

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, KIRBY, HAYNE AND CALLINAN JJ

GREGORY BERNARD GIPP

APPELLANT

AND

THE QUEEN

RESPONDENT

Gipp v The Queen (B4/1998) [1998] HCA 21
Date of Order: 1 April 1998
Date of Publication of Reasons: 16 June 1998

ORDER

1. *Appeal allowed.*
2. *Set aside the order of the Court of Appeal of Queensland and in lieu thereof order that the appeal to that court be allowed, the convictions quashed and a new trial ordered on counts 3, 4, 5, 6 and 7.*

On appeal from the Supreme Court of Queensland

Representation:

P R Whitford for the appellant (instructed by Robinson & Robinson)

M J Byrne QC with L J Clare for the respondent (instructed by Director of Public Prosecutions (Queensland))

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

CATCHWORDS

Gipp v The Queen

Criminal Law – Sexual offences – General evidence of history of sexual abuse – Whether evidence admissible as similar fact or propensity evidence – Whether admission of evidence amounted to a miscarriage of justice – Whether directions or failure to direct by trial judge as to use of that evidence amounted to a miscarriage of justice.

Criminal Law and Procedure – Nolle prosequi – Purported entry of nolle prosequi in respect of some but not all counts in indictment – Whether this procedural irregularity amounted to a miscarriage of justice – Whether leaving the evidence with respect to these charges before the jury amounted to a miscarriage of justice.

Appeal – Points and objections not taken below – Role of court of criminal appeal.

Words and phrases – "unsafe and unsatisfactory" – "miscarriage of justice".

Criminal Code Act 1899 (Q), ss 563, 668E.

1 GAUDRON J. On 1 April 1998, the Court pronounced orders allowing the appeal in this matter, setting aside the order of the Court of Appeal of Queensland, and in lieu thereof, quashing the appellant's convictions and ordering a new trial on counts 3, 4, 5, 6 and 7 of the indictment presented against him in the District Court of Queensland on 4 March 1996. I now set out the background facts and my reasons for participating in that order.

2 The appellant was indicted on seven charges involving the sexual abuse of his step-daughter. There were four charges of unlawful and indecent assault, which offences were alleged to have occurred, respectively, on 24 December 1982, on a date unknown between 9 and 25 December 1983, on a date unknown between 13 December 1985 and 23 January 1986 and on 11 May 1986. There were also three charges of rape. Those offences were alleged to have occurred, respectively, on a date unknown between 13 December 1985 and 23 January 1986, on a date unknown between 12 December 1986 and 1 February 1987 and on a date unknown between 9 December 1988 and 31 January 1989. The appellant pleaded not guilty to all charges.

3 The prosecution case consisted, in the main, of the uncorroborated evidence of the complainant. Some aspects of her evidence were open to criticism. Her evidence relating to the first two counts of unlawful and indecent assault did not accord with her earlier evidence at committal proceedings and, in consequence, the prosecution "withdrew" those counts from the jury. Moreover, she admitted that she had perjured herself at the committal proceedings by denying that she had been convicted of a drug offence and, also, by denying that she had smoked marijuana. And she readily acknowledged that she had not complained to police until approximately six years after the last of the offences charged.

4 The appellant gave evidence denying that he had ever behaved improperly towards the complainant. Additionally, it was argued on his behalf that it was highly improbable that there was any indecent assault as alleged on 11 May 1986. That was the only specific date alleged for any of the counts left to the jury. As it happens, 11 May 1986 was Mother's Day and, also, the day on which the complainant was admitted to hospital with acute appendicitis. She gave evidence that, on that day, her mother, her aunt and grandmother went to bingo "at about lunchtime" and that, thereafter, she was indecently assaulted by the appellant who later took her to hospital. She said in her evidence in chief:

"... he took me upstairs and he was rubbing his penis on my vagina. I was in heaps of pain. I was - that was late in the afternoon and he took me to the hospital after he'd finished."

5 On the other hand, the appellant and the complainant's mother each gave evidence that the appellant took the complainant to hospital when, or just before, the complainant's mother left for bingo with the complainant's aunt and grandmother. The complainant's mother placed the time at "about 12 o'clock",

indicating that bingo started at 1.30pm. That account was, to some extent, borne out by medical records which reveal that the complainant was seen by a doctor at the hospital to which she was taken at 12.50pm. The records do not reveal the precise time that she arrived.

6 Except for the two counts which were "withdrawn" from the jury, the appellant was convicted on all counts. There were some unsatisfactory features of the trial. As already mentioned, the prosecutor "withdrew" the first two counts from the jury. More precisely, he purported to enter a nolle prosequi to those charges, a course which, it is conceded by the respondent, was not then permitted¹. Of more concern, the evidence of the complainant with respect to those counts was left before the jury with no explanation and with no indication, either from counsel or the trial judge, that it was inconsistent with the complainant's earlier evidence. The jury was simply instructed that those counts had been withdrawn and that there was no need to deliver a verdict on them.

7 Of even greater concern than the situation involving counts 1 and 2 is the fact that the complainant gave evidence in chief that the appellant had regularly sexually molested her in Victoria prior to the offence charged in count 1. In cross-examination - although not in response to questions actually asked - she also asserted that the sexual abuse "happened on a regular basis ... these aren't just the only ones" and that "it started when I was four". Subsequently, in answer to a direct question from defence counsel, she again said that the abuse occurred on a "regular basis", explaining that "[i]t was once a week, maybe twice a week".

1 As at 29 May 1996, the date of the trial, s 563 of the *Criminal Code Act* 1899 (Q) read as follows:

"(1) A Crown Law Officer may inform any court, by writing under the officer's hand, that the Crown will not further proceed upon any indictment then pending in the court.

(2) An officer appointed by the Governor in Council to present indictments in any court of criminal jurisdiction may inform that court, by signed writing, that the Crown will not further proceed upon any indictment then pending in that court.

(3) When such information is given to the court the accused person is to be discharged from any further proceedings upon that indictment."

Section 563 was subsequently amended by s 98 of the *Criminal Law Amendment Act* (1997) (Q) by the addition of the words ", or in relation to any charge contained in any indictment," after "indictment" in both sub-ss (1) and (2) and by the addition of "or charge" after "indictment" in sub-s (3).

8 The trial judge instructed the jury that the complainant's general evidence of sexual abuse was "led to show the nature of the relationship between the complainant and the accused" and that there was "no need for [them] to be satisfied beyond reasonable doubt of those background facts ... provided that [they] accept[ed] the complainant's account that it occurred". It may be that the complainant's general evidence with respect to abuse led to the quite disturbing request by the jury for "guidance on what, in fact, [they were] to base [their] decisions on, whether it should be facts that were provided or more or less the evidence through the sworn testimony".

9 It is convenient, at this stage, to say something of the general evidence of sexual abuse which, in the view of the trial judge, went "to show the nature of the relationship between the complainant and the accused". There are occasions when evidence of criminal conduct other than that charged is admissible in proof of an offence because it raises the objective improbability of that evidence bearing an explanation consistent with the accused's innocence of that offence². Evidence of that kind is usually called "similar fact" or "propensity" evidence and has a special probative value because, for example, it is highly improbable that persons would concoct the same story³ or because it reveals some idiosyncratic or peculiar modus operandi which makes it highly probable that the acts in question were all committed by the same person.

10 On other occasions, evidence of other criminal conduct may be admissible because, when taken in conjunction with other evidence, it is probative of the offence charged. Thus, evidence of previous acts of incest was admissible in *R v Ball*⁴ because, taken "together with evidence ... that [the defendants] slept in the same bed, [that evidence] made it likely that incest took place between the dates charged in the indictment"⁵. And evidence of other criminal or reprehensible conduct is sometimes admissible because it is relevant to a subsidiary issue that arises in the trial. Thus, for example, evidence of morally blameworthy conduct

2 See *BRS v The Queen* (1997) 71 ALJR 1512 at 1520 per Toohey J, 1524 per Gaudron J; 148 ALR 101 at 111, 117. See also *Hoch v The Queen* (1988) 165 CLR 292 at 294-295 per Mason CJ, Wilson and Gaudron JJ; *Harriman v The Queen* (1989) 167 CLR 590 at 600 per Dawson J, 614 per Gaudron J; *S v The Queen* (1989) 168 CLR 266 at 287 per Gaudron and McHugh JJ; *Pfennig v The Queen* (1995) 182 CLR 461 at 481-482 per Mason CJ, Deane and Dawson JJ, 506 per Toohey J.

3 *Hoch v The Queen* (1988) 165 CLR 292 at 295-296 per Mason CJ, Wilson and Gaudron JJ.

4 [1911] AC 47.

5 *Harriman v The Queen* (1989) 167 CLR 590 at 631 per McHugh J, explaining the decision in *R v Ball* [1911] AC 47.

was led by the prosecution in *BRS v The Queen*⁶ to counter evidence of good character to be called in the defence case. So, too, evidence of a prior conviction for sexual molestation of the complainant was admissible in the defence case in *B v The Queen*⁷ because "an important element of [the] defence [was] that [the complainant] had made false allegations with a view to taking advantage of [the appellant's] past conduct"⁸. However, where evidence of blameworthy conduct or of an offence committed on some other occasion is admitted because it is relevant to some subsidiary issue, the trial judge must instruct the jury as to the limited use that they may make of that evidence⁹.

11 General evidence of sexual abuse on occasions other than those charged does not have that special probative value which renders evidence admissible as "similar fact" or "propensity" evidence. And in this case, there was no feature of the kind present in *R v Ball*¹⁰ that made it directly relevant to the question whether the appellant was guilty of the offences charged. Thus, unless there was some subsidiary issue in the trial to which it was relevant, the evidence of general sexual abuse was not admissible.

12 In cases of child sexual abuse, the defence case may be conducted in such a way as to raise an issue to which prior abuse is relevant. As pointed out by McHugh and Hayne JJ in this case, evidence of prior sexual abuse may explain lack of surprise or failure to complain. If they are issues in the trial, evidence of general sexual abuse is relevant and admissible. But they can only be made issues by the way in which the defence case is conducted. And they were not made issues in this case. More precisely, they had not been made issues when the evidence of general abuse was given by the complainant in chief and repeated in non-responsive answers in the course of her cross-examination. Thus, that evidence was not admissible.

13 The complainant's evidence with respect to the first two charges in the indictment is in exactly the same position as her evidence in chief and her non-responsive answers with respect to sexual abuse on occasions other than those charged: it did not have the special probative quality necessary to make it

6 (1997) 71 ALJR 1512; 148 ALR 101.

7 (1992) 175 CLR 599.

8 (1992) 175 CLR 599 at 602 per Mason CJ.

