HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HEYDON, CRENNAN AND KIEFEL JJ

SKA APPLICANT

AND

THE QUEEN RESPONDENT

SKA v The Queen [2011] HCA 13
4 May 2011
S100/2010

ORDER

1. *Special leave to appeal granted in respect of grounds 2, 3 and 4 of the amended draft notice of appeal dated 13 August 2010, but refused on grounds 1 and 5.*

2. *Appeal treated as instituted and heard instanter and allowed.*

3. *Set aside the order of the Court of Criminal Appeal of New South Wales dismissing the applicant's appeal against conviction to that Court made on 14 July 2009.*

4. *Remit the matter to the Court of Criminal Appeal for rehearing.*

On appeal from the Supreme Court of New South Wales

Representation

H K Dhanji SC with C E Alexander for the applicant (instructed by Crawford & Duncan)

D M L Woodburne SC with J A Girdham for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

SKA v The Queen

Criminal law – Appeal – Appeal on ground jury verdict unreasonable, or cannot be supported, having regard to the evidence – Application of test in *M v The Queen* (1994) 181 CLR 487 – Whether Court of Criminal Appeal made independent assessment of evidence.

Criminal law – Appeal – Video evidence – Where Court of Criminal Appeal relied on transcript of evidence – Whether sufficient to rely on transcript of evidence.

Criminal law – Appeal – Trial judge's opinion – Where trial judge considered a jury acting reasonably could not have been satisfied beyond reasonable doubt of accused's guilt – Whether regard should be had to trial judge's opinion.

Words and phrases – "unreasonable, or cannot be supported", "unsafe or unsatisfactory".

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

1 FRENCH CJ, GUMMOW AND KIEFEL JJ. The applicant seeks special leave to appeal from the judgment of the New South Wales Court of Criminal Appeal[1] which dismissed his appeals against both conviction and sentence for sexual assault, aggravated sexual assault and aggravated indecent assault against a child. The facts and circumstances relating to those charges and the history of the proceedings are contained in the reasons of Crennan J.

2 The applicant's ground of appeal in the Court of Criminal Appeal relevant to the proceedings in this Court is that the verdicts of the jury were perverse and not supported by the evidence. Section 6(1) of the *Criminal Appeal Act* 1912 (NSW) ("the Criminal Appeal Act") states that the Court of Criminal Appeal "shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence".

The evidence

3 The five charges brought against the applicant concerned offences which were alleged to have been committed in two periods in time. The first three charges were alleged to have occurred between 1 June 2004 and 31 July 2004, when the complainant was under 10 years of age. The fourth and fifth charges were alleged to have occurred between 1 December 2006 and 25 December 2006, when the complainant was 10 years of age. It is the latter charges, and in particular when they were said to have occurred, which assumed importance on the hearing of this application.

4 The applicant's wife is the sister of the complainant's father. The applicant was therefore referred to as the complainant's uncle. One of the applicant's daughters, Sh, was good friends with the complainant. The complainant said, when interviewed by a police officer, that the offences occurred whilst she was sharing a bedroom with her sister and Sh, during visits or "sleepovers" at the applicant's family home. On each occasion she alleged that the applicant came to the room and either fondled her breasts with his hands inside her pyjama top (counts 2, 3 and 5) or digitally penetrated her vagina (counts 1 and 4).

5 In the interview the complainant confirmed that she was at her uncle's house having a "sleepover" with her cousin on the last occasion when he had touched her – the occasion of counts 4 and 5. She said it was "[a]bout, just before Christmas, around then." She later said that she went to the house around

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1 *SKA v The Queen* [2009] NSWCCA 186.

3.00 or 4.00 pm. Asked to recall whether it was a weekday or on the weekend, she replied:

> "A. It was, I think it was a Friday. No, wait, it was, it was the day before Christmas Eve.
>
> Q58. The day before Christmas Eve?
>
> A. Yes, I think so. I think that was when. 'Cause we were having that kind of, like since our families are really close, we just go over to their house and we'd have that little family get together."

6 The complainant's evidence-in-chief took the form of the videotape recording of her interview, which was played to the jury[2]. She also gave some oral evidence. In the cross-examination of the complainant which followed, she was asked if her uncle's house remained the same throughout the periods in question, up until 23 December 2006. The question was directed to the complainant's recollection of some renovations having been undertaken, which is not presently relevant. Her answer, however, assumes relevance with respect to the time of the last two alleged offences. She answered:

> "A. Yes but it may have – may have not been 23 December but … [L]ike I guessed that it may have been the day before New Year's Eve because I do remember some celebrations around then but it could have been maybe even a week before that."

She was then asked:

> "Q. I see so why are you changing that?
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> A. Well because I've thought of it. I thought maybe – and I've watched the video I've thought, oh well then I think I thought that it may have been the day before New Year's Eve, but it may have not been. I thought it was around that time –

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2 This was permitted under the *Evidence (Children) Act* 1997 (NSW). That statute was repealed by s 5 of the *Criminal Procedure Amendment (Vulnerable Persons) Act* 2007 (NSW), but s 3 and Sched 1 of the 2007 Act inserted in the *Criminal Procedure Act* 1986 (NSW) a provision saving the application of the 1997 Act to proceedings thereunder which were pending immediately before its repeal. The present provisions provide a particular exception to the hearsay rule: *Gately v The Queen* (2007) 232 CLR 208 at 240 [104]-[105]; [2007] HCA 55.

Q. The day before Christmas Eve?

A. Yeah it's Christmas Eve, sorry."

7 In re-examination she was taken back to her answers to the questions by the police officer in her interview, and asked to explain why she had said "Yes, I think so" when asked to confirm that the last offences occurred on the day before Christmas Eve, and why she had used the term "around". She said that she was not exactly sure of the date and then went on:

> "I do know it was before Christmas because I remember the last time I saw them which was the night of Christmas Eve and they were just leaving just before 12.00 and I was complaining because I wanted them to stay till the thing go to – the clock go to Christmas, so I do remember the last time was before Christmas, some time within December."

8 Before the jury were addressed, the trial judge (Finnane DCJ) discussed the date of the 2006 offences with prosecution and defence counsel in the absence of the jury. At the end of that discussion the trial judge stated:

> "I'm not going to let the jury have the view or decide this case on the basis that any time in December is good enough. In my view the evidence on which the Crown case is based is it's the 22nd or the 23rd, that's the evidence. Maybe the 24th but no other time. There's no possibility on the evidence of any earlier weekend raised in December or any other day so I wouldn't allow [the prosecution] to address on that."

During the closing address to the jury, the prosecutor stated that the incidents were "sometime just before Christmas". In summing up his Honour told the jury that, in relation to the events of 2006, the complainant's evidence was that these assaults occurred perhaps on the Friday night, which would have been 22 December, the Saturday night, being 23 December, or possibly Sunday 24 December. She had related the offences to the period around Christmas.

9 The date of the incidents the subject of counts 4 and 5 is critical because the applicant led evidence at trial which provided an alibi for the period from the evening of 22 December up to and including Christmas Eve. The applicant gave evidence that he was at a concert, in which one of his daughters was performing, on 22 December 2006, a fact confirmed by his wife. There was evidence that, on the evening of 23 December 2006, the applicant and his family visited a person recently arrived from overseas at his home and remained there until about 11.00 pm. Other evidence confirmed a large gathering, on the evening of 24 December, for dinner at the home of the complainant's family. The evidence of the firstmentioned witness was unchallenged and the other witnesses were not seriously challenged about their accounts.

10 The effect of this evidence, as the trial judge observed for the benefit of the jury, was that if the jury came to the view that the incidents could only have occurred in the period immediately before Christmas of 2006 and the evidence providing an alibi was not disproved, it was unlikely that the jury could conclude beyond reasonable doubt that the applicant was guilty of the 2006 offences.

The task of the Court of Criminal Appeal

11 It is agreed between the parties that the relevant function to be performed by the Court of Criminal Appeal in determining an appeal, such as that of the applicant, is as stated in *M v The Queen*[3] by Mason CJ, Deane, Dawson and Toohey JJ:

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty".

12 This test has been restated to reflect the terms of s 6(1) of the Criminal Appeal Act. In *MFA v The Queen*[4] McHugh, Gummow and Kirby JJ stated that the reference to "unsafe or unsatisfactory" in *M* is to be taken as "equivalent to the statutory formula referring to the impugned verdict as 'unreasonable' or such as 'cannot be supported, having regard to the evidence'."

13 The starting point in the application of s 6(1) is that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and the jury has had the benefit of having seen and heard the witnesses[5]. However, the joint judgment in *M* went on to say[6]:

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's

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3 (1994) 181 CLR 487 at 493; [1994] HCA 63.

4 (2002) 213 CLR 606 at 623-624 [58]; [2002] HCA 53.

5 *M v The Queen* (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ.

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

> advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred."

Save as to the issue whether the Court of Criminal Appeal erred in not viewing a videotape of the complainant's police interview, to which reference will be made later in these reasons, this qualification is not relevant to the present matter.

