

HIGH COURT OF AUSTRALIA

BRENNAN CJ,
GAUDRON, McHUGH, GUMMOW AND KIRBY JJ

COLIN VAUGHAN PALMER

APPELLANT

AND

THE QUEEN

RESPONDENT

Palmer v The Queen (M41-1997) [1998] HCA 2
Date of Order: 2 December 1997
Reasons for Judgment Delivered: 20 January 1998

ORDER

- 1. Appeal allowed.*
- 2. Set aside the order of the Court of Appeal and in lieu thereof grant leave to appeal to that Court, allow the appeal and quash the appellant's convictions and enter verdicts of acquittal in their place.*

On appeal from the Court of Appeal of the Supreme Court of Victoria

Representation:

R K Kent QC with M R Simon for the appellant (instructed by Jonathan Kemp & Associates)

W H Morgan-Payler QC with G J C Silbert for the respondent (instructed by P Wood, Solicitor to the Director of Public Prosecutions)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Palmer v The Queen

Criminal law – Sexual offences – Cross-examination of accused as to whether complainant had motive to lie – Relevance – Inviting jury to speculate – Risk of reversal of onus of proof – Whether judge's directions capable of neutralising prejudicial effect of cross-examination.

Criminal law – Sexual offences – Unsafe and unsatisfactory verdict – Alibi.

1 BRENNAN CJ, GAUDRON AND GUMMOW JJ. In June 1994 the complainant, whom we shall call "L", was aged 14. At that time, she was recuperating at home in Camberwell, a Melbourne suburb, after an operation. She lived with her mother who was in daytime employment, so L was left at home during the day. The appellant, aged 34, was a process server who had met and become friendly with the mother two years before. His duties as a process server took him to various suburbs of Melbourne. He made an offer to L's mother that he would pick up L at home and take her out for a drive. L's mother agreed to that suggestion.

2 On Wednesday 22 June 1994, the appellant called at the home and took L with him into town. He took her to lunch at a restaurant which he frequented close to his office. Later in the day he took her home. The following day, Thursday 23 June, he called at the home again and spent some time there. On Tuesday 28 June he again called and took L with him on his rounds. He did the same on Thursday 30 June and on Friday 1 July. On that afternoon she went with him to his house and assisted with some office work for which he paid her \$20. L gave evidence that on these occasions the appellant had engaged in sexually suggestive conversation or conduct. The appellant's evidence denied that he had done so.

3 There is a conflict of evidence as to what happened on Monday 4 July. L alleged that the appellant called for her and took her with him on his rounds until about 6.00pm that evening when, in a lane next to a church in Richmond, he stopped the car, put the seat back and said that he wished to have a sleep. Her evidence as to what happened from that point onwards was the foundation of the prosecution case on an indictment containing 11 counts of sexual offences. We take a description of her allegations from the judgment of Brooking JA in the Court of Appeal of Victoria:

" Later, when it was dark, he pulled up in a lane beside a church and said he wanted to have a sleep and wound his seat back and asked her to do the same, which she did. He appeared to sleep for a while and then, according to the girl, there occurred the first of the incidents which led to the applicant's being charged with seven counts of committing an indecent act with a child under the age of 16 and two counts of digital rape, together with two alternative counts of taking part in an act of sexual penetration with a child aged between 10 and 16.

According to the complainant, after taking her hand and sucking her fingers the applicant began rubbing one of her breasts through the clothing. She tried to move away and he desisted. That incident was the subject of count 1. She moved to the far side of the seat and he drove off.

After driving off he rubbed both breasts continuously or repeatedly through her clothing, although she told him more than once to stop.

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Ultimately he was handling her naked breasts. This was the subject of count 2.

Count 3 concerned the applicant's act, according to the complainant, of taking her hand and placing it on his thigh and trying to place it in his crotch. She moved her hand away.

He drove to his home and they went inside and, continuing the complainant's account, he offered alcohol to her to drink, which she refused. He led her into the study and sat down and pulled her down so that she was sitting on his knees. She was resisting. He put his hand under her dress and touched her thigh but, by using her elbow, she stopped him touching her between the legs. She tried to move away. He had his other hand under her jumper. He kissed her and bit her lower lip. These events were the subject of count 4.

She got up and telephoned her mother. He said, 'You'd better not tell mummy what's going on, she might not like it.' While she was telephoning he was putting his hands up her dress. That is the subject of count 5.

After making the telephone call she walked towards the door. He came up behind her and put his hands around her from behind. She was shaking and he told her that she was horny. He walked her down to the bedroom and sat her down on the bed and pushed her down. He left her in order to pull down the blinds and she got up and walked towards the door but he took her back to the bed and lay partly on top of her, kissing her. He completely unbuttoned her dress and sucked her breast and bit her nipple. This gave rise to count 6.

Then, on two separate occasions, the two rapes alleged, he inserted two fingers into her vagina. She rolled off the bed and stood up and he said, 'I could fuck you silly right now.' He put her hand on his crotch, making her feel his erection, and this gave rise to count 11, the seventh and last indecent act count.

Later, she said, he drove her home but did not come inside the house."

- 4 L's mother gave evidence that the appellant had rung her at work to obtain her permission to take L out on 4 July, that L had later called in to bring her a piece of cake, that after trying to ring L at home late that day she (the mother) arrived home at about 7.00pm, telephoned the appellant's home and left a message on his answering machine asking where L was and then, about 45 minutes later, she received a call from L who said she was at the appellant's house. The mother said that L arrived home at 9 or 9.30pm that evening, went straight past the mother's

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bedroom door into the shower where she stayed. When her mother knocked on the door, L told her to go away until ultimately L went to sleep in the shower. Then her mother woke her and L went to bed. She did not tell her mother what the appellant had allegedly done.

5 The appellant gave evidence. He firmly denied that he was in the company of L at any time on 4 July. However, the jury convicted him on six counts of wilfully committing an indecent act with a child under 16, namely, counts 1, 2, 4, 5, 6 and 11 and on two counts of intentional sexual penetration of L by introducing his finger into her vagina without her consent, namely, counts 7 and 9. Count 7 and count 9 were alternatives of counts 8 and 10 respectively. The jury thus found the appellant guilty of having done each of the acts alleged by L against him except the act alleged in count 3. The Court of Appeal dismissed the appellant's applications for leave to appeal against conviction and sentence. Special leave to appeal to this Court was granted in order to consider the propriety of a line of cross-examination which the Court of Appeal held to be permissible in the present case. The grant of special leave being unrestricted, the appellant raises that question and also the question whether the conviction was unsafe and unsatisfactory.

Cross-examination of the appellant

6 In the course of L's cross-examination by counsel for the appellant, the following exchange occurred:

"All this bloke had done is take you out and for some reason you have taken a fancy to him, isn't that right?---No, he took me back to his place.

This is some sort of pay back on him for some indiscretion he doesn't even know about, isn't that right?---No, I am not lying."

When the appellant gave evidence, his cross-examination by counsel for the prosecution commenced thus:

"Mr Palmer, as I understand it, from the questions that were put to [L] yesterday, you would really, it seems, be at an absolute loss to think as to why she should make up the allegations?---You are asking me what - - -

Yes?---I have no idea why she has said what she has.

You would have heard Mr Montgomery mention to her yesterday, 'It was a pay back for some indiscretion he does not even know about'; did you hear Mr Montgomery say that to [L]?---I think he did, yes.

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So far as you are concerned there is absolutely nothing about your behaviour towards [L] in the past prior to the 4th July, or at all, that would account for her making such an allegation against you?---I have, as I said before, under question from Mr Montgomery, in reference to this - no, I have done nothing.

So even with the benefit of hindsight, or as in the time that has elapsed from the time you were questioned by police - which is about August of 1994 - until now, you are still at a loss?---Yes."

At the end of a lengthy cross-examination the following occurred:

"I suggest what [L] said you did and said to her over the days leading up to and on the 4th of July is exactly how it happened?---I am telling you it is not.

At this stage, as you sit there today, you can't think of any reason, or anything you have done to her - - -?---No, I haven't.

As to why she would make this up?---I am saying that to you, that is correct."

No objection was taken to these questions at the time, but the asking of them gave rise to one of the grounds of appeal to the Court of Appeal¹. Brooking JA, speaking for a unanimous Court of Appeal, rejected this ground, saying:

" Mr Kent submits that this cross-examination of his client was impermissible, but, whatever the position might have been had the complainant herself not been cross-examined about motive to misrepresent (and as to this I express no opinion), the applicant had chosen to raise that matter and cannot complain that it was taken up by the Crown Prosecutor when she came to cross-examine the applicant. Again, I might interpolate, there was no objection taken at the trial to this cross-examination."

The question which had been put to L in cross-examination attributed to her a motive to lie, namely, "pay back" or revenge. Cross-examination is permissible and evidence is admissible to establish that a complainant has a motive to make and persist in false allegations. Thus it is said in *Wills on Circumstantial Evidence*²:

1 Ground 2: "The trial of the applicant miscarried in that the applicant was cross examined by the prosecutor ... as to whether the complainant had any motive to make her allegations."

2 6th ed (1912) at 256-257; *Taylor on Evidence*, 12th ed (1931), vol 2, par 1442.

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" It is frequently therefore of the highest importance to investigate the motives of the complainant, and to ascertain whether they are such as may have led to the institution of a false charge. The just course of inquiry in such circumstances was thus laid down by Mr Justice Cresswell. 'The jury,' he said, 'had nothing to do with the prosecutor's motives except so far as if it should appear that there was any motive for the prosecution of an unworthy character made out, it would then be their duty to watch such a case much more narrowly than one in which no such motive appeared. Even in that case, however, if the evidence satisfied them of the truth of the charge, they had no right to look at the motives that had induced the prosecutor to prefer it, but were bound to say that the accused person was guilty'³".

In *R v Uhrig*⁴ Hunt CJ at CL said:

"A motive to lie where it does exist is a very relevant factor in judging a witness's credit. It will almost inevitably have substantial probative value in relation to the issue of credit, and so will pass the test posed by s 103 of the *Evidence Act* 1995 for admissibility. If the alleged motive is denied by the witness, other evidence may be led to rebut that denial in accordance with s 106."

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It is one thing to permit cross-examination of a complainant in order to elicit, if possible, a motive to lie. It is another thing to permit cross-examination of an accused to show that an accused cannot prove any ground for imputing a motive to lie to the complainant. A complainant knows whether he or she has a motive to lie and, as a motive to lie is a fact that may be proved to impeach the complainant's credit, the complainant may be asked about it. And evidence may be given by other witnesses of events from which such a motive may be inferred⁵. But the fact that an accused has no knowledge of any fact from which a motive of the kind imputed to a complainant in cross-examination might be inferred is generally

3 *R v Coyle* (1851) 34 CCC Sess Pap 725.

4 Unreported, Court of Criminal Appeal (NSW), 24 October 1996 at 16-17.

5 *R v Yewin*, noted in *Harris v Tippett* (1811) 2 Camp 637 at 638-639 [170 ER 1277 at 1278]; *Thomas v David* (1836) 7 Car & P 350 [173 ER 156] considered in *R v Cargill* [1913] 2 KB 271 at 275; *Attorney-General v Hitchcock* (1847) 1 Ex 91 [154 ER 38]; *Hall v Marchant* [1914] St R Qd 174 at 179; *R v Shaw* (1888) 16 Cox CC 503. This is an exception to the general rule that a witness' evidence on a question going only to credit cannot be contradicted by other evidence: *Piddington v Bennett & Wood Pty Ltd* (1940) 63 CLR 533 at 545; *R v Livingstone* [1987] 1 Qd R 38 at 41; *Smith v The Queen* (1993) 9 WAR 99 at 103-105.

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irrelevant. In general, an accused's lack of knowledge simply means that his evidence cannot assist in determining whether the complainant has a motive to lie, but if the facts from which an inference of motive might be drawn are facts that the accused would know if they existed, his lack of knowledge could be elicited to disprove those facts.