9 *BRS v The Queen* (1997) 71 ALJR 1512 at 1520-1522 per Toohey J, 1525-1526 per Gaudron J, 1527-1531 per McHugh J and 1539-1544 per Kirby J; 148 ALR 101 at 112-114, 119-120, 121-126, 138-143.

10 [1911] AC 47.

5.

admissible as "similar fact" or "propensity" evidence; nor was it otherwise directly relevant to the question of guilt, and no subsidiary issue arose in the trial to which it was relevant.

14 The matters which have thus far been considered were not the subject of complaint at trial or in the Court of Appeal and, only indirectly, was complaint made in this Court. The same is true of the trial judge's direction that the jury need only be satisfied on the balance of probabilities with respect to the complainant's general evidence of sexual abuse, except that this issue was raised somewhat more directly in this Court. The only ground of appeal taken in the Court of Appeal was that the verdicts were "unsafe and unsatisfactory and against the weight of the evidence in particular the complainant's evidence which was uncorroborated". The single ground of appeal in this Court is that the Court of Appeal "failed to apply, or incorrectly applied, the principles which govern an appellate Court's assessment and determination of whether a verdict is unsafe and unsatisfactory".

15 In the main, the appeal to the Court of Appeal was argued by reference to the evidence of events on 11 May 1986, the day on which the complainant was admitted to hospital with acute appendicitis. However, attention was drawn to the complainant's admission of perjury at the committal proceedings, the unsatisfactory nature of her evidence with respect to the counts "withdrawn" from the jury and the course taken with respect to those counts. And the respondent's argument drew attention to the general evidence of sexual abuse "occurring on a regular weekly basis", extending back to a period before the complainant and her family moved to Queensland.

16 The appeal to the Court of Appeal was dismissed. Davies JA, with whom Fitzgerald P and de Jersey J agreed, said of the events of 11 May 1986 that "the hospital records were not necessarily inconsistent with [the complainant's] evidence" and that "the jury could have concluded that [she] was mistaken as to the times on that day but nevertheless have accepted her evidence as to the indecent assault ... and ... rejected the evidence of the appellant and his wife." It was also noted that "the jury had the advantage ... of observing each of [the witnesses] give evidence". Thus, it was held that "[t]here [was] no basis ... for concluding that [they] should have had a reasonable doubt [with respect to the events of 11 May]". The appellant subsequently appealed to this Court.

17 The expression "unsafe and unsatisfactory" has no very precise meaning. It is commonly used to indicate that, although there was evidence to sustain a verdict of guilty, the jury ought, nonetheless, have entertained a reasonable doubt as to guilt¹¹. That is the sense in which it was understood by the Court of Appeal in this

11 See, for example *Chamberlain v The Queen* [No 2] (1984) 153 CLR 521 at 531 per Gibbs CJ and Mason J; *Morris v The Queen* (1987) 163 CLR 454 at 461 per Mason CJ, 473 per Deane, Toohey and Gaudron JJ; *M v The Queen* (1994) 181 CLR (Footnote continues on next page)

case. However, it, or an equivalent expression such as "unjust or unsafe", may be used to indicate that there is some defect in the summing up¹² or "some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled"¹³.

18 It is well settled that, where it is contended that a verdict is unsafe or unsatisfactory, in the sense that the jury should have entertained a reasonable doubt as to guilt, "[a]n appellate court must itself consider the evidence in order to determine whether it was open to the jury to convict"¹⁴. And "[i]f the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence."¹⁵ In that exercise, it is necessary for an appellate court to have regard to the whole of the evidence. And ordinarily, it will also be necessary to have regard to the trial judge's summing up.

19 An examination of the whole of the evidence does, in my view, lead to the conclusion that there is no necessary inconsistency between the hospital records and the complainant's evidence with respect to the events of 11 May 1986 and that, notwithstanding the difficulties associated with her evidence, the jury was not bound to have entertained a reasonable doubt as to guilt. Reference has already been made to those difficulties. It is sufficient to observe that they were not such that a jury could not accept her evidence relating to the offences upon which the appellant was convicted. So far as concerns the events of 11 May 1986, the complainant referred in her evidence in chief to the relevant events occurring "late in the afternoon". However, she said in cross-examination that her mother, aunt and grandmother left at lunch time, that she then got up from her bed and hid under

487 at 492-493 per Mason CJ, Deane, Dawson and Toohey JJ (with whom Gaudron J agreed on this point at 508).

12 *Carr v The Queen* (1988) 165 CLR 314 at 340-341, 345 per Gaudron J. See also *Chidiac v The Queen* (1991) 171 CLR 432 at 458 per Gaudron J.

13 *Davies and Cody v The King* (1937) 57 CLR 170 at 180.

14 *Carr v The Queen* (1988) 165 CLR 314 at 331 per Brennan J.

15 *M v The Queen* (1994) 181 CLR 487 at 494 per Mason CJ, Deane, Dawson and Toohey JJ, referring to *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 618-619 and *Chidiac v The Queen* (1991) 171 CLR 432 at 443-444. See also *Jones v The Queen* (1997) 72 ALJR 78; 149 ALR 598.

the house, although not for very long, was then taken to the bedroom, indecently assaulted, and after lying there for a little while, taken to hospital. There was nothing inherently improbable in that account. And as the appellant's evidence was that it only took 5 or 10 minutes to get to hospital, it did not necessarily conflict with the medical records.

20 Although an examination of the evidence does not disclose that the verdict was unsafe or unsatisfactory in the sense that the jury should have had a reasonable doubt with respect to the charge relating to events on 11 May 1986, it clearly reveals that there was evidence before the jury of offences other than those upon which they had to determine the appellant's guilt or innocence. Specifically, there was the evidence given by the complainant with respect to counts 1 and 2 and her general evidence of having been sexually abused from the age of four. That would have been apparent to the Court of Appeal had the whole of the evidence been examined. And because the evidence to which reference has been made is admissible only in limited circumstances or for limited purposes, an examination by the Court of Appeal of the transcript would necessarily have led it to peruse the trial judge's summing up to see what, if any, direction had been given with respect to that evidence.

21 Even if the Court of Appeal had come to the view that, no objection having been taken, no miscarriage of justice was occasioned by the evidence with respect to the first two counts being left before the jury or by the receipt of the complainant's general evidence of sexual abuse, it could not in my view have reached the same conclusion with respect to the trial judge's direction relating to the complainant's evidence that she had been abused from the age of four. The bare direction to the jury that they had only to be satisfied with respect to that evidence on the balance of probabilities was erroneous and dangerously so. It left open the possibility that the jury might reason from a finding, on the balance of probabilities, that there was a relationship involving regular sexual abuse, that the appellant was guilty of the specific offences charged.

22 Had the Court of Appeal been aware of the trial judge's direction with respect to the complainant's evidence of regular sexual abuse, it would inevitably have concluded that there was a substantial possibility that the jury was mistaken or misled in the manner in which they reached their decision and that, in that sense, the appellant's convictions were unsafe and unsatisfactory. Because that did not occur, it must be concluded that the Court of Appeal failed to apply the principles which govern an appellate court's assessment of whether a verdict is unsafe and unsatisfactory. And it is for that reason that I joined in the orders made on 1 April 1998.

23 Before leaving this matter, it is appropriate to note two other matters. First, were I of the opinion that, given the limited nature of the argument in the Court of Appeal, it could not be said that it adopted an incorrect approach in considering whether the convictions were unsafe and unsatisfactory, I would, nonetheless,

grant leave to the appellant to amend his grounds of appeal and allow the appeal. In this respect, it is sufficient to note that, when an appeal is lodged, the entire matter is before the court to which the appeal is brought and, unless there is some statutory provision to the contrary, that court "can entertain any matter, however arising, which shows that the decision of the Court appealed from is erroneous"¹⁶.

24 The effect of s 668E(1) of the *Criminal Code Act 1899* (Q) is to require the Court of Appeal, in an appeal against conviction, to determine whether there is any defect in the trial process occasioning a miscarriage of justice. Although in its reasons in this case, the Court of Appeal dealt only with the question whether the appellant's convictions were unsafe and unsatisfactory, in the sense that the jury should have entertained a reasonable doubt as to guilt, the actual decision was that there was no defect in the trial process occasioning a miscarriage of justice. That decision was wrong. And an appeal having been lodged, it is the duty of this Court to so hold, notwithstanding the limited nature of the matters argued in the Court of Appeal. It is because a court of criminal appeal must decide whether there has been an error occasioning a miscarriage of justice and, on appeal, this Court must decide whether that decision was right or wrong, that an appeal may succeed in this Court on a point neither taken at trial nor in the subsequent appeal to a court of criminal appeal¹⁷.

25 The second matter that should be noted is that questions were asked of the appellant in cross-examination as to whether he could provide a reason why the complainant might make false allegations against him. The trial judge correctly directed the jury that it was not for the appellant to provide any such reason. However, the questions should not have been asked. As pointed out in *Palmer v The Queen*¹⁸, the appellant's inability to provide a reason may have resulted in "his protestations of innocence ... [ringing] hollow in the jury's ears". Or to put the matter bluntly, it might have given the complainant's evidence a measure of credibility which it did not deserve and, at the same time, falsely detracted from the credibility of the appellant.

16 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 601 per Griffith CJ.

17 See, for example *De Jesus v The Queen* (1986) 61 ALJR 1 at 3 per Gibbs CJ, 6 per Mason and Deane JJ, 68 ALR 1 at 5, 10; *Bahri Kural v The Queen* (1987) 162 CLR 502 at 512 per Toohey and Gaudron JJ; *Robinson v The Queen* (1991) 180 CLR 531 at 536; *KBT v The Queen* (1997) 72 ALJR 116 at 119 per Brennan CJ, Toohey, Gaudron and Gummow JJ, 126 per Kirby J; 149 ALR 693 at 697, 706. See also *Stirland v Director of Public Prosecutions* [1944] AC 315 at 327-328.

18 (1998) 72 ALJR 254 at 259; 151 ALR 16 at 23; [1998] HCA 2 at 11.

26 McHUGH AND HAYNE JJ. Pursuant to the grant of special leave, Gregory Bernard Gipp ("the appellant") appeals against an order of the Court of Appeal of Queensland dismissing his appeal against convictions on two charges of indecent assault and three charges of rape of his step-daughter ("the complainant"). The question for determination in the appeal is whether the convictions of the appellant should be set aside because they are unsafe or unsatisfactory or because a miscarriage of justice has occurred.

27 In our opinion, having regard to the conduct of the trial, the convictions are not unsafe or unsatisfactory. Nor was there any miscarriage of justice.

Factual background

28 The complainant is the step-daughter of the appellant who married her mother in 1975. At the time, the complainant was three years old. The family lived in Victoria initially but moved to Queensland in about 1979.