14 In determining an appeal pursuant to s 6(1) of the Criminal Appeal Act, by applying the test set down in *M* and restated in *MFA*, the Court is to make "an independent assessment of the evidence, both as to its sufficiency and its quality"[7]. In *M*, Mason CJ, Deane, Dawson and Toohey JJ stated[8]:

> "In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, 'none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand'."

The decision of the Court of Criminal Appeal

15 The other members of the Court of Criminal Appeal (McClellan CJ at CL and James J) agreed with the reasons of Simpson J for dismissing the appeal. Her Honour detailed the evidence of the complainant and, in that process, noted her evidence as to when the alleged incidents occurred. She noted that the complainant had initially said that the incident the subject of the 2006 allegations occurred "just before Christmas, around then" and that, more specifically, the complainant had said that it was the day before Christmas Eve[9]. She observed that the complainant was giving this account in April 2007[10]. Her Honour noted the complainant's responses to questions in cross-examination about when the 2006 events had occurred[11]:

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7 *Morris v The Queen* (1987) 163 CLR 454 at 473 per Deane, Toohey and Gaudron JJ; [1987] HCA 50.

8 *M v The Queen* (1994) 181 CLR 487 at 492-493 (footnotes omitted).

9 *SKA v The Queen* [2009] NSWCCA 186 at [36].

10 *SKA v The Queen* [2009] NSWCCA 186 at [36].

11 *SKA v The Queen* [2009] NSWCCA 186 at [53].

> "She said that initially she had thought that was the day before New Year's Eve, because she could remember some celebrations, but that she then thought it could have been a week earlier than that. She concluded that it may have been the day before Christmas Eve."

16 Simpson J outlined the evidence which had been led for the defence, including the alibi evidence. In this regard her Honour focussed upon the evidence of witnesses as to what took place on 23 December[12]:

> "The [applicant] then gave evidence about his activities on 23 December 2006. He said that the daughter of neighbours, who was close to Sh, spent some time with Sh at his home in the morning. The complainant was not present. At 6.00pm, the family went to Mass, as was their practice. He did not recall seeing the complainant at Mass, although it was also her family's usual practice to attend.
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> The [applicant] and his family then returned home, and remained at home until about 8.45pm, when they took food to the home of his uncle, [Mr J], who was returning from India that evening. His brother-in-law (brother of his wife and of the complainant's father) was also present with his family. They remained at Mr [J's] home until 10.30 or 11.00pm, then returned home."

Her Honour then added[13]:

> "The following day, 24 December, they spent some time in the morning shopping, and had dinner at the complainant's home with her family and others."

Her Honour did not refer to the applicant's activities on 22 December 2006.

17 The focus of her Honour upon the applicant's whereabouts on 23 December is explicable. The notice of alibi given by the applicant was directed to the morning and evening of 23 December, in the belief that the complainant had committed herself to that date in the early interview. It was in connection with the alibi notice that her Honour observed that it was directed to

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12 *SKA v The Queen* [2009] NSWCCA 186 at [83]-[84].

13 *SKA v The Queen* [2009] NSWCCA 186 at [85].

the complainant's assertion that events occurred "'the day before Christmas Eve' (although, it will be recalled, the complainant was not dogmatic as to the date)."[14]

18 In submissions to the Court of Criminal Appeal, the applicant sought to establish that the verdicts were unreasonable by reference to a number of points, 13 in all, concerning the reliability of the complainant's evidence. Her Honour described them as "essentially jury points"[15]. Amongst them was the point that the complainant had committed herself to the date of 23 December for the 2006 offences and the evidence had established an alibi for that date.

19 Because they were of the nature of points to be made to the jury and therefore, inferentially, not of themselves decisive of the appeal, her Honour did not deal with them in any detail. Rather, her Honour made some observations "that might help to shed some light on the approach that may have been taken by the jury."[16] In that process, her Honour said that in relation to the 2006 allegations the complainant's account was sufficient to enable the jury to conclude, if they accepted her evidence, that the specific incidents the subject of the charges had occurred[17]. Her Honour discounted other points sought to be made by the applicant, in his attempt to undermine the possible acceptance of the complainant's evidence. Her Honour observed that what was important was the complainant's description of the event and that "[t]he jury was plainly prepared to accept her account."[18] Her Honour then concluded[19]:

> "I am satisfied, on the evidence, that it was open to the jury to reach the verdicts it did. To the extent that it is relevant, I would also be satisfied beyond reasonable doubt, on the evidence, that the [applicant] committed each of the offences charged. I would dismiss the appeal against conviction."

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14 *SKA v The Queen* [2009] NSWCCA 186 at [70].

15 *SKA v The Queen* [2009] NSWCCA 186 at [113].

16 *SKA v The Queen* [2009] NSWCCA 186 at [113].

17 *SKA v The Queen* [2009] NSWCCA 186 at [117].

18 *SKA v The Queen* [2009] NSWCCA 186 at [122].

19 *SKA v The Queen* [2009] NSWCCA 186 at [124].

This appeal

20 The reasoning of the Court of Criminal Appeal exposes a fundamental problem with its approach to its task. The Court concerned itself with whether, as a question of law, there was evidence to support the verdicts, rather than making its own independent assessment of the evidence. The applicant submitted in this Court that this reasoning demonstrated an "inverting of the process" required to be undertaken by the Court of Criminal Appeal. The reasons of Simpson J indicate that her Honour considered what should have been the central question – whether on the evidence the Court was satisfied that the applicant was guilty of the offences – as rather an ancillary question to the question whether there was a sufficiency of evidence to sustain the conviction. As Deane, Toohey and Gaudron JJ made clear in *Morris v The Queen*[20], such an inquiry is not what is required by s 6(1) of the Criminal Appeal Act.

21 To determine satisfactorily the applicant's appeal, the Court of Criminal Appeal was required to determine whether the evidence was such that it was open to a jury to conclude beyond reasonable doubt that the applicant was guilty of the offences with which he was charged. The applicant correctly submits that two errors are evident in the reasoning of the Court of Criminal Appeal in reaching this conclusion. First, the Court of Criminal Appeal did not satisfactorily determine the date at which it was alleged that the applicant committed the offences the subject of counts 4 and 5. Whilst it is true that an appellate court is not always bound to deal with all arguments put to it, this was a critical matter. Secondly, this led the Court into error when considering the sufficiency of evidence on which it was open to a jury to have concluded beyond reasonable doubt that the applicant was guilty of committing the 2006 offences.

22 On appeal, the task of the Court of Criminal Appeal was to make an independent assessment of the whole of the evidence, to determine whether the verdicts of guilty could be supported. There is no doubt that the Court of Criminal Appeal was not bound by the ruling of the trial judge concerning the date of the 2006 offences. However, the Court of Criminal Appeal was required to form an opinion as to the date of the 2006 offences in order to weigh the whole of the evidence. The reasons for judgment by Simpson J do not disclose that the Court of Criminal Appeal made an independent assessment of the evidence concerning the 2006 offences, and therefore the Court could not weigh the competing evidence to determine whether the verdicts of guilty could be supported.

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20 (1987) 163 CLR 454 at 473.

23 It was not sufficient to say that the complainant's account of the incidents was sufficiently particular to enable a jury to accept it. The complainant's evidence as to when they occurred was also part of her account and, potentially at least, a matter by which her other evidence fell to be considered. It may be that the argument of the applicant on the appeal, which focussed upon the complainant's nomination of the evening of 23 December as the date of the last two offences and then as one of many "jury points", served to distract the attention of the Court of Criminal Appeal. Observing that the complainant had not been dogmatic about 23 December may not have sufficiently overcome her identification of the days before Christmas as essential to her recollection. These were matters to be considered by the Court of Criminal Appeal.

24 To the extent that Simpson J considered whether she was satisfied that it was open to the jury to be satisfied beyond reasonable doubt as to the guilt of the applicant, it appears that this consideration was undertaken without any weighing of the competing evidence; an exercise which the Court of Criminal Appeal was required to undertake to determine whether the verdicts of guilty were unreasonable or could not be supported. Simpson J's reasons do not demonstrate that her Honour weighed the conflicting evidence respecting the 2006 offences and therefore it appears that the Court of Criminal Appeal failed to perform the duty required of it by the Criminal Appeal Act.

25 Special leave should therefore be granted, the appeal allowed and the matter remitted to the Court of Criminal Appeal for rehearing of the appeal from all convictions. The rehearing must necessarily extend to the 2004 offences. A conclusion as to whether one episode of offences occurred is plainly relevant to the other.

Other matters

26 The applicant's submissions, that the Court of Criminal Appeal was obliged to have regard to the trial judge's opinion that a jury acting reasonably could not have been satisfied beyond reasonable doubt, and to have regard to the video recording of the complainant's evidence-in-chief, should be rejected for the reasons given by Crennan J. Since the matter should, in our view, be remitted it is necessary to say something further concerning the latter contention.

27 The first ground of the applicant's proposed amended notice of appeal was that the Court of Criminal Appeal "erred in failing to view for itself that part of the evidence of the complainant which was presented by way of a pre-recorded video recording of an interview between the complainant and the police." Neither in the notice of appeal, nor in the argument which followed, was it explained why the Court of Criminal Appeal could be said to have fallen into

error in this regard, particularly since it had not been raised before that Court and there was no argument put by the applicant about it[21].

