

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY AND HAYNE JJ

KUNNAKATIL JOHN SURESH

APPELLANT

AND

THE QUEEN

RESPONDENT

Suresh v The Queen (P39-1997) [1998] HCA 23
3 April 1998

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Western Australia

Representation:

J Courtis for the appellant (instructed by Wojtowicz Kelly)

J R McKechnie QC with J Mactaggart for the respondent (instructed by
Director of Public Prosecutions (Western Australia))

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CATCHWORDS

Suresh v The Queen

Criminal law - Sexual offences - Prior complaint evidence - Admissibility - Requirement that evidence of complaint be early or recent.

Criminal law - Sexual offences - Prior complaint evidence - Effect of admission of prior consistent complaint evidence on credibility of complainant - Whether accused deprived of chance of acquittal that is fairly open where prior consistent complaint evidence wrongly admitted - Application of proviso.

Criminal law - Sexual offences - Prior complaint evidence - Summing up to jury - Jury directed that complaint evidence relevant to identification of accused as sexual offender.

Criminal law - Prior inconsistent statement - Complaint evidence relied on by defence as prior inconsistent statement - Admissibility of prior inconsistent statement - Purpose of rules governing admissibility of prior inconsistent statements.

Criminal law - Whether prior complaint evidence should be led which does not specifically identify accused - Relevance and probative value of prior complaint evidence which does not specifically identify accused.

The Criminal Code (WA), s 689(1).

Evidence Act 1906 (WA), ss 20, 21, 22 and 36BC.

- 1 GAUDRON AND GUMMOW JJ. The appellant was convicted of a number of sexual offences against the daughter of friends with whom he and his family stayed shortly after their arrival in Australia and with whom they later maintained regular social contact. The offences in question spanned the period between 23 December 1990 and 28 March 1992. The complainant was born on 13 December 1982 and was, thus, aged eight at the time of the first offence charged and not quite 9½ at the time of the last.
- 2 At trial, the complainant gave evidence that, although they were not related, she usually referred to the appellant as "Uncle Suresh". There was also evidence that she was related to two persons who were properly described as uncles, one of whom lived in Australia and maintained close contact with her immediate family. In the course of her evidence, the complainant also said that, in October 1992, she told some of her schoolfriends that she had been sexually abused by her uncle, without nominating the person to whom she was referring. Two of her schoolfriends were called as witnesses in the prosecution case and they testified that she had, in fact, confided in them in those terms at that time. No objection was taken to their evidence or to that of the complainant as it related to her conversation with them.
- 3 On appeal to the Court of Criminal Appeal of the Supreme Court of Western Australia, the evidence as to what was said by the complainant to her schoolfriends was treated as evidence of prior complaint. It was held by majority (Franklyn and Anderson JJ, Rowland J not deciding) that the evidence was wrongly admitted because the complaint was not made within a reasonable time of the offences charged¹. However, the court was unanimously of the view that the admission of that evidence did not result in a miscarriage of justice.

1 *Suresh v The Queen* (1996) 16 WAR 23 at 36 per Anderson J (with whom Franklyn J agreed at 25).

Accordingly, the proviso to s 689(1) of *The Criminal Code* (WA) ("the Code")² was applied and the appeal dismissed. The appellant now appeals to this Court.

4 Evidence of prior complaint is admissible in sexual offence cases by way of exception to the rule against hearsay. It is admissible because of the tendency of people to assume, at least in earlier times, that the victim of a sexual offence will complain at the first reasonable opportunity and that, if complaint is not then made, a subsequent complaint is likely to be false³. It follows that evidence of complaint is only admissible if it is evidence of early complaint or, as is usually said, of "recent complaint". And it is admitted not as evidence of the facts in issue⁴, but as evidence of consistency which buttresses the credit of the complainant⁵.

5 As Gaudron J explained in *M v The Queen*, the assumption that the victim of a sexual offence will complain at the first reasonable opportunity is an assumption of doubtful validity, particularly in cases of child sexual assault⁶. And it is an assumption that is now frequently called into question, including by directions to the effect that there may be good reason why a person would delay in making a complaint. Where a direction of that kind is given, a jury may well take the view that evidence of a prior consistent complaint enhances the credit of the complainant even though the complaint was not made until well after the events in issue.

2 Section 689(1) provides:

" The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal, if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

3 See *M v The Queen* (1994) 181 CLR 487 at 514-515 per Gaudron J.

4 *R v Lillyman* [1896] 2 QB 167.

5 *Kilby v The Queen* (1973) 129 CLR 460 at 472 per Barwick CJ.

6 (1994) 181 CLR 487 at 515.

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6 Where, as here, the jury is instructed that there may be good reason why a person might delay in making complaint and the prosecution case depends on the credibility of the complainant with respect to events which are largely uncorroborated and which, of their nature, are not likely to be witnessed by other persons, it is difficult to envisage circumstances in which it might be said that wrongful admission of evidence of a prior consistent complaint could not enhance his or her credibility. And if that possibility cannot be excluded, the accused will have been deprived of a chance of acquittal that was fairly open and a proviso of the kind found in s 689(1) of the Code cannot then be applied⁷.

7 If the evidence as to what the complainant said to her schoolfriends was simply evidence of prior but late complaint, the fact that, in this case, the complainant's credibility was very much in issue would require that the appeal be determined in the appellant's favour. However, the evidence was not simply evidence of that kind. It was evidence which had an additional significance in light of the defence case, a case which was signalled well prior to the calling of the evidence in question.

8 The defence case was, to some extent, dictated by statements made by the appellant to the arresting police officers. In those statements, he denied that he had sexually interfered with the complainant but asserted that she had engaged in sexually explicit behaviour and that, at least once, she had touched him in a sexual manner. And in response to a question whether he had placed her hand on his penis, he replied "No, that's not true. I've noticed the way she behaves. Maybe someone else's, you know."