29 The complainant gave general evidence that her step-father had sexually assaulted her when she was four years of age and that the assaults had continued until she left home at the age of 16. Only seven of the incidents occurring during this long period were the subject of the charges in the indictment. Four of these charges were for indecent assault; three were for rape. The seven offences allegedly occurred between December 1982, when the complainant was 10 and January 1989 when she was 16. During the trial, the Crown entered a nolle prosequi in respect of counts 1 and 2 of the indictment. These counts alleged offences of indecent assault committed in December 1982 and 1983, respectively.

30 Counts 3 (indecent assault) and 4 (rape) arose out of an incident which allegedly took place between dates in December 1985 and January 1986 when the complainant was 13 years old. She alleged that she was lying on her bed when the appellant came into her room and told her that he wanted "a rub" (a term allegedly used by the appellant to describe a practice of rubbing his penis outside her vagina). He told her to go into his bedroom. The complainant went into the bedroom and laid down on the bed. The appellant undressed her and put his fingers inside her vagina (count 3) and said he thought she was ready. He then said "would you like a fuck?" and got on top of her and put his penis inside her (count 4). He ejaculated on the complainant's stomach.

31 Count 5 alleged an indecent assault which the complainant says she recalls because on that day she was admitted to hospital for an emergency appendectomy. She alleged that the assault took place between 12 noon when her mother, grandmother and aunt left the home to go to a bingo game and the time when the appellant took the complainant to the hospital that afternoon. Before the three women left, the appellant indicated that he wanted "a rub". The complainant refused, saying that she was in a lot of pain. After her mother had left, the appellant

found the complainant hiding under the house. He took her upstairs and rubbed his penis against her vagina until he ejaculated. He then took her to the hospital where she had an emergency appendectomy that afternoon.

32 Count 6 alleged a rape occurring between December 1986 and February 1987, when the complainant was 14 years old. The complainant testified that she came home from the beach with her boyfriend and found the appellant alone in the house. The appellant told the complainant to send her boyfriend home, which she did. He then asked her if she felt like "a rub". The appellant made her get down on the floor of the lounge room, take off her pants and get on her hands and knees. He then had intercourse with her from behind. The appellant said he wanted to have intercourse that way because he had sunburn on his legs and another position would hurt his legs.

33 Count 7 alleged a rape occurring between December 1988 and January 1989 when the complainant was 16 years old. She said that she had been with a friend who lived next door and came home to get a jumper. The appellant was on the lounge. He asked her if she would like "a fuck". The complainant said, "No". The appellant persisted. Eventually, he took her into his bedroom, took off her pants, and had intercourse with her against her will. The complainant said that the appellant ejaculated inside her, which upset her because she feared becoming pregnant. She called him a bastard. Shortly after this incident, she went to live with her aunt in Melbourne.

34 The complainant did not complain of any of these incidents until 1991 when she told her boyfriend. However, she gave evidence that the appellant had sexually molested her for many years prior to the incidents, the subject of the indictment. She said that she told her younger sister about these sexual assaults when she was 10 and her sister was 8 years old. Apparently the sister has no recollection of such a complaint. The complainant explained the absence of a complaint by saying that it was not something that she could talk to people about, "I've grown up with it. I thought dads did that to little girls, that's what fathers and daughters did". Somewhat inconsistently with this belief, she also said that she didn't want her "nanna" to know because she knew that she would move out of the house and thought that her mother "couldn't live with nanna not being there".

35 About early 1992, the complainant began to see a counsellor concerning emotional problems arising out of the sexual abuse but discontinued the counselling. In 1995, she began to see a new counsellor which eventually led to police laying the present charges in that year.

The trial

36 The principal witnesses at the trial were the complainant, the appellant and the complainant's mother. The complainant's evidence was uncorroborated. The appellant denied the charges and all allegations of sexual misbehaviour. The evidence of the complainant's mother, if correct, supported the appellant's claim that no sexual offence took place on the day that the complainant went to the hospital. The mother testified that the appellant left for the hospital with the complainant *before* the three women left for the bingo game. The hospital records indicated that the complainant was seen by a doctor at the hospital at 12.50 pm.

37 The jury convicted the appellant on the five counts left to them. He was sentenced to 10 years imprisonment on each count of rape and five years imprisonment for each count of indecent assault, the latter sentences to be served concurrently with the rape sentences.

The Court of Appeal

38 In the Court of Appeal, counsel for the appellant contended that his convictions were unsafe and unsatisfactory. In support of this ground, he relied on the following arguments:

1. In count 5 (the hospital incident) the complainant's evidence was directly contradicted by her mother's evidence and the hospital records tend to support the mother's version of events. Consequently, a reasonable jury must have had a reasonable doubt.
2. The complainant's credit was seriously affected because she had admitted at the trial that, during the committal proceedings, she perjured herself by denying that she had used marijuana in the recent past. At the trial she had admitted that she had been convicted for possession of marijuana.
3. Significant variations "within the complainant's evidence" supported the conclusion that the convictions were unsafe and unsatisfactory. In support of this submission, counsel for the appellant referred to the complainant's evidence in relation to the first and second counts of the indictment which were the counts the subject of the *nolle prosequi*. He pointed out that in evidence the complainant had said that she was older when the incident in count 1 occurred than she was when the incident in count 2 occurred. However, count 1 alleged that the incident in that count occurred in December 1982 while count 2 alleged the incident in that count occurred in December 1983. Furthermore, her evidence was that she was seven or eight years old when the count 2 incident occurred when, on the date alleged in the indictment, she would have been 11 years old. Counsel for the appellant used these inconsistencies to argue that the complainant was not a reliable witness.

In the Court of Appeal, counsel said, "I do not submit that by themselves these variations would be fatal to the convictions, but they are a compounding factor telling against the complainant's veracity and reliability".

4. The complainant had given inconsistent evidence at the trial and at the committal hearing in relation to when the appellant first said to her "Would you like a fuck" or words to that effect. At the committal hearing, the complainant had said that the expression was first used in respect of the charge laid in count 7 which occurred in December 1988 or January 1989. At the trial, the complainant said that the appellant had used this expression in respect of the incident the subject of count 4 (December 1985 - January 1986) as well as the incident charged in count 7.

- 39 The Court of Appeal dismissed the appeal. Davies JA gave the leading judgment. Fitzgerald P and de Jersey J agreed with his reasons for judgment. After reviewing the evidence, Davies JA said that the appellant's main argument in support of the claim that the convictions were unsafe or unsatisfactory related to count 5 which concerned the indecent assault on the day that the complainant went to hospital. His Honour said:

"Those records [ie the hospital records] show that the complainant was first seen by a doctor at 12.50 pm on that day. However, the complainant had said that the appellant's wife left at lunch time and she was generally unable to be specific as to times so that in my view the hospital records were not necessarily inconsistent with her evidence. Alternatively, the jury could have concluded that the complainant was mistaken as to the times on that day but nevertheless have accepted her evidence as to the indecent assault on that day and to have rejected the evidence of the appellant and his wife.

In the end, in my view, the jury were left with a conflict of evidence between the complainant on the one hand and the appellant and his wife on the other. In resolving that, the jury had the advantage, which this Court lacks, of observing each of them give evidence and from that observation forming a view as to their credibility. There is no basis, in my view, for concluding that the jury should have had a reasonable doubt on that question."

- 40 In our opinion, his Honour's assessment of the evidence was correct. In cross-examination of the complainant, counsel for the appellant attempted to commit the complainant to a time frame of either one or two hours for the events before the trip to hospital. The extent to which the complainant agreed with the time frame and committed herself to it appears minimal. In any event, the hospital records which place the time at which the complainant saw a doctor as being 12.50 pm do not directly contradict the complainant's evidence.

41 While the complainant's evidence was contradicted by the evidence of her mother on the sequence of events that day, the jury were not bound, acting reasonably, to accept the mother's evidence. The mother said that on this particular day she remembered the appellant leaving in a car to take the complainant to the hospital at the same time as she and the other women left for bingo. If the mother's evidence is correct, the events did not take place as the complainant has described them. However, it was open to the jury to reject the mother's testimony. She and three of her children were still living with the appellant while the complainant had left home at the age of 16, six years before the trial took place. The jury, who saw the witnesses, may have taken the view that the mother was not so impartial a witness that her account should be preferred to that of the complainant. In any event, the jury may have thought that the mother's account was inaccurate given that the incident had happened 10 years before and there was little reason for her to remember it. On her own account, she obviously had not been worried enough about her daughter's health to go with her to hospital, preferring to go off to bingo with her mother and sister. The mother's evidence was often hesitant and was inconsistent with her evidence at the committal hearing on issues which should have been easy to remember such as sleeping arrangements in the household.

42 Davies JA also rejected the claim that the complainant's perjury made her an unreliable witness. His Honour said that although perjury is a serious offence, "the jury was entitled to consider her failure to be truthful about how many times she had smoked marijuana did not affect her credibility on the central issue in this case." His Honour rejected the contention that variations in the complainant's evidence made the convictions unsafe or unsatisfactory. His Honour said that none of the variations "were substantial". In relation to the variations in the complainant's evidence concerning when the appellant had first said words to the effect: "Would you like a fuck", his Honour said that "having regard to the time which has elapsed between the events which occurred and the time when she gave evidence, this was of no great significance."

43 In our opinion, having regard to the arguments put to the Court of Appeal, that Court was correct in rejecting the appellant's appeal. The reasons given by Davies JA were no doubt brief. But they were clearly correct. Nothing is to be gained by setting out in greater detail the reasons which lead us to the same conclusion as his Honour reached.

The appeal in this Court

44 If the appellant's argument in this Court had followed the course taken in the Court of Appeal, not only would his appeal have been dismissed but a grant of special leave to appeal would almost certainly have been refused. Between the Court of Appeal and the hearing in this Court, however, the appellant instructed new counsel who has radically transformed the appellant's argument that his convictions are unsafe or unsatisfactory. In this Court Mr Whitford, who had not

appeared at the trial or in the Court of Appeal, contends that two errors occurred during the trial which make the convictions of the appellant unsafe or unsatisfactory and, in any event, a miscarriage of justice.

45 First, he contends that the trial was flawed in that, contrary to then provisions of the *Criminal Code Act 1899* (Q) ("the Criminal Code"), the trial judge permitted the Crown to enter a nolle prosequi in respect of two counts in the indictment. At that time, the Crown only had power to enter a nolle prosequi in respect of an indictment, not particular charges in the indictment. Mr Whitford contends that the entry of the nolle prosequi deprived the appellant of the benefit of acquittals on the two counts and the opportunity to comment to the jury on the inconsistencies in the evidence of the complainant in respect of those counts. Second, he contends that the trial judge's directions in respect of a general history of sexual interference concerning incidents other than those that were the subject of the charges were so inadequate as to prejudice the fair trial of the action.

