HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ

WGC APPELLANT

AND

THE QUEEN RESPONDENT

WGC v The Queen
[2007] HCA 58
12 December 2007
A20/2007

ORDER

Appeal dismissed.

On appeal from the Supreme Court of South Australia

Representation

D H Peek QC with A J Crocker for the appellant (instructed by Scammell & Co)

P Brebner QC with S Gill for the respondent (instructed by Director of Public Prosecutions (SA))

CATCHWORDS

WGC v The Queen

Criminal law – Offences – Elements of offence – Information – Section 49(3) of the *Criminal Law Consolidation Act* 1935 (SA) ("the Act") created the offence of having sexual intercourse with a person of or above the age of 12 years and below the age of 17 years – Section 49(4) of the Act provided a defence to the offence when the complainant was of or above the age of 16 years and the accused believed on reasonable grounds that the complainant was of or above the age of 17 years – The Particulars of Offence alleged that the appellant had sexual intercourse with the complainant when she was aged 13 – The appellant alleged that sexual intercourse occurred when the complainant was aged 16 and that he believed on reasonable grounds that she was of or above the age of 17 years – The jury convicted the appellant – Whether the date of the offence was a material particular that had to be proved beyond reasonable doubt – Relevance of the conduct of the trial to whether the date was a material particular – Relevance that the elements of the offence were admitted – Whether the prosecution should have amended the Particulars of Offence to allege alternative dates – Whether the defence in s 49(4) of the Act was available to the offence as alleged in the Particulars of Offence.

Criminal law – Jury verdicts – Whether the verdicts were uncertain because it cannot be known whether the jury convicted the appellant for an offence committed when the complainant was aged 13 or 16 – Whether the verdicts were uncertain because different jurors may have reached the verdict by different processes of reasoning – Whether the trial judge misdirected the jury.

Criminal law – Sentencing – Jury verdict – Basis for sentencing when jury have two routes to conviction and one involves less serious culpability.

Words and phrases – "Information", "material particular", "Particulars of Offence".

Criminal Law Consolidation Act 1935 (SA), ss 49(3), 49(4).

1 GUMMOW J. The appellant was born on 12 July 1949. The complainant was born on 21 September 1972. Accordingly, the complainant turned 12 years of age on 21 September 1984 and 17 years on 21 September 1989. At a jury trial in July 2006 in the District Court of South Australia, the appellant was convicted of the two counts in the Information. They were of unlawful sexual intercourse with the complainant, being a person under 17 years, contrary to s 49(3) of the *Criminal Law Consolidation Act* 1935 (SA) ("the Act"). The verdicts were majority verdicts. An appeal against conviction was dismissed by the Court of Criminal Appeal (Vanstone, Layton and David JJ) on 14 December 2006[1], and, on limited grounds, the appellant appeals by special leave to this Court.

2 The circumstances in which the trial was conducted and the evidence given are described by Kirby J in his reasons and what follows here should be read with that account in mind.

3 Section 49 was added to the Act in 1976[2]. The section had been amended in 1981[3], but was not amended in any presently relevant respect between 1984 when the complainant turned 12 and 1989 when she turned 17.

4 What was encompassed by charges and convictions of behaviour contrary to s 49(3) of the Act? To answer that question the text of the relevant portions of the section should be set out:

> "(3) A person who has sexual intercourse with a person of or above the age of twelve years and under the age of seventeen years shall be guilty of a misdemeanour and liable to be imprisoned for a term not exceeding seven years.
>
> (4) It shall be a defence to a charge under subsection (3) of this section to prove that –
>
> (a) the person with whom the accused is alleged to have had sexual intercourse was, *on the date on which the offence is alleged to have been committed*, of or above the age of sixteen years; and
>
> (b) the accused –

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1 (2006) 96 SASR 301.

2 By the *Criminal Law Consolidation Act Amendment Act* 1976 (SA).

3 By the *Criminal Law Consolidation Act Amendment Act* 1981 (SA).

(i) was, *on the date on which the offence is alleged to have been committed*, under the age of seventeen years; or

(ii) believed on reasonable grounds that the person with whom he is alleged to have had sexual intercourse was of, or above, the age of seventeen years.

...

(7) Consent to sexual intercourse is not a defence to a charge of an offence under this section.

(8) This section does not apply to sexual intercourse between persons who are married to each other."

(emphasis added)

5 Section 49(4) provides for two defences. The first (pars (a) and (b)(i)) is made out where the accused proves that the complainant was of or above the age of 16 years and that the accused was under the age of 17 years. That could have had no application to the facts of this case. The second defence (pars (a) and (b)(ii)) is made out where the accused proves that the complainant was of or above the age of 16 years and that the accused had the belief on reasonable grounds that the complainant was of, or above, the age of 17 years. It is this second defence which is presently material.

6 The critical issue of construction of s 49(4) concerns the import of the phrase "was on the date on which the offence is alleged to have been committed". The phrase is placed in a sub-section stating that what follows shall be a defence to a charge under s 49(3). The phrase appears twice, in pars (a) and (b)(i), and thus has an impact upon each of the two defences just described.

7 An accused does not make allegations, particularly as to the date on which the alleged offence was committed. The passive voice is used in the expression "is alleged ...", but the better construction attaches the phrase to the elements of the charge against which s 49(4) provides for defences.

8 What then is conveyed in s 49(4) by the term "the date"? In answering that question it would be inappropriate to begin with what might follow from the general proposition that in reckoning time by days ordinarily the law takes no account of fractions of a day[4]. A solar day of 24 hours is a division of time. Here, what is to be construed is the statutory expression "the date". It is true that

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4 *Prowse v McIntyre* (1961) 111 CLR 264 at 273, 276, 277-278, 280.

in popular usage "date" may identify a particular day on the calendar. But the term "the date" encompasses more than that, including both a particular point in time at, and a period of time within which, an event or transaction occurs.

9 In *Hackwill v Kay*[5], O'Bryan, Dean and Monahan JJ considered the authorities supporting the general proposition that an allegation in an indictment or information of a date as that of the commission of the offence is immaterial unless it be an essential element of the offence. Upon the proper construction of the statutory provision before them[6], their Honours concluded that the date was such an essential element.

10 Rule 4 in Sched 3 to the Act deals with the setting out of offences and counts in an information. Sub-rules (2)-(4) are as follows:

> "(2) Account of an information shall commence with a statement of the offence charged, called the statement of offence.
>
> (3) The statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence and, if the penalty for the offence charged is fixed by statute, may contain a reference to the section of the statute fixing the penalty.
>
> (4) After the statement of the offence, particulars thereof shall be set out in ordinary language in which the use of technical terms shall not be necessary: Provided that where any rule of law or any enactment limits the particulars of an offence which are required to be given in an information, nothing in this rule shall require any more particulars to be given than those so required."

11 In the present case, the particulars of the offences identified the date alleged as "between the 31st day of January 1986 and the 28th day of February 1986 at Renmark or another place". This would have been sufficient to identify "the date" within the meaning of s 49(4) of the Act. The submission by the respondent is that no particular date was essential to its case other than that in 1989 when the complainant would have no longer been under the age of 17 as

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5 [1960] VR 632 at 634.

6 *Justices Act* 1958 (Vic), ss 88(3), 200, 215.

indicated by s 49(3). This should not be accepted. The above words in the particulars were an element of the offences charged.

12 Between the periods 31 January 1986 and 28 February 1986, the complainant undoubtedly was not above the age of 16 years and under the age of 17 years. There was no possibility of a defence based upon s 49(4). But if, as the appellant contended at trial, he had had sexual intercourse with the complainant only at a later date, (in 1989), he had an immediate answer to the charges.

13 The appellant submits as the first ground of appeal to this Court that (a) the only offences with which the appellant was charged were offences which could not engage a defence under s 49(4) and (b) hence the date of the offences as alleged in the particulars had to be proved. That submission should be accepted.

14 The trial miscarried in a serious respect because there was never any charge against the appellant alleging a date in 1989 as the date of the offences. To a charge in that form, there properly could have been propounded a defence based upon pars (a) and (b)(ii) of s 49(4), namely upon the age of the complainant as 16 years or above and the belief of the appellant on reasonable grounds that the complainant was of or above 17 years of age.

15 Although the conduct of the trial produced a situation where there was before the jury no charge so framed as to allege a 1989 date, the jury was instructed to proceed as if that was the case and as if the defence based upon reasonable belief fell for decision, being a distinct matter from the issue whether the complainant should be accepted in her evidence fixing the date in 1986.

16 The appellant correctly submits that "the date" spoken of in s 49(4) is that alleged in the Information upon which the trial (and any pre-trial proceedings) are conducted. The date might have been amended by the Court pursuant to s 281(2) of the Act but the prosecutor did not seek such an amendment, nor the provision of alternative counts.

17 The upshot of the failure to amend the date or to frame alternative counts to allow for events allegedly occurring in 1986 and in 1989, and of the fashion in which the trial fell out, is that it is impossible to ascertain from the (majority) verdicts the offences (if any) of which the appellant was convicted.

18 I agree with the orders proposed by Kirby J.

19 KIRBY J. A jury in the District Court of South Australia found WGC (the appellant) guilty on two counts of an Information presented by the State Director of Public Prosecutions. The counts charged the appellant with acts of unlawful sexual intercourse with the complainant, V. Following the verdicts, the appellant was convicted by Herriman DCJ. His appeal against his conviction was dismissed by unanimous decision of the Court of Criminal Appeal of South Australia[7]. Against that order, by special leave, the appellant appeals to this Court.

20 The appellant complains that his trial was conducted contrary to law. As these reasons will explain, the appellant is entitled to succeed on two of his arguments. His convictions should be quashed and a new trial ordered.

The facts and legislation

21 *The statutory provisions*: The Information charging the appellant alleged two counts of unlawful sexual intercourse contrary to s 49(3) of the *Criminal Law Consolidation Act* 1935 (SA) ("the Act"). At the time of the alleged offences, s 49 of the Act provided, relevantly:

> "49(1) A person who has sexual intercourse with any person under the age of twelve years shall be guilty of a felony and liable to be imprisoned for life.
>
> (2) …
>
> (3) A person who has sexual intercourse with a person of or above the age of twelve years and under the age of seventeen years shall be guilty of a misdemeanour and liable to be imprisoned for a term not exceeding seven years.
>
> (4) It shall be a defence to a charge under subsection (3) of this section to prove that –
>
> (a) the person with whom the accused is alleged to have had sexual intercourse was, on the date on which the offence is alleged to have been committed, of or above the age of 16 years; and
>
> (b) the accused –

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7 *R v W, GC* (2006) 96 SASR 301.

(i) was, on the date on which the offence is alleged to have been committed, under the age of seventeen years; or

(ii) believed on reasonable grounds that the person with whom he is alleged to have had sexual intercourse was of, or above, the age of seventeen years.

…

(7) Consent to sexual intercourse is not a defence to a charge of an offence under this section."

22 *The Information and the trial*: The Information specified particulars of the offences charged in the two counts. Relevantly, the offence alleged in the first count was particularised as "performing an act of cunnilingus upon" the complainant. The offence particularised in the second count was one of having "vaginal sexual intercourse" with the complainant. In both particulars the offence was alleged to have occurred "between the 31st day of January 1986 and the 28th day of February 1986 at Renmark or another place".

23 The prosecution of the appellant was conducted on the footing that the second offence had followed immediately after the first, each constituting a part of a single sexual encounter. The particularity of the two counts, alleging separate acts of "sexual intercourse", conformed to the common law requirement to plead separate offences by way of separate charges[8].

24 The trial of the appellant took place in July 2006. This was some 20 years after the alleged offences. Such a great delay in the prosecution of an accused is inescapably prejudicial to his defence. It calls for a serious reflection by the prosecutor before a prosecution is launched; possible consideration of a judicial stay of the proceedings; but, if they are brought, the strict observance of accuracy and fairness in the conduct of the trial.

25 The complainant gave evidence of the two acts of intercourse having occurred on a houseboat in February 1986, when she was 13 years of age. She said that the appellant was a friend of her parents and committed the offences on the houseboat trip when other passengers, including her parents, were asleep. She said that she could identify the date because she had "lost her virginity" at the age of 13, a few weeks earlier in the Christmas holidays.

26 The appellant gave evidence at his trial. As had been foreshadowed by his counsel in outlining his defence at the commencement of the trial, the appellant

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8 See *Walsh v Tattersall* (1996) 188 CLR 77 at 104-105.

did not deny having had intercourse with the complainant. However, he denied that such intercourse had occurred in 1986. He stated that it had occurred in 1989 when the complainant was aged 16. He asserted that, at the time of the intercourse, he believed that the complainant was aged 17.