9 Before the trial commenced, defence counsel applied to the trial judge, Murray J, to exclude the appellant's statements with respect to the complainant's sexually explicit behaviour. At the same time, counsel foreshadowed that, if the evidence were to be admitted, an application would be made under s 36BC of the *Evidence Act* 1906 (WA) to cross-examine the complainant in relation to her sexual experiences with other persons⁸. It was ruled that the statements in question

7 *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J; *Wilde v The Queen* (1988) 164 CLR 365 at 371-372 per Brennan, Dawson and Toohey JJ, 381 per Gaudron J; *Glennon v The Queen* (1994) 179 CLR 1 at 9 per Mason CJ, Brennan and Toohey JJ, 12-13 per Deane and Gaudron JJ.

8 Section 36BC provides that in proceedings with respect to a sexual offence, the defendant must not adduce evidence of the sexual experiences of the complainant unless an application to do so is made in the absence of the jury and leave is granted for that course.

should be admitted and leave was granted to cross-examine in the manner indicated, although some restrictions were imposed in that regard.

10 It was put to the complainant in cross-examination that she was not in the habit of referring to the appellant as "Uncle Suresh" and evidence was later led in the defence case to that effect. It was also put to the complainant by defence counsel that, when she spoke to her schoolfriends, she was not referring to the applicant but to "some other uncle, a real uncle, [who] had been doing something to [her]". Further, it was put that, her allegation having come to the notice of the school principal, her mother told her to say it was Uncle Suresh.

11 The precise nature of the defence case and the significance of the evidence as to what was said by the complainant to her schoolfriends clearly emerges from the summing up of the trial judge. His Honour instructed the jury that, as evidence of complaint, that evidence was not evidence of the facts in question but might be used in "mak[ing] a judgment about whether ... [to] believe [the complainant's] story" and then explained that, in addition to that use, the evidence had "another significance". That significance was whether the reference to "my uncle" was a reference to the applicant or to some other person, a matter which he said "[had] been discussed with [the jury] at some length from the bar table". He added that it was suggested that the evidence might raise a doubt whether the complainant "was a genuine and truthful witness". The defence case, thus, relied heavily on the evidence in question, the jury being urged not to treat it as evidence of a prior complaint against the appellant but, in effect, as a prior inconsistent statement in which the complainant alleged that she had been abused by somebody else.

12 As a general rule, a witness' prior inconsistent statement is received in evidence only if the witness denies having made the statement in question. That rule is not concerned with the evidentiary significance of a prior inconsistent statement, but with the efficient conduct of litigation. It is designed to prevent the calling of evidence on a matter not in issue. It may be that, as a matter of procedure⁹, evidence should not have been led in this case from the complainant's schoolfriends, there being no dispute that, when speaking to them, she referred to "my uncle" and not specifically to the appellant. But that does not mean that their evidence was irrelevant or that it lacked probative value with respect to what was said.

13 Once it is appreciated that the evidence of what was said by the complainant to her schoolfriends was admitted without objection and was relied upon by the

9 See ss 20, 21 and 22 of the *Evidence Act* 1906 (WA). Section 20 provides that a party should not impeach the credit of his or her own witness unless the trial judge finds the witness to be hostile. Sections 21 and 22 outline the procedure by which a prior inconsistent statement can be proved against a witness.

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defence as evidence of a prior inconsistent statement, it is by no means clear that the Full Court of Appeal was correct in holding that it was inadmissible. And that is so even if its receipt involved some procedural irregularity. What is clear, however, is that, having regard to the defence case, it cannot be said that receipt of that evidence deprived the accused of a chance of acquittal that was fairly open.

14 The appeal should be dismissed.

15 McHUGH J. The question in this appeal is whether the Court of Criminal Appeal of the Supreme Court of Western Australia erred in holding that no miscarriage of justice occurred in the conviction of the appellant despite that Court's finding that the trial judge had wrongly admitted evidence of a complaint of sexual interference. In my opinion, no miscarriage of justice occurred, and the appeal should be dismissed.

16 The appellant was found guilty of a number of sexual offences against the daughter of friends with whom the appellant and his family had stayed after their arrival in Western Australia as migrants. The offences for which the appellant was convicted took place between 23 December 1990 and 28 March 1992. The complainant was aged eight at the time of the first offence and nine at the time of the last offence. In her evidence she testified that, around October 1992, she had told school friends that her uncle had sexually interfered with her. It was the appellant's case that the complainant had two uncles who had stayed at her parents' home but that the appellant was not one of them. Two of her school friends gave evidence confirming her account of the complaint. Counsel for the appellant did not object to the evidence being admitted. When the trial judge asked how the evidence was admissible, counsel for the appellant said that it was being led as evidence "of recent complaint". Counsel for the Crown agreed that this was the basis upon which the evidence was tendered.

17 It is difficult to accept that the evidence was properly admissible as evidence of a recent complaint having regard to the six month delay and the apparent existence of reasonable opportunities to make a complaint. But counsel for the appellant plainly wanted the evidence to be admitted. The statements that the complainant made to her school friends provided a strong foundation for the appellant's claim that the complainant's evidence implicating him could not be accepted because she had made an earlier inconsistent statement implicating her "uncle". The appellant contended that he was not the person implicated. Even if the trial judge had rejected evidence of the complaint in the complainant's evidence-in-chief, counsel for the accused would have brought the statement out in cross-examination on the basis that the complainant had made a prior inconsistent statement concerning the offence. The fact that, before any evidence was tendered in the case, counsel for the appellant sought and was granted leave to cross-examine the complainant on the statement confirms that counsel would have adopted this forensic tactic. If the complainant had denied making the statement, the appellant would have been able to call the two school friends to prove the making of the statement.

