother] about her complaints, the Judge did not identify and deal with all aspects of the inconsistencies. The same applies in relation to the Judge's consideration of [the complainant's mother's] evidence of admissions by [the appellant]. But that has to be balanced against the fact that the Judge dealt with a number of aspects of the inconsistencies, and clearly was persuaded by other matters upon which he was entitled to rely. The Judge wrongly treated the failure to cross-examine [the complainant] as precluding the use of the inconsistencies to impugn her evidence. But as to that my view is that if one accepts that the inconsistencies were explicable in a manner that did not provide a basis for them to reflect on [the complainant's] credit (as the Judge actually decided), there is nothing of significance in the point."

35 Doyle CJ concluded as follows[22]:

> "The ultimate question is whether the failure of the Judge to consider all aspects of what I will call the inconsistency argument has given rise to a miscarriage of justice. The matter can be put in three different ways. First, has it resulted in the Judge failing to consider a significant aspect of the defence case? Second, is there a real risk of the Judge having been led into error in his ultimate conclusion by his failure to consider the relevant matters? Third, if the Judge had summed up to the jury along the lines of his reasons, raising only the matters that he identified in his reasons, would the Court conclude that the jury had been misdirected?
>
> I agree that the inconsistencies were a significant aspect of the defence case. But I am satisfied, in the end, that the Judge has considered the substance of the defence case on this issue. [Counsel for the appellant] rightly identified aspects of the argument to which the Judge has not referred, but assessing the Judge's reasons as a whole I consider that he has sufficiently dealt with this aspect of the defence case.

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21 *R v M,WJ* [2004] SASC 345 at [79].

22 *R v M,WJ* [2004] SASC 345 at [84]-[88].

As to the second question, I do not agree that the matters that the Judge failed to deal with are of such significance that there is a real risk of the Judge's ultimate conclusion being flawed. Once again, reviewing the Judge's reasons as a whole I am satisfied that his conclusion could not have been affected by the aspects of the argument to which he did not refer.

As to the third question, bearing in mind that it is not necessary for a judge to spell out to the jury all aspects of the factual issues that they have to decide, I am not persuaded that a direction to the jury that brought to the jury's attention the matters that the Judge dealt with, and did not refer to the aspects of the submissions that he overlooked, would be an erroneous direction on the facts.

Conclusion

For all those reasons I consider that the omissions in the Judge's reasons are not sufficient to lead to the conclusion that the verdict should be set aside. The appeal should be dismissed."

The appeal to this Court

36 The appellant's grounds of appeal to this Court are variants of two propositions: that the Court of Criminal Appeal erred in the application of the principle established in *Browne v Dunn*[23], and that the inconsistency to which reference has been made, invalidated the convictions. The former proposition is correct, the latter is not.

37 Something should first be said of the trial judge's criticism of the appellant's failure, in effect, to give the complainant an opportunity of explaining away the inconsistency arising out of her mother's evidence. The criticism is ill-founded for these reasons. The complainant had already given her evidence when the mother gave her evidence. It was not for the appellant to know and anticipate, by cross-examining the complainant, what the mother would say about the complainant's assertions of complaints of multiple offences at Sutcliffe Street. It was not for the appellant to iron out inconsistencies in the case for the prosecution. Secondly, his Honour erred in holding that if there were competition between the avoidance of unfairness to the complainant and a "technical view of the rules of evidence"[24] (whatever that in the circumstances means), the former must prevail. It is not for a judge to depart from the rules of

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23 (1893) 6 R 67.

24 *R v WJM* [2004] SADC 75 at [86].

evidence on such a basis. The rules are designed to ensure fairness to all, certainly not least, to an accused in a criminal trial.

38 We should next say something about the rule in *Browne v Dunn*, which, in substance, both the trial judge and the Chief Justice thought should be applied here against the appellant, its application in criminal cases generally, and his Honour, the Chief Justice's reference to the appellant's counsel's failure to seek to have the complainant recalled for further cross-examination. The rule is essentially that a party is obliged to give appropriate notice to the other party, and any of that person's witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party's or a witness' credit.