27 The appellant testified to various circumstances which, it was argued, afforded reasonable grounds for a mistaken belief that the complainant was of or over 17 years of age. These included that she allegedly had a well-developed figure; that she apparently had sexual experience; was wearing nothing but a g-string bikini during the houseboat trip; had a few days earlier had sexual intercourse in the back section of a truck with an older person while the appellant was driving the truck to the houseboat; and earlier on the day of the intercourse, in a small rowing boat away from the houseboat, had rubbed the appellant's penis with oil in a sexually explicit manner. If the jury accepted this evidence, it was not suggested that it would not have been capable of satisfying the requirements of the defence under s 49(4) of the Act, if that defence was available having regard to the age of the complainant at the time of the offences.

28 The complainant's parents, each of whom gave evidence for the prosecution at the trial, testified that there had been a number of houseboat trips between 1982 and 1990, between five and eight in all. In a short opening to the jury the appellant's trial counsel made clear the way in which the appellant would be conducting his defence[9]:

> "Ladies and gentlemen, from the defence point of view I can tell you that it will not be an issue for you as to whether the sex occurred. Consensual sexual acts, which are the subject of the information, occurred between [the appellant] and [the complainant]. That will be common ground in the case and you need not worry about that. What your attention should be focused upon, as [the prosecutor] put to you, is when it occurred because the defence case is that it occurred not on the houseboat trip in 1986, as [the complainant] said, but in the houseboat trip in 1989 when [the complainant] was 16 years of age and, accordingly, as [the prosecutor] correctly put to you, the issue for you in the trial will be when did it occur, what do you think about that and what are you convinced about that, and then, secondly, it will be for [the appellant] to establish to your satisfaction, on the balance of probabilities, that first he believed that [the complainant] was [17] and, secondly, that he had reasonable grounds for that belief and in due course you will hear about that. So that you can start this trial knowing exactly what the issues joined between the prosecution and the defence are, and you need not concern yourselves at

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9 (2006) 96 SASR 301 at 308 [33]. See also reasons of Crennan J at [159].

> all as to whether these consensual acts of sexual intercourse took place or did not take place: timing will be the all important issue in this case."

29 Despite this indication that the appellant would be giving evidence and would be asserting that the acts of sexual intercourse occurred in 1989, not 1986, the prosecutor neither then, nor at any time before the verdicts, sought to amend the particulars of the counts of the Information. Nor did she seek to add further, alternative counts, charging acts of unlawful sexual intercourse in February 1989 that the appellant, by his counsel, had indicated he would admit. Neither did the trial judge at any stage require the prosecutor to plead or particularise alternative counts[10] or to elect as between alternative versions of unlawful sexual intercourse upon which the prosecution would rely in the trial[11].

30 *The trial judge's directions*: After the close of the prosecution case, counsel had a discussion with the trial judge concerning the instruction that he should give to the jury. At that point, the appellant's counsel reminded the judge about the particularisation of the offences:

> "[The complainant] has been adamant about '86 and she said that a number of times. That's how it's particularised. At the close of her evidence and the close of the Crown case, there is no application to expand the period of particularisation. The accused, in turn, has said '89 and has tied it back to a realisation of her correct age."

31 The trial judge observed that his instructions to the jury would depend, in part, on "the way defence addresses". The appellant's counsel said:

> "I will be addressing to the jury that she is incorrect about asserting '86 and that the accused is correct about asserting 1989."

32 The prosecutor responded:

> "As to the timing of the sex, what we have to establish beyond a reasonable doubt is that she was under 17. Having said that, we haven't amended our particulars and I think there's no grounds that we could have – she is adamant about it being in 1986, so I think that I have to agree with what my learned friend has put about that."

33 The following morning, the prosecutor reverted to the issue. She submitted that it would be wrong in law for the jury to find the appellant not

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10 cf *Cramp* (1999) 110 A Crim R 198 at 208-209 [37]-[41]; *R v Mead* [2002] 1 NZLR 594 at 599 [21].

11 *R v Frederick* [2004] SASC 404 at [32].

guilty because "it happened in '87, for example". She contended that the dates of the offences were not material to the charges. The trial judge said that he would adopt the course of saying to the jury: "The prosecution case is it is 1986. You focus on that. If you are not satisfied, then go to the 1989". Neither the prosecutor nor trial counsel for the appellant demurred to this approach.

34 In the result, the trial judge directed the jury that if they concluded that the offences occurred in February 1986, as was the prosecution case, they "would likely find the accused guilty on both counts and … would not have to consider the question any further". However, he then proceeded to deal with an accusation which was outside the particulars:

> "[B]ut if you think they occurred in February 1989, or thereabouts, as the accused said they did, then I must instruct you as to how you will deal with that finding.
>
> As you know, in February 1989 [the complainant] was still 16 years of age, she was under the age of 17. So, even on the accused's account of events, the ordinary elements of the offence would be made out. But you must then consider whether the accused has a special defence available to him under the law."

The trial judge gave the jury extended directions on the defence provided by s 49(4) of the Act. This was not a defence that was available on the offences charged and particularised in the Information.

35 *Flaws in the directions*: A criminal trial is an accusatorial proceeding[12]. The accused person cannot, and the judge ordinarily will not, interfere in the way in which the prosecution formulates and presents its case. In this trial, the prosecutor was put on notice at the outset of the issue which the appellant intended to proffer for the jury's determination. Soon after the close of the prosecution case, the prosecutor gave explicit consideration to whether she should seek to amend the particulars. She elected not to do so. So far as the record of the trial was concerned, the issue for trial was whether the prosecution had proved beyond reasonable doubt the two offences of unlawful sexual intercourse in 1986, and that alone. However, instead of adhering to the trial of the accusation brought by the prosecution, deliberately unamended, the trial judge was led by the conduct of trial counsel to open for the jury's determination an issue not strictly arising on the Information, namely whether the appellant had proved an entitlement to rely on a defence under s 49(4) of the Act, on the hypothesis that the alleged acts of unlawful intercourse had taken place not as pleaded (1986) but at another time (1989).

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12 *RPS v The Queen* (2000) 199 CLR 620 at 630 [22].

36 The trial judge gave no directions to the jury to assist them in what they should do if they divided amongst themselves as to the proof that the offences charged had occurred in 1986 or 1989. Neither did he give any directions to the jury about the requirement that they should be unanimous (or reach a requisite majority[13]) concerning the elements of the offences before they convicted the appellant of them.

37 As things transpired, the record of the trial indicates that the issue of the two pathways open to the jury in reasoning to their verdicts occasioned the appellant's jury some concern. Shortly before the trial judge began his summing up he notified the parties that he had received a written question from the jury. The question was:

> "If the charges is [sic] for one specific instance, what is the relevance, apart from trying to support the defendant's argument, the victim was mistaken as to the date of the incident or the activities of 1989 in drawing a verdict."

38 The judge and trial counsel for the appellant expressed themselves uncertain as to the meaning of the question. However, the judge indicated that he intended to "deal with [it] in my instruction". The jury's question gives emphasis to the need that existed for accurate assistance to the jury on the way in which they should consider the appellant's intended defence in the light of the Information. Unfortunately, insufficiently assisted by trial counsel, the judge's instruction did not accurately clarify the approach which the law required the jury to adopt.

39 *Decision of the appellate court*: In an affidavit read in the appeal to the Court of Criminal Appeal, trial counsel for the appellant acknowledged that, at trial, she had not adverted to the legal proposition that the date in the Information was a material particular; or that a verdict of guilty would be "bad for duplicity or uncertainty". She said that such possibilities only occurred to her, after conviction, when she was considering the issue of sentencing. She stated (and it was not contested)[14] that she did not intentionally refrain from raising these issues at trial out of any tactical motive or for some forensic purpose.

40 Despite the objections propounded for the appellant, the Court of Criminal Appeal were unconvinced that they should lead to orders quashing the resulting conviction and requiring a new trial. That Court rejected the complaint that the

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13 *Juries Act* 1927 (SA), s 57(1); cf *Cheatle v The Queen* (1993) 177 CLR 541 at 548.

14 (2006) 96 SASR 301 at 315 [52].

trial judge had erred in failing to direct the jury that the date of the offence, as alleged in the Information, was a "material particular"[15]. As well, it dismissed the submission that the jury's verdicts were uncertain, because unclear as to whether they were returned on the basis of the jury's satisfaction that the offences had happened in 1986 or 1989 or with some jurors concluding that it was 1986 and others 1989[16].

The issues for decision

41 Having regard to the grounds on which special leave was granted to the appellant, two issues arise for decision. They are:

(1) *The materiality issue*: Whether, in the circumstances of the case, the date of the alleged commission of the offences charged in the Information constituted a material particular, requiring the trial judge to direct the jury that the prosecution was obliged to prove beyond reasonable doubt that the offences happened on the date particularised; and

(2) *The alternative theories issue*: Whether, in the circumstances of the case, and given the alternative paths that the jury might have taken to convict the appellant of the offences with which he was charged, the trial judge erred in failing to direct the jury that they were required to be unanimous (or to reach their verdict by the requisite majority) in relation to the offences on the basis of the different paths of reasoning open to them, depending on their conclusion as to whether the offences had occurred in 1986 or 1989.

42 Other arguments were advanced for the appellant, including the suggestion that the course adopted in the appellant's trial made it difficult, or impossible, to sentence the appellant appropriately for want of an indication of the basis of the jury's verdicts[17]; or because the trial judge had failed to question the jury about that basis, when their verdicts were returned[18]. However, these issues are incidental to the primary attack that the appellant made on the conduct of his trial. It will be sufficient for this Court to deal with the two issues identified. Indeed, a decision favourable to the appellant on either of these issues

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15 (2006) 96 SASR 301 at 303 [1], 306 [16], 312-315 [45]-[50].

16 (2006) 96 SASR 301 at 315 [51] per David J, Vanstone J concurring at 303 [1].

17 cf *Giam* (1999) 104 A Crim R 416 at 420 [24]; cf *Cheung v The Queen* (2001) 209 CLR 1 at 52 [160]; cf 44-45 [132]-[133].

18 *R v Isaacs* (1997) 41 NSWLR 374 at 377-378.

would be sufficient to require that the verdicts be quashed and the convictions dependent on them set aside.

The materiality of the date of the offences

43 *General rule: non-materiality*: Generally, the date of an offence, whether specified in the formal document containing the charge or in separate particulars, is not treated as a material fact which the prosecution must prove beyond reasonable doubt in order to make good its accusation. So much was stated by Atkin J in *Severo Dossi*[19], although his Lordship acknowledged that there were exceptions to the general rule[20]:

> "From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence. 'And although the day be alleged, yet if the jury finds him guilty at another day, the verdict is good, but then in the verdict it is good to set down on what day it was done, in respect of the relation of the felony; and the same law is in the case of an indictment'[21] … Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual day specified in the indictment."

44 Because of the position at common law, there was in *Dossi* (as is often the case) no need to invoke the broad statutory powers of the kind commonly given to courts to amend indictments in the course of a trial[22].

45 The provision of particulars of a count in an Information is envisaged by r 4 in Sched 3 to the Act. The consequence of providing such particulars is then governed by the significance to be attached to them in the circumstances of the case. This requires attention to be given to the terms of any statutory provision stating the offence in question. It also requires attention to the way the particular trial was conducted.

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19 (1918) 13 Cr App R 158.

20 (1918) 13 Cr App R 158 at 159-160.

21 Coke, 2 *Inst* (1817) at 318.

22 See eg (1918) 13 Cr App R 158 at 160 citing *Indictments Act* 1915 (UK), s 5(1).

46 *Exceptions arising from statute*: The potential of statutory provisions, exceptionally, to render the specification of a date material, has been acknowledged in many cases. In *Hackwill v Kay*[23], the Full Court of the Supreme Court of Victoria, after citing *Dossi*, addressed its attention to whether the date specified was an essential part of the alleged offence and thus had to be proved strictly in order for the prosecution to succeed. In *Hackwill*, the statute provided that an information for offences of the relevant kind "shall be laid within 12 months from the time when the matter of such information arose *and not afterwards*". On the basis of such a provision, the Full Court held that the date of the alleged offence was "a most material matter and is … part of the essence of the offence"[24].

47 Likewise, in cases concerned with sexual offences "where the age of the alleged victim is an essential element of the charge", courts have, rightly, concluded that allegations as to time may be rendered material[25].