18 In these circumstances, by admitting the evidence the trial judge made no "wrong decision" on a question of law, and there was no "miscarriage of justice" within the meaning of s 689(1) of *The Criminal Code* (WA). If the evidence was not admissible as evidence of recent complaint, it was admissible as evidence of

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an arguably prior inconsistent statement¹⁰ affecting the complainant's credibility even though it was led in evidence-in-chief. The fact that it was admitted in evidence-in-chief by the Crown and not in cross-examination by counsel for the appellant did not make it inadmissible, if it went to an issue. For tactical reasons, for example, it is not uncommon for counsel to attempt to blunt the predicted effect of a cross-examination of a witness by leading, and seeking to explain, in evidence-in-chief a discreditable incident concerning the witness¹¹. Counsel for the Crown, of course, did not lead the evidence to assist the appellant or to blunt the effect of cross-examination. He led evidence of the complaint for the purpose of showing consistency in the account of the complainant¹². But that does not mean that that evidence was not admissible as evidence of a prior inconsistent statement.

- 19 It is true that, technically, the evidence of the school friends was admissible only if the complainant had denied making the statement. But the admission of their evidence added nothing to the substance of the matter. The complainant conceded making the statement. The school friends' evidence merely confirmed what was common ground between the parties - the complainant had told her school friends that her uncle had sexually interfered with her. The critical question was to whom was she referring? Was she referring to "'Uncle' Suresh" or to a natural uncle? That someone had sexually interfered with the complainant does not seem to have been an issue at the trial. The appellant's case was that he had been falsely accused because the complainant's mother feared that a family member - a natural uncle - would be arrested for the sexual assaults.
- 20 However, even if the evidence was not technically admissible as evidence of a recent complaint or a prior inconsistent statement, no substantial or for that matter any miscarriage of justice occurred in this case. Accordingly, the proviso to s 689 applies and the appeal must be dismissed. An examination of the transcript of the trial shows that counsel for the appellant saw the admission of the statement as being for the appellant's forensic benefit because it was a weapon which could be used to impugn the credibility of the complainant in a case where conviction depended on her word against that of the appellant and because it supported the

10 On the basis that the complainant testified that it was the appellant who had sexually interfered with her but had told her school friends that it was her uncle who had interfered with her.

11 A well known example is Sir John Simon's question to his witness in "The 'Mr A' Case" in the *Old Bailey Trial Series* published by Jarrolds (at 261): "I am sorry to have to ask you, Mr Newton, but I had better ask it here. Have you been convicted of forgery?"

12 *R v Kilby* (1973) 129 CLR 460 at 466.

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defence theory of the case. That theory emerged plainly in the cross-examination of the complainant's mother who was asked:

"I suggest to you ... that in fact when you first became aware that your daughter had said something at the school in November 1992 ... that you became fearful that she was referring to a relative of yours? Absolutely not.

And I suggest to you that you subsequently did everything in your power to try and divert any attention from a possible relative of yours? This is sick. This is a sick allegation and it is not true.

And I suggest to you that you saw Mr Suresh as an easy target? Why would I pick him as an easy target?

A person as you say, as you believed, without friends, too many friends? So?

A person who had stayed at your house? Right.

A person whom you had known? Right. I know a lot of people.

And I suggest that you decided to try and shift the attention towards him? No way on earth. I was very fond of the family."

- 21 Plainly, counsel for the appellant did not see the complaint as giving rise to any of the difficulties that defence counsel have traditionally seen in the admission of complaint evidence. Instead of seeing the complaint as being something to be feared, counsel perceived it as being something to be exploited. The trial judge recognised this when, after giving a traditional direction concerning the use that jury could make of the complaint, he said:

"[T]he suggestion which is put by way of cross-examination of the child and her mother would seem to *give to the circumstances of the complaint some different significance* and it is suggested that it may raise doubt in your mind that the child was a genuine and truthful witness." (emphasis added)

- 22 Having regard to the way in which the case was conducted, it is impossible to conclude that the admission of the complaint evidence constituted a miscarriage of justice. The evidence was admitted without objection because it was perceived to be highly supportive of the defence theory of the case. Other counsel may have elected to fight the case on a different basis from that selected by the appellant's counsel, but no one could reasonably say that a competent counsel would not have run the case in the way that defence counsel ran it at the trial.

- 23 The appellant wanted the evidence of the complaint to be admitted because its admission was perceived as giving the appellant a better chance of acquittal

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than if the tender of the evidence had been rejected. The admission of the complainant's statement to her school friends therefore did not deny the accused a fair trial or result in a miscarriage of justice. On the contrary, by not objecting to the admission of the statement and then using it to support the defence theory of the case, the appellant exercised his right to a fair trial. It would undermine the system of adversarial criminal justice if the admission of technically inadmissible evidence, not objected to for rational forensic reasons, could result in the quashing of a conviction because the forensic tactics had failed to bring about the accused's acquittal.

Order

24 The appeal should be dismissed.

25 KIRBY J. Difficulties are presented by this appeal, whichever way it is approached.

26 If the evidence of the complainant and her young school friends was inadmissible as evidence of "recent complaint"¹³ (as the majority in the Court of Criminal Appeal of Western Australia thought¹⁴), there are significant obstacles to applying the proviso to uphold the appellant's conviction¹⁵. Yet if the true basis for the admissibility of such evidence was that it constituted evidence of prior inconsistent statements by the complainant, different instructions to the jury were required of the trial judge.

27 A difficulty arises for my consideration of the appeal, following a ruling made, by majority, during the hearing. Realising, at the eleventh hour, the quandary presented by the foregoing problem, counsel for the appellant sought to amend the notice of appeal to complain about the insufficiency of the trial judge's directions to the jury on the use which they might make of the evidence in question. The application was refused; but without prejudice to the appellant's entitlement to press this complaint if it proved relevant to the application of the proviso.

Evidence given as "recent complaint"

28 Most of the facts necessary to understand my reasons are set out in the opinion of Gaudron and Gummow JJ. I will not repeat them.

29 The offences with which Mr Kunnakatil Suresh (the appellant) was charged were alleged to have taken place between 23 December 1990 (first count) and 28 March 1992 (ninth count). The first time that the complainant, then a school girl aged nine years, "told her story" to school friends was in about October 1992, ie about seven months after the last offence charged. The matter is a little complicated because, in evidence, the complainant stated that other incidents of a similar kind, not the subject of any charge, had taken place between March 1992 and when she spoke to her school friends in late 1992.