46 No objection to these "errors" was raised at the trial or in the Court of Appeal of the Supreme Court of Queensland. To circumvent this difficulty, Mr Whitford contends that, where a convicted person alleges that his or her conviction is "unsafe or unsatisfactory", a court of criminal appeal has a duty to examine the record for errors that are "manifest on the face of the record". He contends that a trial that contains legal error manifest on the face of the record is unfair and constitutes a "miscarriage of justice" within the meaning of that term, as it is used in the common form criminal statutes. It follows that, if the trial has been unfair in this sense, it does not matter that the accused did not object to the admission or form of irrelevant or prejudicial evidence or to a particular direction or raise a legal argument or that there was sufficient and satisfactory evidence on which the jury could convict the accused. He submits that:

"the duty of an appellate court to be vigilant and to conduct its own independent inquiry must extend to an assessment not only of the evidence but also of the circumstances attending the conduct of the trial. It must be satisfied not only that upon the whole of the evidence that it was reasonably open to the jury to be satisfied beyond reasonable doubt that the accused was guilty, but it must also be satisfied that there is nothing apparent on the record which constitutes a failure in observing the conditions essential to a fair trial or which raises a substantial possibility that the jury may have been mistaken or misled."

47 That being so, he contends that in the present case the Court of Appeal failed to apply or incorrectly applied the principles which govern a determination of whether a verdict is unsafe or unsatisfactory.

The test for determining whether a verdict is unsafe or unsatisfactory

48 In our opinion, the test suggested by Mr Whitford for determining whether a conviction is unsafe or unsatisfactory or constitutes a miscarriage of justice must be rejected. It is unsupported by authority and would place an inordinate burden on a court of criminal appeal. Moreover, such an approach would be contrary to the adversarial nature of our legal system, which relies on an impartial judge as arbiter of the issues and which requires that the parties determine which issues will be put before a court for decision.

49 The prevailing test for determining whether a verdict is unsafe or unsatisfactory was authoritatively formulated in *M v The Queen*¹⁹ by Mason CJ, Deane, Dawson and Toohey JJ. Their Honours said the correct test was whether the Court thought that upon the whole of the evidence it was "open to the jury" to be satisfied beyond a reasonable doubt that the accused was guilty. This test was re-affirmed in *Jones v The Queen*²⁰. It places a duty on a court of criminal appeal to undertake an assessment of the evidence to determine whether a conviction was unsafe or unsatisfactory. But that does not mean that the court is obliged to read every word of the transcript and exhibits. The test laid down in *M v The Queen* was formulated against the background of the adversarial system of justice, a system heavily dependent on the parties to identify the issues and the evidence relevant to those issues. It is impossible to think that the majority in *M v The Queen* intended to impose a duty on courts of criminal appeal to examine often innumerable appeal books, often containing hundreds and sometimes thousands of pages of evidence and exhibits, and evaluate evidence which the parties have not thought fit to draw to the court's attention. Still less is there any reason to suppose that the majority in *M v The Queen* intended to impose a duty to examine the transcript looking for issues arising from the "circumstances of the case" which have not been raised by the parties.

50 If the contention of the appellant were upheld, the character of courts of criminal appeal would change from that of courts of appeal to that of tribunals for the judicial review of convictions. As long as the fundamental premise of the criminal justice system is that criminal proceedings are adversarial in nature, it is not possible to conclude that a court of criminal appeal has erred merely because it failed to identify an error in the trial which the accused did not rely on as a ground of appeal.

51 A criminal trial under the common law system remains today, as it has been for many centuries, based on the theory that it is an adversarial contest between

19 (1994) 181 CLR 487.

20 (1997) 72 ALJR 78; 149 ALR 598.

the Crown and the accused. Each party gathers its own evidence, tenders its own evidence and cross-examines the evidence of the opposite party. Each party selects the grounds upon which it relies and argues them without assistance from the court. For its part and subject to statutory exceptions, the court's role is generally limited to determining what legal rules govern the issues selected by the parties and whether the evidence and contentions of the parties are within those rules.

- 52 In a criminal appeal, the adversarial nature of the proceedings is maintained. The appellant frames the issues for determination by the appellate court by selecting the grounds upon which he or she relies to quash a conviction or vary a sentence or, in the case of a Crown appeal, the grounds upon which it relies to increase the sentence. The court plays no part in framing the grounds of appeal. As Mason CJ and Brennan J pointed out in *Pantorno v The Queen*²¹:

"In principle, the notion is erroneous that a court must tell the parties what the law is. A court is under no duty to a party to advise him how to present his case; the court's duty is to give him a reasonable opportunity to present his case".

These words were uttered in relation to the duty of a court in a criminal trial but they are equally applicable to an appeal against a criminal conviction. Their Honours went on to say²²:

"The responsibilities of counsel cannot be assumed by the court, for its even-handedness would be compromised by assuming a responsibility for the conduct of the case of one of the parties."

- 53 It is true that criminal proceedings are not wholly adversarial in nature. One important exception to the adversarial nature of criminal proceedings is that a trial judge has a duty to direct the jury on any matter that could result in the acquittal of the accused even though the accused deliberately refuses to argue the point²³. A trial judge also has a duty "to ensure that rules made for the protection of an accused person do not constitute a trap for those who are unrepresented and ignorant of them"²⁴. In *Pantorno*²⁵, Mason CJ and Brennan J also said that a trial

21 (1989) 166 CLR 466 at 472-473.

22 (1989) 166 CLR 466 at 473.

23 *Pemble v The Queen* (1971) 124 CLR 107.

24 *Pantorno* (1989) 166 CLR 466 at 473 citing *MacPherson v The Queen* (1981) 147 CLR 512 at 546.

25 (1989) 166 CLR 466 at 473.

judge has a duty to keep out inadmissible evidence although we doubt that their Honours intended it to apply in respect of all inadmissible evidence. Another exception to the adversary system is that the Crown has a duty to draw the attention of the trial judge and to courts of criminal appeal to a matter that might affect the criminal liability or sentence of the accused, if the Crown is aware of the matter.

54 Nevertheless, criminal proceedings could not retain their adversarial nature if it were the duty of trial judges and courts of criminal appeal to take every step that they thought was appropriate to protect the accused's interests at the trial or on appeal. It is one thing to say that, when all the evidence is in, a trial judge has a duty to direct the jury that they must consider a matter that the accused has not raised in his or her defence. It is not surprising that, in furtherance of the requirement that there should be a trial according to law, appellate courts modified the adversary system to impose this duty on trial judges. The trial judge has heard the evidence. It therefore imposes no great burden on the judge to require him or her to direct the jury on all "defences" that are legally open on the evidence.

55 But it is quite a different matter to say that an appellate court has a duty to examine the whole record and determine whether that record contains error requiring the quashing of the accused's conviction notwithstanding that the appellant has not relied on an issue or on evidence. Courts of criminal appeal would no longer be courts of appeal; they would be tribunals for the judicial review of criminal convictions. Their role would cease to be that of an appellate court deciding issues selected by the Crown and the accused. They would necessarily become active parties in the proceedings; the members of an appellate court would become judicial ombudsmen whose function was to investigate the records of criminal trials to determine whether convictions should be set aside because of some factual or legal error on the part of the trial judge whether or not the appellant had raised the error. Inevitably, the investigatory function of the "court" would break down the doctrine of separation of powers and result in appellate courts becoming part of the executive branch of the State, as they effectively are in many jurisdictions that reject the adversary system of justice.

56 Such a change in the nature of criminal proceedings in this country would also have consequences in this Court whose jurisdiction to hear appeals is given by s 73 of the Constitution. The appellate jurisdiction of this Court is premised on two basic propositions. First, an appeal to this Court is an appeal in the strict sense and not an appeal by way of rehearing²⁶. That proposition has the consequence

26 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73; *Mickelberg v The Queen* (1989) 167 CLR 259.

that the Court cannot admit fresh evidence on a civil²⁷ or criminal²⁸ appeal to the Court. If this Court decided an appeal on a ground that was not before the court from whose order the appeal is brought, the appeal would be by way of rehearing and this Court would be exercising original not true appellate jurisdiction²⁹. Appellate jurisdiction is conferred on this Court to determine only whether the judgment, the subject of the appeal, was correct on the materials before the court which gave that judgment³⁰. Second, this Court can only make the orders that could have been made by the court from whom the appeal is brought.

- 57 The proposition that this Court can only make orders that could have been made by the court from whom the appeal is brought has the consequence that any order of this Court must be in accord with the jurisdiction of that court. If, pursuant to the jurisdiction conferred by s 73 of the Constitution, this Court allows or modifies a judgment, s 37 of the *Judiciary Act* (1903) (Cth) gives the Court power to "give such judgment as ought to have been given in the first instance". That mandate directs this Court to the issues that were before the court from whom the appeal is brought. In determining what judgment that court ought to have made, the grounds of appeal relied on in that court must be decisive. As Toohey and Gaudron JJ pointed out in *Mickelberg v The Queen*³¹:

"Ordinarily, an appeal raises the correctness or otherwise of the decision under appeal in the light of the evidence *and issues* as they were before the court whose decision is in question." (emphasis added)

- 58 The jurisdiction of a court of appeal ordinarily depends on the grounds of appeal that can be legally raised in support of the appeal. Under the common law system of justice, jurisdiction is the authority to decide issues between parties. In the case of an appellate court, that authority is governed by the issues raised in the notice of appeal and any notice of contention relied on to support the judgment

27 *New Lambton Land and Coal Co Ltd v London Bank of Australia Ltd and Others* (1904) 1 CLR 524; *Ronald v Harper* (1910) 11 CLR 63; *Grosalik v Grant* (1947) 74 CLR 355; *Crouch v Hudson* (1970) 44 ALJR 312.

28 *Davies and Cody v The King* (1937) 57 CLR 170 at 172; *Mickelberg* (1989) 167 CLR 259.

29 *Werribee Council v Kerr* (1928) 42 CLR 1 at 20 per Isaacs J; *Davies and Cody* (1937) 57 CLR 170 at 172.

30 *Ponnamma v Arumogam* [1905] AC 383 at 388; *Craig v The King* (1933) 49 CLR 429 at 444; *Davies and Cody* (1937) 57 CLR 170 at 172; *Mickelberg* (1989) 167 CLR 259 at 267-268, 274, 298.

31 (1989) 167 CLR 259 at 298.

against which the appeal is brought. In the absence of a special statutory regime, a notice of appeal that does not specify a ground of appeal is invalid³² and the appellate court in which it is "filed" has no authority to determine any issue affecting the parties.

- 59 In Queensland, the jurisdiction of the Court of Appeal in criminal cases appears to depend on a valid notice of appeal³³. Section 668D³⁴ provides that a person convicted on indictment may appeal against the conviction "on any ground which involves a question of law alone" or "with the leave of the Court ... on any ground of appeal which involves a question of fact alone, or question of mixed law and fact, or any other ground which appears to the Court to be a sufficient ground of appeal". Section 668E provides:

"(1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.