48 Is the offence against s 49 of the Act of such a kind as to attract the exception in *Dossi* so that the particularised date is to be seen as an "essential part of the alleged offence" with a consequent obligation on the prosecution to prove the date strictly and for the judge to direct the jury that such strict proof is required? The better view of the language and purpose of s 49 is that the date is material. It forms an essential element of the accusation which the appellant has to meet. It must be so explained to the jury.

49 *Support for materiality*: Three textual considerations support this conclusion. The offence for which s 49(3) of the Act provides requires the prosecution to prove, as one of its elements, that the person against whom the offence was committed was of or above the age of 12 years and also under the age of 17 years. Because time is thus rendered of the essence, proof of the date of the happening of the offence is essential to proving that the offence has occurred. In most criminal offences, the age of the victim is immaterial to proof of the offence. Not so in the case of an offence as described in s 49(3). As a matter of principle, therefore, if s 49(3) is put in play by the prosecutor, the age of a victim must be proved beyond reasonable doubt so as to bring the accused within the ambit of the offence as expressed. This is because different ages attract very different consequences.

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23 [1960] VR 632 at 634.

24 [1960] VR 632 at 634 (emphasis in original).

25 *H* (1995) 83 A Crim R 402 at 410-411; *R v Frederick* [2004] SASC 404.

50 Secondly, within s 49, distinct offences are created respectively by s 49(1) and s 49(3). At the time of the offence alleged against the appellant, s 49(3) rendered any such offence a misdemeanour, carrying a maximum punishment of seven years imprisonment. The fact that s 49(1) of the Act characterised the offence of sexual intercourse with a person under the age of 12 years as a felony, and provided in such a case for punishment of imprisonment for life, illustrates the significance attached by the scheme of the section to the age of the alleged victim at the time of the offence.

51 Although the felony/misdemeanour dichotomy was abolished in South Australia in 1995[26], the provision of the two distinct offences in sub-ss (1) and (3) of s 49 of the Act reinforces the conclusion that, in this instance, the age of the alleged victim is a material, ie essential, element of the offence to be established by the prosecution. Depending on the age of the alleged victim at the time of the offence, different provisions apply and substantially different penalties are attracted. Such differentiation reflects the particular concern of the community to protect young people of specified ages from sexual predation.

52 Thirdly, the scheme of the defence for a person charged under s 49(3), afforded by s 49(4), makes it clear that the defence is only engaged by express reference to the age of the alleged victim on a specified date. That date, in turn, is identified as the one "on which the offence is alleged to have been committed". The terms of s 49(4)(a) thus posit, as essential ingredients of the defence, the identification of the alleged age of the complainant at that time. The defence is not available to a charge brought under s 49(1). Once again, the scheme of the Act makes it plain that where a defence is raised under s 49(4), the age of the alleged victim is a material, indeed crucial, ingredient.

53 *Confirmation in the statutory text*: But could the phrase "the date on which the offence is alleged to have been committed" mean "alleged by the accused"? For a number of reasons, such a meaning should not be accepted[27].

54 First, the natural meaning of the phrase "date on which the offence is alleged to have been committed" is the date when the prosecution alleges that the offence had been committed. To ascribe the "allegation" to the accused is to strain the language of s 49(4)(a). Had the paragraph been intended to refer to the accused's version of events at large, it would have said so. Thus, it could have referred objectively to the "date on which sexual intercourse took place".

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26 *Criminal Law Consolidation Act* 1935 (SA), s 5D inserted by *Criminal Law Consolidation (Felonies and Misdemeanours) Amendment Act* 1994 (SA), s 4; see also amended s 49.

27 cf reasons of Hayne and Heydon JJ at [116].

Instead, consistent with the accusatorial character of the criminal trial, the defence is related, in terms, to the allegation made by the prosecution. It is that allegation alone which the accused is obliged to defend.

55 Secondly, confirmation that this is so appears in the repeated use of the word "alleged" in s 49(4)(a). The first use clearly refers, and refers only, to the "person with whom the accused is alleged to have had sexual intercourse" by the prosecution. That, in turn, is a reference back to the prosecution's allegation of the offence in s 49(3). It would be curious and surprising if the past participle "alleged", in par (a), envisaged a different proponent of the allegation when first and secondly used in the same paragraph.

56 Thirdly, s 49(4) is concerned with the provision of a defence in a criminal proceeding in South Australian courts which, in such matters, observe an accusatorial procedure. In that procedure, it is the prosecutor who makes the relevant allegations. An accused may "state", "assert", "suggest" or "say in defence" that the act of sexual intercourse was committed on a particular date. It would be a strained use of language to suggest that the accused "alleged" the date on which the offence was committed. In the context, allegation is the business of the prosecution. Section 49(4)(a) should be read accordingly.

57 Fourthly, in further reinforcement of this conclusion, it can be noted that, elsewhere in Australia, where a defence of a similar kind has been provided, the legislature has omitted the phrase "on the date on which the offence is alleged to have been committed". Thus, in the carnal knowledge provision of the *Criminal Code* (NT), as first enacted[28], it is simply stated as follows:

> "It is a defence to a charge of a crime defined by this section to prove that the accused person believed, on reasonable grounds, that the female was of or above the age of 16 years."

58 Such is not the provision of s 49(4)(a) of the Act in question here. The differentiation of statutory language highlights the importance attached to the date of the offence alleged by the prosecution. This, in turn, reinforces the critical importance of the prosecution's demonstration of the age of the alleged victim at the time when any offence is proved to have occurred.

59 Exceptional circumstances presented by the occasional difficulty of establishing the precise birth date of some alleged victims of such offences can be readily met. The issue of the age of the alleged victim is one of fact to be proved to the requisite satisfaction of the jury as an ingredient of the offence. Similarly, the appellant did not contest, nor could he, the length of the period of

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28 s 129(3). See *Cole & Leggett* (1994) 77 A Crim R 91 at 92.

time encompassed in the particulars of the counts of the Information (being the entire month of February). However, there must be limits to any such imprecision, given that the essential character of the offences provided for in s 49 vary by specific reference to the age of the alleged victim as at the date of the offence alleged by the prosecution. In some trials, the date of an offence may be immaterial. In the appellant's trial, from the start, it was not.

60 *Confirmation in the conduct of the trial*: Even if, contrary to the foregoing, one were to conclude that, in the language and structure of s 49 of the Act, the date of the offence alleged by the prosecution was not a material element of the offence, *as pleaded*, it was certainly rendered material by the way the appellant's trial was *conducted*, once he had announced his defence. Through his counsel, he made it plain, immediately after the prosecutor's opening, in the passage cited in these reasons, that the date of the alleged offences would be of the essence. Thus, from the very outset, the appellant indicated that the issue for the jury's decision would be whether the alleged offences took place in 1986 or 1989 and, if the latter, whether he had proved the matters of defence required by s 49(4)(b)(ii) of the Act.

61 It was in response to these indications that the complainant repeatedly reaffirmed her testimony that the offences happened in 1986. The prosecutor considered, but rejected, the possibility of amending the particulars (and, by inference, adding further or alternative counts or particulars to the Information). In this Court, it was not contested that the alternative course would have been open to the prosecutor.

62 In view of the adherence of the complainant to the accusation that the offences happened in February 1986, it was open to the prosecution to elect to persist with the counts as originally framed and particularised. What is surprising is that the prosecutor omitted (in the light of the admission of other, different but serious offences) to seek the amendment of the Information to add fresh counts (or additional particulars) of alternative accusations. Had that course been followed, it would have permitted, indeed required, a more accurate focus on the true issues in the trial. It would have brought the pleadings into line with the issues that the parties agreed should be litigated before the jury. It would have facilitated the just and efficient conduct of the trial[29] within amended particulars. It would have addressed the attention of the parties more accurately to the directions that were required from the trial judge, following the shifting ground in the conduct of the case.

63 *The direction on materiality was erroneous*: Because these steps were not taken, that conduct strayed from an accurate attention to the accusation which,

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29 *Johnson v Miller* (1937) 59 CLR 467 at 489-490 per Dixon J.

formally, the prosecution brought against the appellant. It is not correct to say that that accusation was simply a charge that the appellant had unlawful sexual intercourse with the complainant, a person of or above the age of 12 years and under the age of 17 years. To say that is to ignore the terms of the Information as particularised; the evidence of the complainant, being the only direct evidence of the alleged offences tendered by the prosecution; and the general requirement of particularity in the identification of criminal accusations and, where contested, their proof in a criminal trial[30].

64 In default of amendment and the accurate re-expression of the accusation which the prosecution was bringing against the appellant, the trial judge should have confined the trial to the question whether the prosecution had proved beyond reasonable doubt that the offences recounted by the complainant had occurred at the time that she alleged, namely February 1986.

65 To the offences charged and particularised, the appellant's acknowledgment of acts of sexual intercourse at other times and in circumstances potentially attracting a defence under s 49(4) of the Act was legally immaterial. In the absence of amendment of the Information or particulars, if the trial had followed correct procedures, all references to s 49(4) of the Act and the circumstances of uncharged and unparticularised offences in 1989 should have been ruled inadmissible and excluded.

66 Instead, the appellant's trial counsel sought to introduce, by way of defence, evidence and argument addressed to the application of s 49(4) to later events involving uncharged offences. The prosecutor acquiesced in that course. So did the trial judge. It follows that, even if, contrary to the foregoing, the provisions of s 49(3) and (4) in their generality did not render the age of the complainant a material fact for the trial of the appellant (as I would hold) the way that the appellant's trial unfolded plainly did.

67 There have been many cases where a like conclusion has followed the manner in which a trial has been conducted, elevating a particular date to an essential element in the prosecution's case. Thus, in *R v VHP*[31], Gleeson CJ, in the New South Wales Court of Criminal Appeal, accepted a prosecution concession that evidence by the complainant that he was "sure" that the offence occurred on a specific date within the range of dates in the indictment, made that

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30 *S v The Queen* (1989) 168 CLR 266 at 275 per Dawson J, 288 per Gaudron and McHugh JJ; *Walsh v Tattersall* (1996) 188 CLR 77 at 112; *KBT v The Queen* (1997) 191 CLR 417 at 422-423, 432-433; cf *Thompson* (1996) 90 A Crim R 416 at 419.

31 Unreported, New South Wales Court of Criminal Appeal, 7 July 1997 at 15-16.

date, in the circumstances of the trial, of the essence. In the present case, the complainant was likewise "adamant" that the offences on the houseboat happened in 1986. Given that this became the contested factual issue for trial, it rendered proof that the events happened in 1986 (when no defence was available under s 49(4) of the Act), not 1989, an essential element in the prosecution case[32].

68 The prosecution could not have it both ways. It either had to elect to go to the jury relying solely on the accusation that the offences happened in 1986 or it should have amended the Information so as to render the s 49(4) issue relevant to the trial and within the Information as particularised. What it did was to adhere, unamended, to the original Information; to permit the s 49(4) issues to be adduced; to take advantage of the appellant's admission of different offences against s 49(3); but not to facilitate appropriate directions to the jury by the trial judge on the materiality of the date of the offences found and on the alternative ways of reasoning to verdicts on the charges brought.

69 *Consequences of the error*: In default of any amendment by the prosecutor of the Information or of the particulars, the trial judge should have told the jury that, to find the appellant guilty it was necessary for them to be satisfied unanimously beyond reasonable doubt that the offences had happened in 1986 and that, for the purpose of reaching such verdicts, proof that the offences occurred in 1986 was an essential ingredient of the accusation which the prosecution had to prove. If, contrary to proper practice and the terms of the Information and particulars, the judge permitted the prosecutor to rely on uncharged acts in 1989, it was then necessary for the judge to give like directions to the jury on the prosecutor's obligation to prove the 1989 offences beyond reasonable doubt and to reach their conclusion unanimously on that footing before proceeding to consider the defence which the appellant sought to raise, in that event, under s 49(4).

70 As no such directions were given to the jury, and because the Court of Criminal Appeal decided otherwise, the appeal to this Court must be allowed on this ground.

The requirement of jury unanimity upon the verdicts

71 *Rationale for jury unanimity*: There is another, and in a sense a simpler and more obvious, basis upon which the appellant has demonstrated flaws in the verdicts returned in his trial. It concerns the interpretation and safety of the

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32 Compare also *Kennedy* (2000) 118 A Crim R 34; *Stringer* (2000) 116 A Crim R 198.

verdicts which the jury returned, understood in light of the way in which the trial was conducted.