30 At no stage did the complainant identify the appellant to her school friends by name. She simply told them that she had been sexually abused by an "uncle", without identifying him further. Despite this important weakness in the evidence of complaint, the testimony of the complainant herself and of two of her school

13 cf *Kilby v The Queen* (1973) 129 CLR 460 at 466; *Crofts v The Queen* (1996) 186 CLR 427 at 435, 446-449.

14 *Suresh v The Queen* (1996) 16 WAR 23 per Anderson J, Franklyn J concurring.

15 *The Criminal Code* (WA), s 689(1).

friends on this point was received. It was placed before the jury. When its tender was foreshadowed in the absence of the jury the trial judge asked how such evidence was admissible¹⁶. Counsel then appearing for the appellant indicated that he believed that the Crown was leading the evidence "by way of recent complaint". This was confirmed by the prosecutor. Despite the reservations which the trial judge appeared to signal, counsel for the appellant did not object to the evidence. Instead, he made an application for leave to cross-examine the complainant upon it. That leave was granted to permit counsel to "put to her [the] suggestion that the offences of which she has given evidence were committed not by the accused but by another person referred to by her as 'uncle'"¹⁷. The trial then proceeded on that footing. No objection was taken to the evidence of the making and receiving of the complaints. No suggestion was made that the complaints constituted a prior inconsistent statement in which the complainant had alleged that she had been abused by somebody other than the appellant.

31 When first confronted with the accusations by the police, the appellant's initial defence was a complete denial. He has adhered to that denial. However, to the police, he added a suggestion that the complainant was sexually forward and suggestive in her conduct in relation to him; conduct which he discouraged. He also recounted a report from his wife that she had chanced upon the complainant masturbating her sister. Such conduct on the part of a young girl is not impossible. However, it would have involved an obvious and very risky strategy to present it to a jury. For understandable forensic reasons, trial counsel did everything possible to keep the appellant's statements to the police out of evidence; but without success.

32 A different hypothesis was presented for the appellant at the trial. This was that the appellant was not truly the "uncle" to the complainant; that at least two actual uncles had stayed with the complainant's family in the past; and, when the stories of sexual abuse circulated in the complainant's school, her mother, to protect family members, had persuaded the complainant to blame the appellant. This was also an extremely risky strategy. It was rebuffed emphatically by the complainant's mother in the following telling exchange:

"I suggest to you ... that in fact when you first became aware that your daughter had said something at the school in November 1992 ...? ... Mm.

16 *R v Suresh*, Supreme Court of Western Australia, Trial transcript, 31 January 1994 at 12 per Murray J.

17 *R v Suresh*, Supreme Court of Western Australia, Trial transcript, 31 January 1994 at 15.

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... that you became fearful that she was referring to a relative of yours? ... Absolutely not.

And I suggest to you that you subsequently did everything in your power to try and divert any attention from a possible relative of yours? ... This is sick. This is a sick allegation and it is not true.

And I suggest to you that you saw Mr Suresh as an easy target? ... Why would I pick him as an easy target?

A person as you say, as you believed, without friends, too many friends? ... So?

A person who had stayed at your house? ... Right.

A person whom you had known? ... Right. I know a lot of people.

And I suggest that you decided to try and shift the attention towards him? ... No way on earth. I was very fond of the family."

- 33 Prudence in the conduct of the defence might have led to a concerted effort to exclude altogether the evidence of the complaints. However, that was not the course which the defence took. It was simply assumed that evidence of the complaints would be received and this despite the signal of possible doubt from the trial judge. Far from there being any objection to the evidence of the complainant and her school friends, counsel's questions were then directed to extracting from it material for the alternative uncle theory.

The judge's directions to the jury

- 34 In the relevant portion of the trial judge's instruction to the jury he pointed out that, ordinarily, the prosecution would not have been permitted to lead in evidence the fact that a witness had earlier said that an offence had been committed. He explained that such statements would normally be regarded as "self-serving material". He explained that exception was permitted in certain circumstances to allow the prosecution to demonstrate that the complainant had acted consistently throughout. The judge drew attention to the delay in the making of the complaints in this case; to the factors which might explain that delay in the case of a child such as the complainant; and to the fact that the present complaints

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were ultimately made not as a conscious decision but "just came out"¹⁸. The judge went on¹⁹:

"It seems perfectly natural that such a thing might occur if one was feeling down and one was a 9-year-old girl talking to one's best friend. But it is a matter entirely for you to make a judgment about how you think the delay in complaint and the fact of complaint itself bears either positively or negatively upon your assessment of the credibility, and your capacity to believe the child's evidence as to what occurred.

You should understand that the fact of complaint and what she says by way of complaint is not itself evidence of the facts because it is coming from her and because it adds nothing to the account she gives in the witness box. Its purpose is to relate to her credibility and to see how she has behaved after the incidents because that may assist one way or the other to help you to make a judgment about whether you can believe her story and whether you place reliance upon her evidence as a witness of truth."

His Honour then turned to "another significance" which had been placed upon the material, namely the reference to the fact that the offender was described as the complainant's "uncle"²⁰:

"[T]he suggestion which is put by way of cross-examination of the child and her mother would seem to give to the circumstances of the complaint some different significance and it is suggested that it may raise doubt in your mind that the child was a genuine and truthful witness.

It is done effectively by attributing the commission of offences to a person who was really her uncle and to suggest that that is open and something which would therefore raise very considerable doubt as to whether the perpetrator of the offences was the accused - something that needs to be approached with great care."

35 This, together with reminders of the evidence of the visits of biological uncles with whom the complainant had also experienced close contact, were left to the

18 *R v Suresh*, Supreme Court of Western Australia, Trial transcript, 3 February 1994 at 458.

19 *R v Suresh*, Supreme Court of Western Australia, Trial transcript, 3 February 1994 at 458-459.