28 Simpson J herself raised the question whether the Court ought to view the video recording or rely only upon the transcript of the evidence[22]. Her Honour said[23]:

> "At the outset of the hearing of the appeal Senior Counsel for the [applicant] was invited to comment on this question. He declined to submit that the Court ought to view the video, but added:
>
> > 'Unless, of course, your Honours feel that you need to view the video to see the demeanour of the young girl during the course of the interview.'"

Her Honour, however, concluded, in the absence of any argument, that the question should be resolved in favour of the Court proceeding on the basis of the transcript of evidence alone[24]. Influential to her Honour's conclusion was that viewing the recording might create an imbalance, given that the Court would not be viewing the evidence of other witnesses[25]. No other witness's evidence had been the subject of video recording.

29 The correctness of her Honour's observation, as to the potential for an undue focus upon the complainant as a witness, which might result from viewing the video recording, cannot be doubted. It should also be recalled that it was a recording of part only of the complainant's evidence, her evidence-in-chief, and thus may not have been a fair representation of her evidence as a whole.

30 It may be observed that the imbalance of which her Honour spoke may have favoured the complainant as a witness. The trial judge, on the applicant's application for bail following conviction, expressed the view that she was a "very compelling" witness. He also described the applicant as "perfectly honest". This points up the risk to the applicant in having the Court of Criminal Appeal view

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21 *SKA v The Queen* [2009] NSWCCA 186 at [102].

22 *SKA v The Queen* [2009] NSWCCA 186 at [102].

23 *SKA v The Queen* [2009] NSWCCA 186 at [103].

24 *SKA v The Queen* [2009] NSWCCA 186 at [104].

25 *SKA v The Queen* [2009] NSWCCA 186 at [108].

the evidence, which may explain why the applicant's counsel did not ask the Court to do so or take up the suggestion that it might. At the least it may be said there was no obvious benefit to the applicant in that course. More importantly, no reason is now advanced as to why it was necessary that the Court of Criminal Appeal do so.

31 The account given and the language used by witnesses, which are available by way of transcript, are usually sufficient for a review of evidence. It is to be expected that if there is something which may affect a court's view of the evidence, which can only be discerned visually or by sound, it can and will be identified. Absent this purpose it is not possible to conclude that a court is obliged to go further and view a recording of evidence. There must be something in the circumstances of the case which necessitates such an approach.

32 In the Court of Criminal Appeal the applicant relied upon certain speech patterns of the complainant as indicative of uncertainty on her part. However, they were evident from the transcript and were dealt with by Simpson J on that basis[26]. No purpose which would have been served by the Court of Criminal Appeal in viewing the recording, as necessary to the applicant's appeal or in the interests of justice, was identified by the applicant in submissions to this Court.

33 The approach taken by the applicant in submissions was to suggest that it is "commonplace for an appeal court to view such a video". The judgments relied upon provide no support for this proposition. In *CSR Ltd v Della Maddalena*[27] Callinan and Heydon JJ explained that they had viewed a video recording because it had "loomed so large" in the judgment of the court appealed from[28]. Kirby J did not ascribe a reason[29], but his Honour is likely to have had the same reason for viewing the video.

34 Other cases to which the applicant referred offer no further assistance. In each of them a purpose for the viewing may be clearly discerned. In *Clark v HM Advocate*[30] the issue before the Lord Justice General, Lord Cowie and Lord Caplan in the High Court of Justiciary was whether the intonation of the

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26 *SKA v The Queen* [2009] NSWCCA 186 at [111].

27 (2006) 80 ALJR 458; 224 ALR 1; [2006] HCA 1.

28 *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458 at 494 [192]; 224 ALR 1 at 47.

29 *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458 at 472 [56]; 224 ALR 1 at 16.

30 2000 JC 637.

presiding judge at a trial in the Sheriff Court at Falkirk, in parts of his charge to the jury where he posed various questions, suggested answers unfavourable to the accused. In *R v El Moustafa*[31] the Victorian Court of Appeal viewed video recordings of the evidence of two witnesses, in applying the proviso in s 568(1) of the *Crimes Act* 1958 (Vic)[32], in the case of one (the accused) because there was a question about whether he had given his evidence in a persuasive manner and, in the case of the other, because the parties were agreed that his evidence should be viewed[33]. In the course of the Court's reasoning, issues about the use of such evidence by an appellate court, to assess the strength or weakness of a prosecution case, were said to involve a number of considerations. They were said to call for "circumspection in utilising video recordings of evidence of the trial."[34] And, their Honours observed, whether a video recording of any part of the evidence should be viewed must depend upon the particular circumstances of the case[35].

35 The applicant has not pointed to any circumstance in this case which would have necessitated the viewing of part of the complainant's evidence by the Court of Criminal Appeal. The purpose of the proposed ground, it may be inferred, was to bolster the application for special leave.

Conclusion and orders

36 Special leave for the applicant to appeal to this Court should be granted, but only with respect to grounds 2 to 4 inclusive. The appeal should be treated as having been heard *instanter* and allowed. The order of the Court of Criminal Appeal dismissing the applicant's appeal against conviction to that Court should be set aside and the matter remitted to the Court of Criminal Appeal for rehearing.

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31 [2010] VSCA 40.

32 Repealed by s 422(4) of the *Criminal Procedure Act* 2009 (Vic).

33 *R v El Moustafa* [2010] VSCA 40 at [46].

34 *R v El Moustafa* [2010] VSCA 40 at [44] per Redlich and Harper JJA and Habersberger AJA.

35 *R v El Moustafa* [2010] VSCA 40 at [45].

37 HEYDON J. I agree with the orders proposed by and the reasoning of Crennan J. In relation to grounds 3 and 4 of the amended draft notice of appeal, I would add only the following.

38 The applicant submitted that the Court of Criminal Appeal had failed to understand and to carry out the task required of an appellate court in determining whether the verdicts were unreasonable, which was to make its own independent evaluation of the evidence. The premises relied on by the applicant to support the conclusion that the Court of Criminal Appeal had failed in that task were various. They do not support it.

39 The first premise rested on the applicant's criticism of the Court of Criminal Appeal's treatment of the law. That criticism turned on comparing three passages in *M v The Queen*[36].

40 The first passage was summarised by the Court of Criminal Appeal as the test for which *M v The Queen* is authority. The first passage is: "the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."[37]

41 The second passage was quoted by the Court of Criminal Appeal[38]:

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced."

42 But the applicant criticised the Court of Criminal Appeal for not referring to a third passage in the majority judgment in *M v The Queen*[39] appearing a little earlier than the two passages just quoted:

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36 (1994) 181 CLR 487; [1994] HCA 63.

37 (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ.

38 (1994) 181 CLR 487 at 494.

39 (1994) 181 CLR 487 at 492.

> "the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s 6(1)[40]. The question is one of fact which the court must decide by making its own independent assessment of the evidence".

The applicant submitted, both in chief and in reply, that the failure of the Court of Criminal Appeal to quote or refer to this third passage showed that it had failed to undertake an independent assessment of the evidence.

43 But why should the Court of Criminal Appeal have set out the third passage? It was not submitted that the Court of Criminal Appeal was specifically referred to that passage as crucial. The first two passages made, by implication, the same point as the point made more explicitly in the third passage. The members of the Court of Criminal Appeal who heard the applicant's appeal between them, at the bar and on the bench, have participated in hundreds, if not thousands, of cases involving appeals on the ground that the verdict was unreasonable. Of course it is possible that even so experienced a court may have overlooked the relevant test, but it cannot be readily assumed that it did so. There is no basis for ascribing to the Court a fundamental misapprehension of its task. The failure of the Court of Criminal Appeal to quote the third passage is not a ground for doing so. It understood that the appeal was based on the "unreasonable" ground in s 6(1) of the Act. It referred to the relevant test several times. If the failure of the Court of Criminal Appeal to refer to a particular passage in a judgment, in which other passages were referred to and quoted, is to be criticised, a precedent would be set for appeals to be allowed on the ground that the judgments under appeal failed ritually to incant key propositions or quote them from leading judgments, even though it was manifestly clear that the relevant court had kept the key propositions fully in mind. There has been a growing tendency for modern judgments to become too long, too stuffed with bookish references to authority, and too prone to excessive quotation from authority. Acceptance of the applicant's submission would accelerate that tendency sharply and damagingly.