72 The trial judge gave the jury directions about the requirements arising under s 49(4) of the Act, although strictly immaterial to the counts as pleaded and particularised. However, he gave no assistance as to how the jury might properly reach their verdicts on the unparticularised issues that had been raised in evidence and argument. In particular, no directions were given to the jury concerning the alternative pathways that were thereby presented for reaching their verdicts and of the impermissibility of reaching verdicts based on inconsistent factual conclusions.

73 The starting point for analysis of this issue is a reflection on the role of the jury and the reason for having jury trials of serious criminal accusations. In *Cheatle v The Queen*[33], in the context of s 80 of the Constitution, this Court explained the function that unanimous jury verdicts perform:

> "[T]he common law's insistence upon unanimity reflects a fundamental thesis of our criminal law, namely, that a person accused of a crime should be given the benefit of any reasonable doubt. … As Sir James Stephen wrote in 1883[34]:
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> > 'The justification of the rule, now that the character of the jury has changed from that of witnesses to that of judges of fact, seems to me to be that it is a direct consequence of the principle that no one is to be convicted of a crime unless his guilt is proved beyond all reasonable doubt. How can it be alleged that this condition has been fulfilled so long as some of the judges by whom the matter is to be determined do in fact doubt?'"

74 The present case, being one concerned with a State offence, was not one that attracted s 80 of the Constitution. In South Australia, statute provides for majority verdicts in State offences. The verdicts in the present case were reached by the jury by a statutory majority. Nevertheless, the importance of ensuring that the collective mind of the jury is focused on the precise elements of the accusations brought against the accused and that they arrive at their verdicts in the lawful way by reference to each accusation, remains a most important element in the conduct of serious criminal trials in this country[35]. It is a protection for the accused against insubstantial or inadequately proved accusations.

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33 (1993) 177 CLR 541 at 553.

34 Stephen, *A History of the Criminal Law of England* (1883), vol 1 at 304-305.

35 *Beach* (1994) 75 A Crim R 447 at 453-454.

75 *Verdict of the jury as a whole*: This is the reason why this Court and other Australian courts have insisted that the rule requiring unanimity for the jury's verdict (or where permissible a verdict by a statutory majority) must reflect the satisfaction of the jury *as a whole* that the prosecution has established the essential ingredients of each offence charged. This does not mean that the jury must be unanimous in the conclusion that each juror reaches about particular evidence or inferences to be derived from such evidence[36]. Or that each juror must form exactly the same view of the credibility of particular witnesses or the persuasiveness of particular arguments. In a group of citizens, chosen at random to perform jury service, without training or perhaps experience, it would be unrealistic to require unanimity in that sense.

76 What is essential is that, to return a verdict of guilty, the jury must be unanimous in their conclusion that each of the material ingredients of the offences charged, as alleged in the initiating document and as proved in the way the case has been conducted, has been proved beyond reasonable doubt. This is the way by which the law addresses "the requirement for certainty as to the offence charged, which requirement also underlies the rule against duplicitous counts"[37].

77 *Unanimity about the same theory*: The need for it to be clear that the jury have focused their collective attention upon the precise ingredients of the offence charged was emphasised by this Court in *KBT v The Queen*[38]. That was a case where the accused was charged with an offence against the *Criminal Code* (Q) of maintaining an unlawful relationship of a sexual nature with a child under the age of 16 years. It was a precondition for conviction of the offence that, on three or more occasions, the accused had done an act defined to constitute an "offence of a sexual nature" in relation to the child. The trial judge instructed the jury that, to convict the accused, they must be satisfied beyond reasonable doubt that, on at least three occasions within the period charged, the accused had, for instance, unlawfully and indecently dealt with the child.

78 In *KBT* the trial judge did not instruct the jury that they were required to be of the unanimous opinion that the accused had done the *same three acts*, each constituting an offence of a sexual nature, on the same three occasions. The Court of Appeal of Queensland held that the direction given involved a

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36 *Kevin Brown* (1983) 79 Cr App R 115 at 117-118, citing *Agbim* (1979) *Criminal Law Review* 171.

37 *S v The Queen* (1989) 168 CLR 266 at 287.

38 (1997) 191 CLR 417.

misdirection[39]. However, that Court sustained the conviction on the basis of the "proviso"[40]. This Court unanimously reversed the latter conclusion.

79 In *KBT*, the joint reasons of Brennan CJ, Toohey, Gaudron and Gummow JJ said[41]:

> "Having regard to the evidence, it is possible that individual jurors reasoned that certain categories of incident did not occur at all but that one or two did, and more than once, thus concluding that the accused did an act constituting an offence of a sexual nature on three or more occasions without directing attention to any specific act. It is, thus, impossible to say that the jurors must have been agreed as to the appellant having committed the same three acts."

Of the "proviso", the joint reasons said[42]:

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

80 In my reasons, supporting the foregoing conclusion of the Court, I said[43]:

> "The possibilities of various combinations of juror resolution of the accusations and denials about such incidents are such that it cannot be affirmatively determined that upon any of the categories of incident, the requisite juror unanimity was obtained. Logically, it is equally possible that particular jurors were convinced of some, but not all, of the categories of incident. Each one of them may have been convinced as to three offences. They were properly instructed that three were required. But not having been instructed that the *same* three were required, it cannot be denied that the jurors may have severally reached their conclusions upon the basis of *different* offences. If they did so, that would not have conformed to the correct application of … the Code. Because the jurors' verdicts … give no clue as to their reasoning, it is impossible to say either

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39 *Thompson* (1996) 90 A Crim R 416.

40 *Criminal Code* (Q), s 668E(1A).

41 (1997) 191 CLR 417 at 424 (footnote omitted).

42 (1997) 191 CLR 417 at 423.

43 (1997) 191 CLR 417 at 437 (emphasis in original).

> that they settled upon the same three or more offences or that their conclusions … necessarily implied unanimous agreement about the same three or more offences so as to sustain the verdicts, notwithstanding the error in the judicial direction."

81 Exactly the same reasoning applies to the present case. Given the way in which, by acquiescence of the parties, extraneous issues under s 49(4) of the Act were introduced into the appellant's trial, resulting in evidence and submissions on those issues being before the jury, two ways were presented by which the jury could reach verdicts of guilty against the appellant on the counts in the Information. The two ways were those identified by the trial judge himself in his charge to the jury. They were addressed by trial counsel for the prosecution and for the appellant. In effect, they would have permitted the jury to find the appellant guilty of the charges on the alternative bases:

(1) that the prosecution had proved beyond reasonable doubt that both the offences took place in 1986; or

(2) that although the jury were satisfied that the offences had taken place in 1989 not 1986, they were not convinced, on the balance of probabilities, that the appellant had proved that in 1989 he believed on reasonable grounds that the complainant was of or above the age of 17 years.

82 *Application of the principle in KBT*: The difficulty presented by this appeal is precisely the same as that presented in *KBT*. Because the jury gives no reasons (and because no differentiated counts or answers to post-verdict questions permit identification of the jury's mode of reasoning), it is entirely possible that the appellant's jury were divided in the way they reasoned to the verdicts that they returned.

83 Thus, it is possible that a number of the jurors were convinced beyond reasonable doubt that the offences took place in 1986; but that others (perhaps a majority) were equally convinced that they did not, but that they occurred in 1989. Similarly, it is possible that some of the jurors who were convinced that the offences took place in 1986 might have been prepared to agree, accepting the contrary hypothesis, that the appellant had failed to prove that in 1989 he believed on reasonable grounds that the complainant was of or above the age of 17 years. If half of the jurors were prepared to convict the appellant on the basis of a firm conclusion that the events occurred in 1986 and half, although not so persuaded, were prepared to convict the accused on the basis that the offences took place in 1989 without benefit of the defence, a serious injustice would have been done to the appellant. He would have been convicted of the serious offences with which he was charged although, on neither of the postulates that was fought out at trial was a unanimous verdict reached (or requisite majority mustered) to sustain the verdicts returned against him.

84 The foregoing analysis, and the insistence on clear and accurate directions to a jury where alternative foundations or pathways of reasoning are available to reach their verdicts, is a common theme of earlier decisions of this Court, before *KBT* was decided[44]. The same theme is found in numerous decisions of intermediate courts in Australia[45]. With a high degree of consistency, Australian courts, faced with a problem such as the present, have addressed the basic unfairness to the accused of leaving convictions stand where there have been alternative factual bases of liability of the one offence and the jury have not been instructed as to the necessity to have the requisite unanimity upon the agreed basis for their verdicts[46].

85 *A like principle in New Zealand*: Moreover, the line of authority in this country has been generally consistent with similar decisions of courts in England[47], Canada[48] and New Zealand[49]. In New Zealand, the issue of the requirement of jury unanimity, and of the obligation for judicial directions in that respect where alternative factual reasoning is available, was recently considered by the Court of Appeal in *R v Mead*[50]. The reasons of Elias CJ, although dissenting in the result in that appeal, state the principle clearly. They have been followed in this country[51]. In my opinion, they correctly state the law applicable in Australia.

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44 See eg *S v The Queen* (1989) 168 CLR 266 at 276 per Dawson J, 287-288 per Gaudron and McHugh JJ.

45 *Jones v The Queen* [1980] WAR 203; *Trotter* (1982) 7 A Crim R 8 at 17; *Lapthorne* (1989) 40 A Crim R 142 at 144; *Beach* (1994) 75 A Crim R 447 at 453-454; *Willers* (1995) 81 A Crim R 219 at 232; *Leivers & Ballinger* (1998) 101 A Crim R 175 at 188; *Suckling* (1998) 104 A Crim R 59 at 61; *Giam* (1999) 104 A Crim R 416; *Khouzame & Saliba* (1999) 108 A Crim R 170 at 185 [89]; *R v Zampogna* (2003) 85 SASR 56 at 64 [37]; *R v LM* [2004] QCA 192 at [94].

46 *Cramp* (1999) 110 A Crim R 198 at 207-211 [30]-[57].

47 *Kevin Brown* (1983) 79 Cr App R 115; *Giannetto* [1997] 1 Cr App R 1 at 8-9; *Carr* [2000] 2 Cr App R 149 at 158.

48 *Thatcher v The Queen* [1987] 1 SCR 652 at 703 per Lamer J.

49 *R v Chignell* [1991] 2 NZLR 257 at 266; cf *R v Ryder* [1995] 2 NZLR 271.

50 [2002] 1 NZLR 594 at 598 [15]-[17].

51 *Fermanis v Western Australia* (2007) 33 WAR 434 at 453 [66].

86 Elias CJ said[52]:

> "A jury must be unanimous as to the essential ingredients of the offence. This principle, so fundamental as to be generally assumed without need for authority, is affirmed in *R v More*[53] [by] Lord Ackner. But it does not of itself answer the question: What are the essential ingredients upon which there has to be unanimity?
>
> It is not necessary that jurors be in agreement about the evidence. They can arrive at the same point by different reasoning. But the essential points upon which they must agree are not simply a conclusion based upon the statutory criteria for the offence. The statutory elements will need to be *anchored to the facts relied upon by the prosecution as the basis of liability and put in contention by the defence*. *The jury must be agreed upon the factual basis on which they find the accused guilty*: *R v Giannetto*[54] and *R v Carr*[55]. Without such agreement there is no common foundation for the verdict.
>
> The standard jury direction about the need for unanimity refers to the need for the jury to be unanimous as to the 'elements' of the offence. As noted in *R v Menzies*[56], it is usual for the Judge to make it clear what are the essential elements of the case during the course of the summing-up. It is important that the summing-up be tailored to the actual case before the Court in this way.
>
> What elements are essential to criminal liability *in the particular case* and require jury unanimity *is a practical question*, not a technical one. It turns not only upon the legal elements of the offence *but also the factual elements essential to the cases put for the prosecution and defence* …
>
> In many cases, any particulars contained in the count are likely to assist in identifying elements in the case which are essential. Particulars ensure that an accused is given notice of the case against him … Such requirements are essential to fair process. Where allegations of fact in a

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52 *Mead* [2002] 1 NZLR 594 at 598 [14]-[18] (emphasis added).

53 (1987) 86 Cr App R 234 at 252.

54 (1997) 1 Cr App R 1 at 8 per Kennedy LJ.

55 (2000) 2 Cr App R 149 at 158 per Lord Bingham CJ.

56 Unreported, Court of Appeal (NZ), CA 222/97, 16 October 1997 at 10-11.

> count identify the transaction or conduct upon which the prosecution bases the case for criminal liability and where they remain in issue at trial, they may normally be expected to identify essential ingredients of the case upon which jury unanimity will be required. But what is essential turns upon the substance of the case at the end of the trial."