20 *R v Suresh*, Supreme Court of Western Australia, Trial transcript, 3 February 1994 at 460.

jury to unravel. There was no relevant application to correct the summing up. After a retirement of two hours, the jury returned with verdicts of guilty on all counts.

Decision of the Court of Criminal Appeal

36 In the Court of Criminal Appeal, the appellant retained fresh counsel, who has also argued the appeal in this Court. The principal ground of objection there was that the evidence of the complaints, made by the complainant to her school friends, should not have been received. The foundation of this submission was that the complaints had not been made "at the earliest reasonable opportunity"²¹. As such, it was argued, they ought not to have been accepted in evidence.

37 Upon this point, the judges constituting the Court of Criminal Appeal divided. Anderson J (with whom Franklyn J agreed) concluded that the evidence was not admissible²². Their Honours nonetheless applied the proviso²³. They declined relief on the basis that the admission of the evidence "did not actually cause a substantial miscarriage of justice"²⁴. The foundation for that view was their Honours' estimate that it had been an important part of the defence case that the complainant had been so slow to complain. The strong emphasis by the trial judge on the delay made it "possible to say of the complaint evidence as a whole that, if anything, it had a negative effect on the complainant's credibility"²⁵.

38 Rowland J, on the other hand, did not need to consider the proviso. His Honour indicated that he was "not convinced that the evidence ... was not admissible"²⁶. He said²⁷:

"In any event, it appears that counsel for the defendant at trial may have shared that view. It seems that no objection was made to the admission of this evidence, and it may well be that that was consistent with the fact that it

21 *Kilby v The Queen* (1973) 129 CLR 460 at 465 per Barwick CJ; see also at 473 per Menzies J.

22 (1996) 16 WAR 23 at 36.

23 *The Criminal Code* (WA), s 689(1).

24 (1996) 16 WAR 23 at 36.

25 (1996) 16 WAR 23 at 36.

26 (1996) 16 WAR 23 at 25.

27 (1996) 16 WAR 23 at 25.

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was a deliberate and tactical decision made by the defence to permit that evidence to be introduced. I agree with Anderson J that (even if not admissible) the acceptance of this evidence has not resulted in a miscarriage of justice."

39 Again, there was no suggestion in the Court of Criminal Appeal that the evidence was admissible on a ground other than "recent complaint"; for example as containing prior statements of the complainant inconsistent with her testimony in court.

40 When special leave was granted by this Court on the papers²⁸, the point which the parties expected to argue, as indicated by their written submissions, concerned the applicability of the proviso in the stated circumstances. The appellant submitted that, as the only foundation for the exceptional admission of the complaint evidence was to demonstrate consistency in the conduct of the complainant (and thus to bolster her credibility), such evidence was crucial to the prosecution case. As the trial judge had told the jury, and as everyone recognised, the credibility of the complainant was critical to the Crown case. Anything that added to it may have added to the risk that the appellant would be convicted. It diminished the appellant's chances of acquittal. Estimates of how the jury might have reacted to the evidence of complaints were pure judicial speculation. In the appellant's submission, the evidence having been wrongly admitted, there was necessarily a miscarriage of justice and the case was not one for the proviso.

41 The Crown's submissions laid emphasis upon the tactical decision made by the appellant not to object to the testimony about the complaints but to use it to bolster the "other uncle" defence. Alternatively, the Crown met the complaint about inadmissibility head-on. Adopting the approach of Rowland J²⁹, it suggested that delay in complaint which had occurred in this case was not unreasonable. No party submitted an alternative theory for the admission of the evidence (such as a prior inconsistent statement).

42 On the premise that the evidence of complaints ought to have been excluded as not sufficiently "recent", it is impossible, in my view, to justify the application of the proviso. It is impossible to suggest that evidence which buttressed the credibility of the complainant with the testimony of three other witnesses (linked by the complainant's evidence to the appellant) could not have added considerable weight to the complainant's allegations. For all that a court knows,

28 By Brennan CJ, Dawson and Toohey JJ on 15 August 1997.

29 (1996) 16 WAR 23 at 24-25.

the evidence might have been crucial to the jury's reasoning³⁰. In the case of a legal mistake in the conduct of a trial, the approach of an appellate court is significantly different from that taken where no significant legal error has occurred but the verdict is attacked as unreasonable. Everyone in this country is entitled to have a trial conducted according to law. Where a mistake is shown in that regard in a criminal trial, which goes beyond the trivial or irrelevant, there is a heavy onus on the prosecution to demonstrate that, overall, the appellant has not been deprived of a fair trial and has not lost a chance of acquittal which was fairly open. In such a case it is for the Crown, defending the verdict, to demonstrate that the conviction was inevitable. Given the centrality of the credibility of the complainant in this case, I could not agree to the application of the proviso if the evidence of complaint was wrongly admitted, as the majority of the Court of Criminal Appeal held it was³¹.

Defence of the orders under appeal

43 This conclusion necessitates consideration of three possible ways to defend the orders, if not the reasoning, of the Court of Criminal Appeal:

1. That the evidence was admissible upon a basis never previously proposed, namely that it involved prior inconsistent statements on the part of the complainant in which she had identified her assailant as her "uncle" and not, by name, as the appellant, or "Uncle Suresh".
2. That the evidence of the complaints was not inadmissible, being "recent" in the relevant sense by reference to the criteria applicable to a complaint of a child of eight or nine years, as distinct from criteria appropriate and reasonable in the case of a young person or adult.
3. That the appellant had not lost the opportunity of a fair trial at all, but had had the trial which, by his counsel, he had elected to undergo.

44 The first proposition was initially raised as a possibility during argument in this Court. The development of that argument led counsel for the appellant to make the application to enlarge the grounds of appeal which, as I have said, was rejected³². The second proposition was that which attracted Rowland J in the

30 See *Domican v The Queen* (1992) 173 CLR 555 at 570-571.

31 cf *Wilde v The Queen* (1988) 164 CLR 365 at 371-372, 381; *Glennon v The Queen* (1994) 179 CLR 1 at 8-9, 12-13.