44 The conclusion that the Court of Criminal Appeal understood its task is supported by the fact that, read as a whole, its reasons reveal that it approached the evidence by attempting to judge its reliability and cogency for itself. One indication of that is the Court of Criminal Appeal's references to itself seeing "little force", or not seeing "any great moment", or seeing "little moment" in particular matters of fact or criticisms. These expressions were used in relation to points (iii)-(v) of the points into which the Court of Criminal Appeal refined the applicant's submissions. The applicant made no complaint about the manner in which the Court of Criminal Appeal dealt with points (i)-(v), nor about its

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40 ie, s 6(1) of the *Criminal Appeal Act* 1912 (NSW) ("the Act").

failure in terms to deal with points (ix) and (x). It may be inferred that the applicant accepts that in those respects the Court of Criminal Appeal did engage in an independent examination of the evidence for itself, rather than finding it merely sufficient or reposing on jury acceptance of it. As Crennan J has demonstrated, the Court of Criminal Appeal engaged in an independent examination of the evidence going to the other criticisms, even though it did not classify it under points (vi)-(viii) and (xi)-(xiii). The very fact that the Court of Criminal Appeal had been able to reduce some rather diffuse submissions advanced to it into 13 quite differently organised categories is something which not only deserves praise, but also establishes performance of its duty to make an independent assessment of the evidence. It must have equipped the Court for a critical scrutiny of that evidence, and the process of classification in itself assisted the Court to become apprised of the detailed evidence and the alleged imperfections in it as viewed through the critical spectacles of the applicant.

45 The applicant criticised the Court of Criminal Appeal for saying that it was "satisfied, on the evidence, that it was open to the jury to reach the verdicts it did", and then going on to preface a statement that it was satisfied of guilt beyond reasonable doubt with the words "[t]o the extent that it is relevant". The applicant submitted that "that qualification … would suggest … a misapprehension because it was not a question to be qualified. It was the central question and the qualification to the extent that it is relevant would suggest the very absence of centrality of that primary question." The applicant submitted that the Court of Criminal Appeal had "inverted" the order in which the test in *M v The Queen* should be applied. Yet it is plain from *M v The Queen* that the appellate court's personal satisfaction beyond reasonable doubt is not the sole or central question, at least in the sense that it is subject to a qualification. It is a qualification explained by this Court in a passage appearing immediately after the first of the three passages quoted above[41] setting out the question which the court must ask itself[42]:

> "But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

And the same theme was sounded in the second passage from *M v The Queen*, which was quoted by the Court of Criminal Appeal[43]. The expression "[t]o the

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41 See [40].

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

43 See above at [41].

extent that it is relevant" encompasses that qualification. The words with which the Court of Criminal Appeal prefaced its statement that it was satisfied of guilt beyond reasonable doubt, far from revealing an erroneous approach, thus confirmed the consistency of its method with the law stated by this Court in *M v The Queen*. When the Court of Criminal Appeal's analysis of the evidence is read, there is no reason to suppose that it wrongly inverted any aspect of the test called for by *M v The Queen*.

46 The applicant also submitted that the Court of Criminal Appeal had expressed no reasons for its statement that it was satisfied beyond reasonable doubt. That is a baseless submission: the statement was a statement of conclusion, appearing after many pages of evidentiary analysis.

47 At one stage the applicant made an audacious submission that the respondent had failed to submit in this Court that the Court of Criminal Appeal had considered all the evidence, or took into account the evidence given in the defence case, or made its own independent assessment of the whole of the evidence. It was suggested that the respondent's failures in these respects indicated that the Court of Criminal Appeal had not done these things. The respondent was not guilty of these failures. The respondent posed as an issue whether the Court of Criminal Appeal had made an independent assessment of the evidence. And the respondent repeatedly submitted that the Court of Criminal Appeal had made an independent assessment of the relevant parts of the evidence.

48 A further premise invoked by the applicant in support of his contention that the Court of Criminal Appeal had failed to make its own independent assessment of the evidence centred on that Court's occasional references to whether the complainant's evidence was "sufficient" to warrant conviction, and whether it was "open" to the jury to convict. However, the applicant's reliance on these references came to lack significance after the applicant conceded in reply that he was not complaining that the Court of Criminal Appeal had applied a "sufficiency of evidence" test.

49 Another premise for the alleged conclusion that the Court of Criminal Appeal had failed to make its own independent assessment of the evidence turned on references by the Court of Criminal Appeal to the jury accepting the complainant's evidence, and the Court of Criminal Appeal's characterisation of the applicant's factual criticisms of the verdicts as being "legitimate points to put to the jury", as having been, "very effectively", put to the jury, and as being "essentially jury points". These criticisms depend on removing particular phrases used by the Court of Criminal Appeal from their context and over-stressing their significance, instead of concentrating on the substance of what the Court of Criminal Appeal did. There is no reason to doubt that the members of the Court of Criminal Appeal were, as they said, "satisfied beyond reasonable doubt, on the evidence, that the [applicant] committed each of the offences charged." By using

the words "jury points", the Court of Criminal Appeal was not treating them as unworthy of its own independent consideration, nor was it indicating that it proposed not to examine any of them: for it examined them all. The Court of Criminal Appeal was taking into account what this Court said in *M v The Queen* in relation to the need for the appellate court not to disregard or discount, but to pay full regard to, the consideration that the jury has the primary responsibility for determining guilt or the consideration that the jury has seen and heard the witnesses[44].

50 In these and other respects, the application for special leave to appeal wore the appearance of an attempt to set up an "armchair" appeal, in which those responsible for its inception moved hypercritically through the Court of Criminal Appeal's reasoning, assembling a mass of complaints by concentrating on particular parts of the reasons for judgment rather than the whole. Criticisms of the verbal and formalist kind made by the applicant could not have been made if the Court of Criminal Appeal had expressed its reasons in formulaic terms. But the reasons would not have been improved by being expressed in that way.

51 Finally, the applicant endeavoured to make something of the fact that in this Court the respondent referred to evidence to which the Court of Criminal Appeal had not referred but which supported its analysis. The applicant submitted that this showed the respondent seeking to support the verdicts by engaging in the task which the Court of Criminal Appeal allegedly failed to perform, and thus, in effect, revealing a consciousness of the Court of Criminal Appeal's alleged failure. This is not a valid argument. The respondent's demonstration that there was additional evidence supporting the Court of Criminal Appeal's conclusions does not establish that the Court of Criminal Appeal failed in its duty. If it did, then any appeal based on the unreasonableness of a verdict would succeed if it could be shown that the intermediate appellate court had failed to mention a piece of evidence even though the evidence which it had mentioned was adequate to support its conclusions. That cannot be correct.

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44 (1994) 181 CLR 487 at 493: quoted above at [45].

52 CRENNAN J. This application for special leave to appeal concerns whether the Court of Criminal Appeal of New South Wales erred in dismissing an appeal against conviction brought on the ground that the jury's verdicts are unreasonable and cannot be supported having regard to the evidence[45].

53 On 12 August 2008, the applicant was arraigned on an indictment containing five counts relating to sexual offences against a child. Counts 1 to 3 involved one charge of sexual intercourse with the complainant[46], and two counts of aggravated indecent assault[47], between 1 June 2004 and 31 July 2004 when the complainant, the applicant's niece by marriage, was aged eight. Counts 4 and 5 involved a charge of aggravated sexual intercourse with the complainant[48], and one count of aggravated indecent assault[49], between 1 December 2006 and 25 December 2006 when the complainant was aged 10. The aggravating circumstance identified in count 4 was that, at the time of the offence, the complainant was under the authority of the applicant. The applicant pleaded not guilty to all charges.

54 On 21 August 2008, after a trial before Judge Finnane of the District Court of New South Wales, a jury found the applicant guilty of all five counts. On 6 February 2009, Judge Finnane sentenced the applicant in relation to the offences so that they were partially concurrent and partially cumulative, with the result that the applicant was to serve an effective overall sentence of eight years, nine months and 15 days with a non-parole period of four years, nine months and 15 days.

55 The applicant appealed to the Court of Criminal Appeal under the *Criminal Appeal Act* 1912 (NSW) on two grounds (the latter with leave): that the verdicts of the jury are perverse and are not supported by the evidence, and that the sentences are manifestly excessive. The Crown cross-appealed against the sentences on the ground that they are manifestly inadequate. The appeal against conviction, brought under s 5(1)(b) of the *Criminal Appeal Act*, fell to be determined under s 6(1) of that Act, which relevantly provides that the Court of Criminal Appeal shall allow an appeal against conviction if the Court is:

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45 *SKA v The Queen* [2009] NSWCCA 186.

46 *Crimes Act* 1900 (NSW), s 66A.

47 *Crimes Act*, s 61M(2).

48 *Crimes Act*, s 66C(2).

49 *Crimes Act*, s 61M(1).

> "of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence".

This provision, like similar provisions in Australia, derives from the *Criminal Appeal Act* 1907 (UK).

56 On 14 July 2009, the Court of Criminal Appeal (McClellan CJ at CL, James and Simpson JJ) dismissed the applicant's appeal against conviction and sentence, but allowed the Crown's cross-appeal and re-sentenced the applicant, resulting in a non-parole period of eight years.

57 The applicant applied for special leave to appeal against the decision of the Court of Criminal Appeal dismissing his appeal against conviction and, on 30 July 2010, Gummow and Heydon JJ referred the application for special leave to an enlarged bench.