87 Also in *Mead*[57], Elias CJ went on to address specifically problems of the kind that have arisen in this appeal. Her Honour said:

> "In some cases where the prosecution alleges a number of specific incidents it will be a miscarriage of justice not to sever the individual incidents into separate counts in the indictment …
>
> In other cases, particularly where the bases of liability are alternative, the separate elements may be adequately identified for unanimous determination by a direction that the jury undertake a staged determination[58] … Such direction eliminate[s] any risk that the jury would not be unanimous.
>
> In still other cases it may be necessary to instruct the jurors that they must be unanimous on at least one basis sufficient in their collective assessment to constitute the offence. That is the approach taken in *Brown*[59]. …
>
> I do not understand its decision on this point to have been doubted in subsequent cases which have considered and distinguished it."

88 *A like principle in Canada*: The approach of Elias CJ in *Mead* accords with the reasons of Lamer J concurring in the decision of the Supreme Court of Canada in *R v Thatcher*[60]:

> "Depending on the nature of the evidence presented by the Crown, the jury unanimity issue may arise in any case where the Crown alleges factually inconsistent theories, even if those theories relate to the particular nature of the accused's participation in the offence. If the Crown presents evidence which tends to inculpate the accused under one theory and exculpate him under the other, then the trial judge must instruct

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57 [2002] 1 NZLR 594 at 599-600 [21]-[23], [25].

58 Reference is made to *R v Flynn* (1985) 82 Cr App R 319.

59 *Kevin Brown* (1983) 79 Cr App R 115.

60 [1987] 1 SCR 652 at 704 (emphasis added).

> the jury that if they wish to rely on such evidence, *then they must be unanimous as to the theory they adopt*. Otherwise, the evidence will be taken into account by some jurors to convict the accused under one theory while the fact that the evidence exculpates the accused under the other theory is being disregarded by the other jurors who are taking the latter route. In effect, the jury will be adding against the accused the inculpatory elements of evidence which cannot stand together because they are inconsistent."

89 The concurring reasons of La Forest J in *Thatcher*[61] are to like effect:

> "The fact that s 21 makes the particular nature of the accused's involvement in an offence legally irrelevant does not, in my view, in and of itself justify conviction on the basis of *mutually exclusive or alternative theories of culpability*. Were it otherwise, concerns would be raised dangerously akin to those flowing from multiplicitous counts. Concerns about multiplicity of counts and jury unanimity are functional, real concerns embodying society's pre-eminent desire to avoid injustice to accused persons and, as such, cannot be explained away by the mere invocation of a legal fiction."

90 *A like principle in England*: All of the foregoing is simply to elaborate and apply the observation made by Professor Sir John Smith in his comment[62] on the decision of the English courts in *More*[63]:

> "It is submitted that the right answer is clear. The issue should be resolved in favour of the appellant: the jury is *not* satisfied [unless the individual jurors are satisfied on the one factual basis for the conclusion that the accused is guilty]… [Otherwise] to say that *the jury* is satisfied would be a travesty … [W]here there are only two allegations and, say, six jurors are satisfied only that the first is proved and six are satisfied only that the second is proved … every juror is individually satisfied that the defendant committed the offence; but *the jury* is certainly not so satisfied."

91 Applying these basic principles of law and of fairness to the conduct of the appellant's trial the result is straightforward. It invites a practical consideration of the way the issues in the trial were fought. The record demonstrates that, whatever the particulars of the counts of the Information said, the issues were ultimately presented to the jury, and fought, as potentially

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61 [1987] 1 SCR 652 at 705 (emphasis added).

62 Smith, "Satisfying the Jury" (1988) *Criminal Law Review* 335 at 335-336.

63 (1987) 86 Cr App R 234; (1988) *Criminal Law Review* 177 (emphasis in original).

inviting the jury's consideration of two hypotheses upon which they might convict the appellant. Those hypotheses were mutually inconsistent, indeed incompatible. The jury were not told that they were obliged to be satisfied beyond reasonable doubt that the prosecution had established one of the two theories and that upon such theory they were unanimously (or by a statutory majority) satisfied. In the way in which the issues were left to the jury's determination, there was an inescapable possibility that some jurors might have accepted the prosecution's primary case, but that other jurors rejected it and only convicted the appellant on the secondary case. In such an event, it would follow that neither case had been proved to the requisite satisfaction of the entire jury.

92 The point can be tested this way: Could it seriously be suggested that, if the trial of the appellant had taken place before a judge sitting alone, instead of before a jury, the trial judge could have explained verdicts of guilty of the offences charged by reference to acceptance beyond reasonable doubt *both* of the happening of the events in 1986 and *also* in 1989? The two theories of the guilt of the appellant were not supplementary, each reinforcing the other. They were inconsistent alternatives. They attracted different legal consequences, expressed in s 49(4) of the Act. As such, in the way the appellant's trial was conducted, they demanded that a decision should be made between them. It was the obligation of the prosecution throughout the trial to establish the theory which the jury, acting collectively, preferred beyond reasonable doubt. It was that theory that the prosecution had to establish to the unanimous satisfaction of the jury (or to the requisite majority as permitted by the applicable State law).

93 *Conclusion: a vital defect in the trial*: Approaching the question for decision in the practical way suggested by cases that have considered this problem before and focusing, as they have done, on "the facts relied upon by the prosecution as the basis of liability and put in contention by the defence"[64], it is clear that the prosecution here, in effect, sought to have it both ways. It continued to adhere to the only accusations made by the complainant and particularised in the Information. However, in the alternative, on the run, it asserted separate and distinct accusations of similar (uncharged) offences at another time, calling for different considerations if the appellant were to be convicted on that basis.

94 The protective principle of jury unanimity (or verdict by a high permissible majority) had to be applied to whichever of, if either, the postulated theories the jury accepted. It was not sufficient for the trial judge to leave that requirement uncertain. The verdicts in the appellant's trial are opaque. They contain no indication of the way the jury arrived at them. A substantial

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64 *Mead* [2002] 1 NZLR 594 at 598 [15].

miscarriage of justice occurred in the appellant's trial. It was not suggested that the "proviso" regarding criminal appeals could be invoked[65].

95 Assuming without deciding that the judge could have asked the jury to clarify their verdicts[66], he did not do so. Accordingly, the Court of Criminal Appeal and this Court have no way of knowing that the applicable principle of jury unanimity or majority verdict was observed. The position is thus the same as it was in *KBT* in this Court. With respect, it is a mistake to suggest that *KBT* can be distinguished from the present case on the basis that the *actus reus* of the offences with which the appellant was charged was common ground between the parties[67]. For the reasons already identified, the date of the offences in this case formed part of the elements of the offences. The dates were material because, if proved, they attracted different legal consequences. Thus it was essential, for the operation of the crucial principle of jury unanimity, that the relevant acts, including the dates of those acts, be charged and particularised. Failing that, the uncertainty as to the elements that the jury were required to find, unanimously or by statutory majority, in order to reach their verdict, should have been remedied by a clear judicial direction.

96 The majority fails to give a convincing reason why they depart from the Court's past authority; from a legal principle observed in several other countries where jury trial is had; and from basic fairness in the conduct of the trial of the appellant before his jury.

Orders

97 The appeal should be allowed. The order of the Court of Criminal Appeal of South Australia should be set aside. In its place, this Court should order that the convictions of the appellant be quashed and a new trial be had.

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65 *Criminal Law Consolidation Act* 1935 (SA), s 353.

66 cf *R v Isaacs* (1997) 41 NSWLR 374.

67 Joint reasons at [139]; reasons of Crennan J at [171].

98 HAYNE AND HEYDON JJ. At the times relevant to this matter, s 49(3) of the *Criminal Law Consolidation Act* 1935 (SA) ("the Act") provided that it was an offence to have sexual intercourse with a person of or above the age of 12 years and under the age of 17 years. The Act provided that it was a defence to such a charge to prove two matters: first, that "the person with whom the accused is alleged to have had sexual intercourse was, on the date on which the offence is alleged to have been committed, of or above the age of sixteen years"[68] and second, either that the accused was on the date on which the offence is alleged to have been committed under the age of 17 years, or that the accused "believed on reasonable grounds that the person with whom he is alleged to have had sexual intercourse was of, or above, the age of seventeen years"[69].

99 The appellant was charged in the District Court of South Australia with two counts of having had sexual intercourse with a person under the age of 17 years contrary to s 49(3) of the Act. The two counts alleged different acts of sexual intercourse but it was the prosecution's case that one had occurred immediately after the other. That is, it was alleged that there had been a single sexual encounter. The complainant was named and the Particulars of Offence given in respect of each count in the Information alleged her to have been "a child under the age of 17 years". The particulars of each count alleged that the offence occurred "between the 31st day of January 1986 and the 28th day of February 1986 at Renmark or another place". The appellant pleaded not guilty to each charge.

100 Trial counsel for the prosecution began her opening to the jury by describing what "[i]n a nutshell" the case was about. She said it was about "whether [the appellant] had sex with [the complainant] in 1986 when [she] was 13 years old". But a little further into her opening, trial counsel for the prosecution described the two ingredients of each offence as being first, whether there was sexual intercourse and second, whether, at the time, the complainant was under the age of 17. Having told the jury that the complainant would give evidence that the acts of intercourse occurred in 1986, she went on to say that "[i]f you find that sex happened when [the complainant] was 16 years old you will need to consider whether [the appellant] has satisfied you on the balance of probabilities that, first, he believed she was 17 years old at that time; and, second, there were reasonable grounds for him to believe that she was 17 years old at that time". This reference to the possibility of finding that intercourse occurred when the complainant was 16 years old was not further explained to the jury by counsel for the prosecution. But by thus referring to the possibility that

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68 *Criminal Law Consolidation Act* 1935 (SA), s 49(4)(a).

69 s 49(4)(b)(ii).

the offences occurred when the complainant was 16, the prosecution opened its case to the jury on the basis that the dates given in the Particulars of Offence in the Information did not confine the issues to be considered in the trial.

101 Trial counsel for the appellant did not protest at this manner of opening the prosecution's case. Rather, after trial counsel for the prosecution had opened the case to the jury in this way, and before any evidence was called, trial counsel for the appellant made a short statement to the jury which explained what, until then, had been the unexplained reference to the possibility of finding that intercourse had occurred when the complainant was 16. Trial counsel for the appellant told the jury that "[c]onsensual sexual acts, which are the subject of the information, occurred" between the appellant and the complainant. That, she said, "will be common ground in the case and you need not worry about that". The issue that trial counsel for the appellant identified as "the issue [for the jury] in the trial" was "when did it occur". Did it occur, as the complainant alleged, on a houseboat trip that had taken place in 1986 when the complainant was 13 or, as would be the defence case, did it occur on another houseboat trip that had taken place in 1989 when the complainant was 16? (Later evidence would show that the appellant was aged 36 at the time of the 1986 trip and 39 at the time of the 1989 trip.) Trial counsel for the appellant went on to tell the jury that "then" (on the basis that intercourse had happened in 1989) it would be for the appellant to establish on the balance of probabilities first, that he believed that the complainant was 17[70] and second, that he had reasonable grounds for that belief.

102 The trial proceeded on this footing. The complainant gave evidence that she was born on 21 September 1972. She described several summer houseboat trips in the 1980s on which she and members of her family were accompanied by the appellant and other friends of her family. She swore that the appellant had sexual intercourse with her on the 1986 trip and denied that it occurred on a trip in 1989.

103 The appellant gave evidence in his own defence. He gave his date of birth as 12 July 1949. He described having known the complainant and her family for many years and having spent several summer houseboat holidays with the complainant's family during the 1980s. A medical practitioner, he agreed that he may have given the complainant samples of oral contraceptive pills when she was 13 years old. In December 1986, when the complainant was 14, she had consulted him professionally and he had examined her and taken a pap smear.

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70 Trial counsel for the appellant erroneously told the jury, at first, that the appellant had to establish that he believed that the complainant was 16, but immediately corrected what she called her "slip-up" about "the age of consent".

104 The appellant gave evidence that he had had intercourse with the complainant but said that this had happened in 1989 not 1986. He said that he believed that she was then 17 and explained the bases on which he said he had formed this belief. There were three. He said first that he "had come to be aware" that a friend of the complainant was aged 20 and that he thought that the complainant "was two or three years younger than that". Secondly, he said that to his knowledge the complainant had left school and that he "was of the opinion that generally speaking females did not leave school prior to the age of 17". Thirdly, she had had intercourse with an adult friend of his and "I wouldn't have thought that [the friend] would have had intercourse with her had she been under-age".