32 *Suresh v The Queen*, High Court of Australia, Transcript of proceedings, 13 November 1997 at 14-17.

Court of Criminal Appeal. The third proposition was strongly urged by the Crown. I shall deal with each proposition, in turn.

Suggested admissibility as prior inconsistent statements

45 For a number of reasons I do not consider that this Court would be justified now to treat the evidence of complaints as admissible as evidence of prior inconsistent statements by the complainant. This was never suggested at the trial or on appeal. It was not submitted by the parties. It contradicts the only basis upon which the evidence was tendered at the trial. Had the evidence been admitted as a prior inconsistent statement, the appellant would have been entitled to object. Objections directed to that ground were never tested.

46 There was no real inconsistency between the statements made by the complainant at the trial and those allegedly made to her school friends. They certainly did not contradict one another. The most that could be said is that the complaints to the school friends were incomplete or ambiguous. Even if, on this basis, it would have been permissible for the appellant to test the complainant on her prior statement, an application to do so would have had to be mounted. It is by no means certain that her answers would have opened up, and rendered admissible³³, the testimony of her school friends. Most importantly, the judicial instructions which would then have been required for the jury, on the use of the evidence as amounting to prior inconsistent statements, would have been different from those which the judge gave, relevant to the only ground of admissibility propounded, viz recent complaint. This Court recently had occasion to refer to the importance of clarifying, at trial, the basis upon which evidence was tendered so that judicial assistance to the jury on its use might be accurately expressed³⁴.

47 It is here that it is pertinent to note the terms of the amendment which the appellant sought during the hearing in this Court. In effect, the proposed additional ground of appeal complained³⁵ that the trial judge had erred by misdirecting the jury as to the use of the evidence by failing to confine its relevance to the assessment of the complainant's credibility. I would have allowed the amendment to allow the point to be developed. No specific prejudice was claimed by the Crown. However, the application to amend was rejected. Having regard to the failure to raise the point before the hearing in this Court, the ruling was hardly

33 Under the *Evidence Act* 1906 (WA), s 36BC.

34 *BRS v The Queen* (1997) 71 ALJR 1512 at 1521, 1526 and 1543; 148 ALR 101 at 113, 120, 142-143; cf *R v Dolan* (1992) 58 SASR 501 at 503.

35 *Suresh v The Queen*, High Court of Australia, Transcript of proceedings, 13 November 1997 at 14.

surprising. But the suggested ground illustrates the difficulty of belatedly embracing a completely new basis for the admission of the evidence of the complaints. With a different basis would have come the need for different instructions to the jury. The orders below cannot, in my view, be sustained on that different basis.

Complaints recent enough for a young child

48 As I have said, Rowland J favoured adoption of a different rule to be applied to the expectations of "early complaint" or "timely complaint" on the part of a child aged eight and nine years when compared with an older complainant. As his Honour acknowledged, the ordinary rule, requiring prompt complaint as a precondition to the admission of evidence which would otherwise be inadmissible, has its foundations in legal history, past judicial authority and the presuppositions about ordinary human responses which were expressed by judges before a number of modern developments occurred. Such developments include the study and growing understanding of human psychology, a greater appreciation of the impediments to complaint which confront many people who have been subjected to unwanted sexual interference and, especially, the significant recent increase in the number of complaints involving children of tender years³⁶.

49 In *M v The Queen*³⁷, Gaudron J adverted to the last-mentioned consideration. She said:

"Because complaint continues to have significance in relation to sexual offences, it is important for the assumption which justifies that significance to be formulated in terms which indicate that it is neither sex-specific nor of general application ... There is one class of case which cannot be approached on the basis of an assumption of the kind discussed in Hawkins' *Pleas of the Crown*, namely, cases of sexual assault on a child by a person who has the child's trust and confidence. In cases of that kind, the victim may be reluctant to resist the offender or to protest and, on that account, reluctant also to complain. As well, a child in that situation may be reluctant to complain from fear that he or she will not be believed, from fear of punishment or, even, fear of rejection by the offender."

50 In the present case, the delay between the last sexual act referred to in evidence and the complaints to school friends was very brief indeed, if the generalised statements of the complainant, as distinct from the offences charged, are taken into account. If the delay is dated from the last offence charged in the

36 *Jones v The Queen* (1997) 72 ALJR 78 at 92 (fn 54); 149 ALR 598 at 616 (fn 54).

37 (1994) 181 CLR 487 at 515.

indictment, it is around seven months. By comparison with some cases which have come before the courts, these are relatively short intervals. On the other hand, as Anderson J pointed out, the complainant in this case was at all times living in a "warm, secure and supportive family environment"³⁸. The interference allegedly began when the appellant was a stranger who had temporarily moved into her family home. Yet it was nearly two years after its commencement before the complainant "told her story". Even then she did not tell it to a family member but to a school friend.

51 Anderson J was right to emphasise the exceptional character of the admission of statements of complaint. By the authority of this Court, whether such complaint is made "at the earliest reasonable opportunity" is an important consideration in determining its admissibility³⁹. Statute may modify this requirement. In Western Australia, the *Evidence Act* 1906 (WA)⁴⁰ has been amended to require the judge, on the trial of a person for a sexual offence, where there has been an absence of complaint or delay in making a complaint, to give a warning to the jury to the effect that such "absence ... or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false". The judge is also obliged to inform the jury that "there may be good reasons why a victim of an offence such as that alleged may hesitate in making or may refrain from making a complaint of that offence". Such warnings were given in this trial. So far, the statute has refrained from going further. Outside the matters governed by statute the old rule remains⁴¹.

52 This is not a particularly suitable case in which to explore further the point made by Gaudron J in *M*. It is enough for me to say that I could not dissent from the view which Anderson J ultimately reached in the court below that "[o]n any view of the facts, there was ample 'reasonable' opportunity for complaint to be

38 (1996) 16 WAR 23 at 36.

39 *Kilby v The Queen* (1973) 129 CLR 460 at 465, 473.