- 8 If it were permissible generally to cross-examine an accused to show that he has no knowledge of any fact from which to infer that the complainant has a motive to lie, the cross-examination would focus the jury's attention on irrelevancies, especially when the case is "oath against oath". In such a case, to ask an accused the question: "Why would the complainant lie?" is to invite the jury to accept the complainant's evidence unless some positive answer to that question is given by the accused. As Gleeson CJ, speaking for the Court of Criminal Appeal of New South Wales, said in *F*⁶:

"the 'central theme' of the case, according to the trial judge, could be found in the question, 'Why would the complainant lie'? That is a question, often left unspoken, which usually hovers over cases of this nature. ... Whilst that question, sometimes spoken, sometimes unspoken, is often of great practical importance, it is never 'the central theme' of a criminal trial. At a criminal trial the critical question is whether the Crown has proved the guilt of the accused person beyond reasonable doubt. Just as the law does not require the Crown to prove a motive for the criminal conduct of the accused, the law does not require the accused to prove a motive for the making of false accusations by a complainant."

A similar view underlies what Pincus JA said in the Court of Appeal of Queensland in *R v G*⁷:

"for a judge to give a direction implying that, ordinarily, a young complainant in a sexual abuse case is unlikely to invent and adhere to the allegations is difficult to reconcile with the direction (which the learned trial judge gave) that it is dangerous to act on such a complainant's uncorroborated evidence."

6 (1995) 83 A Crim R 502 at 511-512.

7 [1994] 1 Qd R 540 at 545-546.

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The propriety of questioning the accused about his lack of knowledge of any reason why a complainant should lie was considered by Sperling J in the Court of Criminal Appeal of New South Wales in *R v E*⁸:

"we are dealing here with a case where there is no direct evidence of an actual motive to lie, nor evidence from which a specific motive to lie could reasonably be inferred. To ask, 'Why would he or she lie?' in such a case is to invite the jury to speculate as to what might be possible motives for lying and to assess their likelihood. That is not to try the case on the evidence, but to speculate concerning unproven facts. The absence of evidence of a motive for lying and of a plausible explanation for lying is not proof that there was no motive for lying. Yet to pose the question at all is to give legitimacy to that method of reasoning and to that conclusion. ...

Secondly, the question is unfair to the accused. How can the accused or his counsel be expected to see into the mind of the complainant, and be held accountable for failing to discern whatever motive there may be for a false story? ...

Thirdly, the effect of the question is to reverse the onus of proof. The question implies that, unless the jury is satisfied that the complainant is a liar, they should accept the complainant's evidence and convict."

The third observation may overstate the effect of the question in a particular case, especially if the trial judge gives the jury a direction to the contrary. A firm and clear direction from the trial judge may prevent the impropriety of asking the question from causing justice to miscarry. Nevertheless, as the question is irrelevant to any issue in the case, it ought not be asked. As Hunt CJ at CL pointed out in *R v Uhrig*⁹, to ask the question "Why would the witness lie?":

"invites the jury to speculate ... to the conclusion that, unless they are satisfied by the accused that the witness has a motive to lie, they should accept the evidence of that witness and convict.¹⁰ In my view, that danger of such illegitimate speculation is a sufficient reason for saying that the rhetorical question should not be raised in such a case."

8 (1996) 39 NSWLR 450 at 464.

9 Unreported, Court of Criminal Appeal (NSW), 24 October 1996 at 15-16.

10 *R v E* (1996) 39 NSWLR 450 at 464.

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9 A contrary view has been expressed by Callaway JA in the Court of Appeal of Victoria in *R v Rodriguez*¹¹:

" It is true that there is no onus on the accused to prove a motive for the complainant's allegations. It is also true that absence of motive cannot, in cases like these, be inferred from absence of evidence of motive. But neither of those heresies is necessarily embraced when a jury is invited to ask themselves the question 'Why would the complainant lie?' in the course of assessing her or his credibility. Other things being equal, and that is an important qualification, the complainant's account is more likely to be true if a motive or possible motive for lying cannot be discerned and less likely to be true if it can be."

With respect, a complainant's account gains no legitimate credibility from the absence of evidence of motive. If credibility which the jury would otherwise attribute to the complainant's account is strengthened by an accused's inability to furnish evidence of a motive for a complainant to lie, the standard of proof is to that extent diminished. That is the converse of the proposition stated by Cresswell J in the case cited by Wills¹² where his Lordship acknowledged that proof of a motive to lie weakened a complainant's credibility. The correct view is that absence of proof of motive is entirely neutral.

10 It is necessary to distinguish between cross-examination of a witness as to the motive of that witness to lie and cross-examination of another witness designed to show that that witness does not know of any fact from which to infer that the first witness had a motive to lie. The distinction was referred to in the context of a criminal trial by Hunt CJ at CL in another passage from his judgment in *Uhrig*¹³:

" What this Court said in *Regina v F* and in *Regina v E* should not be interpreted as excluding arguments being put to the jury, by either counsel or the judge, relating to the validity of the motive to lie which has been asserted in relation to a witness in the particular case. That is so notwithstanding that there is no requirement for the accused to prove such a motive, although in many such cases where the evidence of that witness is vital to the Crown case it would be appropriate for the judge to direct the jury that, even if they reject the motive to lie put forward by the accused, that does not mean that the witness is necessarily telling the truth, and to emphasize that the Crown must

11 Unreported, Court of Appeal of the Supreme Court of Victoria, 13 June 1997 at 2.

12 fn 2.

13 Unreported, Court of Criminal Appeal (NSW), 24 October 1996 at 16-17.

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still satisfy them that the witness is telling the truth. I believe that it is necessary for such a distinction to be stated expressly, in order to avoid skilful advocates attempting to persuade trial judges that a necessary consequence of this Court's decisions in those two cases is that arguments relating to a motive to lie are excluded in every case. That is not a necessary consequence at all."

11 In our opinion, the view adopted in Queensland and New South Wales is correct in principle. In the present case, although counsel for the appellant in cross-examination of the complainant made it quite clear that the appellant had no known basis for alleging a "pay back" motive, counsel for the prosecution sought to capitalise on that concession. Presumably by reason of the view current in Victoria, no objection was taken to the cross-examination by counsel for the prosecution and the trial judge did not intervene to prevent her from pressing the question and, at the end of the cross-examination, repeating it. The effect of that cross-examination must have been significant. The objectionable questions which opened the cross-examination were put immediately after L had manifested in the presence of the jury her rejection of the appellant's evidence of his innocence. The trial judge had sent the jury out while he instructed L not to cry or to do anything to attract the jury's attention. Then the jury were brought back and the prosecutor opened her cross-examination with the questions that were designed to highlight the fact that the appellant had no ground for imputing to L a motive to lie.

12 However, the Court of Appeal held that the direction given by the trial judge to the jury was sufficient to prevent any miscarriage of justice. Brooking JA said:

" I do not think that there was any irregularity in the cross-examination of the [appellant]. In any event, quite apart from the matter of failure to object, the series of directions given by the trial judge makes it impossible to say that the applicant may have been prejudiced in that, as Mr Kent contends, the jury failed to appreciate the difference between absence of proved motive and proved absence of motive, or led to believe that the applicant was obliged to prove a motive, or led into some other similar error."

His Honour set out portions of the trial judge's charge to the jury in which the judge alerted the jury very clearly to the fact that human beings tell lies. Amongst other things, the trial judge said:

"Of course for the accused's part this is nothing more than the development of an invention that comes about for some reason not discernible, whether as a result of neurosis or whatever it might be on the part of this young child.

...

10.

... It comes down, as is quite obvious, to whether, in the end, you are prepared to be satisfied beyond reasonable doubt to act on [L's] sworn statement that it was the accused who did the things she said were done to her. Of course, it is a question as to whether you are prepared to be confident enough to find beyond reasonable doubt on the basis of all the evidence, including the accused man's evidence, whether those things happened at all. But if you do think they happened and that she was recounting an actual experience or set of experiences, whether she can be relied on in her statement that it was the accused. He says that it simply was not and for some reason that he cannot fathom, he has simply been picked by her. Perhaps she wanted to punish her mother for entrusting her to this stranger, this process server. You can think of dozens of theories, I suppose, as to why it might happen.

You are dealing with this particular girl, who was 14 at the time. You have seen her in the witness box, you have seen her level of commitment now, her emotional state about it all, now in 1996. And it comes down, as I said earlier, not as to whether the accused probably did it. You may say, 'Well, he probably did do it.' - I am not suggesting you do, I am merely referring to the approach that is open to you. You may say, 'Well, he very probably did do this, but, in the end, on looking at the whole of the evidence; in particular, the material he has put forward, and looking at the whole evidentiary picture as one piece; I say that it just hasn't been proved beyond reasonable doubt; I've got a lurking doubt about it.' If that is your state of mind, the law says you must give him the benefit of it and find him not guilty.

If, on the other hand, having scrutinised the evidence with the utmost care, you are thoroughly convinced beyond reasonable doubt that it is reliable, then it is your duty to say so and find him guilty of those counts that you think have been made out."

- 13 Although these and similar directions quoted by Brooking JA correctly instructed the jury on the issues for their determination and the onus and standard of proof of guilt, we doubt whether the directions were capable of neutralising the prejudicial effect of the opening and closing questions of the cross-examination of the appellant. Having acknowledged that he could offer no reason to impeach the credit of L who had been showing her disbelief in his denials in evidence in chief, his protestations of innocence may well have rung hollow in the jury's ears. In our opinion, it is necessary to allow the appeal on the ground that the asking of the questions in the circumstances of the case may have occasioned a miscarriage of justice. If that were the only ground of appeal, the Court would order a new trial. But a further ground remains for consideration.

11.

Unsafe and unsatisfactory

- 14 The prosecution case did not depend solely on L's evidence. That evidence was supported by the evidence of her mother and particularly by the evidence of the mother's leaving a message on the appellant's answering machine on the evening of 4 July, of the call from L about 45 minutes later and of L's appearance and conduct when she arrived home that night. The appellant's defence was, in substance, an alibi. He says he was delivering process on the day and at the times when the events to which L deposed allegedly occurred. If the alibi evidence is so cogent as to engender in any reasonable mind a doubt of the accused's guilt, the conviction must be quashed and a verdict of acquittal entered however cogent the prosecution evidence would otherwise be. To appreciate the significance of the defence evidence, it is necessary to refer to the practice which the appellant adopted in producing affidavits of service of process and the course of the police investigation into L's complaint.
- 15 During the relevant period, the appellant was engaged in serving summonses for rates which the City of Northcote was seeking to recover from some of its ratepayers. He had a large number to serve in substantially the same area. Before he served a summons, he took a photocopy of it. When he served a summons, he took a note of the date, the time, the person served and the place of service. The note was subsequently used by his wife (from whom he was then temporarily separated) or himself to fill out the particulars in the affidavits of service. One copy of the affidavit was sworn before a Justice of the Peace or a sergeant of police and returned to the appellant's employer who would file it in the Court in which the summons was returnable. A photocopy of the affidavit was made (either before or after the original affidavit was sworn) and was retained by the appellant in his records. However, cross-examination of the appellant showed that his system was often slipshod. It appears that on 4 July the appellant swore a number of affidavits of service relating to the service of summonses on 1, 2 and 3 July, on 6 July he swore affidavits of service relating to the service of summonses on 5 July, but he did not swear the affidavits of service relating to the service of summonses on 4 July until 8 July. He explained, by reference to the different handwriting on the last-mentioned affidavits, that they had not been written up ready to be sworn on 6 July. At that time, L had made no complaint against him.
- 16 After L made her complaint to the police in August 1994, Detective Sergeant Coughlin went to the appellant's house at about 8.30am on 26 August 1994. The appellant accompanied Coughlin to the police station where, after a conversation between them, they returned to the house at about 12.45pm. Coughlin then seized the appellant's diary, a Sharp organiser and a box containing summonses on which the details of service were written. These were in fact copies of the affidavits of service. There were hundreds of these copies of affidavits, some of which related to service of summonses on 4 July 1994 and others to service of summonses on

other days. They were tendered in a bundle at the trial¹⁴ and the bundle included a schedule evidently prepared by the police which recorded the names of the defendants who had been served and the time and place of service. The police interviewed those defendants whom they could find who had been served with process allegedly on 4 July. None was able to confirm the date of service but equally none denied that he or she had been served. The manager of the collection agency which employed the appellant gave evidence of the response of many of the defendants who had been served with process by the appellant. If the affidavits of service were true, as the appellant swore they were, he could not have engaged in the conduct of which he was convicted.