105 The appellant's evidence of his belief about the complainant's age was the primary focus of cross-examination. Trial counsel for the prosecution emphasised the fact that the appellant had known the complainant and her family for as long as he had, had dealt with her professionally when she was 14, and had then had her exact date of birth recorded in his clinical notes. All that was said, in his cross-examination, about the date at which the intercourse occurred was that the appellant, having heard her evidence, thought "that she appears to believe" that it took place in 1986, but that he thought "she is quite mistaken and confused". He said he did not recall "anything ever happening apart from the 1989 houseboat trip".

106 In her final address to the jury, trial counsel for the appellant argued that the jury should not be satisfied beyond reasonable doubt that the intercourse which had occurred between the appellant and the complainant had occurred in 1986. Trial counsel for the appellant concluded her address by identifying what she said would be the questions the jury would ask themselves when considering their verdict. She described these as:

> "First you will ask, has the Crown proved beyond reasonable doubt that the sexual act between them happened in February 1986? If you decided that affirmatively, if you thought the answer was yes, you wouldn't have to go any further, but in my submission you will not come to that conclusion because you simply can't come to that conclusion. ... That question can be posed in another way; is it a reasonable possibility that it happened, the sexual act happened, in 1989? If the answer to that question is yes, then you go on, and the next thing you ask is this; is it probable that [the appellant] had a belief that when he had sex with [the complainant] she was aged 17?
>
> Is it more probable than not that he held that belief, ... and if you answer that affirmatively then you say to yourselves, was it reasonable for him, was it reasonable, objectively looking at it, would a reasonable

> person in his position have had that belief? If the answer to that is yes, you will acquit [the appellant] of these charges."

107 Consistent with the way in which the trial had been conducted, the trial judge instructed the jury that the appellant had admitted that he had had sexual intercourse with the complainant when she was under 17 but that:

> "there is one important matter that the [appellant] does dispute and that is as to when those acts occurred. It is, of course, the prosecution case, and on the basis of [the complainant's] evidence, that they occurred in February 1986 and at no later time. If, on all the evidence, you are satisfied beyond reasonable doubt that they did in fact occur in February 1986 at a time when you might think [the complainant] was 13, then you would likely find the accused guilty on both counts and you would not have to consider the question any further. But if you are not satisfied beyond reasonable doubt that those acts of sexual intercourse occurred in 1986, but if you think they occurred in February 1989 or thereabouts, as the [appellant] said they did, then I must instruct you as to how you will deal with that finding."

The trial judge then directed the jury about the matters to be considered in relation to the defence, including the question of burden and standard of proof.

108 Taken in isolation, the passage quoted from the trial judge's instructions may have been unduly favourable to the appellant. The trial judge spoke of the jury not being satisfied beyond reasonable doubt that the acts in question occurred in 1986 and of the jury "think[ing]" that the events occurred in 1989. In particular, what was said at this point of the trial judge's charge did not draw the jury's attention to the need to decide whether the appellant had shown, on the balance of probabilities, that the acts of intercourse had taken place when the complainant was of or above the age of 16. It is not necessary, however, to pursue this aspect of the matter further. If there was any error in this respect, it is one which worked to the advantage of the appellant.

109 The jury returned majority verdicts of guilty to both counts. It is not possible to say what was the basis of those verdicts. In particular, it is not possible to say whether some or all members of the jury who joined in the verdicts were persuaded beyond reasonable doubt that the events in question occurred in 1986. It is not possible to say whether some or all members of the jury, being doubtful whether the events occurred in 1986 or 1989, were not persuaded on the balance of probabilities that the appellant had established each of the three necessary elements of the defence upon which he relied: that the events *had* occurred in 1989, that the appellant had the requisite belief and that he held that belief on reasonable grounds. And this uncertainty about the way in which the jury may have reasoned to their verdicts, coupled with the possibility

that individual jurors may have taken different paths to those verdicts, lies at the heart of the appellant's (unsuccessful[71]) appeal to the Full Court of the Supreme Court of South Australia against his conviction, and his appeal to this Court.

110 The appellant put his complaint in a number of different ways. In the Full Court he had alleged that the trial judge had erred first, by not directing the jury that the dates alleged in the Particulars of Offence were material, secondly, in leaving the case to the jury on the basis that they could convict the appellant of the offences charged even if they occurred in 1989 (provided that the defence was rejected) and thirdly, by not directing the jury that "they must find unanimously (or by statutory majority) that the same identified offences had occurred". Alternatively, the appellant alleged that "[t]he convictions are, as a matter of law, bad for duplicity and uncertainty".

111 In this Court, the appellant expressed the same complaints slightly differently. He alleged that the only offences charged were offences for which the defence provided by s 49(4) of the Act could not be engaged and that "hence the date of such offences had to be proven as alleged". He alleged that the trial judge had erred in not directing the jury that the date of the offences was a material particular that had to be proved beyond reasonable doubt. He further alleged that the verdicts returned by the jury were "uncertain or void" in that the jury's reasoning to those verdicts may have taken different paths.

112 Nothing turns on these differences in the expression of the appellant's complaint. Rather, as these reasons will demonstrate, resolution of the issues raised in the appeal turns upon two critical considerations. First, the appellant's trial was conducted by both sides from start to finish on the footing that the dates alleged in the Particulars of Offence were not material. That is, both sides fought the trial on the basis that the dates given in the particulars did not confine the relevant factual disputes to whether acts of intercourse occurred between those dates. Secondly, the elements of the offence were admitted. The appellant sought to establish a defence having three distinct elements. In such a case it will never be possible to know from a jury's verdict of guilty any more than that all of the jurors who agreed in the verdict agreed that they did not accept that all three elements of the defence had been established on the balance of probabilities.

113 To explain why these two considerations are determinative of the appeal it is necessary to begin from the proper construction of the relevant provisions of the Act. Sub-sections (3) and (4) of s 49 of the Act, as those provisions stood both in 1986 and 1989, provided:

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71 *R v W, GC* (2006) 96 SASR 301.

"(3) A person who has sexual intercourse with a person of or above the age of twelve years and under the age of seventeen years shall be guilty of a misdemeanour and liable to be imprisoned for a term not exceeding seven years.

(4) It shall be a defence to a charge under subsection (3) of this section to prove that—

(a) the person with whom the accused is alleged to have had sexual intercourse was, on the date on which the offence is alleged to have been committed, of or above the age of sixteen years; and

(b) the accused—

(i) was, on the date on which the offence is alleged to have been committed, under the age of seventeen years; or

(ii) believed on reasonable grounds that the person with whom he is alleged to have had sexual intercourse was of, or above, the age of seventeen years."

114 Contrary to the submission of the appellant, s 49(3) (so far as presently relevant) provided for only one form of offence: having sexual intercourse with a person of or above the age of 12 and under the age of 17. Even read in the light of sub-s (4) it did not provide for different offences, or for different species of the one offence, according to whether the defence for which sub-s (4) provided could be engaged.

115 The appellant submitted that, because s 49(4) used the expression "on the date on which the offence is alleged to have been committed" in both par (a) and par (b), two separate offences, or two distinct species of offence under s 49(3), should be identified – one where the complainant was alleged to be of or above the age of 16 and one where she was not. But as the submission itself reveals by its reference to an *alleged* age, the identification of separate offences or species of offence depends upon an impermissible elision of the separate and distinct elements of the offence and the defence. The *offence* is constituted by having sexual intercourse with a person between stated ages – of or above 12 and under 17. (The appellant admitted that he had had sexual intercourse with the complainant when she was under 17.) By contrast, the *defence* requires the defendant to prove, on the balance of probabilities, that the complainant was of or above the age of 16. For the purposes of the defence, the date at which the complainant's age is to be fixed is "the date on which the offence is alleged to have been committed".

116 Much of the appellant's argument proceeded from the assumption that the expression, "the date on which the offence is alleged to have been committed", is to be understood as meaning "the date on which the *prosecution* alleges the offence to have been committed". But that is not what is said. The expression is cast in the passive voice. The words used are apt to encompass an allegation made by either the prosecution *or* the accused.

117 In the present case, where the prosecution alleged intercourse when the complainant was 13, and the appellant admitted intercourse when she was 16, the defence could be engaged only if the expression "the date on which the offence is alleged to have been committed" is understood as referring to what the appellant alleged to have been the case. The expression is used in the context of providing for a defence to a charge which can be engaged only where there has been sexual intercourse with a person aged between 12 and 17. At least in a case like the present, where the prosecution alleges a date of intercourse before the complainant's 16th birthday, the expression must be understood as referring to the date which the *accused* asserts was the date of intercourse. If it is not read in this way, an accused could not rely on the defence in a case like the present. For other cases, it is sufficient to observe only that the relevant words *include* reference to the date which the accused says was the date of intercourse.

118 Further, it by no means follows from the use of the expression, "the date on which the offence is alleged to have been committed", that the prosecution must allege a date of commission of the offence which (once the complainant's age is known) will reveal whether a defence under s 49(4) may be established. There are several reasons why that is so.

119 First, although proof of the exact age of a complainant will usually be very easy, that is not inevitably so. For example, the date of birth of some who have come to Australia in recent times may not always be proved easily. And all that s 49(3) requires the prosecution to prove is that the complainant was aged *between* the identified ages – of or above 12 and under 17. Section 49(3) requires no greater precision of proof. Secondly, s 49(4)(a) makes plain that it is for the accused to allege and prove that the complainant was of or above the age of 16 at the critical date. There is no warrant for reading that requirement back into the provisions of s 49(3). One provision specifies a particular age (16 at the critical date); the other specifies a range of ages. Thirdly, the use of the (perhaps) awkward expression "the date on which the offence is *alleged* to have been committed" is readily explained as no more than the drafter's recognition that the defence is raised when there has been no decision that any offence *has* been committed; there is no more than an allegation. It is not to be read as qualifying the otherwise clear terms of s 49(3).

120 The proper application of s 49(3) and (4), thus construed, can be illustrated by reference to an allegation of an offence that occurred between

specified dates. If it is assumed that the complainant's date of birth can be proved and that the complainant's 16th birthday falls within the period specified as the dates between which the offence is alleged to have been committed, the prosecution may establish its case by proving no more than that the alleged intercourse occurred at some time between the dates alleged. If the person accused seeks to rely upon the defence under s 49(4), par (a) of that sub-section makes plain that it is for the accused to prove that the intercourse occurred when the complainant was "of or above the age of sixteen years". If the accused does not prove that on the balance of probabilities, the defence fails.

121 The Information preferred against the appellant stated the offence charged in each count as "Unlawful Sexual Intercourse" and referred to s 49(3) of the Act. The Particulars of Offence given of each count alleged that the appellant "between the 31st day of January 1986 and the 28th day of February 1986 at Renmark or another place" had sexual intercourse with the complainant, "a child under the age of 17 years". The particulars of each count described the form of intercourse alleged. The appellant submitted that the date of the offences thus alleged had to be proved beyond reasonable doubt.

122 Recognition of the different elements to be established in proof of the offence and in proof of the defence, coupled with the recognition of the different incidence of the burden of proof of each (with the consequent difference in the applicable standard of persuasion) is critical to consideration of this submission. The appellant submitted that were the dates alleged in the Particulars of Offence not treated as material particulars to be proved beyond reasonable doubt, "an innocent person would be in a hopeless position". This was said to be because the person thus accused "could not assert his defence of reasonable belief because the Information alleges an incorrect date of intercourse when the complainant was in fact younger than sixteen" and yet "the jury would be directed that the date ... need not be proven as alleged".

123 The two steps in this aspect of the appellant's argument (first that the accused could not assert a defence of reasonable belief because, at the date alleged by the prosecution, the complainant was under 16, and second that the date of offending need not be proved to be the date alleged by the prosecution) proceed from opposing premises. The first step assumes that evidence may not be led in support of an argument which seeks (in pleading terms) to confess and avoid because the date of the alleged offending is an essential ingredient of the offence. The second step assumes that the date of the alleged offending is *not* an essential ingredient of the offence. Once that internal inconsistency is revealed it is evident that the argument must be rejected.

124 Treating the date of the alleged offence stated in the particulars as not an essential element to be proved beyond reasonable doubt does not disadvantage the accused. On the contrary, it enables a person accused of the offence to go

beyond a bare denial of intercourse on the date alleged with all the forensic awkwardness and disadvantage that would otherwise result for an accused, especially an accused who elected to give evidence.