40 s 36BD; cf *Crimes Act* 1900 (NSW), s 405B(2) considered in *R v Davies* (1985) 3 NSWLR 276 at 278; *Crimes Act* 1958 (Vic), s 61(1)(b) considered in *Crofts v The Queen* (1996) 186 CLR 427 at 443-452.

41 In *Crofts v The Queen* (1996) 186 CLR 427 at 451, the Court made it clear that provisions such as the *Evidence Act* 1906 (WA), s 36BD were not designed to convert complainants in sexual misconduct cases into an especially trustworthy class of witnesses. Referring to *Longman v The Queen* (1989) 168 CLR 79 at 86-87, the Court repeated its opinion that such provisions were not intended to "sterilise" complainants from critical comment where the particular facts of the case and the justice of the circumstances required it. The object was simply to remove the former requirement to treat complainants about sexual misconduct as specially suspect.

made in this case shortly after each group of offences occurred"⁴². The fact that the omission to avail herself of such opportunities may have been understandable in the circumstances would not have removed the significant obstacle to the exceptional admission of the evidence of complaint, correctly expressed by the majority in the Court of Criminal Appeal. I will therefore proceed on the footing that the majority were correct in this regard. If an objection to the evidence of the complaints had been made, such evidence should have been rejected. But what follows from the failure of trial counsel to object?

The way the trial was conducted

53 The Crown submitted that, far from having been denied a fair trial, the appellant had the trial which, by his trial counsel, he elected to undergo. Far from having been denied the chance of acquittal by the wrongful admission of prejudicial evidence, the accused had positively acquiesced in the admission of the evidence of complaints so as to construct the alternative uncle defence which was pressed upon the jury. This defence was not exactly the same as that originally raised in the appellant's statement to the police. But neither was it completely inconsistent with the appellant's assertion that the complainant was sexually mature beyond her years; by inference as a possible result of earlier contact with a real "uncle".

54 What is to be done when retrospect suggests that a trial strategy was seriously misguided, may have inflamed a jury but was consciously determined? Given the adversarial nature of our legal system, it is ordinarily necessary to hold a litigant to the way in which the case is presented by that litigant's legal representatives. This is true of criminal as well as of civil litigation⁴³. In a criminal trial, a judge has a duty to put to a jury any basis upon which they might find for the accused, whether or not that basis has been raised by the accused's legal representatives⁴⁴. This duty lies in reserve. In a sense, it helps to ensure against oversight, mistake or unevenness in the quality of legal representation which is an unavoidable feature of any trial system. That notwithstanding, the general rule is that, particularly in a criminal trial, a judge must be extremely cautious before intervening⁴⁵. One reason for such restraint is that, whilst the trial is proceeding, the judge may have insufficient materials upon which to understand why a particular course has been

42 (1996) 16 WAR 23 at 36.

43 *R v Birks* (1990) 19 NSWLR 677 at 684; *R v Miletic* [1997] 1 VR 593 at 598.

44 *Pemble v The Queen* (1971) 124 CLR 107 at 118; *R v Visser* [1983] 3 NSWLR 240 at 242.

45 *R v Birks* (1990) 19 NSWLR 677 at 684; *Re Knowles* [1984] VR 751 at 766-767.

adopted⁴⁶. Ordinarily, it will be presumed that legal representatives will decide upon trial tactics in the best interests of their client and, in important matters, upon express instructions. Out of an appreciation that serious mistakes can sometimes arise from incompetence, ignorance or inexperience, courts of criminal appeal have developed rules to safeguard accused persons from the risk of miscarriage of justice where serious default on the part of legal representation is shown⁴⁷. However, this does not mean that every tactical decision, considered with hindsight to have been misjudged, opens the door to a ground of challenge to the jury's verdict. Such a rule would be intolerable and unworkable. It would seriously undermine the finality of litigation which is important in criminal as it is in civil trials. All of this was said, in terms which I would accept, by the Full Court of the Supreme Court of Victoria in *Re Ratten*⁴⁸, and recently endorsed by the Court of Appeal of that State in *R v Miletic*⁴⁹:

"Under our law a criminal trial is not, and does not purport to be, an examination and assessment of all the information and evidence that exists, bearing upon the question of guilt or innocence. Even the Crown has some degree of choice as to what witnesses it will call. And the accused is completely free to decide how he will conduct his defence. He has the right to choose what issues he will contest, what facts he will dispute, whether he will give evidence or not, whether he will call witnesses or not, and, if he elects to call witnesses, which ones he will call. All these rights are fundamental to the conception of fair trial under our system of criminal justice.

In conformity with this conception of fair trial, if an accused person can show that he has been prevented by surprise, fraud, malpractice or misfortune from presenting at his trial evidence of substantial importance which he desired to present ... then ordinarily the fact that he has been tried and convicted without such evidence having been called involves that he has been deprived of his right to a fair trial and that there has, in that respect, been a miscarriage of justice.

But on the other hand, if the reason why the additional evidence was not called is merely that the accused and his advisers made a deliberate choice not to call particular witnesses or a particular class of evidence, then obviously the accused has not been denied, but has exercised, his right to a

46 *R v Visser* [1983] 3 NSWLR 240 at 242.

47 *Jukov v The Queen* (1994) 76 A Crim R 353 at 361.

48 [1974] VR 201 at 214.

49 [1997] 1 VR 593 at 597-598.

fair trial, and there has been no miscarriage of justice of the kind described above."

- 55 I agree that the fundamental question remains whether a conviction "involves or has brought about a miscarriage of justice"⁵⁰. Neither the proof that the accused was represented by competent legal representatives nor that a conscious forensic choice was made relieve the appellate court from considering the claim that a mistake has occurred which has produced a miscarriage of justice. But that conclusion will rarely be reached where the defence has been conducted competently. It will be even more rare when the conduct complained of involved a forensic choice, consciously elected with the prospect of perceived advantage, but the peril of risks to the accused.