17 The appellant's evidence as to service of the summonses on 4 July and the allegations made by L are mutually inconsistent. In cross-examination, the prosecutor suggested to the appellant that the summonses which he said he served on Monday 4 July had in fact been served on Sunday 3 July. That hypothesis, or alternatively the hypothesis that the 4 July summonses were served at different times from those recorded in the copy affidavits, was accepted by Brooking JA as an hypothesis which the jury were entitled to accept. Hayne JA agreed and added that it was open to the jury to convict on the footing that L may have made a mistake about the date. Southwell AJA agreed, adding that he was troubled by some of the alibi evidence as to the delay in swearing the affidavits of service relating to 4 July.

18 The case was fought entirely on the footing that the alleged offences occurred on 4 July. L was able to identify the date quite clearly. She gave this evidence:

"HIS HONOUR: How do you fix the date as being 4 July rather than some other date in July?---Because I remember that date, and American Independence Day helps me to remember that too, actually, but I remember that day. I know it was definitely the 4th, it was a Monday, I think, 4 July."

In cross-examination, when she was asked about a version of events that she had given to a school friend, Megan, counsel put it to her that in that version the events took place on a different day, but L gave the reply:

"Yeah, but I know - whether I told her a different day or not, I know when it happened on, it happened on 4 July."

14 Other than one copy affidavit relating to service at 6.13pm on 4 July which had been missed by the police officers and which the appellant produced together with the original affidavit produced from the Magistrate's Court file.

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Moreover, the hypothesis that the events could have happened on a different day is inconsistent with the schedule prepared by the police recording affidavits of service of summonses on the days immediately following 4 July. The complainant could not have made a mistake which would be of any assistance to the prosecution case. If one looks at the schedule for 4, 5 and 6 July it appears that the appellant was engaged in serving process on each of those days in and around the areas of Thornbury and Northcote. Significantly, he was so engaged on 5 and 6 July as well as on 4 July in the serving of process at about 6.00pm. That time is significant because it is the time which L identifies as the time when the appellant was in the car next to the church, probably in Richmond. She said:

"we were definitely parked at 6 because he turned the radio on and I heard it on the radio."

19 There is also a record of the appellant's use of a credit card at a Caltex service station in Thornbury at 5.10pm on 4 July which is consistent with, though not conclusive of, his service of summonses in that area at the times stated in the affidavits of service. Leaving out of account the service which he first effected on 4 July (he was uncertain about the time of the service of that particular summons), the affidavits show that he served 29 summonses between 12.21pm and 9.18pm that day at places and at intervals that are inconsistent with his having committed the acts of which he was convicted.

20 It is possible, of course, that he fabricated the times or even the date of service of the summonses which he deposed to having served on 4 July. But that hypothesis postulates a fabrication between 4 July and 8 July when he swore the affidavits before any complaint had been made by L. Since the police established that the defendants had in fact been served at some time, the hypothesis must be that he served those affidavits on Sunday 3 July though no defendant recalled having been served on a Sunday.

21 There are some aspects of L's evidence that might engender some doubt about accepting her allegations at face value. Her description of the physical movements of the appellant in touching her breasts as he drove the car through the city is puzzling and her confiding to her friend Megan that she thought the appellant to be "cute" does not sit easily with the distaste L expressed in evidence for the appellant's conduct. However, these are matters which, if they stood alone, the jury would have had the best opportunity of evaluating and, if they thought fit, discounting for one reason or another. But the stark inconsistency between L's evidence and the alibi evidence which is based on the copy affidavits of service in the circumstances in which they were produced is not so easily discounted. Moreover, the summing up did not draw the jury's attention to the necessity to be satisfied beyond reasonable doubt that there was no truth in the alibi evidence before they could convict.

22 In our opinion, it was not open to the jury to convict in the face of the alibi evidence. So far as that evidence could be tested, it was confirmed. It was not produced by the appellant in immediate response to the police informing him of L's allegation but by police seizure of his records in consequence of his explanations of his duties as a process server. The apparent delay in the swearing of the affidavits relating to 4 July was satisfactorily explained by the appellant wife's delay in filling out the forms. The alibi evidence could not but engender a doubt that it might be true. And that is sufficient to require an acquittal.

23 We would allow the appeal, set aside the order of the Court of Appeal refusing leave to appeal and in lieu thereof grant leave to appeal to that Court, allow the appeal and quash the convictions and enter verdicts of acquittal in their place.

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24 McHUGH J. The order under appeal, made by the Court of Appeal of the Supreme Court of Victoria, dismissed the appellant's appeal against his convictions on various charges of sexual assault. He contends that his convictions should be set aside because he was improperly cross-examined as to whether he knew of any reason why the complainant should concoct the charges against him. He also contends that, on the whole of the evidence, the convictions are unsafe and unsatisfactory. The principal questions in the appeal are:

- (1) whether, on a charge of sexual assault, the accused can be questioned as to whether he or she knows of any reason why the complainant should fabricate the charge; and
- (2) whether the Court of Appeal of the Supreme Court of Victoria erred in finding that the appellant's convictions were not unsafe and unsatisfactory.

25 I would answer both questions, Yes.

26 In my opinion, the questioning of an accused person as to his or her knowledge of facts that could throw light on the complainant's motivation for fabricating a charge of sexual assault is relevant in determining whether the accused is guilty of the charge. Cross-examination of the appellant as to whether there was anything in his behaviour that would account for the complaints against him was therefore admissible. His first contention fails. However, on the whole of the evidence, the appellant's convictions are unsafe and unsatisfactory. The strength of the appellant's alibi was so great that it was not open to the jury to be convinced beyond a reasonable doubt that he committed the alleged offences on the date put forward by the Crown, a date that was central to the Crown case. The appellant's second contention therefore succeeds with the result that his conviction must be quashed and acquittals entered in respect of all charges.

The factual and procedural background

27 The appellant was presented for trial before the Melbourne County Court charged with seven counts of committing an indecent act with a child under the age of 16, two counts of rape and two counts of taking part in an act of sexual penetration with a child aged between 10 and 16. The offences were alleged to have been committed against the complainant on 4 July 1994. On that date the appellant was aged 34 and the complainant was a female, aged 14. The appellant pleaded not guilty to all counts.

The evidence for the prosecution

- 28 The appellant, who worked as a process server, was a friend of the complainant's mother and had agreed to spend time with the complainant while she was recuperating from an operation and her mother was at work. After the complainant was released from hospital in June 1994, the appellant visited her on six occasions. On the first of these occasions, he took her with him while he served some documents. Later that day he took her to lunch at a Chinese restaurant. On four of the following five occasions, he also took her with him while he served documents. The complainant assisted the appellant with the photocopying and stamping of summonses. On each of their outings, the appellant made suggestive comments and gestures. On a visit which took place on 23 June, the appellant told her that if she were 21, "I'd have you". He took her by the shoulders, pulled her down to his chest, and kissed her on the cheek.
- 29 On Monday 4 July, the appellant arrived at the complainant's house around noon. The complainant said that she was sure about the date because "American Independence Day helps me to remember". She left the house with the appellant to help him deliver some summonses. At about 1.30pm, the appellant took her to her mother's place of work in the Melbourne suburb of Richmond where the complainant handed her mother a piece of chocolate cake. The complainant then accompanied the appellant to a number of suburbs around Melbourne while he delivered summonses.
- 30 At around 5.30pm, the appellant said that he was tired and that he usually had a sleep at this time of day. He stopped the car in a laneway beside a church at 6.00pm; the complainant was able to identify the time because of a radio announcement. The appellant slept until 6.30 or 6.40pm. When he awoke he took her right hand, sucked her fingers and rubbed her arm and left breast through her clothes. The rubbing was rough and "hurt a lot". The complainant responded by bending down, putting her backpack on top of her lap and pushing herself into the corner of the car seat.
- 31 After the appellant re-commenced driving, he rubbed the complainant's breast. When they were near the Melbourne Casino she told the appellant "it was rough ... I definitely told him he was hurting me and I told him not to". The appellant had his hand inside her bra. He touched her so roughly that he nearly ripped her necklace. The appellant also placed the complainant's hand on his thigh and tried to put her hand on his crotch.
- 32 The appellant then drove her to his home where he offered her alcohol which she refused. After playing his answering machine, which contained a message from the complainant's mother, he led her to his study where, despite her resistance, he put her onto his knee. He put his hand under her dress and touched

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her leg and thigh. She prevented him from touching between her legs. He put his other hand under her jumper. When she tried to move away, the appellant pulled her towards him, kissed her and bit her lip.

33 The complainant told the appellant that she wanted to call her mother. He allowed her to do so but told her that she had "better not tell mummy what's going on, she might not like it". The complainant did not tell her mother what had occurred because she was scared and because she did not know what the appellant would do. While she was on the phone, the appellant tried to put his hands up her dress.

34 After the complainant finished the phone call, she started to walk towards the door. The appellant put his arms around her from behind. He told her that she was exciting and that she was horny. Despite her protests, the appellant then took her to his bedroom and pushed her on to the bed. When she got up to leave, the appellant sat her back down again. He kissed her, pushed up her jumper, unbuttoned her dress and sucked and bit her breast. She told him that he was hurting her. The appellant then rubbed the area between her legs on the outside, and then on the inside, of her underpants. On two occasions, the appellant digitally penetrated her vagina while she was on the bed. After the second of these occasions, the appellant said: "I could fuck you silly right now". The appellant then placed the complainant's hand on his crotch and moved her hand over his erection.

35 As I have said, the complainant's evidence concerning these matters was the basis of eleven charges of various forms of sexual assault.

36 After the incidents occurred, the appellant drove the complainant to her home but he did not go inside. On the way home, they stopped and picked up some dinner at McDonalds. When the complainant got home, she threw the McDonalds bag on her mother's bed and had a shower. She noticed blood in her underpants. Her vagina and breasts stung. She cried and then fell asleep while she was in the shower. Her mother woke her.

37 The complainant did not complain of any of these incidents until 18 August, over six weeks after they had occurred. She said that she did not tell her mother when she returned home on 4 July because she thought she "was overreacting and didn't need to mention it".

38 The complainant's account was supported in important respects by her mother who said that, on 4 July 1994, her daughter had delivered her a slice of chocolate cake at work. Before the cake was delivered, the appellant had phoned her and asked if he could take the complainant with him while he delivered summonses. She said that later on that day she had telephoned her home to speak

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to her daughter. There was no response as late as 7.00pm. She finally telephoned the appellant's house and left a message on his answering machine. The complainant's mother said that, at least 45 minutes later, she received a call from her daughter who said that she was at the appellant's house. Her daughter sounded agitated and evasive. The complainant's mother said that her daughter arrived home around 9.00 or 9.30pm and "flew past my bedroom door and threw a bag with some McDonalds on my bed". She confirmed the complainant's evidence that the complainant had fallen asleep in the shower and that she had woken her up. She said that her daughter "didn't - wouldn't talk".

The evidence for the appellant

39 The appellant gave evidence in his defence. He denied the complainant's allegations and said that, although the complainant and her mother were known to him, he had not been with the complainant on 4 July 1994. He claimed that no one accompanied him while he served summonses in the Melbourne suburbs of Thornbury and Fairfield throughout that day. He produced affidavits of service which showed that he had served process at regular intervals throughout the afternoon and evening of 4 July, the first at 12.21pm and the last at 9.18pm. He had a break between 1.30 and 3.53pm, when he drank coffee with one of the people he had served. He said that the affidavits of service had been written up by his wife from his records and that he had sworn them before a police officer on 8 July. Unless the jury were convinced beyond reasonable doubt that this evidence was false, they could not possibly have convicted the appellant. If the affidavits of service were correct, the appellant was engaged in serving process at all material times when the complainant alleged that the offences took place in the car when it was parked in a laneway beside a church and at the appellant's home¹⁵. Consistently with the affidavit evidence, the appellant could have committed the offences that the complainant said had occurred during the driving. But if the appellant could not safely be convicted of the offences alleged to have occurred in the laneway or at his home, he could not safely be convicted of any offences against the complainant.

40 The appellant also produced bank records which indicated that he had used an Eftpos card to purchase petrol from a service station in the Melbourne suburb of Thornbury at 5.10pm on 4 July. Witnesses called on the appellant's behalf verified the bank records and gave evidence relating to the nature of his work and the swearing of affidavits.