...

(2) Subject to the special provisions of this Chapter, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered."

- 60 These sections make it clear that jurisdiction of the Court of Appeal in the present case depended on the identification of a point of law as a ground of appeal or the leave of the Court to raise some other ground of appeal. Because that is so, unless the grounds now relied on by Mr Whitford fall within these alternatives, this Court would seem to have no power to order the Court of Appeal to do that which, under the Criminal Code, it was not authorised to do. No doubt where the court whose judgment is "appealed from" has failed to exercise its jurisdiction, this Court has jurisdiction to allow the appeal and remit the proceedings to the lower court to re-consider the matter³⁵. But this extraordinary jurisdiction is an incident

32 cf *R v Lennard* [1984] 1 Qd R 1 at 2; *R v Lawrence* [1980] 1 NSWLR 122 at 147; *Ollis and Andersen v The Queen* (1986) 21 A Crim R 256 at 258.

33 *Lennard* [1984] 1 Qd R 1 at 2; *Ollis and Andersen* (1986) 21 A Crim R 256 at 258.

34 *Criminal Code Act 1899* (Q).

35 *Mickelberg* (1989) 167 CLR 259 at 270.

of the Court's true appellate jurisdiction. The only suggestion that the Court of Appeal failed to exercise its jurisdiction in this case is falsely premised on the assumption that that Court had a duty to consider evidence and points not relied on by the parties.

61 It would seem to follow from the foregoing considerations that this Court has no jurisdiction to set aside the appellant's convictions and order an acquittal or new trial if the grounds upon which Mr Whitford relies were not before the Court of Appeal. Where in the course of an appeal to this Court, it becomes apparent that an error in the course of a trial has occurred, but the error has not been the subject of a ground of appeal in the courts below, it may be that, as an incident of the appellate jurisdiction conferred by s 73, this Court also has power to allow the appeal and order the intermediate appellate court to consider whether it should allow the appellant to amend his or her notice of appeal to raise the point in question. But ordinarily this Court's power would seem to be limited to making the orders which the intermediate court of appeal should have made on the issues before it.

62 However, in *Pantorno*³⁶, the Court allowed an appellant to take a ground of appeal that had not been argued in the Court of Criminal Appeal of the Supreme Court of Victoria. Mason CJ and Brennan J thought that the point had been raised implicitly although not argued in the Court of Criminal Appeal. The judgment of Deane, Toohey and Gaudron JJ appears to proceed on the same ground. Importantly for present purposes, Mason CJ and Brennan J expressly left open³⁷ the question whether this Court has "jurisdiction to set aside a judgment correctly and regularly pronounced when the only ground which might warrant the allowing of an appeal is raised for the first time in this Court."

63 *Pantorno* is explicable on the ground that the point argued in this Court was implicitly raised, although not articulated, before the Court of Criminal Appeal. No such explanation is available in respect of *Giannarelli v The Queen*³⁸ where the Court quashed a conviction on a ground that had not been taken at the trial or in the Court of Criminal Appeal. None of the judgments dealt with the question of the Court's jurisdiction to quash a conviction in these circumstances. However, both Gibbs CJ and Deane J said that it would only be in exceptional circumstances

36 (1989) 166 CLR 466.

37 (1989) 166 CLR 466 at 475.

38 (1983) 154 CLR 212.

21.

that the Court would grant special leave to appeal in respect of a point raised for the first time in this Court. Gibbs CJ said that³⁹:

"It is of course only in an exceptional case that this Court will give special leave to appeal from a decision of a Court of Criminal Appeal affirming a conviction when the point that the applicant seeks to raise in attacking the conviction was not taken either at the trial or in the Court of Criminal Appeal."

64 In *Giannarelli*⁴⁰, the Court found the circumstances were sufficiently exceptional to require a grant of special leave. Deane J said:

"There are three features of the applications which ordinarily would combine to preclude the grant of special leave to appeal on a question of admissibility of evidence. Those features are: the failure to object to the admission of the evidence when it was tendered; the failure subsequently to seek a direction to the jury that the evidence be disregarded; and the failure to raise the question of the admissibility of the evidence upon the appeal to the Victorian Court of Criminal Appeal. The present circumstances are, however, exceptional in a number of respects."

65 Notwithstanding the orders made in *Giannarelli*, we would wish to hear full argument on the issue before setting aside a judgment of a State or federal court on a ground that was not raised in the courts below. Whether the appellate jurisdiction of this Court extends to setting aside a judgment of a State or federal court upon a ground not argued in those courts is a question of far reaching constitutional importance. It is a question on which the States as well as the Commonwealth have a vital interest, affecting as it does the orderly administration of justice in the State and federal systems. However, because we are of opinion that the new grounds relied on by Mr Whitford would not have required the Court of Appeal to set aside the appellant's convictions, it is unnecessary to say anything further about the matter, particularly since the States and the Commonwealth have not had the opportunity to make submissions on this important issue.

Withdrawal of the two counts from the jury

66 Neither statute nor common law principle authorised the entry of a nolle prosequi in respect of the first two counts in the indictment. At that time in Queensland, the Crown could enter a nolle prosequi in respect of an indictment only. It had no authority to enter it in respect of individual counts in the indictment.

39 *Giannarelli* (1983) 154 CLR 212 at 221.

40 (1983) 154 CLR 212 at 230-231.

However, the Crown submitted that this practice was in fact usual in Queensland. Since the trial, the Criminal Code has been amended to allow such a course⁴¹.

67 Counsel for the appellant did not object to the entry of the nolle prosequi. Indeed, he seems to have consented to that course. Both counsel agreed that nothing needed to be said to the jury other than that there was no need for a verdict on the two counts, a course which the learned trial judge followed. No verdict was entered in relation to the counts. However, Mr Whitford contends that the entry of the nolle prosequi caused unfairness to the appellant because the evidence led in relation to counts 1 and 2 showed that the complainant was confused about the dates of the events described and that this confusion damaged her credibility as a witness. He contends that her confusion and resulting inconsistencies in her evidence rendered the convictions on the remaining counts unsafe and unsatisfactory. But as we have indicated this argument was examined by the Court of Appeal and rightly rejected.

68 It is impossible to conclude that the entry of a nolle prosequi in respect of counts 1 and 2 unfairly prejudiced the appellant or that the inconsistencies in respect of the dates make the convictions on the remaining counts unsafe or unsatisfactory. It is unsurprising that the complainant confused the exact dates of events which took place years before when she was very young and which were, so she alleged, only two of many incidents occurring over a long period. The complainant said in evidence, "It was a long time, this is like nine, 10 years ago. I said I wasn't sure on my dates. I had to go through with the police prosecutor to work out dates". It was open to a reasonable jury to find that her confusion - inconsistencies, if you like - did not prevent them from believing her account of the remaining charges as credible.

69 The judge should have left counts 1 and 2 to the jury or the nolle prosequi should have covered all counts and resulted in the jury's discharge. However, counsel for the appellant consented to the course taken, and the matter raises no special leave point. No verdict was taken on the two counts. If the Crown should now attempt to prosecute those counts, a judge would have no alternative to staying the prosecution as an abuse of process.

The background or relationship evidence

70 Mr Whitford contended that the fair trial of the appellant was fundamentally flawed by reason of the admission of general evidence of a history of sexual molestation of the complainant by the appellant and the failure of the trial judge to direct the jury that they could only use this evidence if they were satisfied that it had been proved beyond reasonable doubt. He contended that whether the

41 s 563(2).

evidence was admissible as propensity evidence or to show the relationship between the parties, it was so prejudicial that it was analogous to "those intermediate facts which constitute indispensable links in a chain of reasoning towards an inference of guilt"⁴².

- 71 The complainant gave evidence in very general terms of a history of sexual interference which was not confined to the matters alleged in the indictment. She alleged that the interference had started before and continued on a regular basis after the family arrived in Queensland. In evidence-in-chief, the complainant was about to testify as to the first of the incidents which were the subject of charges (count 1) when the Crown Prosecutor said to her:

"Firstly, before we get to that, had there been some pattern of behaviour that had occurred from when you came up from Victoria? - It was regular. He was sexually molesting me.

Yes, what do you mean by that? - Well, no penetration. He was using his penis. He was rubbing his penis between my legs until he ejaculated.

This was before you came to Queensland? - That was before. That was in Victoria.

Yes, and did that continue after you arrived in Queensland? - It continued in Queensland. It didn't happen when we lived with his parents. It wasn't until we moved to Silver Bridle."

- 72 Counsel for the appellant did not object to this evidence. It was admissible to show the relationship⁴³ which existed between the parties and to explain why the complainant so readily complied with the various demands of the appellant. Without evidence of the background and the continuing nature of the conduct of the appellant, the evidence of the complainant may have seemed "unreal and unintelligible"⁴⁴. Without knowing the course of the relationship, the jury may have had great difficulty in accepting that the incidents could have occurred in the

42 *Shepherd v The Queen* (1990) 170 CLR 573 at 579.

43 *Harriman v The Queen* (1989) 167 CLR 590 at 630-631; *S v The Queen* (1989) 168 CLR 266 at 279.

44 *R v Garner* (1963) 81 WN (Pt 1) (NSW) 120 at 122; *R v Gellin* (1913) 13 SR (NSW) 271 at 278-279.

way that the complainant described⁴⁵. Thus, the complainant described the events concerning the offence the subject of count 1 as follows:

"We were all sleeping in the same room and we had all bunk beds in the room. We'd been in there for maybe half an hour and [the appellant] had come in and asked me to come and squeeze blackheads on his back and it was there that -

Had you done that before? -- Yes.

Yes? -- He told me to come into the bathroom. When I went into the bathroom he told me to take down my pants. He'd taken his pants off and was sitting on the edge of the bath and he made me sit on top of his lap with no pants on. He put his penis between my legs and was rubbing my vagina until he ejaculated.

Yes. What happened then? -- He told me to - or he got up and got a towel and wiped himself clean and he gave me the towel. He had a shower and told me to have a shower when he's finished and I went and laid out back in the lounge room on the floor and I just remember my mum coming home and waking me up off the floor."

73 Neither on this or on any other occasion did the complainant tell her mother what had happened. Knowing that this was not the first time that the complainant and the appellant had engaged in sexual activity helps to explain the complainant's apparent lack of surprise at being called into the bathroom to gratify the appellant's sexual desires and her matter of fact recounting of the incident. The regularity with which incidents such as this occurred also helps to explain her failure to mention the incident to her mother and the appellant's confidence - manifested by the omission of any threat or inducement - that the complainant would regard the incident as nothing unusual.