58 In an amended draft notice of appeal, the applicant identified five grounds of appeal as follows:

> "1. The Court of Criminal Appeal erred in failing to view for itself that part of the evidence of the complainant which was presented by way of a pre-recorded video recording of an interview between the complainant and the police.
>
> 2. The Court of Criminal Appeal erred in failing to have regard to the trial judge's expressed view that 'the jury acting reasonably could not have convicted' the applicant.
>
> 3. The Court of Criminal Appeal erred in failing to properly apply the test in *M v The Queen* (1994) 181 CLR 487[50].
>
> 4. The Court of Criminal Appeal erred in failing to find that the verdicts of the jury are unreasonable or cannot be supported having regard to the evidence.
>
> 5. The Court of Criminal Appeal erred in having regard to material that was not before the jury, namely the unedited account of the complainant's evidence."

59 In order to explain these grounds of appeal it is necessary to refer both to the evidence and to the course of the trial.

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50 [1994] HCA 63.

The trial

60 The complainant's evidence in chief at the trial was given in the first instance by way of a video recording of an interview of the complainant by a police officer, Detective Senior Constable Bagnall ("the Bagnall interview")[51]. The Bagnall interview was recorded on 10 April 2007 when the complainant was nearly 11 years old. An edited copy of the video recording was played to the jury, following which the complainant gave oral evidence and was cross-examined.

61 The complainant gave evidence of the incidents, the subject of the charges, concerning 2004 and 2006. She also gave evidence of an incident of alleged sexual interference by the applicant in 2001, which was not the subject of any charge.

62 The complainant's father is the brother of the applicant's wife. Both families migrated to Australia from India. The complainant has two older sisters, one of whom, L, is three years older than she is. The applicant has two daughters, one of whom, Sh, was younger than, and good friends with, the complainant.

63 The complainant said that sexual encounters with the applicant occurred in both 2004 and 2006, when she was staying at the house of the applicant and his family and sharing a bed with her sister L and her cousin Sh. During the trial, the occasions when the complainant stayed at the applicant's house were referred to as "sleepovers". The applicant gave evidence that the bed used during the sleepovers was a standard, queen-sized bed.

64 In relation to the 2004 incident, the complainant gave evidence that the applicant got into the bed she was occupying with L and Sh when L and Sh were asleep, and that the applicant digitally penetrated her vagina (Count 1). She said she awakened Sh and asked Sh to play a game, at which point the applicant left the room. She said that the applicant returned subsequently and fondled her around the breast area with his hand inside her pyjamas (Count 2) and she got up and went to the toilet with L, who was by then awake. The complainant said that the applicant followed her and L to the toilet and asked, during that time, whether

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51 The *Criminal Procedure Act* 1986 (NSW) was amended by the *Criminal Procedure Amendment (Vulnerable Persons) Act* 2007 (NSW) to permit such a course under that Act. It became effective from 12 October 2007 and contained a transitional provision (cl 56 of Sched 2) in respect of analogous provisions in the *Evidence (Children) Act* 1997 (NSW). The Bagnall interview was conducted when the latter Act applied.

she was okay. She said when she got back into bed the applicant came back and fondled her breasts again (Count 3).

65 As to the 2006 incident, the complainant gave evidence that the applicant came into the bedroom when L and Sh were asleep in the bed with her, and that the applicant digitally penetrated her vagina (Count 4). She said she pushed him away. She said she told the applicant she needed a drink of water and was away from the bed for 10 to 15 minutes, during which time the applicant came and asked whether she was alright. She said the applicant then fondled her breasts inside her pyjama top (Count 5). She said nothing was said by the applicant, or her, when the incidents occurred.

66 In the Bagnall interview the complainant gave evidence as to the time when the 2006 incident occurred; she said that it was "[a]bout, just before Christmas, around then". On the same issue, later in the Bagnall interview, she gave the following evidence:

> "Q56: And do you remember what day that was?
>
> A: No, I don't remember what day, I'm sorry.
>
> Q57: Do you remember, that's OK. Do you remember, was it a, a weekday or a weekend, or something else?
>
> A: It was, I think it was a Friday. No, wait, it was, it was the day before Christmas Eve.
>
> Q58: The day before Christmas Eve?
>
> A: Yes, I think so. I think that was when."

67 In her oral evidence at the trial the complainant said of the time at which the 2006 incident occurred:

> "I guessed that it may have been the day before New Year's Eve because I do remember some celebrations around then but it could have been maybe even a week before that."

When her interlocutor queried this by saying "[t]he day before Christmas Eve?", she corrected the evidence set out immediately above by saying:

> "Yeah it's Christmas Eve, sorry."

68 The prosecution called the complainant's older sister L to give evidence. L had also been interviewed by Detective Senior Constable Bagnall and an edited transcript of that interview was in evidence. The complainant's sister did not say anything in her interview which corroborated the specific allegations made by the

complainant, but gave evidence of an occasion when the applicant put his arm around her and she "was just really uncomfortable". The complainant's sister also gave oral evidence and was cross-examined. She could not recall any occasion when the applicant was in the bed during a sleepover. The complainant's mother and father were also called to give evidence; their evidence was partly directed to issues such as the frequency and warmth of interaction between the two families.

69 The Crown tendered an undated alibi notice in respect of the applicant, under s 150 of the *Criminal Procedure Act* 1986 (NSW), directed to the day before Christmas Eve. In that alibi notice, it was asserted that on 23 December 2006, from between 1.30 to 1.40pm until 4.45pm the applicant and his wife visited friends, and that from between 8.30 to 8.45pm until 10.30 to 11pm they visited the applicant's uncle, who had just returned from India. At trial, the alibi notice was not relied upon and that which the alibi asserted as to the earlier part of the day was proven to be incorrect.

70 The applicant gave evidence and denied ever having sexually interfered with the complainant or ever having been in bed with her. He gave evidence about the frequency and warmth of interaction between the two families relevant to the uncharged acts alleged against him in 2001 and gave evidence of the family circumstances in 2004.

71 He also gave evidence of his movements and those of his family on 22, 23, 24 and 25 December 2006. The applicant gave evidence that on 22 December 2006 one of his daughters had a concert in Blacktown which was attended by his family between 6.30 to 9.30pm and that no-one other than his family was at his place that night. He said that on 23 December 2006 he and his family went to Mass at 6pm and at about 8.30 to 8.45pm until 10.30 to 11pm he and his family visited his uncle, who had just returned from India. He said the complainant was not with him that night. He said that on the morning of 24 December 2006 he was shopping and in the evening he attended dinner at the house of the complainant's parents. He also gave evidence that on the evening of 25 December 2006 he attended a family party.

72 The applicant's wife gave evidence, and corroborated the applicant's evidence concerning the concert in Blacktown on 22 December, the visit to the applicant's uncle on 23 December and the visit on 24 December to the complainant's parents. The applicant's uncle gave evidence corroborating the applicant's visit to him on 23 December 2006. The applicant's brother-in-law corroborated the applicant's visit to the applicant's uncle on 23 December 2006 and the visit to the complainant's parents' house on 24 December 2006. The witnesses, who corroborated the applicant's visit to his uncle on 23 December 2006, were not challenged on that evidence by the prosecution.

73 As to the allegations concerning 2006, during the course of discussion about proposed directions, which took place in the absence of the jury, the trial judge said to the prosecutor:

> "You are to refer only to this, that the evidence in the case was that these events occurred on 22 or 23 or perhaps 24 December … You are not to raise the possibility that these events might have occurred at some other time in December."

74 The prosecutor said he wished to say to the jury that when first asked about the date the complainant said "just before Christmas, around then". The trial judge responded:

> "the 'around then' has to be qualified. You have to point out to [the jury] that her case is these events occurred on 22, 23 or 24 December. That's the case that was put and I'm not going to allow some other case to be put."

75 In his final address, the prosecutor referred the jury to a copy of the indictment, which referred to "[b]etween 1 December 2006 and 25 December 2006" in relation to counts 4 and 5. He then addressed the jury to the effect that the complainant could not, and could not be expected to, remember the exact or precise dates upon which the alleged offences occurred. No issue or complaint was raised in respect of that address in relation to the 2006 incident.

76 In defence counsel's final address, he stated that the complainant's evidence was that the occurrence alleged in 2006 happened on 23 December 2006.

77 After conviction, applications were made to the trial judge, on behalf of the applicant, for a certificate under the *Criminal Appeal Act*[52], which his Honour declined to grant, and for bail, which his Honour indicated he proposed to uphold before he proceeded to sentence the applicant. During the course of the judgment in respect of bail, his Honour recorded that the applicant appeared to be "a perfectly honest witness" and also that he "found the complainant a very compelling witness". His Honour then continued: "I find it impossible to see how any jury acting reasonably could be satisfied beyond reasonable doubt … In my opinion the jury acting reasonably could not have convicted the accused."

78 In the Court of Criminal Appeal, the sole ground of appeal against conviction was treated as a complaint that the verdict of the jury with respect to each of the five counts, of which the applicant was convicted, was unreasonable

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52 Section 5(1)(b).

or could not be supported having regard to the evidence[53]. It was recognised correctly that, in undertaking its function under the relevant part of s 6(1) of the *Criminal Appeal Act*, the Court was bound to apply the test stated by four members of this Court (Mason CJ, Deane, Dawson and Toohey JJ) in *M*[54]:

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty[55]."

79 Their Honours proceeded to give guidance to appellate courts in respect of their task:

> "But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations[56]."