39 One corollary of the rule is that judges should in general abstain from making adverse findings about parties and witnesses in respect of whom there has been non-compliance with it. A further corollary of the rule is that not only will cross-examination of a witness who can speak to the conduct usually constitute sufficient notice, but also, that any witness whose conduct is to be impugned, should be given an opportunity in the cross-examination to deal with the imputation intended to be made against him or her. An offer to tender a witness for further cross-examination will however, in many cases suffice to meet, or blunt a complaint of surprise or prejudice resulting from a failure to put a matter in earlier cross-examination. In this case, the appellant was confronted with a forensic dilemma: whether to seek to have the mother's evidence of her daughter's assertions of repeated misconduct at Sutcliffe Street excluded by reason of its prejudicial effect, or deliberately to leave it untouched to provide a basis for a submission that a fundamental inconsistency tainted the whole case. In the event the appellant chose the former. In that endeavour he failed, but was still able, albeit unsuccessfully, to rely on it as setting up a significant inconsistency. On no view was the appellant obliged however to seek to have the complainant recalled as a condition of his reliance upon the inconsistency which had emerged in the case for the prosecution.

40 Reliance on the rule in *Browne v Dunn* can be both misplaced and overstated. If the evidence in the case has not been completed, a party genuinely taken by surprise by reason of a failure on the part of the other to put a relevant matter in cross-examination, can almost always, especially in ordinary civil litigation, mitigate or cure any difficulties so arising by seeking or offering the recall of the witness to enable the matter to be put. In criminal cases, in many jurisdictions, the salutary practice of excusing witnesses temporarily only, and on the understanding that they must make themselves available to be recalled if necessary at any time before a verdict is given, is adopted. There may be some circumstances in which it could be unfair to permit the recalling of a witness, but in general, subject to the obligation of the prosecution not to split its case, and to present or make available all of the relevant evidence to an accused, the course

that we have suggested is one that should be able to be adopted on most occasions without injustice.

41 The obligation of the prosecution to present its whole case in chief and the existence of the unavoidable burden of proof carried by the prosecution are of particular relevance here. Doyle CJ was critical of the appellant for not putting the inconsistency between the complainant and her mother, in turn giving rise to an internal inconsistency in the complainant's account, to the complainant. The criticism does not give due weight to the obligations of the prosecution to which we have referred. It is not for the defence to clear up, or resolve inconsistencies in the case for the prosecution. As soon as the inconsistency emerged, and the trial judge rejected the appellant's objection to the evidence intended to be adduced from the complainant's mother, it was open for the prosecution to offer to tender the complainant for further cross-examination. Had that happened it would then, and only then have been for the appellant, to decide whether to embrace the offer or not. If he had not, then and only then would the criticism that the Court of Criminal Appeal made of his conduct have been valid. The position of an accused who bears no burden of proof in a criminal trial cannot be equated with the position of a defendant in civil proceedings. The rule in *Browne v Dunn* can no more be applied, or applied without serious qualification, to an accused in a criminal trial than can the not dissimilar rule in *Jones v Dunkel*[25]. In each case it is necessary to consider the applicability of the rule (if any) having regard to the essential accusatory character of the criminal trial in this country.

42 That the criticism by the Chief Justice was not warranted does not mean however that the appeal should succeed. Nor does the trial judge's misapprehension as to the application of the rules of evidence to which we have referred dictate that result.

43 The inconsistency related to one count only, and on that, the appellant was acquitted. It is not difficult to treat as quite separate the offences alleged at each of the addresses. These were discrete events at different times and different places, opportunistically committed in the different circumstances of each of the occasions. It is easy to understand that those that occurred at Jeffries Street might be more vivid and precisely recalled than the one at Sutcliffe Street which was alleged to have been committed years before and when the complainant was younger. Furthermore, as both the trial judge and the Court of Criminal Appeal in effect held, the inconsistency was not in any event so fundamental as to undermine the strong case on the counts on which the appellant was convicted.

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25 (1959) 101 CLR 298. See the discussion of this case in *RPS v The Queen* (2000) 199 CLR 620 at 632-633 [27]-[29] and *Dyers v The Queen* (2002) 210 CLR 285 at 327-328 [120]-[123].

The appellant has not made out that he suffered such a miscarriage of justice as to warrant the quashing of the convictions[26].

Order

44 We would dismiss the appeal.

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26 Section 353(1) of the *Criminal Law Consolidation Act* 1935 (SA) provides:

> "The Full Court on any such appeal against conviction shall allow the appeal if it thinks 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 before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; but the Full Court may, notwithstanding that it is of the opinion that the point raised in 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."