The accused exercised his right to a fair trial

- 56 The object of the foregoing approach is not to punish an accused for an erroneous tactical decision made by that person's legal representative. It is to put an end to what would otherwise be an infinite regression of argument which would be destructive of finality of trials and of certainty in the administration of justice. It is not to hold the accused rigidly to rules of a game which ordinarily must be played by others over whom, as courts recognise, effective control by the accused is often more theoretical than real. It is to accept the realities within which a criminal trial takes place, reserving complaints about alleged miscarriages of justice arising from the conduct of the trial by a party's legal representatives to really serious cases of incompetence, ignorance and inexperience.
- 57 In the present case, it was not suggested that the appellant was represented at his trial with an incompetence that would invite appellate intervention on that ground. Such a suggestion would have required a ground of appeal with appropriate particulars, supported, where necessary, by evidence. Nor was it submitted that the choice made, to allow the evidence of the complaints to go before the jury, occurred by accident, oversight or ignorance of the law. The trial judge very properly directed specific attention to the question of the admissibility of the evidence of complaints. This notwithstanding, trial counsel raised no objection. The die was then cast. The accused wished to have the jury pass upon the "other uncle" hypothesis. For the trial judge, in the face of such an election, to have interfered, interrogated counsel or the appellant and taken it upon himself to exclude the evidence would have been extraordinary and wholly unacceptable.

50 *R v Sarek* [1982] VR 971 at 983; *Jukov v The Queen* (1994) 76 A Crim R 353 at 361; *Maric v The Queen* (1978) 52 ALJR 631 at 634-635; 20 ALR 513 at 520 per Gibbs J.

58 In the words of *Re Ratten*⁵¹, the appellant was not denied, but exercised, his right to a fair trial. In such circumstances there was no miscarriage of justice in permitting the evidence of the complaints to be given.

Postscript: conditions for parole

59 At the close of argument, counsel for the appellant moved the Court to grant the appellant bail. He did so on the basis of an affidavit of the appellant which was tendered. Bail was unanimously refused. However, in light of the appellant's affidavit, I would add a postscript to these reasons.

60 The appellant states that he became eligible for parole on 3 February 1997. He states that, because of what follows, he is not eligible for release until 4 June 1999 when he will have completed serving his entire sentence. The reason why the appellant was not released to parole is said to be because he declined to complete a course in the sex offenders' treatment programme conducted at the Casuarina Prison in Western Australia where he is detained. The explanation advanced for refusing him admission to that programme was that it is "a condition precedent of admittance into that course that the prisoner admits their guilt". The statements of fact in the appellant's affidavit were not contested by the Crown.

61 At least where appellate proceedings are outstanding, it may be hoped that some means will be found to relieve prisoners of the obligation to make such an admission, assuming it is indeed required and, if it is, that it is lawful. Enforced admissions of guilt, as the effective price of liberty, are not normally a feature of criminal justice in Australia. Whilst an acknowledgment of wrongdoing and the undertaking of such courses may be useful in particular cases, the extraction of admissions by the prospect of early release from custody will often lack integrity and may affront the dignity of the conscience even of a convicted person⁵². A better means of encouraging participation in the treatment course should, in my view, be considered⁵³. A discretion to accommodate the exercise of legal rights

51 [1974] VR 201 at 214.

52 See Fox, "Compulsion of Voluntary Treatment in Sentencing" (1992) 16 *Criminal Law Journal* 37 at 38-39; Pithers, "Maintaining Treatment Integrity With Sexual Abusers" (1997) 24 *Criminal Justice and Behaviour* 34 at 49; cf *R v Tutchell* [1979] VR 248 at 256.

53 The former co-ordinator of the sex offender programme at the Casuarina Prison has emphasised that the main criterion for admission is that "[t]he offender needs to *want* to change - not in order to get parole or any other form of inducement": Cull, "The Treatment of Rapists: A Measure of Prevention" in Eastaugh (ed), *Without Consent*: (Footnote continues on next page)

and also cases of conscientious objection (arguably manifested in this case at the price of the appellant's continuing detention in custody) would be highly desirable, if not legally required.

Conclusion and orders

62 In this way, but by a different route, I come to the same conclusion as the Court of Criminal Appeal. There was, ultimately, no miscarriage of justice of which the appellant can complain. The appeal should be dismissed.

63 HAYNE J. The circumstances giving rise to this appeal are described in the reasons for judgment of Gaudron and Gummow JJ and I do not repeat them. I agree that the appeal should be dismissed.

64 At the trial, counsel, who then appeared for the appellant, did not object to the reception of evidence of the complainant's statement to her friends which it is now said was wrongly admitted. Indeed he told the trial judge, before any evidence was called, that he wished to cross-examine the complainant about the statement that she had made, with a view to showing that she had complained about another man, not the appellant. To that end, counsel sought and obtained leave⁵⁴ to cross-examine the complainant by suggesting that her complaint was a complaint about sexual conduct by someone other than the appellant. The contention that the perpetrator was someone other than the appellant was central to his defence and the appellant sought to use the evidence of the complainant's statements to her friends at school in support of that contention.

65 In these circumstances there was no "wrong decision of any question of law" and there was no miscarriage of justice⁵⁵. Trial counsel for the appellant actively sought the admission of the evidence which is now the subject of attack in order to use that evidence in aid of the case which the appellant sought to argue at trial. Despite those arguments, the appellant was convicted. It was not, and could not have been, suggested that the course adopted by trial counsel was not a course reasonably open. The appellant was not deprived of a chance of acquittal that was fairly open⁵⁶.

54 Pursuant to *Evidence Act* 1906 (WA), s 36BC.

55 *The Criminal Code* (WA), s 689(1).

56 *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J; *Wilde v The Queen* (1988) 164 CLR 365 at 371-372 per Brennan, Dawson and Toohey JJ, 381 per Gaudron J; *Glennon v The Queen* (1994) 179 CLR 1 at 9 per Mason CJ, Brennan and Toohey JJ, 12-13 per Deane and Gaudron JJ.