80 It was noted in the joint judgment that the expression "unsafe or unsatisfactory" does not appear in the legislation[57]. The once common use of that expression, in the context of the legislation, and a subsequent return to a preference for the precise statutory language are both noted and explained in *MFA v The Queen*[58]. *M* has been affirmed and applied in this Court in *Jones*

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53 *SKA v The Queen* [2009] NSWCCA 186 at [94].

54 (1994) 181 CLR 487 at 493.

55 See *Whitehorn v The Queen* (1983) 152 CLR 657 at 686; [1983] HCA 42; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 532; [1984] HCA 7; *Knight v The Queen* (1992) 175 CLR 495 at 504-505, 511; [1992] HCA 56.

56 *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 621.

57 (1994) 181 CLR 487 at 492.

58 (2002) 213 CLR 606 at 614 [25] per Gleeson CJ, Hayne and Callinan JJ, 620 [45]-[46] per McHugh, Gummow and Kirby JJ; [2002] HCA 53; see also *R v Hillier* (2007) 228 CLR 618 at 629-630 [20]; [2007] HCA 13.

v The Queen[59], *MFA*[60], *R v Hillier*[61] and *R v Nguyen*[62]; further, in *Weiss v The Queen*[63] this Court reiterated that criminal appeal provisions, such as s 6(1), require an appellate court to "make its own independent assessment of the evidence". It is the assessment of the whole of the evidence which provides the basis for any opinion or conclusion under s 6(1).

81 In *Dinsdale v The Queen*[64], Gaudron and Gummow JJ had occasion to consider a different provision, under the *Criminal Code* (WA)[65], which empowered the Court of Criminal Appeal of Western Australia to quash the sentence imposed at trial and pass another sentence "if they [thought] that a different sentence should have been passed". Their Honours said:

> "this opinion of the Court of Criminal Appeal must be expressed as well as formed, so that, to adapt a statement by McHugh JA in *Soulemezis v Dudley (Holdings) Pty Ltd*[66], the essential ground or grounds for the formation of the opinion are articulated."

The reasons of the Court of Criminal Appeal

82 The Court of Criminal Appeal did not view the video recording of the Bagnall interview. Instead, their Honours relied solely on an unedited transcript of that interview, whereas the jury had seen an edited video recording, the redacted transcript of which was incorporated into the ordinary, daily transcript of the trial. The question of whether the video recording should be viewed at the appellate level was considered. Her Honour Simpson J (with whom McClellan CJ at CL and James J agreed) noted the following[67]:

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59 (1997) 191 CLR 439 at 452; [1997] HCA 56.

60 (2002) 213 CLR 606 at 614 [25], 624 [59].

61 (2007) 228 CLR 618 at 629-630 [20].

62 (2010) 85 ALJR 8 at 14 [33]; 271 ALR 493 at 500-501; [2010] HCA 38.

63 (2005) 224 CLR 300 at 316 [41]; [2005] HCA 81.

64 (2000) 202 CLR 321 at 329 [21]; [2000] HCA 54.

65 Section 689(3).

66 (1987) 10 NSWLR 247 at 280.

67 *SKA v The Queen* [2009] NSWCCA 186 at [103].

> "At the outset of the hearing of the appeal Senior Counsel for the [applicant] was invited to comment on this question. He declined to submit that the Court ought to view the video, but added: 'Unless, of course, your Honours feel that you need to view the video to see the demeanour of the [complainant] during the course of the [Bagnall] interview.'"

83 In the absence of submissions to the contrary, Simpson J formed what her Honour described as the "tentative view" that the video evidence should not be put before the appellate court[68].

84 Over some 80 paragraphs Simpson J dealt with the evidence including the evidence given by, and on behalf of, the applicant[69]. When coming to the question of whether the verdicts were unreasonable, Simpson J noted that "[t]he approach taken on behalf of the [applicant] was, essentially, to attack the reliability of the complainant."[70] Her Honour then distilled the applicant's arguments constituting criticisms of the complainant's evidence into thirteen points. This covered the issues defined at trial and in the Court of Criminal Appeal and referred to evidence which her Honour had already considered. All thirteen points raised for consideration specific evidence in the trial upon which the applicant wished to rely in order to support the appeal ground that the verdicts are unreasonable and could not be supported having regard to the evidence, and most of the thirteen points encapsulated the applicant's arguments in respect of that specific evidence.

85 Her Honour then said[71]:

> "These were, of course, all legitimate points to put to the jury. And they were, very effectively, put to the jury. It was within the jury's province and function to evaluate them, individually and in conjunction with one another, in order to determine whether they cast doubt on the evidence given by the complainant. Plainly, after due deliberation – in excess of three hours, following a trial the evidence in which occupied only 407 pages of transcript (plus the transcript of the two interviews) – the jury was satisfied that, notwithstanding the arguments of senior counsel, the essential evidence of the complainant was sufficient to

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68 *SKA v The Queen* [2009] NSWCCA 186 at [104].

69 *SKA v The Queen* [2009] NSWCCA 186 at [13]-[93].

70 *SKA v The Queen* [2009] NSWCCA 186 at [111].

71 *SKA v The Queen* [2009] NSWCCA 186 at [112]-[113].

warrant conviction. The question for this Court is whether it was open to the jury to reach that conclusion.

These were essentially jury points. I do not propose, therefore, to comment on each point made. It is appropriate, however, to make some observations that might help to shed some light on the approach that may have been taken by the jury. In doing so, I will retain the point numbering system above."

86 Her Honour proceeded to consider the applicant's criticisms of the evidence at the trial in respect of some six of the thirteen points, then said[72]:

"As I have mentioned, it is not necessary to dissect every argument put on behalf of the [applicant]. All were put to the jury. Obviously, all were rejected.

I am satisfied, on the evidence, that it was open to the jury to reach the verdicts it did. To the extent that it is relevant, I would also be satisfied beyond reasonable doubt, on the evidence, that the [applicant] committed each of the offences charged. I would dismiss the appeal against conviction."

Application of the test in *M*

87 The primary complaint made on behalf of the applicant was that the Court of Criminal Appeal failed to discharge its function under s 6(1) of the *Criminal Appeal Act* in accordance with the test in *M*. It was said that the test in *M* was misapplied because the whole of the evidence was not independently assessed on the appeal.

88 First, it was submitted that, contrary to the authority of *Morris v The Queen*[73], approved in *M*[74], Simpson J concentrated on the sufficiency of the evidence, not its quality or weight, especially by asking whether it was open to the jury to conclude that the essential evidence of the complainant was sufficient to warrant conviction.

89 There is a difference between the function of an appellate court in assessing the evidence at a trial in order to determine whether a verdict of guilty

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72 *SKA v The Queen* [2009] NSWCCA 186 at [123]-[124].

73 (1987) 163 CLR 454 at 473; [1987] HCA 50.

74 (1994) 181 CLR 487 at 492 per Mason CJ, Deane, Dawson and Toohey JJ, 525 per McHugh J.

was unreasonable, and the function of a trial judge in considering whether as a matter of law there is evidence on which an accused could be convicted. With the former, regard must be had to the whole of the evidence[75]. Paraphrasing part of the test in *M*, as Simpson J did, was not an error.

90 The next and related criticism made of the reasoning in the Court of Criminal Appeal was that not all of the arguments advanced by the applicant in respect of the evidence were dealt with, including particularly the applicant's criticisms of the complainant's evidence in the light of the alibi evidence relied on by the applicant in relation to 23 December 2006. That led to the contention that conclusions reached in relation to the appeal against conviction were expressed without the Court making its own independent assessment of the whole of the evidence. It was said that the respondent did not submit that the Court of Criminal Appeal took into account the whole of the evidence in the defence case; rather, the respondent sought to support the verdicts by analysing all of the evidence.

91 The six points referred to by Simpson J in her judgment, which the applicant contended showed that her Honour had not dealt with the whole of the evidence, were (using the numbers and text in the Court of Criminal Appeal, as corrected by the applicant)[76]:

> "(vi) in cross-examination the complainant said that she was 'just not clear' about the first time the [applicant] molested her;
>
> (vii) in relation to the 2006 [sic, 2004] allegations, the complainant claimed that when she went to the toilet L accompanied her but that she did not tell L what had happened and that this was because she was afraid about what other people might think and that she was not comfortable talking about it. It was submitted that this evidence was 'fanciful', given her assertions that the two girls had gone to the toilet after the [applicant] got into bed with them (and with Sh);
>
> (viii) notwithstanding the complainant's claims that L was present on this occasion (and other occasions), L's evidence did not in any way support that of the complainant;
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> …

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75 *MFA v The Queen* (2002) 213 CLR 606 at 615 [26]; *R v R* (1989) 18 NSWLR 74 at 80-81.

76 *SKA v The Queen* [2009] NSWCCA 186 at [111].