125 If the date given in the particulars is not a material fact, the accused may, as in this case, seek to confess and avoid the charge by admitting that intercourse did occur, but alleging that it occurred in circumstances in which the accused has a defence. That defence would not be open to an accused if the dates alleged in the particulars must be proved beyond reasonable doubt. If the date given in the particulars is a material fact, the accused would be left to deny the charge preferred against him on a very narrow basis – that it did not occur at the time alleged by the complainant. The disadvantage to the accused in being confined to the answer "not then" is evident. Not least is that because it leaves the accused unable to meet effectively any evidence given by the complainant that reveals knowledge most likely acquired from intimate dealings with the accused.

126 The Act should not be construed in a way that restricts the availability of a defence under s 49(4) beyond the confines set by the terms of the provision. In particular, the date specified in the Particulars of Offence is not to be treated as a material particular that precludes the accused controverting the prosecution case by confession (of intercourse on a different date) and avoidance (by proof of the elements of the defence under s 49(4)).

127 It may readily be accepted that, as Callinan J said in *Cheung v The Queen*[72], counts in an information "should be framed with all such specificity as to time, place, and circumstance as is possible". As Callinan J pointed out in *Cheung*[73], identifying the time at which an offence occurred may be important in fixing punishment. Sexual offences against young persons may well provide examples of cases in which the criminality of an offender may be assessed differently according to the age of the victim. But the chief reason to insist upon specificity in the framing of counts in an information is to ensure a fair trial. It is for the prosecution to identify as precisely as possible the charge that is preferred against an accused person. And the particulars that are given of an offence are to be framed with that purpose at the forefront of consideration.

128 Sometimes, as in this Court's decision in *S v The Queen*[74], the prosecution's inability to give precise particulars leads to the laying of charges

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72 (2001) 209 CLR 1 at 52 [160].

73 (2001) 209 CLR 1 at 52 [160].

74 (1989) 168 CLR 266.

which, on examination, are duplicitous. But that was not said to be so here. The prosecution alleged (and the appellant admitted) the occurrence of a single sexual encounter encompassing two forms of sexual intercourse. That may be contrasted with the charges laid in *S* where the charges alleged an act of intercourse at a time not specified more precisely than during a particular year, but the evidence led was of multiple acts of intercourse during the year in question.

129 In framing the particulars of an offence the prosecution cannot be more precise than the evidence available for tender at the trial will permit. If the evidence which the prosecution can adduce at trial will not fix precisely the date or place at which an offence occurred, the prosecution cannot give particulars that pretend to such precision. The particulars given in the present matter illustrate the point. They alleged the occurrence of intercourse between specified dates spanning a month and "at Renmark or another place".

130 It was not submitted that this specification of dates and place of commission of the alleged offences was insufficient. What the appellant submitted was that, despite what had happened at trial, the prosecution should have been confined to the dates specified in the particulars. If particulars given in an information are not to confine the area for debate between the parties, what is their purpose? No application was made to amend the particulars or to prefer alternative charges against the appellant. Having framed the Information in the terms it did, why is the prosecution not to suffer whatever consequences follow from a failure to regularise its pleadings?

131 Stated at this level of abstraction, the appellant's arguments appear unanswerable. But examination reveals that the arguments proceed from false premises. They depend upon the proposition either that the date of offending must be proved beyond reasonable doubt or that it was for the prosecution to establish the complainant's precise age when the offending conduct occurred. (As noted earlier, the prosecution must establish only that the complainant was of or above the age of 12 and under 17.) It is necessary to explain how the argument for confining the prosecution to the dates specified in the particulars proceeds from one or other of these premises. It is convenient to begin that task by examining how the prosecution might have acted in response to the appellant's defence of confession and avoidance.

132 Implicit in much of the appellant's submissions was the contention that, after the opening statement by trial counsel for the appellant, the prosecution should have sought to amend the Information by adding two alternative counts alleging commission of the offences between dates in 1989. This proposition assumes that the opening statement by trial counsel for the appellant constituted or contained admissions upon which the prosecution could rely in proof of the hypothesised alternative allegations. The argument also assumes, however, that

the specification of alternative dates could be made *only* by preferring alternative charges, not by amending the Particulars of Offence to allege alternative dates. The latter assumption is not right. It proceeds from treating the date of the offence as an essential ingredient of the offence. And for the reasons given earlier, that is not correct. The error in the assumption is illustrated by the appellant accepting (correctly) that to allege that the offence occurred between specified dates and "at Renmark or another place" violated no relevant principle. If no greater specificity than that was necessary to identify the case the appellant had to meet, no basis was identified for requiring that the chosen span of dates *whatever its width* be treated as an element of the offence. The only time-related element of the offence is provided by the terms of s 49(3) – that the complainant is proved to be of or above the age of 12 and under the age of 17 when the offence occurred. What then is needed in amplification of the allegation that is made by the charge is the particulars that can be given of when and where the offence occurred. But those are particulars of the charge, they are not elements of the offence.

133 It follows that, contrary to the appellant's submissions, if any amendment of the record was required by the course taken by trial counsel for the appellant making the opening statement she did, it was to amend the Particulars of Offence by alleging that each offence occurred between 31 January 1986 and 28 February 1986 *or* between 31 January 1989 and 28 February 1989. And the trial proceeded, from start to finish, as if that had been done.

134 That this was the relevant step to take is illustrated by considering what would have happened if the appellant's trial had not taken the course it did. The immediate occasion for making any amendment to the Information was said to be the opening statement made on behalf of the appellant. South Australian criminal procedure did not require the making of any opening statement on behalf of the appellant at that point of the trial[75]. If, then, the trial had proceeded without any opening statement on behalf of the appellant and without his having made any earlier admission of intercourse with the complainant, the first notice that the prosecution had of the appellant's contention that he admitted that intercourse had occurred, but at some date other than that stated by the complainant, may have been in the course of the cross-examination of the complainant. And even then there would probably be no admissible evidence that would found the preferring of any new and separate charge against the appellant or even found an amendment to the Particulars of Offence. Not until the appellant elected to give evidence, and admitted to intercourse with the complainant, would there be any sufficient evidentiary basis upon which a prosecutor could properly allege the occurrence of the crime in 1989 as distinct from 1986.

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75 cf *Crimes (Criminal Trials) Act* 1999 (Vic), s 13.

135 If, as the appellant submitted, the date of commission is an essential element of the prosecution's proofs and the only procedural footing upon which alternative dates of commission may be put in issue at the trial is to lay alternative counts, the prosecution would be obliged to apply for leave to file over a fresh information laying alternative counts. An application of that kind, in a case where there was no earlier admission of intercourse, could not be made before the accused had given evidence-in-chief in answer to the original set of charges. The accused would then have to be rearraigned on that new information and pleas taken to the new charges. But would the trial otherwise proceed without interruption and on the evidence that had already been adduced? Would the accused be entitled to cross-examine the complainant again?

136 By contrast, if the dates of the offences are not constituent elements of the charges, but matters only of particulars, the information could be amended without difficulties of the kind just mentioned. In particular, there would be no additional charges laid and no rearraignment of the accused. When it is recalled that these difficulties emerge as a result of an accused seeking to rely upon a defence of which one essential element is proof by the accused that the complainant was of or above the age of 16, it is evident that the procedural tangle which would follow from accepting the appellant's argument suggests error in the assumptions that underpin that argument. The appellant's argument should not be accepted.

137 In fact, at the appellant's trial, no amendment was ever made to the Particulars of Offence. At the trial there was some inconclusive reference to the absence of amendment in the course of a discussion between the trial judge and both trial counsel about the directions to be given to the jury. But it was not said then that anything turned upon the fact that the Information had not been amended. Rather, as indicated earlier in these reasons, the trial was conducted from start to finish upon a footing consistent only with the Particulars of Offence being understood as encompassing alternative allegations of the date of the offences as 1986 or 1989. Once it is understood that the only amendment that would have been made to reflect this common understanding of the parties was an amendment to the Particulars of Offence, it is evident that the failure to seek or make the amendment occasioned no miscarriage of justice.

138 There remains for separate consideration the opacity of the jury's verdicts of guilt. The appellant admitted the elements of the offences charged. It follows that, as earlier explained, the guilty verdicts show no more than that the jurors who joined in the verdict agreed that the appellant had not established the defence upon which he sought to rely. The verdicts do not reveal which element or elements of that defence were found not to have been proved. It may well be that individual jurors reached different conclusions about the separate elements of the defence. In particular, individual jurors may have reached different

conclusions about how old the complainant was at the time of the admitted intercourse. But the jury's following different paths to the conclusion that a defence should be rejected will always be a possibility when a jury is required to consider a defence where the accused bears the burden of proving all of a number of separate elements. The jury's verdict of guilt in such a case will always be opaque and may be sustained by different processes of reasoning. The unanimity that is required is in the jury's verdict, not the reasoning that supports the verdict.

139 It is important to bear steadily in mind that the acts the subject of the charges were admitted. The issues the appellant raised were when did the acts occur, and did he believe, on reasonable grounds, that the complainant was aged 17. By contrast, the issue in *KBT v The Queen*[76] was whether acts which constituted offences of a sexual nature had been proved. The holding in that case, that the jury had to be agreed as to the commission of the same three or more acts constituting offences of a sexual nature, is not inconsistent with the dismissal of the present appeal.

140 It may be accepted that the verdicts in the present case would leave the trial judge with a difficult fact-finding exercise in connection with sentencing. The principles to be applied in the fact-finding task were considered by this Court in *R v Olbrich*[77]. The task in this case may well be as difficult as that presented in some cases of homicide where a verdict of manslaughter is returned. That the sentencing task is or may be difficult does not reveal error in the appellant's trial or the occurrence of any miscarriage of justice.

141 The appeal should be dismissed.

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76 (1997) 191 CLR 417.

77 (1999) 199 CLR 270.

142 CRENNAN J. After delivery of majority verdicts of guilty, the appellant was convicted in the District Court of South Australia of two counts of unlawful sexual intercourse with the complainant, a person under the age of 17 years, contrary to s 49(3) of the *Criminal Law Consolidation Act* 1935 (SA). The appellant, a general practitioner of medicine, was a close friend of a married couple whose daughter was the victim of the alleged offences.

143 The appellant now appeals against his conviction.

144 At all material times, s 49(3) provided:

> "A person who has sexual intercourse with a person of or above the age of twelve years and under the age of seventeen years shall be guilty of a misdemeanour and liable to be imprisoned for a term not exceeding seven years."

145 The procedural history and facts of the case are fully set out in the joint reasons of Hayne and Heydon JJ and are repeated here only to the extent necessary to explain these reasons. I agree with Hayne and Heydon JJ that the appeal should be dismissed.

146 The complainant was born on 21 September 1972 and turned 17 years of age on 21 September 1989. The appellant did not contest that sexual intercourse (an act of cunnilingus and vaginal intercourse) occurred when the complainant was under the age of 17. Therefore the essential facts or elements of the offence within the express terms of s 49(3) were not facts in issue. Particulars of the offences identified the date of sexual intercourse as "between the 31st day of January 1986 and the 28th day of February 1986".

147 Section 49(4) provided a special defence to a charge under s 49(3) if the complainant was, "on the date on which the offence [was] alleged to have been committed, of or above the age of sixteen years" (s 49(4)(a)) and the accused "believed on reasonable grounds" that the complainant "was of, or above, the age of seventeen years" (s 49(4)(b)(ii)).

148 In the context of admitting the occurrence of sexual intercourse with the complainant when she was under 17 years of age, the appellant raised this s 49(4) defence, thus accepting the onus of proving the essential facts of the defence on the balance of probabilities.

149 The result was that the contested issues at the trial were whether the admitted acts of sexual intercourse occurred when the complainant was 13 or 16 years of age and, if at 16, whether the appellant believed on reasonable grounds that the complainant was of or above the age of 17. Evidence at trial was directed to those contested issues.

150 There were four grounds of appeal advanced in this Court which covered two related complaints. The first and second grounds of appeal claimed that the Court of Criminal Appeal and the trial judge erred in failing to treat the date of the offences as a material particular which had to be proven beyond reasonable doubt. This was said to involve an incorrect construction of s 49.

151 The third and fourth grounds of appeal alleged that the verdicts were uncertain. The third ground of appeal stated:

> "The majority verdicts are uncertain or void in that it is impossible to know whether the Appellant has been convicted of offences committed in February 1986 in the circumstances alleged by the prosecution or of offences committed in 1989 in the circumstances stated by the Appellant on oath."

152 The fourth ground of appeal asserted error on the basis that the majority verdicts are uncertain or void because different jurors may have made different findings "as to the dates and circumstances of the offences" as referred to in the third ground of appeal.