74 In his summing up, the learned trial judge said:

"There is also overall evidence of ongoing conduct by the accused over many years. ... That evidence of general behaviour is led to show *the nature of the relationship* between the complainant and the accused, rather than present a picture of isolated events from time to time. *There is no need for you to be satisfied beyond reasonable doubt of those background facts because they are given generally, provided that you accept the complainant's account that it occurred*, but when you come to consider any count on the indictment you must be satisfied beyond reasonable doubt that the Crown has proven an

45 *R v Etherington* (1982) 32 SASR 230.

incident as alleged by the complainant on the day alleged or within that time scale which is alleged that they're in." (emphasis added)

75 The trial judge did not direct the jury that, if they accepted that the appellant had sexually interfered with the complainant on occasions other than those charged, they could use that fact to infer that the appellant had committed the offences which were the subject of the five counts left to them. The evidence tendered was general in its nature and, as the above passage makes clear, was admitted for the limited purpose of making the circumstances of the specific offences more intelligible. It was admissible because it was evidence "as to acts so closely and inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances"⁴⁶. Counsel might have objected to the generality of the evidence and insisted that the complainant should recite in detail, so far as she could, the times, places and manner of these sexual interferences. But he preferred - what seems to us to have been the better forensic choice - that the evidence of the sexual history should be given shortly and without prejudicial detail.

76 If the evidence of sexual history had been directed to specific incidents, although not the subject of charges, the learned judge would have been entitled to direct the jury that if they found one or more of those incidents proved, they could use such a finding or findings as proof of a "guilty passion" in support of the charges in the indictment⁴⁷. In that event, it would have been necessary to direct the jury that these incidents as well as the charges had to be proved beyond reasonable doubt.

77 No doubt the evidence of general behaviour, if accepted, proved the commission of other criminal acts. But it was not tendered as propensity evidence. If the evidence had been tendered to prove propensity, it would have required careful direction in accordance with the principles emphasised by this Court on numerous occasions in recent years⁴⁸. Moreover, as *BRS v The Queen*⁴⁹ shows, if evidence admitted for reasons other than propensity in fact reveals a criminal or reprehensible propensity on the part of the accused, a trial judge must carefully

46 *R v Bond* [1906] 2 KB 389 at 400; see *Wilson v The Queen* (1970) 123 CLR 334 at 338, 343.

47 *R v Ball* [1911] AC 47 at 71; *O'Leary v The King* (1946) 73 CLR 566 at 575, 577, 582; *R v Hissey* (1973) 6 SASR 280 at 288-289.

48 See, for example, *Pfennig v The Queen* (1995) 182 CLR 461.

49 (1997) 71 ALJR 1512; 148 ALR 101.

direct the jury as to the use which they can make of the evidence⁵⁰. In *BRS*⁵¹, McHugh J pointed out:

"If the evidence is admitted for a reason other than reliance on propensity, the judge must direct the jury that they can use the evidence for the relevant purpose and for no other purpose. In some cases, the judge may need to be more specific. He or she may need to direct the jurors that they cannot use the evidence for an identified purpose. If the evidence is admitted because the Crown wishes to rely on the accused's propensity as an element in the chain of proof, it is especially necessary that the judge give the jurors clear directions as to the manner in which they may use the propensity evidence."

78 In this case, the learned judge correctly directed the jury that the background evidence went to show the nature of the relationship between the appellant and the complainant so that they could understand the context of the incidents that were the subject of the charges. No doubt, it would have been better if his Honour had gone further and expressly told the jury that, if they found that there was a previous or continuing history of incidents, they were not to use that finding to reason that the accused committed the offences charged. But his Honour's failure to take that further step does not mean that he necessarily misdirected the jury or that the verdict is unsafe or unsatisfactory or that there has been a miscarriage of justice. Having regard to the conduct of the case and the rest of his Honour's summing up, there is no reason to suppose that the jury might have used the general behaviour evidence as propensity evidence. Neither counsel nor the judge suggested that course. Furthermore, the whole thrust of the summing up was that the jury had to be satisfied beyond reasonable doubt that the complainant's evidence in respect of each incident was reliable.

79 No doubt it would also have been better if his Honour had made no mention of the standard of proof when referring to the background evidence. But his Honour's statement was not a misdirection. It is the charge, not the surrounding facts, that must be proved beyond reasonable doubt. Sometimes, a fact may be so indispensable to a finding of guilt that it is necessary to direct the jury that that finding be proved beyond reasonable doubt even though that fact is not one of the ultimate facts that constitute the offence. But, as Dawson J pointed out in *Shepherd v The Queen*⁵² where:

50 *BRS* (1997) 71 ALJR 1512 at 1527-1528; 148 ALR 101 at 121-122.

51 (1997) 71 ALJR 1512 at 1528; 148 ALR 101 at 122.

52 (1990) 170 CLR 573 at 579.

"the evidence consists of strands in a cable rather than links in a chain, it will not be appropriate to give such a warning. It should not be given in any event where it would be unnecessary or confusing to do so."

That statement was made with respect to circumstantial evidence but is equally applicable to a case such as the present.

80 The evidence concerning the relationship of the parties in this case was not, as Mr Whitford's submission recognised, an indispensable link in a chain of reasoning leading to an inference of guilt. It was not, for example, evidence of the kind with which the House of Lords had to deal with in *R v Ball*⁵³ where the charge of incest between the dates alleged must have failed without proof that there had been a previous sexual relationship between the brother and sister.

81 Furthermore, the evidence of the previous and continuing history in this case was far removed from the kinds of propensity evidence that have attracted the stringent requirements of admissibility and direction imposed by common law doctrine. Propensity evidence of that kind usually refers to evidence that describes the manner in which a person commits a criminal or wrongful act or which shows that a person has a general disposition to commit crime or crime of a particular kind. Propensity evidence of that kind usually concerns crimes or wrongs committed against the person or property of a person other than the person whose property or person is the subject of the crime charged. It usually disadvantages the accused by introducing evidence from a third person which corroborates the complainant or by revealing that the accused has committed criminal acts or wrongful conduct of a similar kind on other occasions.

82 The other criminal conduct in the present case does not concern a third person. In that respect, the case is very different from *BRS*⁵⁴ where the Court held that a conviction was unsafe because the trial judge had failed to direct the jury as to the use that they could make of evidence of bad character which revealed a criminal propensity on the part of the accused (a schoolmaster). To rebut a claim of good character, the Crown had led evidence that the accused had engaged in improper sexual conduct with a schoolboy other than the complainant. The majority of this Court held that there was a real chance that, without a clear direction, the jury may have used the evidence of bad character not merely to rebut evidence of good character but to conclude that the accused had a propensity to engage in improper sexual activity with schoolboys and had given effect to it in his dealings with the complainant.

53 [1911] AC 47.

54 (1997) 71 ALJR 1512; 148 ALR 101.

83 Nor is this a case where, in the course of committing wrongful acts other than those charged, the appellant used the same distinctive *modus operandi* as he did while committing the offences with which he was charged. It is true that the form of indecent assault seems to have always been what the complainant called "a rub". But for the purpose of propensity doctrine, that act itself was no more distinctive than if he had inserted his finger into the complainant's vagina. In any event, the use of a distinctive *modus operandi* is ordinarily of significance only where there is or are a victim or victims other than the complainant.

84 Furthermore, the evidence of general behaviour in this case hardly offends the policy reasons which courts and commentators have relied on to exclude propensity evidence. In *Pfennig v The Queen*⁵⁵, McHugh J said:

"Various reasons have been put forward to justify this exclusion. One reason is that it creates undue suspicion against the accused and undermines the presumption of innocence⁵⁶. Another is that tribunals of fact, particularly juries, tend to assume too readily that behavioural patterns are constant and that past behaviour is an accurate guide to contemporary conduct⁵⁷. Similarly, '[c]ommon assumptions about improbability of sequences are often wrong'⁵⁸, and when the accused is associated with a sequence of deaths, injuries or losses, a jury may too readily infer that the association 'is unlikely to be innocent'⁵⁹. Another reason for excluding the evidence is that in many cases the facts of the other misconduct may cause a jury to be biased against the accused⁶⁰. In the present case, for example, once the H evidence was

55 (1995) 182 CLR 461 at 512-513.

56 *Perry v The Queen* (1982) 150 CLR 580 at 593-594 per Murphy J; *R v Boardman* [1975] AC 421 at 451 per Lord Hailsham; Piragoff, *Similar Fact Evidence*, (1981) at 4.

57 Cowen and Carter, *Essays on the Law of Evidence*, (1956) at 144-145; Imwinkelried, "The Use Of Evidence Of An Accused's Uncharged Misconduct To Prove *Mens Rea*: The Doctrines which Threaten to Engulf the Character Evidence Prohibition", *Ohio State Law Journal*, vol 51 (1990) 575 at 581-582; Ligertwood, *Australian Evidence*, 2nd ed (1993) at 81-82; Palmer, "The Scope of the Similar Fact Rule", *Adelaide Law Review*, vol 16 (1994) 161 at 169.

58 *Perry* (1982) 150 CLR 580 at 594 per Murphy J.

59 *Perry* (1982) 150 CLR 580 at 594 per Murphy J.

60 *R v Bond* [1906] 2 KB 389 at 398 per Kennedy J; Piragoff, *Similar Fact Evidence*, (1981) at 4-5; *Cross on Evidence*, 2nd Aust ed (1991), par 21145; Ligertwood, *Australian Evidence*, 2nd ed (1993) at 81.

admitted, it would require a superhuman effort by the jury to regard the appellant as other than a person of depraved character whose uncorroborated evidence, whether or not he was guilty, could not be acted upon except where it supported the prosecution case. Functional reasons also play a part in excluding evidence of bad character. Trials would be lengthened and expense incurred, often disproportionately so, in litigating the acts of other misconduct; law enforcement officers might be tempted to rely on a suspect's antecedents rather than investigating the facts of the matter; rehabilitation schemes might be undermined if the accused's criminal record could be used in evidence against him or her⁶¹."

- 85 It follows that that part of the summing up of which Mr Whitford complains contains no misdirection and did not require a further direction. Its effect on the fairness of the trial generally depends on all the circumstances of the case including the summing up generally and the manner in which the case was conducted.

Overall effect of judge's summing up

- 86 The learned trial judge referred to the non-specific evidence of sexual molestation in a short passage which occurred in about the middle of his summing up. Up to that point, his Honour had dealt with the criminal convictions of the complainant in relation to drug possession and pointed out that these could be taken into account on the question of credit. His Honour had also discussed the complainant's admission of perjury and said:

"She was prepared to lie on oath and it does raise the question if someone has done that once what are the limits; to what extent might she do it again? These are matters for you to consider."

- 87 His Honour then dealt in detail with the onus of proof and the issue of reasonable doubt:

"Where that situation arises and there exists room for a reasonable inference consistent with the accused's innocence that is the one that you must draw rather than an inference consistent with his guilt because, as you have heard, the Crown, having brought these charges against the accused, has the onus of proof and has to prove its case beyond reasonable doubt and it must do so in respect of each and every count of the indictment.