15 Between 5.30 and 9.30pm on 4 July, the affidavits of service verified service of process at 5.45, 5.52, 5.58, 6.02, 6.13, 6.18, 6.20, 6.50, 7.10, 7.45, 8.09, 9.02, 9.04 and 9.18pm.

The evidence and directions on the complainant's motivations for fabrication

41 During cross-examination, counsel for the appellant put to the complainant that she had told a friend that she had a crush on the appellant. Later, the following exchange took place between the appellant's counsel and the complainant:

"Q: This is some sort of pay back on [the appellant] for some indiscretion he doesn't even know about, isn't that right?

A: No, I am not lying."

42 When the appellant was being cross-examined, he was reminded of the above exchange. He was asked:

"Q: So far as you are concerned there is absolutely nothing about your behaviour towards [the complainant] in the past prior to the 4th July, or at all, that would account for her making such an allegation against you?

A: I have, as I said before, under question from [the appellant's counsel], in reference to this - no, I have done nothing.

Q: So even with the benefit of hindsight, or as in the time that has elapsed from the time you were questioned by police - which is about August of 1994 - until now, you are still at a loss?

A: Yes."

43 The issue was raised again towards the end of the appellant's cross-examination:

"Q: At this stage, as you sit there today, you can't think of any reason, or anything you have done to her - ?

A: No, I haven't.

Q: As to why she would make this up?

A: I am saying that to you, that is correct."

44 No objection was made by the appellant's counsel to this cross-examination.

45 In charging the jury, the trial judge gave directions which included the following:

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"It comes down in this case to a question of veracity, or truthfulness. It seems to me the ultimate question is 'Are you satisfied on the basis of all the evidence that you have heard that [the complainant] was truthful?'. Of course, you must ask yourselves whether she was accurate, but the gist of the dispute is not as to her accuracy so far as describing the events that she said happened to her, but as to whether she is telling the truth when she says they happened to her at the hands of the accused man.

It is axiomatic that human beings tell lies ...

...

That people tell lies is notorious and manifest, and that people tell lies at times without any discernible motive for them to do so, is also a matter of commonplace knowledge.

...

Now people do tell lies of that sort. I am not saying anything, let me reiterate, about this particular complainant ... but I simply draw your attention to the fact that it is known that people tell lies, and tell lies without any dishonourable motive. It may, of course, come from their psychological state; some sort of neurosis. Sometimes, teenagers tell lies about their parents and to their parents, perhaps based on a feeling of antipathy because of perceived neglect or disregard, or for all sorts of reasons. And it is incumbent on you to bear that simple truth in mind in assessing the evidence.

...

Of course, a person may give an account of events that is detailed and ostensibly very plausible. They may be describing a true incident, but for some reason, they may simply attribute that incident to the wrong person ... So there are all those things, and I am simply putting those as general considerations to bear in mind for the sake of being careful about the verdict that it is your responsibility to return.

...

... Of course for the accused's part this is nothing more than the development of an invention that comes about for some reason not discernible, whether as a result of neurosis or whatever it might be on the part of this young child.

...

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... The philosophy behind the criminal law, it is sometimes said, is that it is weighted in favour of accused persons for the sake of freedom of the individual in the community. It is a safeguard from being falsely convicted, and therefore it is better that nine guilty men escape than one innocent man should be convicted. It is obviously an appalling prospect that a man should find himself simply named by some person who is perhaps neurotic or psychologically ill or for some reason substituted him for somebody else, and made him the person who performed a series of acts that did occur but which he did not take part in and that he says he did not take part in and had nothing to do with it. Nobody said he had anything to do with it, until 18 August."

- 46 The jury convicted the appellant on all counts in the indictment except count three (committing an indecent act with a child under the age of 16) and counts eight and ten (taking part in an act of sexual penetration with a child aged between 10 and 16). Counts eight and ten were expressed as alternatives to two rape charges in the indictment on which the appellant was found guilty. Applications by the appellant for leave to appeal against his conviction and sentence were unanimously dismissed by the Court of Appeal of the Supreme Court of Victoria (Brooking and Hayne JJA, Southwell AJA) on 10 September 1996.

The relevance of questions addressed to an accused person about knowledge of a complainant's motivations for fabrication

- 47 Central to this appeal is the issue that was raised when the complainant was cross-examined about a potential motive for fabrication. She denied that she had made a false complaint because she wanted to "payback" the appellant for an unreciprocated "crush". The courses which were open to the Crown and the appellant to support or refute this denial necessarily depended on the proper characterisation of the question and answer dealing with the complainant's motivation for fabricating her allegations. If evidence concerning this issue is properly regarded as going solely to the credit of the complainant, two evidentiary rules would come into play.
- 48 First, the well established¹⁶ finality rule would apply. That rule stipulates that answers given by a party or witness in cross-examination regarding collateral facts such as credit must be regarded as final¹⁷. If that rule applied, neither the appellant nor any other witness could give evidence of facts that would rebut the

16 *Harris v Tippett* (1811) 2 Camp 637 [170 ER 1277]; *Attorney-General v Hitchcock* (1847) 1 Ex 91 [154 ER 38].

17 *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 at 545 per Latham CJ, 551 per Starke J; *Natta v Canham* (1991) 32 FCR 282 at 295.

complainant's denial that she had fabricated the complainant. However, there are exceptions to the finality rule. Probably the best known is that, if a witness denies in cross-examination that he or she has been convicted of an offence, the opposite party may tender evidence of the conviction¹⁸. Similarly, where the credibility of the witness is affected by a mental or medical condition, evidence as to that condition may be tendered¹⁹. Another exception is where the veracity of a witness has been attacked in cross-examination. In that case, evidence may be led concerning the witness's general reputation for veracity²⁰. Conversely, where a suggestion of bias on the part of a party or witness is denied by that party or witness in cross-examination, evidence may be led to establish the bias²¹.

49 Second, the "bolster rule" would apply. That rule stipulates that evidence is not admissible if it merely bolsters the credibility of a party or witness, whether the evidence is sought to be led in evidence-in-chief or cross-examination of another witness or in re-examination of the party or witness attacked²². Applied to this case, the bolster rule would prevent cross-examination of the appellant as to his absence of any knowledge of the complainant's motives for fabricating the charges.

50 Accordingly, if the issue of the complainant's motivation for fabricating her complaint is regarded as going merely to credit, her answer would be regarded as final under the traditional rules of evidence. It could not be contested by the appellant's counsel (the finality rule) or supported by her own counsel (the prohibition on bolstering). However, in my view evidence concerning the motive or lack of motive in the complainant for falsifying her complaint is admissible not only in relation to her credit but also in relation to the facts-in-issue in the case.

51 The line between evidence relevant to credit and evidence relevant to a fact-in-issue is often indistinct and unhelpful. The probability of testimonial evidence being true cannot be isolated from the credibility of the witness who gives that evidence except in those cases where other evidence confirms its truth either

18 *Bugg v Day* (1949) 79 CLR 442 at 465; see also *Evidence Act* 1958 (Vic), s 33.

19 *Toohy v Metropolitan Police Commissioner* [1965] AC 595.

20 *R v Watson* (1817) 2 Stark 116 [171 ER 591]; *R v Richardson* [1969] 1 QB 299.

21 *Thomas v David* (1836) 7 Car & P 350 [173 ER 156]; *R v Phillips* (1936) 26 Cr App R 17.

22 "[I]n general evidence can be called to impugn the credibility of witnesses but not led in chief to bolster it up" *R v Turner* [1975] QB 834 at 842.

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wholly or partly. Furthermore, the conclusions drawn from that evidence are necessarily dependent on the credibility of the deponent. Zuckerman has correctly described the distinction between evidence as to the credibility of witnesses and evidence as to facts-in-issue as productive of absurdity²³. Indeed, in some cases, the credibility of a witness may be of such crucial importance that it is decisive of the facts-in-issue, particularly where, as in the present case, the witness is a participant in the very facts-in-issue or the only eyewitness to them²⁴.

52 The rationale behind the credit and facts-in-issue distinction does not depend on logic. It "is based primarily upon the need to confine the trial process and secondarily upon notions of fairness to the witness"²⁵. It is rooted in the need for "case management"²⁶ rules. The distinction is regarded as necessary to prevent the trial of a case being burdened with the side issues that would arise if parties could investigate matters whose only real probative value was that "they tended to show the veracity or falsity of the witness who was giving evidence which *was* relevant to the issue"²⁷. It is for that reason, as Lord Pearce pointed out in *Toohey v Metropolitan Police Commissioner*²⁸ that "[m]any controversies which might ... obliquely throw some light on the issues must in practice be discarded because there is not an infinity of time, money and mental comprehension available to make use of them".

53 That being so, the evidentiary rules based on the distinction between issues of credit and facts-in-issue should not be regarded as hard and fast rules of law but should instead be seen "as a well-established guide to the exercise of judicial regulation of the litigation process"²⁹. This view is consistent with the statement of that formidable advocate and judge, Sir Hayden Starke³⁰, in this Court in

23 *The Principles of Criminal Evidence*, (1989) at 98.

24 See Ligertwood, *Australian Evidence*, 2nd ed (1993) at par 7.96.

25 *Natta v Canham* (1991) 32 FCR 282 at 298.

26 *Natta v Canham* (1991) 32 FCR 282 at 296.

27 *Toohey v Metropolitan Police Commissioner* [1965] AC 595 at 607 per Lord Pearce.

28 [1965] AC 595 at 607.

29 *Natta v Canham* (1991) 32 FCR 282 at 298.

30 See 97 CLR at iv and v.

*Piddington v Bennett and Wood Pty Ltd*³¹, where he accepted that the finality rule is "a rule of convenience, and not of principle". To elevate the finality rule and the prohibition on bolstering to fixed rules of law rather than rules of convenience would be a mistake, particularly as the finality rule has been strongly criticised.

- 54 In *R v Funderburk*³², the English Court of Appeal criticised the dependence of the finality rule on the determination of "collateral facts". The Court said³³:

"The difficulty we have in applying that celebrated test is that it seems to us to be circular. If a fact is not collateral then clearly you can call evidence to contradict it, but the so-called test is silent on how you decide whether that fact is collateral. The utility of the test may lie in the fact that the answer is an instinctive one based on the prosecutor's and the court's sense of fair play rather than any philosophic or analytic process."

In its Report No 26, *Evidence (Interim)* (1985) and Report No 38, *Evidence* (1987), the Australian Law Reform Commission pointed to the considerable potential probative value of evidence which is relevant only to contradict the testimony of another witness³⁴. The finality rule was criticised as "an artificial and inflexible limitation which may result in the court being misled"³⁵.

- 55 No doubt considerations of case management require that not all evidence going to the credibility of a witness should be admissible. Much of it, while relevant to the issues in a logical sense, has so little probative value with respect to those issues that it is impracticable to admit it. For reasons of convenience, it is necessary to maintain the rule that independent evidence rebutting the witness's denials on matters going to credibility is not ordinarily admissible. In this, as in

31 (1940) 63 CLR 533 at 551, citing *Christian J in R v Burke* (1858) 8 Cox CC 44 at 53.

32 [1990] 1 WLR 587; [1990] 2 All ER 482.

33 [1990] 1 WLR 587 at 598; [1990] 2 All ER 482 at 491.

34 Australian Law Reform Commission Report No. 26, *Evidence (Interim)*, (1985), vol 1 at 226; Report No 38, *Evidence*, (1987) at 105.

35 Australian Law Reform Commission Report No 26, *Evidence (Interim)*, (1985), vol 1 at 226.

25.

other areas of the law of evidence, a distinction exists between what is relevant³⁶ and what is admissible. In general, evidence of a relevant fact is excluded only when it infringes some policy of the law, one of which (even in civil cases) is that evidence of a relevant fact is not admissible if the probative value of that fact is so low that it cannot justify the time, convenience and cost of litigating its proof³⁷. If evidence going to credibility has real probative value with respect to the facts-in-issue, however, it ought not to be excluded unless the time, convenience and cost of litigating the issue that it raises is disproportionate to the light that it throws on the facts-in-issue.