153 The appellant was unsuccessful before the Court of Criminal Appeal of South Australia (Vanstone, Layton and David JJ) in seeking to have the verdicts quashed for latent duplicity or uncertainty[78]. In rejecting the argument the Court of Criminal Appeal relied on "the fact that there was only ever one occasion where sexual acts took place"[79].

154 Section 49(3) did not in terms specify that the date of an alleged offence was an essential fact; what was essential about time was that the complainant was between 12 and 17 years of age when the offence occurred. The same statutory maximum penalty applied to the appellant irrespective of whether the complainant was 13 or 16 on the occasion of the offences.

155 It is undoubtedly good practice to frame a count in an information with "all such specificity as to time"[80] as circumstances permit so as to clearly identify for the accused the charges with which he or she needs to deal.

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78 *R v W, GC* (2006) 96 SASR 301 at 305-306 [12]-[16] per Layton J, 312 [44], 314-315 [47]-[50] per David J (with whom Vanstone J agreed).

79 *R v W, GC* (2006) 96 SASR 301 at 315 [50] per David J.

80 *Cheung v The Queen* (2001) 209 CLR 1 at 52 [160] per Callinan J.

156 However, the general rule is that the date of an offence is not a material particular and need not be proven, unless a date is "an essential part of the alleged offence"[81]. The terms of s 49 were consistent with the general rule.

157 Exceptions to the general rule occur when the conduct of a trial has the effect of rendering a date a material particular[82] or vital as, for example, when an alibi is raised by the defence in respect of a particular date[83]. Equally, the defence, or both the prosecution and the defence, may conduct a trial by treating the date of an offence as not material[84].

158 Whether or not a date of an offence is a material particular in a case involving sexual offences where the age of the complainant is relevant will depend on the circumstances of the case, including issues of procedural fairness. For example, it would be erroneous to describe the time of an offence under s 49(3) as "immaterial"[85] if a jury were left with a belief that it could bring in a guilty verdict even if a complainant were above 17 years of age, or where the prosecution led evidence of different and conflicting versions of the same incident[86], or evidence equally capable of referring to a number of different occasions[87]. However, there were no such issues of procedural fairness here, where the appellant admitted the alleged acts of sexual intercourse with the complainant when she was under 17 years of age[88].

Conduct of the trial

159 Before the prosecution called any witnesses, defence counsel opened the case briefly to the jury on the basis that it was important for the jury to "look at the evidence knowing what the issues in this case" were. She then said:

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81 *Dossi* (1918) 13 Cr App R 158 at 159 per Atkin J; followed in South Australia in *H* (1995) 83 A Crim R 402 at 410 per Mullighan J. See also Archbold, *Criminal Pleading, Evidence and Practice* (2007) at 87-88 [1-127].

82 *Stringer* (2000) 116 A Crim R 198 at 202 [22] per Grove J.

83 *R v Dean* [1932] NZLR 753; *R v Kringle* [1953] Tas SR 52.

84 *Swan* (1987) 27 A Crim R 289 at 302 per Carter J.

85 *R v Radcliffe* (1990) *Criminal Law Review* 524 at 524.

86 *R v Frederick* [2004] SASC 404.

87 *S v The Queen* (1989) 168 CLR 266; *Johnson v Miller* (1937) 59 CLR 467.

88 cf *R v Frederick* [2004] SASC 404 at [36] per Duggan J.

> "[F]rom the defence point of view I can tell you that it will not be an issue for you as to whether the sex occurred. Consensual sexual acts, which are the subject of the information, occurred between [the appellant] and [the complainant]. That will be common ground in the case and you need not worry about that. What your attention should be focused upon … is when it occurred … [Y]ou need not concern yourselves at all as to whether these consensual acts of sexual intercourse took place or did not take place: timing will be the all important issue in this case."

160 The trial was conducted on behalf of the appellant as foreshadowed by his counsel. As mentioned, the sexual acts alleged as the foundation of the counts in the Information were admitted. Accordingly, there was no complaint that the counts contained in the Information were bad for duplicity or that the appellant was uncertain about the allegations of acts of sexual intercourse with which he needed to deal. There was no dispute that there was only one incident, during a January-February period, which gave rise to the two counts. No direction was sought that the appellant was entitled to an acquittal if the jury were not agreed about the date on which the offences occurred. Time was critical only to the special statutory defence.

Submissions on the appeal

161 It was contended on this appeal that s 49 should be construed as rendering the date of an offence alleged thereunder a material particular, especially having regard to the reference in s 49(4) to "the date on which the offence is alleged to have been committed". This was said to render the date of an offence essential because engagement of the defence depended on the age of the complainant at the time of the offence. Common law principles governing the materiality of dates were also said to support this construction. Secondly, the appellant contended the convictions were void for uncertainty most particularly as they were capable of equal application to sexual intercourse occurring in 1986 (as particularised in the Information) or in 1989 (as admitted by the appellant), and jury members may have convicted on the basis of different findings as to dates.

162 The respondent submitted that the date of the alleged offences was not a material particular because time was not an essential fact or element of the offences, and that an accused cannot transform the date particularised in an information into an essential fact or element simply by disputing the date. Further, the respondent submitted that there was no uncertainty for duplicity in the convictions as there was no uncertainty about the specific acts on which the convictions were based.

Was the date a material particular?

163 In the absence of a successful defence under the provisions of s 49(4), the acts of sexual intercourse, which were the subject matter of the Information, were criminal irrespective of whether they occurred in 1986 or in 1989. It was not an essential fact that the jury find that the acts constituting the offences occurred in 1986 before returning a verdict of guilty. The terms of the counts followed the language of s 49(3), alleging that the complainant was "under the age of 17 years", and identified two specific sexual acts. It was those acts or facts which constituted the offences which were the essential facts for a conviction.

164 In the circumstances, the date of the commission of the offences was not an essential fact or element of them. It was, however, an essential fact or element of the statutory defence. In availing himself of the defence under s 49(4), the appellant proceeded on the basis that the phrase in s 49(4)(a) "the date on which the offence is alleged to have been committed" encompassed his allegation in his defence that the sexual acts occurred in 1989, when the complainant was "of or above the age of sixteen years". He was entitled to take that course in reliance on the terms of s 49(4) and to undertake the burden of proving both that the complainant was "of or above the age of sixteen years" when the admitted incident occurred, and that he had the requisite belief set out in s 49(4)(b)(ii).

165 That the date was an essential fact or element of the statutory defence (limited to sexual intercourse with complainants of or over 16 years of age) does not render the date an essential fact or element of the more widely described offence. Not only was time not an essential fact or element of the offences here, but the appellant did not conduct the trial so as to render the date of the offences a material particular.

166 The appellant's admissions of the acts alleged as the foundation of the counts, and his reliance on a s 49(4) defence despite the particulars as to date in the Information, show that he did not treat the 1986 date alleged in the particulars as material. On this appeal, the appellant did not allege that the particulars as to date in the Information led to any uncertainty at the trial about the offences with which he had to deal. Nor was it asserted on this appeal that his admissions that the acts charged occurred were wrongly made. That no amendment was made to the particulars in order to allege alternative dates did not embarrass the appellant or reduce his defence to bare denials or deprive him of the opportunity of raising the special statutory defence.

167 The appellant's submissions on the construction of s 49 must be rejected. In particular, it is not correct to read into s 49(3), by reference to s 49(4), a requirement that a date of an offence is invariably an essential fact or element of an offence charged under s 49(3). There was no express requirement in the legislation, or anything arising from the conduct of the trial or the unfolding of the evidence, which required an exception to the general rule to be made in this

case. Therefore, there was no requirement for a direction from the trial judge that the date of the commission of the offences was a material particular required to be proven by the prosecution beyond reasonable doubt.

Were the verdicts uncertain?

168 The question raised by the third ground of appeal is of greater difficulty because of a superficial resemblance between the facts of this case and cases concerning counts suffering from latent duplicity. It sometimes happens that a count will only be revealed to be bad for duplicity after evidence has been led. If that difficulty is not addressed, a miscarriage of justice may occur. First, a trial will not be fair if an accused is not clearly on notice of the occasion or the case which he or she must meet; this can be of great moment when different defences apply in respect of separate offences or occasions. In *Johnson v Miller* Dixon J said[89]:

> "… a defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge."

169 Secondly, a conviction based on a count which is bad for duplicity will be void for uncertainty because the conviction will be "capable of equal application" to separate offences[90]. If evidence reveals that particulars originally given may apply equally to separate acts, matters or things founding separate offences, a court may order that further particulars be given[91], or the prosecution may be required to make an election as to which offence is to be treated as the subject matter of the count[92], or the information may be amended and an adjournment granted to permit an accused a fair opportunity to deal with an amended count[93].

170 Here, the evidence did not reveal separate incidents, or separate offences arising from separate incidents. The single incident and the sexual acts forming the foundation of the counts were admitted. The dispute over whether the acts occurred in 1986 or 1989 amounted to no more than two different accounts of the circumstances of the same incident. The trial judge summed up to the jury on the

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89 (1937) 59 CLR 467 at 489.

90 *Johnson v Miller* (1937) 59 CLR 467 at 488 per Dixon J.

91 *Johnson v Miller* (1937) 59 CLR 467 at 490 per Dixon J; *S v The Queen* (1989) 168 CLR 266 at 274 per Dawson J.

92 *Johnson v Miller* (1937) 59 CLR 467 at 489-490 per Dixon J.

93 *Johnson v Miller* (1937) 59 CLR 467 at 490 per Dixon J.

basis that the two different dates reflected the prosecution and the appellant's differing accounts of the date on which admitted sexual acts occurred. Following the terms of counts 1 and 2, verdicts of guilt in respect of the two identified acts of sexual intercourse with the complainant when she was under the age of 17 years do not give rise to uncertainty in the appellant's conviction in the sense described in *Johnson v Miller*[94]. For those reasons, the fact that the prosecution did not amend the particulars to reflect alternative particulars of the date of the offences did not result in majority verdicts which are uncertain.

171 As to the fourth ground of appeal, it must be conceded that it is not possible to discern from the verdicts whether different members of the jury convicted on the basis of different findings as to the date of the offences. However, as the date was not an essential fact or element of the offence under s 49(3), jury unanimity on the date was unnecessary. This is distinct from the offence under consideration in *KBT v The Queen*[95]. There, the jury was required to be agreed as to the commission of the same three or more illegal acts, because the *actus reus* of the offence was the doing, as an adult, of an act which constituted an offence of a sexual nature in relation to a child on three or more occasions[96]. Here, the jury had to be satisfied beyond reasonable doubt that the acts of sexual intercourse alleged occurred when the complainant was under 17 years of age, facts which defence counsel always treated as "common ground" in the case.

172 The jury was not obliged to follow the same evidential path to arrive at a unanimous decision that the essential facts constituting the offence had been established[97].

173 The appellant has not yet been sentenced. It is "commonplace" that the issues of guilt resolved by a jury may not include matters of "potential importance to an assessment of … culpability"[98], which is the task of the sentencing judge. In assessing culpability, a sentencing judge resolves matters of

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94 (1937) 59 CLR 467 at 488 per Dixon J.

95 (1997) 191 CLR 417.

96 *KBT v The Queen* (1997) 191 CLR 417 at 422 per Brennan CJ, Toohey, Gaudron and Gummow JJ.

97 Archbold, *Criminal Pleading, Evidence and Practice* (2007) at 507 [4-391]-[4-392].

98 *Cheung v The Queen* (2001) 209 CLR 1 at 9 [5] per Gleeson CJ, Gummow and Hayne JJ.

fact and matters of aggravation or mitigation left unresolved by a verdict[99]. In determining the basis for sentencing, a sentencing judge must make findings of fact beyond reasonable doubt[100]. Where there are two routes to conviction, one of which involves more serious culpability than another and it is not possible for a sentencing judge to be satisfied that the jury must have reasoned to conviction by the route involving the greater degree of culpability, then an accused would be sentenced on the more favourable basis[101].

Conclusions and Order

174 There was no error in the trial judge's directions to the jury as to the date of the commission of the offences and there was no error in the conduct of the trial giving rise to any miscarriage of justice.

175 The appeal should be dismissed.

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99 *Cheung v The Queen* (2001) 209 CLR 1 at 9 [5], 11 [9] and 12-13 [14] per Gleeson CJ, Gummow and Hayne JJ.

100 *R v Isaacs* (1997) 41 NSWLR 374 at 378-380; *Cheung v The Queen* (2001) 209 CLR 1 at 11 [9] and 12-13 [14] per Gleeson CJ, Gummow and Hayne JJ.

101 *Cheung v The Queen* (2001) 209 CLR 1 at 11 [9] per Gleeson CJ, Gummow and Hayne JJ.