If there exists a reasonable inference consistent with the accused's innocence then the Crown has not removed all reasonable doubt. A reasonable doubt is a doubt which you as jurors with your knowledge of

61 See *Cross on Evidence*, 2nd Aust ed (1991), par 21150.

people, awareness of the important function that you do exercise here, consider to be reasonable and not something light and fanciful. The practical result is that you must be sure of the accused's guilt before you may convict him.

...

You still must be satisfied on the Crown case that the complainant's account is truthful and reliable before you may convict."

88 His Honour then turned to the uncorroborated nature of the complainant's evidence and warned that:

"In all cases of a sexual nature, whether the complainant is male or female, a child or mature person, it has been the practice, of course, based on some sorry experience in the past to warn juries that they ought to be slow to convict in the absence of corroboration. The warning is generally that it is dangerous to act without corroborative evidence.

Corroboration is simply evidence independent of the complainant tending to implicate the accused as the offender. ... The courts have decided on this because there have been a number of injustices done, people wrongly convicted in the case of complaints of a sexual nature.

The difficulty is that complaints of that kind are very easy to make and have been made for all sorts of reasons, some for no reason at all, and they are impossible to refute because they have happened or they are alleged to have happened in circumstances where there cannot be witnesses. ...

You may still convict even when there is no corroboration if you are still satisfied that the complainant's account is entirely safe to act upon without that corroboration. You can imagine that if a sexual offence is committed it would be wrong for a person to escape conviction simply because there was no witness to it, but you must be entirely satisfied of the honesty and reliability of the complainant before you act on that evidence alone. There are five counts which relate to specific events."

89 There then followed the passage in which the trial judge referred to the evidence of "general behaviour" to which Mr Whitford objects. Immediately after that passage, his Honour said:

"You must be satisfied of those matters alleged in each count on the indictment before you may convict the accused. Each incident alleged must be proven separately and distinctly from other allegations. You have to compartmentalise the evidence in respect of each count. Your verdict on any

31.

one count does not determine the matter in respect of any other. You can convict on any count without necessarily reaching the same conclusion on others. You may, of course, acquit on any count without necessarily coming to the same conclusion on all others.

If you accept the evidence of the complainant you may yet acquit the accused on any count; for example, if you are not satisfied of the date of an incident or that the Crown has proved what it set out to prove or has not proved it clearly enough, but *if you find that you do not believe [the complainant's] account in relation to any one incident as an honest account it would be dangerous for you to accept her evidence at all and you should acquit on all counts.*" (emphasis added)

90 Then after referring to the specific charges, his Honour again emphasised to the jury that they could not convict the accused unless they were convinced beyond a reasonable doubt as to the reliability of the complainant's account:

"Now, as you've been told, the Crown case stands or falls depending upon your assessment of the complainant You may not properly convict the accused on any count unless you are convinced beyond reasonable doubt that her account is safe to rely upon."

91 Almost at the end of his summing up, his Honour said:

"The Crown has the onus of proof, so if the evidence before you, including that of the accused, leaves you with a reasonable doubt as to the honesty and reliability of [the complainant's] account you must find the accused not guilty."

92 The jury retired at 4.20 pm. At 10.25 am the following day, the jurors indicated that they would like to hear "the summing-up again". His Honour did not accede to this request but gave the following direction among others:

"The Crown case in respect of each count does depend entirely upon the evidence of [the complainant]. If her account is acceptable to you then there is evidence upon which you may convict on every count. If her evidence is not acceptable, *and you have to be satisfied very clearly of her reliability before you may convict*, if it is not acceptable to you you should, as a matter of caution, acquit.

The consequences of a conviction are severe. That is not a matter which you should take into account in itself, but it shows that *you should be careful not to convict, particularly here where there is no corroboration, unless you are absolutely satisfied of the reliability of the girl's account.*" (emphasis added)

93 Overall, the judge emphasised the correct standard of proof at many points in his summing up. He gave particular attention to the prior conviction of the complainant, her admitted perjury, the danger of relying on uncorroborated evidence in sexual trials and the duty of the jury to acquit if they had any doubt about any of the charges. The judge put particular emphasis in his summing up on the fact that the jury had to be satisfied that the complainant's evidence was "entirely safe" to act upon; "you must be entirely satisfied of the honesty and reliability of the complainant"; "you may not properly convict the accused on any count unless you are convinced beyond reasonable doubt that her account is safe to rely upon."

94 Counsel for the appellant made no objection to the summing up. Nor did he ask the judge to give any further directions. And as we have already pointed out, no objection was taken in the Court of Appeal to the passage that is now claimed to have brought about unsafe or unsatisfactory convictions or a miscarriage of justice.

95 A further indication that the "general behaviour evidence" did not unfairly or improperly affect the trial is that little emphasis was placed on it during the trial. The Crown did not refer to or rely on it during its address to the jury, and the judge only referred to it in the one short passage to which we have referred. Counsel for the appellant, however, did seek to make some use of it. The thesis of his cross-examination was that the complainant had invented all the allegations against the appellant. He opened his cross-examination by putting to the complainant that she had "learnt those stories off by heart" and that she had "made those stories up". Later, he used the continuing history of "general behaviour" to put to the complainant that it was unlikely that any of these incidents could have taken place without anyone ever finding out about them:

"See, you say certainly from the time, don't you, from the time you were first raped, that's the [AS] incident [Count 4], it happened weekly, right through until the last occasion, the [JP] incident [Count 7]? - It was just a regular basis. It was once a week, maybe twice a week.

Every time he touched you from [AS] it was a matter of rape, it wasn't just touching? - It was penetration, yes.

And no one ever stumbled across you or anything like that in all of that time in this weekly occurrence? - No.

It simply didn't happen, did it? - It did happen."

96 Given the conduct of the case and the summing up of the trial judge, we think that there is not a real risk that the jury improperly used the "general behaviour" evidence to convict the accused. It was never put to the jury by the Crown or the

trial judge that they were entitled to conclude that, if the appellant had interfered with the complainant in the past, that was a fact from which they could infer that the appellant was guilty of the offences with which he was charged. The learned judge limited the use of the "general behaviour" evidence to show the nature of the relationship between the appellant and the complainant. It obviously did not occur to counsel at the trial that this evidence could be used as proof of guilt rather than explanatory of the relationship of the parties. His failure to take any objection is a powerful factor for concluding that no miscarriage of justice is likely to have occurred in the case. The case was fought on credibility. With great respect to those who think differently, we cannot accept that the complainant's allegation of the appellant's "general behaviour" made the difference between conviction and acquittal. It is hardly to be supposed that the acceptance of her evidence to the beyond reasonable doubt standard turned on the fact that she added the "general behaviour" evidence to her evidence of the five specific incidents.

Conclusion

97 The Court of Appeal correctly applied the test for determination of whether a verdict is unsafe or unsatisfactory and it was clearly open on the evidence for the jury to be satisfied beyond a reasonable doubt that the accused was guilty. Furthermore, in the context of the trial and the entire summing up, neither the admission of the "general behaviour" evidence nor the judge's direction in relation to it make the convictions of the appellant unsafe or unsatisfactory or brought about a miscarriage of justice.

98 We would dismiss the appeal.

99 KIRBY J. The parties argued that important principles were at stake in this appeal. But each perceived the principles differently.

100 The appellant relied on the rule that "every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed"⁶². As this had not happened, a miscarriage of justice had occurred against which the Court should protect the appellant⁶³. For the Crown, the basic principle in issue concerned the function of a court of criminal appeal. The jurisdiction of such a court was invoked by grounds of appeal. Such a court was not obliged to "trawl through" the record to identify errors of law or of procedure about which no specific complaint was made. Nor was it the function of this Court to intervene where error on the part of a court of criminal appeal could not be shown. As will be demonstrated, each of these principles is important. Reconciling them is by no means easy.

Alleged sexual offences against a step-daughter

101 The relevant facts are set out in the reasons of McHugh and Hayne JJ. It will be noted that most of the counts related to events, the dates of which could only be defined by reference to Christmas-time school holidays in various years. Although this is not unusual in offences of this kind, it obviously presented forensic difficulties for the appellant. His case was substantially confined to a general denial of the complainant's allegations. The generality and brevity of her evidence effectively precluded defences (such as alibi) which might have been available in a case involving charges of greater specificity and particularity.

102 On 29 May 1996, the appellant was arraigned before a jury in the District Court at Southport in the State of Queensland. The indictment charged four counts of indecent assault and three of rape. The appellant pleaded not guilty and stood his trial. The trial was very short. Effectively the entire evidence, the addresses and the charge to the jury were all completed on the first day. After a luncheon adjournment on that day, in circumstances which it will be necessary to relate, the prosecutor "withdrew" the first two counts of the indictment from the jury's consideration. Following the judge's directions at the end of the first day, the jury retired to consider their verdicts. They returned on the following morning with a question which it will be necessary to mention later. After certain additional directions, they retired once again. Later that morning they returned with verdicts of guilty on the remaining five counts. The appellant was convicted of the offences contained in those counts. He was sentenced to ten years imprisonment on each count of rape and five years imprisonment on each count of indecent assault. It

62 *Mraz v The Queen* (1955) 93 CLR 493 at 514. See also *KBT v The Queen* (1997) 72 ALJR 116 at 119; 149 ALR 693 at 697.

63 See the passages quoted in *Carr v The Queen* (1988) 165 CLR 314 at 331.

was ordered that all sentences be served concurrently. An appeal against conviction to the Court of Appeal of Queensland was dismissed⁶⁴. By special leave, the appellant appealed to this Court.

The alleged defects of the trial

103 Before this Court, the appellant made three complaints about the trial - that the evidence supporting the verdicts was flawed; that the withdrawal of two counts of the indictment was improper; and that evidence of a general history of molestation should not have been admitted. Only the first of these was raised before the Court of Appeal. In my view, it was rightly rejected. I am also of the view that the second should be rejected. But I would uphold the third.

1. Complaints about the evidence supporting the verdicts

104 Before the Court of Appeal the challenge to the appellant's conviction rested on a single ground of appeal, namely that the verdict was "unsafe and unsatisfactory and against the weight of the evidence in particular the complainant's evidence which was uncorroborated".

105 Under this ground, the appellant advanced various objections to the evidence adduced at the trial. In respect of count 5, he argued that the testimony of the appellant's wife (the complainant's mother) effectively contradicted the complainant's evidence. Further, the hospital records as to the time of admission tended to support the appellant's version of events. The appellant also relied on the complainant's "perjury" before a committal hearing in relation to her use of cannabis, evidence which, at the trial, she withdrew and admitted to have been false. He emphasised variations in the complainant's evidence as to the dates of the alleged offences. All of these matters were adequately dealt with in the reasons which Davies JA gave for the Court of Appeal. There is no occasion for this Court to disturb that court's treatment of them.