> (xi) the complainant's evidence concerning the presence or otherwise of L during the commission of the 2004 [sic, 2006] offences was conflicting. In her interview the complainant said that L and Sh were both present. Later in the interview she said that she thought L had gone home with the family and did not stay that night. In oral evidence (in chief) she reverted to saying that she thought L was present because she recalled her being present while they watched the movie ('Charlie and the Chocolate Factory');
>
> (xii) [the applicant's uncle's] evidence established an alibi for the [applicant] between 9.00pm and 11.00pm on the evening of 23 December 2006, and made it highly unlikely that the complainant had been present at his house at any other time on that evening. The complainant had committed herself to the 23 December date, and [the applicant's uncle's] evidence, like the evidence of the DVD release date, undermined the complainant's account of this event, also to the point of irretrievability;
>
> (xiii) the evidence concerning the frequency of overnight stays and contact between the two families up to 2004 was conflicting. The complainant, L, and both of her parents gave evidence that the children stayed at the [applicant's] house from time to time from 2001; the [applicant] and his wife both gave evidence that this did not begin to occur until 2004, when Sh started school. Circumstantial evidence pointing to the unlikelihood of that having occurred before 2004 was given – for example, the disruption caused by the renovations, the cooling of relationships between the families during and following the visit of the [applicant's] mother, and difficulties following the birth of the [applicant's] younger daughter, SA."

92 By reference to the matters set out in the six points, the applicant submitted that "[a]spects of the evidence were not dealt with by Simpson J". That submission underpinned a submission that there was no foundation for her Honour's ultimate conclusion that she was satisfied, on the evidence, that it was open to the jury to reach the verdicts it did. There is no complaint about what both parties called the "summary" of evidence in the Court of Criminal Appeal, which covered the issues defined in the trial as they were pursued on appeal and extended, as I have already observed, over some 80 paragraphs. However, it was contended that apart from their coverage in the summary of evidence, points (vi), (vii), (viii), (xi), (xii) and (xiii) were all dealt with cursorily as matters which were put to the jury[77]. The submission, and its incorrectness, is well illustrated by reference to point (xii) concerning the alibi evidence.

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77 *SKA v The Queen* [2009] NSWCCA 186 at [123].

The alibi issue – point (xii)

93 In relation to point (xii), the applicant asserted that, in respect of the 2006 incident, the complainant had committed herself to the date of 23 December 2006 and the alibi evidence showed this was wrong.

94 It was submitted that there was no response to the applicant's contention that the alibi evidence of the applicant irretrievably undermined the complainant's evidence of the 2006 incident. Further, complaint was made that the evidence given by the applicant in relation to his movements on 22 December 2006 was not mentioned in the reasons.

95 In answer to these submissions the respondent submitted that Simpson J had dealt with the evidence concerning the date of the incident in a manner which indicated that the complainant had not committed herself to the date of 23 December 2006, with the result that any error about the date did not irretrievably undermine the complainant's evidence.

96 The first point to be made about this issue is that the Court of Criminal Appeal was not bound by the ruling of the trial judge concerning the date of the 2006 incident, as it is for that Court to undertake its own assessment of the evidence.

97 The second point to be made is that, contrary to the applicant's submission that her Honour did not deal with the evidence of the applicant and his uncle concerning the 23 December 2006 date, the whole of the evidence as to whether 23 December was the date on which the 2006 incident occurred, including that of the applicant, the applicant's wife and his uncle, was dealt with by Simpson J[78].

98 In relation to the evidence of the applicant's uncle, her Honour referred to the fact that he produced documentary evidence of his travel arrangements involving 23 December 2006 and further noted that he was not cross-examined[79]. Also, her Honour considered the evidence of the applicant's wife and stated that her evidence of family activities on 23 December 2006 corroborated that given by the applicant[80]. Her Honour also noted the applicant's evidence of his movements on 24 December 2006[81].

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78 *SKA v The Queen* [2009] NSWCCA 186 at [53], [70], [83], [84], [91] and [92].

79 *SKA v The Queen* [2009] NSWCCA 186 at [92].

80 *SKA v The Queen* [2009] NSWCCA 186 at [91].

81 *SKA v The Queen* [2009] NSWCCA 186 at [85].

99 In the main body of her judgment, Simpson J dealt with the complainant's evidence in respect of the incident in December 2006. After doing so her Honour said: "[the complainant] concluded that [the incident] *may* have been the day before Christmas Eve" (emphasis added)[82]. When her Honour considered every aspect of the alibi notice directed to the date 23 December 2006, her Honour repeated her evaluation that "the complainant was not dogmatic as to the date"[83]. That evaluation inevitably dealt with the applicant's argument noted in point (xii). Having regard to the fact that her Honour dealt with all of the evidence as to the date of 23 December 2006, including that of the complainant, the applicant, the applicant's uncle and the applicant's wife, it is unremarkable that Simpson J referred to the applicant's argument, noted in point (xii), as a legitimate point to be put to the jury. Her Honour's assessment that the complainant was not dogmatic about the date of the 2006 incident bore on all of the applicant's evidence of his movements on 22, 23 and 24 December 2006.

100 More generally, the respondent's response to the applicant's contention that points (vi), (vii), (viii), (xi), (xii) and (xiii) were only dealt with as matters which were legitimate points to put to the jury was that the whole of Simpson J's judgment showed that no detail of the complainant's account was left unexamined. Further, it was submitted that in that part of the judgment which both parties referred to as the summary of the evidence, Simpson J noted the significant issues to which the evidence related, including the applicant's criticisms of the complainant's case. Those submissions must be accepted, as their correctness can be demonstrated in respect of each aspect of the evidence which the applicant claims was not dealt with for the purposes of the test in *M*. That exercise in respect of point (xii) has already been done.

101 Point (vi) concerned the complainant's evidence that she was not clear about the dates of the uncharged 2001 incident. This point overlapped with point (ii) which also dealt with the complainant's uncertainty about the time of the 2001 incident. The applicant's submission that Simpson J did not deal with this aspect of the evidence is incorrect. The complainant's evidence was that she was not sure about the details because she was "very young" at the time (she was 4). Her Honour dealt with the relevant evidence[84] and evaluated the complainant's uncertainty about the date[85]. Her Honour also reviewed the relevant cross-examination[86]. This issue of the complainant's equivocation about the date

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82 *SKA v The Queen* [2009] NSWCCA 186 at [53].

83 *SKA v The Queen* [2009] NSWCCA 186 at [70].

84 *SKA v The Queen* [2009] NSWCCA 186 at [13], [34] and [35].

85 *SKA v The Queen* [2009] NSWCCA 186 at [35] and [41]-[44].

86 *SKA v The Queen* [2009] NSWCCA 186 at [49]-[52].

was also expressly dealt with by Simpson J in a manner which showed regard to the applicant's criticism that the complainant's evidence was deficient[87].

102 To the extent that the applicant suggested that Simpson J did not deal with L's evidence, the evidence relevant to point (vii) (which overlaps with point (viii)) was dealt with by Simpson J[88]. Her Honour accepted the applicant's argument that the evidence of L did not corroborate the complainant's evidence[89]. Her Honour also dealt with the complainant's evidence as to why she was "afraid about telling people" about the 2004 events. Of the 2004 incident, on the topic of the complainant not talking to others about it, Simpson J records that the complainant said[90]:

> "I think I was on the verge of sort of understanding what was going on but I think for the same reason I was still a bit afraid about telling people and what they might think and what might happen between us two families."

103 Point (xiii) concerned conflicting evidence about the frequency of overnight stays and contact between the two families. The relevant evidence of six witnesses was dealt with comprehensively by Simpson J[91].

104 The jury ultimately had the evidence of the complainant, L (who was not challenged on the issue), and the complainant's mother and father to the effect that the overnight stays and contact were frequent. As against that there was conflicting evidence of the applicant and his wife. It is unremarkable that Simpson J noted that the applicant's arguments in relation to the issue were legitimate points to put to the jury.

105 The description of six points as legitimate points to put to the jury has been misunderstood by the applicant. The remark was made in the context that the contested issues in the trial turned on the complainant's word against the applicant's word and there were factual conflicts which were ultimately for the resolution of the jury.

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87 *SKA v The Queen* [2009] NSWCCA 186 at [118].

88 *SKA v The Queen* [2009] NSWCCA 186 at [15], [58]-[62] and [64]-[66].

89 *SKA v The Queen* [2009] NSWCCA 186 at [65].

90 *SKA v The Queen* [2009] NSWCCA 186 at [46].

91 *SKA v The Queen* [2009] NSWCCA 186 at [56]-[57] (the complainant), [65] (L), [67] (the complainant's mother), [68] (the complainant's father), [75]-[81] (the applicant), and [87] and [89] (the applicant's wife).

106 The remark was not an indication that some of the evidence would not be assessed by her Honour. The misunderstanding which has arisen is that the applicant has incorrectly treated her Honour's isolation of thirteen points as confining her Honour's assessment of the evidence. Her Honour's isolation of the thirteen points was merely a method of distilling the applicant's criticisms of the complainant's evidence, being evidence with which she had already dealt. The applicant has treated that part of the judgment where her Honour describes six points as legitimate points to put to the jury as though her Honour thereby dispensed with considering the whole of the evidence. As demonstrated in these reasons, that is incorrect.