56 The rigid distinction between credit and facts-in-issue and the rules predicated on that distinction should therefore be minimised by the adoption of a more flexible view as to when matters going to the credibility of a witness should be admitted as evidence probative of the facts-in-issue. Evidence concerning the credibility of a witness is as relevant to proof of an issue as are the facts deposed to by that witness. There is no distinction, so far as relevance is concerned, between the credibility of the witness and the facts to which he or she deposes. The credibility of evidence is locked to the credibility of its deponent. The truth of that proposition is in reality recognised by the rule that a witness can be cross-examined as to matters of credit. Because that is so, it is irrational to draw a rigid distinction between matters of credit and matters going to the facts-in-issue.

57 Thus, in *Piddington v Bennett and Wood Pty Ltd*³⁸, although the majority of the Court applied the finality rule to declare inadmissible evidence which sought to disprove an eyewitness's explanation of how he had come to be at the scene of an accident, Latham CJ³⁹ found such evidence to be relevant to a fact-in-issue and therefore immune from the operation of the finality rule. Relying on the decision

36 I use relevant in the sense explained by Sir James Stephen in his *Digest of the Law of Evidence*, 5th ed (1887) art 1 at 2:

"The word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other."

37 See *Evidence Act* 1958 (Vic), s 37(b).

38 (1940) 63 CLR 533.

39 Starke J was also in dissent.

in *Melhuish v Collier*⁴⁰, Latham CJ said⁴¹ that the question of admissibility was dependent on "whether the truth or falsehood of the fact of which evidence is sought to be given may fairly influence the belief of the jury as to a matter in dispute".

58 In this case, the complainant's motivation or lack of it for fabricating her allegations could fairly influence the belief of the jury as to the probability of the occurrence of the alleged offences. When a serious allegation is made against a person, one of the first inquiries most persons make in testing the truth of the allegation is to ask whether the person making the allegation has any motive for fabricating it. Any facts that suggest a motive are regarded as throwing light on the probability of the allegation being untrue. Conversely, where no facts suggesting a motive are known, the probability of the allegation being true is frequently enhanced. This is particularly so when the case depends, as it so often does in cases concerning sexual charges, on the complainant's word against the word of the accused.

59 In the ordinary course of events, people do not invent serious allegations against other persons. Even less frequently do they invent a serious allegation against a person and then perjure themselves in a court of law to support the allegation. Experience teaches of course that some people will concoct charges against other persons. But most people do not. Consequently, facts which show motivation for fabrication or the lack of it go to the probability of an issue. The fact that a person had⁴² or did not have⁴³ a motive is relevant in many criminal prosecutions. That is because motive or its absence throws light on the probability of whether an event occurred or was committed by the accused. Similarly, motive or its absence is often relevant as to whether the evidence of a witness is true.

60 In *R v Robinson*⁴⁴, the Court of Appeal of the Supreme Court of Victoria held that:

"while an accused person is not called upon to establish some motive for a complainant to make allegations of sexual assault, the fact that no sensible or

40 (1850) 15 QB 878 [117 ER 690].

41 (1940) 63 CLR 533 at 546.

42 See, for example, *Plomp v The Queen* (1963) 110 CLR 234.

43 See, for example, *R v Wallace* (1931) 23 Cr App R 32 at 33; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 565, 572, 595, 628.

44 [1996] 1 VR 402 at 409.

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acceptable motive could be put forward by the defence is not without significance. The jury may well have thought that it was fanciful to suggest that at a mature age the complainant, almost without reason, would have decided to concoct a detailed story of sexual abuse occurring some six years previously."

- 61 Furthermore, in many cases, particularly those concerned with sexual assault, an accused person can be asked whether he or she knows of any facts that would suggest a motive for concocting the allegation. I would regard the position as correctly stated by the Full Court of the Supreme Court of South Australia in *R v Leak*⁴⁵:

"In our view a witness ought not to be asked whether another witness is telling lies or has invented something. Any witness, of course, can be asked if what another witness has said is true. *He can be asked if he knows of any reason why the other witness should be hostile to him or should tell a false story about him.* But if he says that what the other witness has said is not true, he should not be asked to enter into that witness's mind and say whether he thinks the inaccuracy is due to invention, malice, mistake or any other cause. To do so is to ask him for opinion evidence and in our view the normal objections to that type of evidence apply." (my emphasis)

- 62 The fact that an accused knows of no facts suggesting a motive for fabricating a charge does not mean that there is no motive or that the evidence of the complainant is true. As the learned trial judge carefully explained to the jury in this case, a person may give false evidence for many reasons. But the accused is ordinarily the person in the best position to know whether any such facts exist. If the accused can give no evidence as to such facts, it increases the probability that there is no motive unless one accepts the view - which I do not think a court can act upon in the absence of empirical evidence - that most firsthand evidence involving a serious complaint against an accused person is concocted.

- 63 It must be acknowledged, however, that there are dangers in allowing the accused to be cross-examined as to his or her knowledge of facts suggesting motive. If the accused cannot suggest a reason, it may influence the tribunal of fact, consciously or unconsciously, to reverse the onus of proof. That is to say, it may lead the tribunal of fact to conclude that the inability of the accused to point to facts suggesting a motive for concocting the allegation suggests that he or she must be guilty - at all events in those cases where the accused cannot point to evidence contradicting the allegation except his or her denial.

45 (1969) SASR 172 at 173.

An indication of a reversal of proof can be remedied by directions given by the trial judge

64 The appellant submits that the prominence given to the lack of a known motive for fabrication in this case may have led the jury to conclude that his inability to suggest a motive meant that he was guilty and thereby brought about a reversal of the onus of proof. Two recent cases in the Court of Criminal Appeal of New South Wales lend support to his submission.

65 In *R v F*⁴⁶, the trial judge had directed the jury in terms which emphasised that the "central theme" of the trial was the ultimate credit and the acceptability or otherwise of the evidence given by the complainant. While recognising⁴⁷ that the question of why a complainant would lie was "a question, often left unspoken, which usually hovers over cases of this nature", the Court of Criminal Appeal held⁴⁸ that that question could never constitute the "central theme" of a criminal trial. The Court criticised the summing up, reiterating that the law does not require an accused person to prove a motive for the making of a false complaint⁴⁹.

66 In *R v E*⁵⁰, the evidence provided no basis for an assertion that the complainant might be lying. Sperling J, with whom the other members of the Court of Criminal Appeal agreed, held⁵¹ that, in the absence of specific evidence, asking why a complainant would lie "is to invite the jury to speculate as to what might be possible motives for lying and to assess their likelihood". His Honour said⁵² that such a question was impermissible because it was unfair to the accused, had the effect of reversing the onus of proof, and encouraged the jury to adopt a commonsense approach which was contrary to the rigour of the criminal law.

46 (1995) 83 A Crim R 502.

47 (1995) 83 A Crim R 502 at 511.

48 (1995) 83 A Crim R 502 at 512.

49 (1995) 83 A Crim R 502 at 512.

50 (1996) 39 NSWLR 450.

51 (1996) 39 NSWLR 450 at 464.

52 (1996) 39 NSWLR 450 at 464.

67 However, the approach of Sperling J has not been fully accepted in a number of cases. In *R v Uhrig*⁵³, Hunt CJ at CL, with whom the other members of the Court agreed, said that *R v F* and *R v E* "should not be interpreted as excluding arguments being put to the jury, by either counsel or the judge, relating to the validity of the motive to lie which has been asserted in relation to a witness in the particular case". His Honour, although recognising⁵⁴ that an accused need not prove such a motive and that often it will be appropriate for a judge to emphasise that the Crown must still satisfy the jury that the witness is telling the truth, said⁵⁵ that it was not a necessary consequence of these two decisions that arguments relating to a motive to lie are excluded in every case.

68 In *R v Rodriguez*⁵⁶, a case before the Court of Appeal of the Supreme Court of Victoria, Callaway JA said that only the most compelling reasons would lead him to assent to the proposition that a trial judge ought not to allow an issue to be raised at all where, in the words of the Court in *R v F*⁵⁷, that issue is often of great practical importance. His Honour also said⁵⁸ that, although there is no onus on an accused person to prove a motive for the complainant's allegations and an absence of motive cannot be inferred from absence of evidence of motive, "neither of those heresies is necessarily embraced when a jury is invited to ask themselves the question 'Why would the complainant lie?' in the course of assessing her or his credibility". While exhorting counsel and judges to handle the issue with care, Callaway JA stated⁵⁹, correctly in my opinion, that "[a] juror who was impermissibly interrogated as to his or her reasoning process would be entitled to say, 'The complainant may have had a motive to lie but I cannot see it and therefore I approach her testimony with more confidence than if I could see a motive'".

69 In my opinion, the view expressed by Sperling J in *R v E* is premised on an unrealistic view of jury deliberations. The speculation to which his Honour referred is an unavoidable and, I would venture to suggest, expected part of jury

53 Unreported, Court of Criminal Appeal of New South Wales, 24 October 1996 at 16-17.

54 Unreported, Court of Criminal Appeal of New South Wales, 24 October 1996 at 17.

55 Unreported, Court of Criminal Appeal of New South Wales, 24 October 1996 at 17.

56 Unreported, Court of Appeal of the Supreme Court of Victoria, 13 June 1997 at 24.

57 (1995) 83 A Crim R 502 at 512.

58 Unreported, Court of Appeal of the Supreme Court of Victoria, 13 June 1997 at 25.

59 Unreported, Court of Appeal of the Supreme Court of Victoria, 13 June 1997 at 25.

deliberations. To pretend otherwise would be to ignore the realities of the manner in which ordinary people reason and by which juries presumably accept or reject evidence in cases such as the present. The jurors are almost certain to ask themselves the question, why would the complainant invent this terrible allegation? That being so, it is better to give them directions on the matter. At all events, it is a course to be preferred to that of ignoring the process of reasoning that is almost certain to dominate the jury's discussion of the issues when the case comes down to word against word. Even if the law did not permit an accused to be cross-examined as to his or her knowledge of facts suggesting a motive, I think the proper administration of justice would nevertheless require a full direction along the lines given by the trial judge in this case. The need for such a direction is more important than ever having regard to the large number of cases of sexual offences coming before the courts. And once it is accepted that the jury must be directed on the subject, they should be permitted to hear whether the accused can suggest a motive for the complaint.

70 I do not think that allowing such cross-examination of the accused is contrary to this Court's decision in *Robinson v The Queen*⁶⁰. *Robinson* prohibits the trial judge from directing the jury, in assessing the credibility of witnesses, to refer to their interest in the outcome of the trial. To permit such a direction would unfairly burden the accused's case, since he or she invariably has the greatest interest in the outcome of the trial. To permit it would also undermine the presumption of innocence. But to allow the accused to be asked whether he or she knew of facts that would suggest a motive for concoction is not to undermine the presumption of innocence. As in other areas of the law of evidence, there is a risk that a jury may misuse the accused's answer and reverse the onus of proof. But that risk can be overcome by a proper direction, unlike the *Robinson* situation, where the effect of a direction concerning outcome is to undermine the onus of proof.

71 In my opinion, the Crown was entitled to cross-examine the accused as to whether he knew of any facts that would explain the complainant's allegation. It was entitled to do so because his failure to reveal any facts that would provide a reason for the complainant concocting her complaint might assist the jury to find that her evidence was true. The jury could more readily conclude that, in the absence of any suggested motive for concocting the charges, the evidence of the complainant should be accepted. Furthermore, the very full and fair directions of the trial judge ensured that the jury understood that inability of the appellant to suggest such a motive was far from conclusive evidence that the complainant's evidence was true.

60 (1991) 180 CLR 531.

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72 The learned trial judge was therefore correct in permitting cross-examination of the accused on this issue. Moreover, his directions dealt fully and fairly with the problems that can ensue from allowing such cross-examination. His Honour's directions overcame any danger that the jury might reverse the onus of proof. The learned judge made many references to the possibility of fabrication by complainants in sexual offences cases as well as to an array of possible motivations which might have influenced the complainant. In addition, his Honour carefully instructed the jury concerning the onus of proof in criminal cases. The jury could not have believed that the appellant was required to point to a motive for fabrication of the complaint or that he had to prove his innocence because he was unable to suggest a motive for fabrication of the complaint.

The verdict is unsafe and unsatisfactory

73 Although I would not uphold the appellant's appeal on the basis that he was wrongly cross-examined on the complainant's motive for fabrication or on the directions on that subject, in my opinion the convictions cannot stand because they are unsafe and unsatisfactory. The appellant produced affidavits of service that indicated that he had been engaged in serving process throughout the relevant time on 4 July 1994. Police inquiries made of persons allegedly served by the appellant on 4 July failed to reveal any witness who could challenge the accuracy of the appellant's alibi. Moreover, evidence was given concerning phone calls to the appellant's employer on 4 July from two people whom the appellant swore had been served by him on that day. Thus, evidence was adduced that a man named Busselman rang the appellant's employer at 1.04pm on 4 July and asked to pay the debt the subject of the summons by instalments. A man named Matthews also rang to request an extension for his payment on the basis that he had just retired, was an invalid pensioner, and was waiting for a superannuation cheque. This evidence did not contradict the complainant's evidence. But it did prove that at least the appellant had served two of the affidavits of service on or before 4 July. On any view, the alibi evidence of the appellant was cogent.

74 In the Court of Appeal, however, the learned judges raised the possibility that the alibi might have been manufactured. They commented that, if the appellant was guilty, he had a strong incentive to manufacture false documentary evidence for an alibi for 4 July. It is true that the appellant waited four days before swearing the affidavits of service. But if he was guilty, he had to gamble on the hope that, if the complainant was going to complain, she would not do so for some time and that he would be able to conceal the details of his manufactured alibi until it could not be effectively checked. If that gamble failed, his conviction would inevitably follow from his attempt to manufacture a false alibi. The appellant may not have heard of the legal doctrine of consciousness of guilt, but commonsense would have told him that the discovery of a false alibi, particularly one depending on perjured affidavit evidence, would be regarded as overwhelming proof that he was guilty.

It is enough to say, however, that it is impossible to conclude that the appellant's alibi was false unless one commences with the premise that the evidence of the complainant and her mother was correct and that he was guilty.

75 On the evidence it was not open to the jury to be convinced beyond a reasonable doubt that the appellant was guilty of the offences complained of on 4 July 1994⁶¹. It is true that the complainant's evidence, as it appears in the transcript, is very persuasive. It receives significant support from her mother's evidence concerning the delivery of the chocolate cake, the telephone call from the appellant's home, and the conduct of the complainant when she returned home on that night. That some incident affecting the complainant occurred on that night or some other night seems highly likely. But once the alibi evidence is taken into consideration, it was not possible for the jury to be convinced beyond reasonable doubt that the appellant sexually assaulted the complainant on 4 July.

76 Once the conclusion is reached that the alleged offences could not have taken place on 4 July, the Crown gains no comfort from the use of the phrase "on or about the 4th day of July 1994" in the indictment. The case was put to the jury on the footing that the events complained of occurred on 4 July, not on some date around 4 July. The date of 4 July was central to the allegation against the appellant. The case was fought on the basis that the offences occurred on that date. Given the apparent impressiveness of the complainant's evidence and the support for her evidence in her mother's evidence, the jury probably thought that, although the complainant and her mother were truthful witnesses, they were mistaken in asserting that the incidents to which they deposed took place on 4 July. But given the way the case for the Crown was fought, it would be a breach of the rules of natural justice to disregard their evidence as to the date of the incidents and a gross injustice to the appellant to hold that he must have committed those offences on some other day. No other date was alleged and he was not required to defend the charges on any basis other than that he sexually assaulted the complainant on 4 July 1994. On that basis, his convictions must be regarded as unsafe and unsatisfactory.

77 I would therefore allow the appeal and set aside the order of the Court of Appeal. In lieu thereof, I would grant leave to appeal to that Court, quash the convictions and enter verdicts of acquittal in respect of all counts in the indictment.

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

78 KIRBY J. This appeal comes, by special leave, from an order of the Court of Appeal of the Supreme Court of Victoria⁶². That Court unanimously refused leave to the appellant to appeal against his conviction of, and sentence for, sexual offences against L, the complainant. The appeal was argued on two issues. The first was that the Court of Appeal had erred in upholding, as permissible, certain cross-examination of the appellant concerning the reasons the complainant might have had to make false allegations against him⁶³. The second was that the Court of Appeal had erred in rejecting the argument that the jury's verdicts were unsafe or unsatisfactory⁶⁴, in the sense explained by the decisions of this Court⁶⁵.

79 Although it is usually convenient to deal first with specific complaints and to consider the unsafe or unsatisfactory ground at the end of appellate review, and although specific complaints may themselves sometimes conduce to a disquiet about the safety of the convictions, in the way that this appeal was presented it is logical to consider first the unsafe or unsatisfactory ground. If it is upheld, it carries the consequence that the conviction must be quashed and a verdict of acquittal entered. In that event, it would not be necessary to deal with the more difficult, but legally more interesting, first question. Success on that question would ordinarily carry no more than an order for a retrial unless, in exceptional circumstances, a retrial would be futile or unjust⁶⁶.

Suggestion that the verdicts were unsafe or unsatisfactory

80 The general factual background is stated in the reasons of Brennan CJ, Gaudron and Gummow JJ in terms which I accept. Save for reference to a few additional facts, necessary for considering the second question, I will not repeat what their Honours have stated.

81 The appeal now being before this Court without any relevant restriction on the grant of special leave, it is necessary for the Court to conduct its own independent review of the evidence, as required by authority. Acknowledging the constitutional role of the jury and the advantages which they enjoy in hearing and

62 *Palmer v Director of Public Prosecutions* unreported, Court of Appeal of Victoria, 10 September 1996 (Brooking and Hayne JJA, Southwell AJA).

63 Grounds 2(i) and (ii).

64 Ground 2(iii).

65 See for example *M v The Queen* (1994) 181 CLR 487.

66 cf *Edwards v The Queen* (1993) 178 CLR 193 at 213; *R v Costin* unreported, Court of Appeal of Victoria, 7 August 1997 at 19-20 per Charles JA.

seeing the witnesses and watching the trial unfold in its entirety, it remains for the appellate court, considering a complaint that jury verdicts are unsafe or unsatisfactory, to decide whether it was open to the jury to be satisfied beyond reasonable doubt of the guilt of the accused or whether the appellate court is persuaded that there is a significant possibility that an innocent person has been convicted⁶⁷.

82 In the nature of things, by the time a contested trial has proceeded through examination at one level of appeal at least, it will not be uncommon for points of factual contest to be highlighted. Disputed facts are the stuff that trials are made of. The generality of the criteria for appellate interference and the differing judicial reactions to the application of such criteria explain the diversity of opinion not infrequently found, including in this Court, in the application of the unsafe or unsatisfactory ground. That ground is an important safeguard against the risk of miscarriage of justice. Appellate courts must be vigilant in considering the ground, once it is raised. Yet care must be taken that it does not become an illicit means of substituting, in a routine way, trial by appellate judges on transcript for trial by jury on oral evidence given in a public court.

83 It is by no means conclusive, but it is worth recording, that in its oral argument before this Court, the Crown did not devote any time at all to the unsafe or unsatisfactory ground. Nor did the Crown's written submissions analyse the suggested incompatibility of the complainant's version of the offences with the affidavits of service sworn by the appellant, upon which the appellant's alibi was founded. The reasons of the judges in the Court of Appeal suggest that there might have been a deeper analysis of the relevant evidence there⁶⁸. That fact does not relieve this Court of its own independent obligation. However, it makes me cautious when embarking upon the task of detective work for myself. This is especially so when I remember that the original basis for the attack on the safety of the conviction, pleaded in the grounds of appeal and expressed in the appellant's written submissions, was a more general assertion that there was no proper basis

67 *M v The Queen* (1994) 181 CLR 487 at 493-494, 509; see also *Jones v The Queen* unreported, High Court of Australia, 2 December 1997 at 4, 12.

68 *Palmer v Director of Public Prosecutions* unreported, Court of Appeal of Victoria, 10 September 1996 at 19 per Brooking JA. Counsel for the Crown "drew our attention ... to the inconsistencies which might be said to be shown by the affidavits of service compared one with another".

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for the jury to reject the appellant's account at trial and that some aspects of the complainant's evidence were "improbable"⁶⁹.

84 The jury sat through a five day trial. They had much more time to reflect upon the factual criticisms of the complainant's testimony and the suggested incompatibility with it of the appellant's alibi, than this Court can devote. They also had the advantages, conventionally regarded as being of great significance in resolving evidentiary conflicts, of observing the witnesses, and particularly the complainant and the appellant, as they gave their evidence.

The verdicts were not unsafe or unsatisfactory

85 It is true that, as in virtually any trial, there are some aspects of the evidence which afford the appellant a foundation for his argument that the jury's verdicts were unsafe or unsatisfactory. I have reflected upon those aspects of the evidence. Four, in particular, should be mentioned:

1. The complainant's evidence that the appellant parked his car in a lane beside a church in Richmond (which could not later be identified) and then appeared to sleep seems somewhat odd, given that this conduct allegedly occurred at about 6.00 p.m. However, such behaviour would be entirely consistent with a plan on the part of the appellant to seduce his young charge. When weight is given to this possibility the apparent oddity melts away.
2. The complainant's uncertainty about the location of the laneway and her inability to take anyone there is something of a weakness in her evidence. But, having regard to her age at the time of the behaviour complained of and to the fact that she was not a driver or process server familiar with Melbourne's small suburban streets and lanes, such uncertainty was tolerable and even understandable.
3. The evidence of the continuous indecent assault alleged by the complainant, whilst the appellant was said to have been driving several kilometres through a number of city suburbs might, at first blush, seem a trifle improbable. However, such behaviour could have happened, whether furtively or even brazenly. Sexual touching in motor vehicles, even in moving traffic, is not, after all, entirely outside the realm of human experience.

69 Appellant's submissions, p 7.

4. The alleged touching of the complainant whilst she was talking to her mother on the telephone from the appellant's home and when she could have complained to her mother, might also appear surprising at first. But it does not take much imagination, in the case of a girl of fourteen years, to conceive that the complainant might have been grossly embarrassed, confused and too inexperienced or ashamed to tell her mother about the unwanted attentions which were then happening to her. Many victims of unwanted sexual activity, particularly young ones, experience shame and blame themselves⁷⁰. Thus, the complainant said in evidence that she considered herself a "slut". Complainants may also fear (sometimes with justification) that they will not be believed if they complain. The appellant, after all, was a friend of the complainant's mother. This could easily have added a special dimension to the complainant's reticence and embarrassment.

86 When these attacks on the suggested improbability of the complainant's accusations are put to one side, the only real criticism of substance which remains, as to the safety of the verdicts, is that relating to the appellant's alibi based upon the sworn affidavits of service. I accept that those affidavits provided something of a problem for the Crown's case. If believed as an accurate record of the appellant's movements on 4 July 1994, they made it unlikely, or even impossible, that the events deposed to by the complainant happened on that day.

87 There were two ways for the Crown to overcome this impediment. The first would have been to persuade the jury that, notwithstanding the assertion of the complainant that she was sure that the offences had taken place on "American Independence Day", they had actually occurred on another day and that, in this respect only, she had been mistaken. This was an explanation embraced in the Court of Appeal by Hayne JA⁷¹ and by Southwell AJA⁷². However, I agree with Brennan CJ, Gaudron and Gummow JJ that such an explanation was not available in the way in which this trial was conducted. Although the presentment allowed for variance in the date, the particularity of the accusations, and their importance

70 *M v The Queen* (1994) 181 CLR 487 at 515; *Jones v The Queen* unreported, High Court of Australia, 2 December 1997 at 26-27.

71 *Palmer v Director of Public Prosecutions* unreported, Court of Appeal of Victoria, 10 September 1996 at 20-21 per Hayne JA.

72 *Palmer v Director of Public Prosecutions* unreported, Court of Appeal of Victoria, 10 September 1996 at 22 per Southwell AJA.

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for the alibi (and thus for the fair opportunity of the appellant to meet the prosecution case) rendered it impossible to justify the conviction on this footing.

88 There was, however, another basis. This was that the date included in the affidavits arose out of self-serving conduct on the part of the appellant designed to provide an alibi in case the complainant should ever make a complaint about what he had done.

89 It is true that, at the time the affidavits of service were sworn, ostensibly four days after the alleged offences, the appellant did not know that the complainant would lodge a complaint against him. But what he would have known, if the complainant's subsequent accusations were true, was that, if any such complaint were made, the first means that would be used by police to check any alibi he offered would be the virtually continuous diary provided by his completed affidavits of service. Those affidavits had to be completed by him. Even when completed, there was no certainty of a complaint. There were risks of being caught out. However, the possibility of a complaint being made could not have been excluded. Prudence would have dictated covering his tracks in a way that was readily open to the appellant.