107 An appellate court is not required to dissect every argument raised by an appellant. Simpson J's description of certain points as legitimate points to put to the jury is not inconsistent with her Honour having assessed the whole of the evidence in support of the counts, in terms of asking and answering the question framed in *M*. On one view, the applicant's complaint on this aspect of the case may be, in truth, a complaint about the reasons. It might have been desirable to deal with all thirteen points in precisely the same way so as to avoid misunderstanding. However, a consideration of the whole of the judgment shows a comprehensive and independent assessment of the whole of the evidence and a clear appreciation of the applicant's criticisms of the complainant's evidence. That assessment was the foundation for her Honour's conclusions in respect of the counts that upon the evidence it was open to the jury to reach the verdicts it did. Furthermore, in the light of the whole of her Honour's judgment, when her Honour described the six points as legitimate points to put to the jury, it is clear that her Honour was doing no more than following the guidance to appellate courts in *M* to pay full regard to the considerations that the jury is entrusted with the primary responsibility of determining guilt or innocence and has had the benefit of having seen and heard the witnesses. As these reasons show, the Court of Criminal Appeal discharged its functions under s 6(1) of the *Criminal Appeal Act* in accordance with the test in *M*.

108 Although the application for special leave focussed on the submissions about the evidence by video recording, on the referral to a Full Bench the submissions concerning the proper application of *M* became dominant. In the circumstances and having regard to the reasons set out above, special leave to appeal in respect of grounds 2, 3 and 4 of the amended draft notice of appeal should be granted, and the appeal should be treated as instituted, heard instanter and dismissed.

Other matters

109 For the sake of completeness, it is necessary to deal with other criticisms made of the decision of the Court of Criminal Appeal, all of which must be rejected. It was submitted for the applicant that the Court of Criminal Appeal erred in failing to reduce, to the extent that it was able, the disadvantage of not

having been present at the trial. This was said to arise because Simpson J did not have regard to the trial judge's opinion expressed in the judgment granting bail to the applicant pending the appeal, and also because the Court of Criminal Appeal did not view the video recording described above. A related complaint was that the Court of Criminal Appeal erred in having the unedited transcript of the complainant's evidence given by video recording in circumstances where the jury had an edited version.

Opinion of the trial judge

110 Submissions on the alleged failure to take into account the trial judge's opinion were framed by reference to the value of a trial judge's report which must undoubtedly have been of "great use"[92] before the routine provision of transcripts as part of a written record of a trial. In this case, the trial judge was not asked to provide a report[93] and he declined to provide a certificate that the case was fit to appeal.

111 Relevant authorities establish a number of propositions about trial judges' reports which are applicable to the present circumstances where the transcribed evidence is part of the written record.

112 First, whilst a trial judge's report may be a factor to be taken into account it would be wrong to substitute the opinion of the judge for that of the jury[94]. Secondly, the weight to be given by an appellate court to a trial judge's report will vary with the circumstances[95]. Such a report will be of greatest assistance when expressing views about matters not readily apparent from the written

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92 *R v Dent* (1912) 12 SR (NSW) 544 at 551.

93 Section 11 of the *Criminal Appeal Act* relevantly provides:

> "The judge of the court of trial may, and, if requested to do so by the Chief Justice, shall, in case of any appeal or application for leave to appeal, furnish to the registrar the judge's notes of the trial, and also a report, giving the judge's opinion upon the case, or upon any point arising in the case".

It can be noted that s 316 of the *Criminal Procedure Act* 2009 (Vic) is a similar provision, as was s 573 of the *Crimes Act* 1958 (Vic).

94 *R v Appellant W* unreported, Court of Criminal Appeal of New South Wales, 9 March 1990 at 11 per Gleeson CJ; see also *JMV* (2001) 124 A Crim R 432 at 434 [6].

95 *R v Marziale* unreported, Court of Appeal of Victoria, 18 April 1996 at 34 per Winneke P, Brooking JA and Southwell AJA.

record of a trial[96]. Less weight will be given to a trial judge's report in circumstances where the judge's opinion appears to be based almost wholly upon the assessment of the evidence which an appellate court is obliged to undertake for itself[97], or is an opinion which is not fully reasoned. The functions of such a report, when there is in existence an adequate system for reporting of court proceedings[98], have been summarised helpfully in *Sloane*[99]:

> "An important function of a report under s 11 of the *Criminal Appeal Act* is to inform the Court of Criminal Appeal of any problems which might have emerged during the trial, which either do not appear on the face of the record, or which are imperfectly or ambiguously recorded.
>
> Another permissible and relevant function of such a report is its use, by a trial judge, to raise any matters of irregularity or otherwise, which may give cause for significant doubt in relation to a guilty verdict, and which again are not apparent upon a bare reading of the record.
>
> A third permissible reason for such a report is its provision, in response to a specific request from the Court of Criminal Appeal, in relation to any matter which may be of concern to it.
>
> Otherwise, in times where there is in existence an adequate system for court reporting, occasion for the provision of a s 11 report should only arise in exceptional circumstances. Its use in order to justify, or to explain a decision for which reasons should have been provided, is not such a circumstance."

113 In dismissing the appeal against conviction, no reference was made in the reasons of Simpson J to the opinion expressed by the trial judge. However, it was noted in that part of the reasons dealing with the appeal and cross-appeal in relation to sentence that the trial judge "held a strong view" that a jury, acting reasonably, ought not to have been satisfied beyond reasonable doubt of the

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96 *Ahmet* (1996) 86 A Crim R 316 at 323; *R v Garofalo* [1999] 2 VR 625 at 628-629 [44]; *JMV* (2001) 124 A Crim R 432 at 434 [6]; *Sloane* (2001) 126 A Crim R 188 at 189-190 [10]-[13]; *SI v The Queen* [2007] NSWCCA 181.

97 *R v Marziale* unreported, Court of Appeal of Victoria, 18 April 1996 at 34.

98 Section 39 of the *Criminal Procedure Act* provides for the recording of the evidence of witnesses in criminal proceedings.

99 (2001) 126 A Crim R 188 at 189-190 [10]-[13] per Wood CJ at CL.

applicant's guilt, and that an appeal against conviction had strong prospects of success[100].

114 It was also noted that, in his Honour's remarks on sentence, the trial judge had illustrated why the jury should have doubted the veracity of the complainant. First, the trial judge found that the complainant's evidence that the applicant never spoke during the assaults (which were said to have occurred when others were asleep in the room) departed from his past experience in relation to analogous sexual offences. Secondly, the trial judge considered that the applicant's account of his activities on 23 December 2006 contradicted the complainant's account. Thirdly, the trial judge referred to the lack of corroboration of the complainant. Finally, the trial judge doubted the complainant's account of the uncharged incident in 2001 when she was only four years of age. Simpson J observed that the trial judge's remarks reflected his view of the complainant's veracity, which differed from the view taken by the jury[101]. Her Honour also rightly deprecated the trial judge's expression of the view that the jury verdicts were unsafe, for the reason that this raised false hope and complicated the task of the Court of Criminal Appeal in relation to re-sentencing[102].

115 The concerns, underpinning the trial judge's opinion, expressed in his judgment granting bail, did not depend on any advantage from seeing and hearing the witnesses because, as already mentioned, the trial judge found the applicant to be an honest witness and found the complainant to be a compelling witness. The trial judge's opinion was based on his assessment of the evidence, the very task which it was for the Court of Criminal Appeal to undertake independently for itself. In these circumstances there was no error in relation to the way in which Simpson J dealt with the trial judge's opinion.

Evidence by video recording

116 Finally, the failure of the Court of Criminal Appeal to view the video recording was said to be an error, more particularly as an appellate court can and often will view such a video recording when it is tendered as an exhibit at a trial[103]. Simpson J expressed the tentative view that viewing the video recording would have meant assessing a portion of the evidence on a different basis from

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100 *SKA v The Queen* [2009] NSWCCA 186 at [141] and [210].

101 *SKA v The Queen* [2009] NSWCCA 186 at [152].

102 *SKA v The Queen* [2009] NSWCCA 186 at [210]-[211].

103 *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458 at 472 [56], 494 [192]; 224 ALR 1 at 16, 47; [2006] HCA 1.

the rest of the evidence: "It would create an imbalance for the appellate court to be exposed to the visual image and oral recording of one witness and not others."[104] However, it is unnecessary to deal in any detail with submissions made on this branch of the applicant's argument. This is because there was no identification by the applicant's counsel of any forensic purpose to be served by having the Court of Criminal Appeal view the video recording, a course which defence counsel had not urged upon the Court.

117 As to the related complaint – that the Court of Criminal Appeal took into account evidence not before the jury by having an unedited transcript of the Bagnall interview – it is sufficient to observe that the only use made of the unedited transcript of the video recording was to illustrate a speech pattern of the complainant's which was palpable, in any event, in other evidence given by her. Special leave should be refused in respect of grounds 1 and 5 of the amended draft notice of appeal.

Orders

118 The following orders should be made.

1. Special leave to appeal be refused in respect of grounds 1 and 5, and be granted in respect of grounds 2, 3 and 4, of the amended draft notice of appeal dated 13 August 2010.

2. The appeal be treated as instituted, heard instanter and dismissed.

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104 *SKA v The Queen* [2009] NSWCCA 186 at [108].

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