90 Apart from the testimony of the complainant, several features of the evidence lent support to the Crown's case:

1. The only truly incontrovertible evidence about the appellant's movements on 4 July 1994 was provided by his use of an automatic teller machine at Thornbury, near Melbourne, at 5.10 p.m. and at St Kilda at 11.00 p.m. The evidence of these transactions was completely consistent with the complainant's testimony. The only contemporaneous evidence which was inconsistent was that of the affidavits produced by the appellant himself.
2. The latter evidence was itself curious. It was established that the appellant's affidavits for service effected on 5 July 1994 were sworn on 6 July. Yet those relating to service effected on 4 July were not sworn until 8 July. Although an explanation was given, related to inefficiencies in paperwork other, more sinister, explanations are available.
3. The complainant's mother gave a description of her attempts to contact her daughter on 4 July, first by telephone to their home and eventually, at about 7 p.m., by a telephone call to the appellant's home where she left a message on the answering machine asking "Where the hell [L] was". The appellant gave no evidence affirming or denying receipt of this message. Nor did he testify to any steps taken to inform the mother

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that the complainant was not with him. In cross-examination, it was not suggested to the mother that she had not telephoned the appellant's home on 4 July nor left a message there.

4. The mother also gave evidence that forty-five minutes after her call to the appellant's home, her daughter, sounding agitated and evasive, had telephoned her saying that she was at the appellant's home. The mother added vivid testimony as to how her daughter had then arrived home, between 9 p.m. and 9.30 p.m., rushed past the mother's bedroom door, thrown her bag and some take-away food on the mother's bed and then went into the shower where she stayed until she fell asleep. This conduct did not, of course, prove the truth of the complainant's evidence as to offences by the appellant. But it was certainly consistent with something seriously upsetting having occurred to the complainant.
5. The fact that police enquiries of the recipients of process, referred to in the appellant's affidavits, could not, two months later, specify the precise date that service was effected was hardly surprising. If the appellant set about providing himself an alibi, he would quite easily have been able to rely, in the average case, on imprecise memories.

91 The foregoing analysis demonstrates to my mind that the Crown's case did not rely wholly on the complainant's testimony. There was objective evidence, consistent with the complainant's allegations. There was also the evidence given by the mother. I am unconvinced that the alibi evidence, created by the appellant himself, was so persuasive that the jury ought not to have been satisfied beyond reasonable doubt of the guilt of the appellant. Nor do I myself feel such a doubt about his guilt. Nor am I persuaded, on this foundation, that there is a significant possibility that an innocent person has been convicted. When proper allowance is made for the advantages which the jury had, over those enjoyed by an appellate court, I am far from satisfied that this is a case in which this Court is required or authorised to substitute its conclusion on the evidence for the verdicts reached by the jury.

92 I would reject the challenge to the jury's verdicts on the second ground. Subject to what follows, the appellant's conviction should stand.

Cross-examination about the complainant's motive to lie

93 This brings me to the appellant's complaint about the cross-examination which was permitted at the trial which, in his submission, was exacerbated and not repaired by the trial judge and left uncorrected by the Court of Appeal.

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94 Both parties approached that issue by asking three questions: Was the cross-examination permissible of itself? If otherwise not permissible, was it rendered permissible by the way in which cross-examination of the complainant had opened the question up? In either event, did the directions given to the jury by the primary judge sufficiently remove any risk that a miscarriage of justice had occurred so as to sustain the application of the proviso⁷³?

95 Most of the relevant cross-examination of the appellant appears in the reasons of Brennan CJ, Gaudron and Gummow JJ. So does the most pertinent extract from the judge's charge to the jury. I will not repeat these passages. However, I would only add the following interchange. It occurred during the cross-examination of the complainant by counsel for the appellant. Counsel was asking the complainant questions concerning her response to the appellant's alleged familiarity when she drove around Melbourne suburbs with him as he was serving process:

"You were in the company of someone who clearly is propositioning you, according to what you say? ... I didn't think he was propositioning me.

So when you get home on the 30th of June it had never entered your mind on what you have said his behaviour was that he was propositioning you? ... No.

That's nonsense, I suggest? ... No.

Didn't enter your mind because it hadn't happened? ... Yes, it had. *Why would I be lying anyway?*" (emphasis added).

96 It was the last, non-responsive, part of the answer to the cross-examiner's question which placed directly before the jury the issue posed by the appellant's specific complaint about the conduct of his trial. What is the proper response of the law to the question: Why would the complainant, without proof of motive, tell such a grotesque lie about an accused, unless it were true? Why would she expose the accused to loss of liberty, reputation, employment and peace of mind and expose her mother and herself to the public ordeal of a trial if, as the appellant suggested, her accusations were completely false and a figment of her imagination? These questions have been said to "hang over" most criminal trials involving allegations of sexual misconduct⁷⁴. The precise way in which such questions should be addressed has been the subject of much judicial *dicta* in this

73 *Crimes Act* 1958 (Vic) s 568(1).

74 *R v G* unreported, New South Wales Court of Criminal Appeal, 25 March 1991 per Gleeson CJ; cf *R v Rodriguez* unreported, Court of Appeal of Victoria, 13 June 1997.

country⁷⁵, in Canada⁷⁶, in England⁷⁷ and some in the United States of America⁷⁸. It has been the subject of academic commentary⁷⁹. So far, it has not been the subject of a ruling by this Court. There is therefore no holding of the Court which resolves the challenge presented by this appeal. In my view, that resolution is not found by citing favoured passages in the opinions of others. It is necessary for this Court to provide its own opinion. Doing so, it will draw upon available sources of judicial authority. But it will also have regard to relevant matters of legal principle and legal policy.

Common ground between the parties

97 A number of matters may be mentioned at this point as representing common ground between the appellant and the Crown.

1. No objection was taken at the trial to any of the questions or answers given on the issue of the complainant's motivation to lie. Nor was any objection taken to the terms of the trial judge's charge to the jury dealing with this question. It was not suggested that the judge had been otherwise than generally fair in his summing up. Indeed, it was conceded that the summing up on the issue of the burden and onus of proof was strong and wholly favourable to the appellant.
2. It was not argued that the appellant had lost an entitlement to complain about the course of the trial, or the judge's charge, by his failure to

75 See for example *R v Leak* [1969] SASR 172; *R v F* (1995) 83 A Crim R 502; *R v E* (1996) 39 NSWLR 450; *R v G* [1994] 1 Qd R 540.

76 *R v Poirier* (1992) 71 CCC (3d) 426; *R v Leighton* (1994) 155 NBR (2d) 211; *R v Vandenberghe* (1995) 96 CCC (3d) 371; *Regina v HPP* (1996) 112 CCC (3d) 140.

77 cf *R v Feltrin* unreported, Court of Appeal of UK (Criminal Division), 8 November 1991 noted *Times Law Reports* 5 December 1991 and Gans, "Directions on the Accused's Interest in the Outcome of the Trial" (1997) 21 *Criminal Law Journal* 273 at 288.

78 *Schutz v State* 104 NW 90 at 93 (1905).

79 Gans, "'Why Would I Be Lying?': The High Court in *Palmer v R* Confronts an Argument that may Benefit Sexual Assault Complainants" (1997) 19 *Sydney Law Review* 568.

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object⁸⁰. It emerged from argument that something of a difference had arisen on this issue in the approach of the courts in Victoria⁸¹ when compared with the stricter approach taken by courts in other States of Australia, such as New South Wales⁸² and Queensland⁸³. It was accepted that the course adopted by the primary judge at this trial conformed to the practice which, until now, has been generally followed in Victoria on this point. To have objected would have been prudent; but almost certainly futile having regard to the state of legal authority in Victoria.

3. It was accepted by both sides that the issue of a complainant's motivation ought never to be injected gratuitously into a trial nor made the central point of argument, whether by the prosecutor or by the judge. To elevate to the central theme of a trial consideration of the complainant's motives to lie would, it was conceded, involve error⁸⁴. If raised unnecessarily in the judge's charge to a jury, it would involve a misdirection carrying such a risk of miscarriage as ordinarily to require a new trial.
4. The foregoing prohibitions would not prevent the accused from leading relevant evidence or suggesting bias, improper motives or reasons on the part of an accuser to explain why false accusations of such a grave

80 cf Weinberg "The Consequences Of Failure To Object To Inadmissible Evidence In Criminal Cases" (1978) 11 *Melbourne University Law Review* 408. See also Doherty JA's finding that "The failure of counsel to object does not, however, give Crown counsel 'carte blanche' at trial or immunize the cross-examination from appellate scrutiny.": *R v AJR* (1994) 74 OAC 363 at 371; 94 CCC (3d) 168 at 180 quoted with approval in *R v AF* (1996) 93 OAC 102 at 104.

81 Since this case was decided, the issue has been revisited in *R v Rodriguez* unreported, Court of Appeal of Victoria, 13 June 1997 and in *R v Costin* unreported, Court of Appeal of Victoria, 7 August 1997 in which the relevant Victorian authority is noted.

82 See for example in New South Wales *R v F* (1995) 83 A Crim R 502; *R v E* (1996) 39 NSWLR 450; *R v Davies* unreported, Court of Criminal Appeal of New South Wales, 8 December 1994 and *R v Uhrig* unreported, Court of Criminal Appeal of New South Wales, 24 October 1996.

83 See for example *R v G* [1994] 1 Qd R 540 and *Hunter v Freeman* unreported, Court of Appeal (Q), 9 November 1994.

84 *R v F* (1995) 83 A Crim R 502.

kind would be made⁸⁵. A demonstration of bias might well be relevant to the assessment of the credibility of the accuser and to testing the acceptability of the accusation giving rise to the charge.

5. Where the accused suggests that a complainant has a motive to concoct, falsify or distort the evidence of an accusation, it was accepted that it was then necessarily open to the prosecution to test the accused about the suggestion⁸⁶. Any such scrutiny must be conducted within the limits of relevant and admissible evidence. An individual cannot be asked to give evidence on the motivation of another, as such, because any such evidence could only be speculative and a matter of opinion upon which the witness could have no expertise.
6. It was also common ground that, where the accused puts forward, by evidence or submission, a proposition that a witness vital to the Crown case has a particular motive to lie, the judge should direct the jury that, even if they were to reject such motive, that would not mean that the impugned witness was necessarily telling the truth. It would remain for the prosecution to satisfy them that the witness was truthful. Logically this must be so because the accused might have insufficient materials to prove the false motives of an accuser or may be completely ignorant of, or mistaken about, the true motive which lies behind the falsehood⁸⁷.

98 Although this measure of common ground removed some of the controversy from this case, fundamental questions remain. To what extent do repeated suggestions that the accusations of the accuser are false give rise to an entitlement in the prosecution to explore, factually, the relations of the parties in the hope of demonstrating the unlikelihood that false accusations have been made⁸⁸? What is the judge to do where, as in this case, the question "why would I be lying anyway?" is asked (initially) not by the prosecutor but by the complainant during evidence? How directly must the accused raise the issue of the complainant's motivation so as to authorise the prosecutor to test that suggestion and to demonstrate from out of the accused's mouth, or otherwise, a lack of perceived or known motivation in

85 *R v Uhrig* unreported, Court of Criminal Appeal of New South Wales, 24 October 1996 at 16 per Hunt CJ at CL; see also *R v Rodriguez* unreported, Court of Appeal of Victoria, 13 June 1997 per Charles JA at 22.

86 cf *R v HPP* (1996) 112 CCC (3d) 140.

87 *R v Uhrig* unreported, Court of Criminal Appeal of New South Wales, 24 October 1996 at 17 per Hunt CJ at CL.

88 cf *R v Leak* [1969] SASR 172 at 173-174 per Bray CJ, Hogarth and Walters JJ.

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the accuser to make false charges? And, if it be true that the question of the complainant's motivation "hangs over" most criminal trials of this character, would it not be preferable to arm the judge with authority, at least in defined cases, to allow questions to be asked of the accused but under condition that a strong judicial direction to the jury will be given that failure or inability on the part of the accused to establish a suspected motivation does not establish that the accusation is truthful?

Arguments for allowing questions and requiring directions

99 A number of arguments support the proposition that the law should not completely prohibit questions and comment by the prosecutor and the judge concerning the accused's knowledge of the complainant's motivation, even where the accused had not directly raised the issue:

1. It seems to be commonly believed that the question is one which juries will ordinarily ask themselves. This is scarcely surprising. Cases exist⁸⁹, including in this Court⁹⁰ where judges have posed the same question. The number of trials in which the question arises in cross-examination, and the number of appeals in which the issue has been ventilated, demonstrate a natural propensity of the mind to ask whether any motivation might exist to explain what would otherwise be truly wicked conduct.
2. The factual foundation for exploring the question is a conviction that most people, without a wrongful motive, would not accuse another human being of a grave criminal offence, persist in the accusation and repeat it in a solemn public trial without having a proper basis for doing so. Whilst judicial instruction on the onus and burden of proof may provide the desired corrective, if the foregoing presupposition does affect the collective mind of a jury, a serious question of legal policy is presented as to whether it ought not to be explored at the trial, with the benefit of very strong judicial warnings, rather than left to jury speculation with the professional participants ordinarily bound by a code of silence.
3. Even if lawyers observe the rule of silence, they cannot wholly control what witnesses will say. This is demonstrated by the evidence of the complainant in this case. She saw it as implicit in the repeated attacks

89 See for example *R v HPP* (1996) 112 CCC (3d) 140 at 147.

90 See for example McHugh J in *M v The Queen* (1994) 181 CLR 487 at 535-6.

on her truthfulness that she was being accused before the jury of inventing her accusation. She responded by asking the question which it is assumed the jury themselves would be asking: why would she lie? Her spontaneous outburst demonstrates how difficult it may be, in practice, to uphold a complete prohibition against mentioning the question. If it is relevant for an accused person to establish affirmatively an interest, purpose or motive in the accuser to make false accusations, is it not inevitable that a jury will speculate about whether such motivations exist and what they might be? Applying commonsense and ordinary human experience, the jury in the present case would surely have been asking themselves: is the accusation perhaps the product of the imagination of this young woman? Is she saying these things of the accused because she is just reaching puberty, has recently been ill, is left alone at home by her mother, perhaps jealous of her mother's friend whom she admitted describing to her own friend as "cute"? The primary judge tried to express this idea in the one part of his direction to which the appellant took the strongest objection. The judge said⁹¹:

"Of course for the accused's part this is nothing more than the development of an invention that comes about for some reason not discernible, whether as a result of neurosis or whatever it might be on the part of this young child."

The appellant had not suggested a neurosis. Inherent in the appellant's case was the proposition that the complainant had told a lie about his conduct and had then become caught up in a commitment to that lie within the formal paraphernalia of a trial in which her pride and veracity were at stake, but in which he stood to lose much more.

4. The better course, so it was argued for the Crown, was to trust juries to bring "ordinary human experience"⁹² to bear on this issue rather than to sweep that issue under the carpet and to hope, by silence, that no harm would be done. To forbid appropriate questions and to omit appropriate judicial directions would be to condone jury speculation on unknown motives without any real judicial help on the way such issues should be handled. This course demonstrates, so it was suggested, a want of faith in the capacity of a jury in contemporary Australia to act properly on

91 Cited by Brooking JA *Palmer v Director of Public Prosecutions* unreported, Court of Appeal of Victoria, 10 September 1996 at 15.

92 *Crofts v The Queen* (1996) 186 CLR 427 at 451.

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judicial directions about the complainant's possible motives. It also overlooks the fact that the rule of silence, established for cases of accusations of sexual misconduct, would ostensibly also apply to trials involving other crimes where provision of judicial assistance to the jury would conform to the ordinary conduct of jury trials in Australia.

Arguments against permitting questioning on motives

100 The foregoing arguments have force. But so do the arguments which reject any loosening of the general prohibition on initiating questions of an accused as to the possible motivation of the complainant to make false accusations:

1. No witness can give factual evidence about the motives of another person. Even evidence about a past dispute or suspected reason for a false accusation will not prove the motivation of the accuser. Such motivation may be unknown to the accused. It may even, possibly, be unknown to the accuser. To open the issue will necessarily invite intense speculation by the jury which it is difficult, or impossible, to settle by evidence⁹³. If this line of questioning were permitted and the accused were to say that he or she did not know the motives of the accuser, such evidence might tend to help the prosecution. The accused would be driven to conceding that he or she cannot point to, and demonstrate, an improper motive. The diversion could seriously damage the accused in a matter in which ignorance or mystification might be completely justifiable.
2. By initiating questions as to the accused's knowledge of the motivations of the accuser, the risk may be run of effectively shifting the burden of proof at the trial to the accused, such that he or she was virtually obliged to demonstrate the falsehood and improper motives of the complainant⁹⁴. General instructions about the onus of proof may then become swamped by overt speculation which it is impossible to satisfy. If the accused elects to make an issue of that question, by affirmatively suggesting a motive or reason for such falsehood, that may open the door to having the allegation tested. But in the absence of such affirmative suggestion, permitting such questioning and inviting judicial comment about it, may simply intensify, but not satisfy, the question which "hangs over" a jury trial of this kind.

93 *R v E* (1996) 39 NSWLR 450 at 464.

94 *R v Leighton* (1994) 155 NBR (2d) 211 at [9].

3. In most parts of Australia the facility of an unsworn statement by the accused has now been abolished. Ordinarily, therefore, the accused will give evidence in cases of this kind. To permit the opening up of questions about an accuser's possible motives effectively requires the accused to become an advocate, but from a position of weakness in the witness box and on a subject about which the accused may have suspicions but no sure means of knowledge. The fact that the accused cannot affirmatively establish, or even possibly nominate, a reason why the accuser should make such a false accusation adds nothing logically to the credibility of the accusation. Yet permitting the line of questioning might give legitimacy to the reasoning that the accusation must be correct because no motive to lie can be demonstrated⁹⁵. The balance of the trial might then be endangered. That danger explains the strict limitations which have been imposed, both on prosecutors and judges, both in Australia⁹⁶ and overseas⁹⁷.
4. Taking the stance that questioning relevant to an accuser's motives is not permissible, unless initiated by the accused, does not (so it was argued) evidence a want of faith in the commonsense of the jury, or a mistrust of the jury's capacity to resolve the question in a principled way, with the assistance of firm judicial directions. Instead, it represents the adoption of a simple rule which is relatively easy to apply. It is a rule which gives clear instruction to the prosecutor and the judge. It discourages needless appeals. It keeps the focus of the trial on the correct question and away from potentially prejudicial speculation. Although it is true that the issue can arise in the context of non-sexual offences, it presents itself in its most acute form where the accusation charges sexual misconduct. It is of the nature of such matters that caution is still required to prevent the risk of false accusation leading to wrongful conviction. Although there are dangers in a rule of silence, there are greater dangers to the fair trial of the accused in permitting the complainant's motivation to be opened up where the accused has refrained from doing so.

⁹⁵ cf *R v E* (1996) 39 NSWLR 450 at 464.

⁹⁶ See for example *R v E* (1996) 39 NSWLR 450; *R v Uhrig* unreported, Court of Criminal Appeal of New South Wales, 24 October 1996; *R v G* [1994] 1 Qd R 540.

⁹⁷ See for example *R v Vandenberghe* (1995) 96 CCC (3d) 371 at 373; *R v AF* (1996) 93 OAC 102.

Conclusion: the prohibition should be maintained

101 The foregoing arguments of legal principle and legal policy are evenly balanced. For my own part, I would generally favour an approach which accepts the capacity of a jury, with appropriate judicial assistance, to give such weight to evidence and submissions about the accuser's motivations as they consider proper in the context of a trial in which the Crown must prove all elements of the charges brought and do so beyond reasonable doubt.

102 However, although no authority of this Court binds us to a particular outcome, I have concluded that it would not be harmonious with the principle adopted in *Robinson v The Queen*⁹⁸ to permit questions to be asked or suggestions to be made that the accused's evidence is weakened, or the complainant's strengthened, by the inability of the accused to explain why the complainant would lie. In *Robinson*, this Court adopted a rule forbidding questions or comment which would suggest that the accused's evidence, denying the offences charged, is to be the subject of close scrutiny because of the interest which the accused necessarily has in the outcome of the trial. This Court held that to permit, in that case, judicial directions (but by inference also questions making the same suggestions) would undermine the presumption of innocence which the law accords to an accused person⁹⁹. This ruling has attracted some criticism¹⁰⁰. It has been said that it has given rise to different interpretations as to the strictness of the principle established¹⁰¹. But as I read the rule in *Robinson*, it is a simple one, easy to apply. Neither by questions nor submissions, nor by judicial directions may it be suggested that an accused's denial is undermined, and an accuser's accusation strengthened, by the obvious fact that the accused has an interest in acquittal. The forbidden imputation about the accused's motive to lie to secure acquittal has, as its counterpart, a prohibition on the investigation of the motivation, if known, of the accuser to lie, realising as the accuser must that this could result in the accused's conviction and punishment. If the one is forbidden by the authority of this Court, it is impossible, as a matter of principle, to permit the other. Each has a tendency to undermine the protection afforded by the burden and onus which rest upon the prosecution throughout the trial.

98 (1991) 180 CLR 531.

99 (1991) 180 CLR 531 at 535-536.

100 Gans, "Directions on the Accused's Interest in the Outcome of the Trial" (1997) 21 *Criminal Law Journal* 273 at 287-290.

101 Gans, "Directions on the Accused's Interest in the Outcome of the Trial" (1997) 21 *Criminal Law Journal* 273 at 276-277.

103 The principle in *Robinson* has since been re-affirmed by this Court in *Stafford v The Queen*¹⁰². In this appeal, it was not suggested that the principle was wrong. Whilst it does not, as a matter of legal authority, determine the present case, any rule which permitted questioning of the accused about the accuser's motivations, or which encouraged elaboration of that issue by a prosecutor or judge where it had not been initiated by the accused, would be difficult to reconcile with it. In circumstances where the arguments of principle and policy are so finely balanced, the adoption of a rule which is harmonious with an analogous principle earlier accepted by the Court is, for me, decisive.

Result: a new trial should be ordered

104 If a rule forbidding questions of the accused on the accuser's motivation is to be applied there remains the issue whether a retrial should be ordered in this case. Two reasons were suggested by the Crown as to why this was unnecessary. They were that the issue had been opened up by the questions asked of the complainant by the appellant's counsel and that any risk of miscarriage of justice had been removed by the primary judge's strong directions to the jury. In *Stafford*¹⁰³, the trial judge had infringed the rule in *Robinson*. Denying special leave, this Court held that the overall effect of the judge's remarks was favourable to the accused and no miscarriage of justice was shown. Similar submissions were advanced in this case.

105 I do not regard the question asked of the complainant as opening the issue of her motivation to lie in a way that justified the later questioning of the appellant by the prosecutor. Whilst the questions put to the complainant were risky, their terms made it plain that, far from suggesting a motive, the appellant did not know what that motive was¹⁰⁴. To authorise highly prejudicial questioning of an accused of the kind that followed would require a much clearer suggestion of an improper motive on the part of the complainant than was made.

106 As for the charge to the jury, it is true that it was generally fair, even favourable, to the appellant. However, by introducing the suggestion of a "neurosis or whatever" on the part of the complainant - one which had not been proposed by or for the appellant - the judge again drew attention to the issue of motivation. He might have been understood to mean that, unless the jury were

102 (1993) 67 ALJR 510.

103 (1993) 67 ALJR 510 at 511.

104 "This is some sort of pay back on him for some indiscretion he doesn't even know about, isn't that right?".

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satisfied that the complainant was suffering from a "neurosis or whatever", no motive had been shown to lie so that the complainant's evidence could be accepted as truthful. This is precisely the danger of illogical reasoning, destructive of the presumption of innocence, that the law forbids.

Orders

107 The orders of the Court, which followed the majority's conclusions, were pronounced on 2 December 1997. However, in my view the appellant was not entitled to an acquittal. A retrial was neither futile nor necessarily unjust.

108 The orders which I favoured were that the appeal should be allowed. The orders of the Court of Appeal of the Supreme Court of Victoria should be set aside. In lieu thereof, the appellant should have leave to appeal against his conviction. Such appeal should be allowed. The conviction should be quashed and a new trial ordered.