2. Withdrawal of two counts of the indictment

106 In this Court, the appellant complained of the way in which the first two counts of the indictment were withdrawn from the jury's consideration. This was done by a purported nolle prosequi proffered by the prosecutor. It is necessary to describe how that course came about. During the complainant's evidence, she described incidents of alleged sexual molestation which appeared to transpose and confuse the facts relevant to the first two counts of the indictment. She also suggested that the incidents had commenced when she was much younger (aged four) than the counts pleaded had charged. As a result of the way the

64 *Gipp v The Queen* unreported, Court of Appeal of Queensland, 27 August 1996 per Davies JA; Fitzgerald P and de Jersey J concurring.

evidence had been given relevant to the first two counts, the prosecutor told the judge of his intention "to nolle (sic) those counts in view of the variation in the evidence". It seems clear from the trial transcript that this course was agreed between the prosecutor and the appellant's then counsel. The one thing trial counsel insisted upon was that the jury should be informed that the Crown was withdrawing those charges, lest they conclude that the appellant had pleaded guilty to them. The primary judge agreed. When the jury returned, he told them:

"The prosecutor has now determined to withdraw counts 1 and 2. Those are the counts relating to 24 December 1982 and the period between 9 December 1983 and 25 December 1983, two counts of unlawful indecent assault. There will be no need for you to deliver a verdict in relation to those counts".

107 The Crown now concedes that this course was incorrect and irregular at that time. As the *Criminal Code* (Q) ("the Code") then stood⁶⁵, it was open to the Crown to inform the court that it would not further proceed upon an indictment. It was not open to it to "withdraw" a particular charge or charges contained in such indictment. Such a facility has now been provided⁶⁶. However, it was not then in force. The expedient was apparently adopted of handing the indictment to the primary judge with an endorsement signed by the prosecutor stating "[t]he Crown will not further proceed against the accused in respect to counts 1 and 2".

108 The appellant submitted to this Court that the foregoing events were not only irregular; they were unfair. The irregularity derived from the fact that there was no basis in law for the Crown to act as it did. Once the accused had entered a plea of not guilty to the counts of the indictment, by such plea he was deemed to have demanded that the issues raised should be tried by jury⁶⁷. He was entitled to be put in charge of the jury (or as it was formerly said "upon the country") to enquire whether he was guilty or not guilty of the offences, and all of them, to which he had pleaded⁶⁸. The jury were obliged to try the issues which they had been sworn to try. Upon those issues the accused was in their charge until their verdicts were given.

109 The unfairness of which the appellant complained was three-fold. First, he submitted that the Crown should either have entered a nolle prosequi to the whole

65 Code, s 563(1).

66 The section was amended by the *Criminal Law Amendment Act* 1997 (Q), s 98 which commenced operation on 1 July 1997.

67 Code, s 604.

68 *Maher v The Queen* (1987) 163 CLR 221 at 229. See *R v Heyes* [1951] 1 KB 29; *R v Talia* [1996] 1 VR 462 at 471-472; Dearsly, *Criminal Process* (1853) at 49; Archbold, *Criminal Pleading, Evidence and Practice* (1998) at par 4-266.

indictment resulting in his formal discharge from it or it should have agreed to the entry of a verdict of acquittal in respect of counts 1 and 2. The latter course would have afforded the appellant a tactically advantageous position. Instead of gaining this advantage, he gained none by the course which the trial took and the direction which the primary judge gave. Secondly, the appellant complained that the irregular procedure had deprived him of his right to have the jury's verdict upon the first two counts, leaving the charges referred to in those counts wholly unresolved. He was thereby exposed to a risk, however remote, of further prosecution upon those counts, no verdict having been taken to found a plea of *autrefois acquit*. Thirdly, he suggested that, in the course which was adopted, there was no mention in the judge's summing up of the two counts which had been withdrawn nor of how the jury might consider the evidence of the complainant which related to those charges. On one view, the judge's short direction was effectively an instruction to the jury that they should ignore counts 1 and 2 and therefore the evidence which related to these counts. This effectively deprived the appellant of the advantage of relying on the complainant's "confusion" on those counts to support his attack on her credit in relation to the remaining counts.

110 No mention is made of this issue in the reasons of the Court of Appeal. This is unsurprising. The point was not reserved at the trial. No objection was there taken to the "withdrawal" of the counts. No request was made for directions by the primary judge. The point was not specifically raised in the notice of appeal to the Court of Appeal. Although fresh counsel was retained to argue that appeal, the irregularity does not appear to have occurred to him. All this notwithstanding, the appellant submitted that this Court could, and should, address the irregularity and unfairness which he now brought to notice. It was even claimed that the irregularity was such as to involve a departure from the essential requirements of the trial, going to the root of the proceedings, such that the procedure which ensued was not a proper trial at all⁶⁹.

111 The appellant's objections to the procedures surrounding the variation of the indictment do not raise a case of manifest miscarriage of justice. Nor do they present such a radical departure from the legal requirements of a criminal trial as to deprive the appellant's trial of the elemental features prerequisite to a valid conviction. Despite the irregularities which occurred what was done was done with the consent of the appellant's trial counsel. It involved no forensic disadvantage to him. It remained open to him to criticise the complainant's credibility by reference to her testimony in relation to the first two counts, although they were "withdrawn". The course taken fell far short of involving a manifest miscarriage of justice. In the unlikely event that the appellant were ever again prosecuted upon the charges referred to in the first two counts of the original indictment it is unthinkable that proceedings on such charges would not be

69 *Wilde v The Queen* (1988) 164 CLR 365 at 373; *Glennon v The Queen* (1994) 179 CLR 1 at 8; *KBT v The Queen* (1997) 72 ALJR 116 at 126; 149 ALR 693 at 706.

permanently stayed as an abuse of process. I would therefore dismiss this complaint as insubstantial. Accepting that an irregularity has been shown, it did not result in an actual miscarriage of justice calling for this Court's intervention.

3. *General history of molestation: misdirection and non-direction*

112 The appellant, thirdly, complained of the way in which the prosecutor had adduced evidence of a general history of alleged sexual molestation extending beyond the specific incidents, the subject of the remaining counts. At the commencement of the complainant's evidence, she was asked a question which elicited a predictable answer: potentially of a highly prejudicial character⁷⁰:

"All right. Now, during that period of time a number of incidents occurred with you and Mr Gipp? ... Yes.

Can you just describe initially what those incidents were when you first came to Queensland? What happened? ... Yes, there was a time in 1983 myself - we had a cousin's ...

Firstly, *before we get to that, had there been some pattern of behaviour* that had occurred from when you came up from Victoria? ... It was regular. He was sexually molesting me.

Yes, what do you mean by that? ... Well, no penetration. He was using his penis. He was rubbing his penis between my legs until he ejaculated.

This was before you came to Queensland? ... That was before. That was in Victoria.

Yes, and did that continue after you arrived in Queensland? ... It continued in Queensland. It didn't happen when we lived with his parents. It wasn't until we moved to [our house]".

There were several other questions and answers to like effect. For example, during cross-examination, in response to a question relating to the first incident of digital and penile penetration, the following exchange took place⁷¹:

"So - what, a three-year gap between the two incidents; is that right? ... Yes. It happened on a regular basis, like these - these aren't just the only ones that happened."

70 Emphasis added.

71 Emphasis added.

113 In the context of a trial, with evidence as brief and stark as this one, testimony of the foregoing kind had a clear potential to prejudice the fair trial of the appellant. Yet, at no stage did trial counsel object to any of the foregoing evidence. Nor did he make any application for specific directions in respect of it. He did not even object to the first questions asked of the appellant in cross-examination by the Crown Prosecutor:

"It would seem, Mr Gipp, that I think the only reason you put forward as to why [the complainant] has made these stories up about you is that you had to discipline her a few times; is that right? ... Well, I don't know what reason she's done this.

No, but you suggested, as I understand it, through your counsel and just giving evidence then that it was because you had to discipline her [on] a few occasions ...? ... Yeah, well, that was part of it, I suppose. I don't know, you know. I don't know how people think."

114 The primary judge correctly charged the jury that it was not for the appellant to give a reason why the complainant should make false complaints against him. This, he pointed out, would quite often be "totally impossible" and he did not have any onus of proof in that regard⁷². This direction was impeccable. However, his Honour's summing up on the approach which the jury were to take in relation to the evidence about the unreported molestation going back many years was much less satisfactory. He said⁷³:

"There is also overall evidence of ongoing conduct by the accused over many years ... That evidence of general behaviour is led to show the nature of the relationship between the complainant and the accused, rather than present a picture of isolated events from time to time. *There is no need for you to be satisfied beyond reasonable doubt* of those background facts because they are given generally, provided that you accept the complainant's account that it occurred".

115 Again, there was no objection by trial counsel. No relevant request for redirection was made. The passage appears in a charge which contains several reminders to the jury about the onus resting on the Crown and the jury's need to be satisfied that the complainant's account in respect of each incident was an honest one which they could safely rely upon. If they did not believe her in respect of any one incident, they were told that it would be dangerous for them to accept her

72 cf *Palmer v The Queen* (1998) 72 ALJR 254 at 259, 267, 278; 151 ALR 16 at 23, 34, 48-49.

73 Emphasis added.

evidence at all and they should acquit on all counts. The passages are illustrated in the reasons of McHugh and Hayne JJ. I will not repeat them.

- 116 As I have pointed out, the notice of appeal to the Court of Appeal did not contain a specific ground based upon the foregoing evidence or the misdirection or non-direction now argued. Nor was the point expressly mentioned in that Court. It is not referred to in the reasons of the Court for the order dismissing the appellant's appeal. Because it is, in my view, the only one of the appellant's complaints with substance, it is necessary first to consider certain questions pertaining to jurisdiction.

The nature of and limits of appellate jurisdiction

1. Statutory basis for appellate intervention

- 117 Appeal is not a facility of the common law. It is a creature of statute⁷⁴. Accordingly, those who appeal must bring themselves within the power granted to the appellate court by statute. It is the filing of the notice of appeal, or equivalent initiating process, which invokes the jurisdiction of a court of appeal⁷⁵. That step is not a mere formality⁷⁶. If a notice of appeal does not specify a ground of appeal, the appeal may be invalid although an appellate court ordinarily has ample power to grant leave for the addition of a ground, or additional grounds, of appeal⁷⁷.

- 118 In Queensland, the provision of the Code expressing the grounds upon which appellate intervention may be had in ordinary criminal cases follows a form which is basically common to all Australian jurisdictions. The Queensland provision is found in s 668E of the Code. Relevantly it states:

"(1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.

74 *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225 per Rich, Dixon, Evatt and McTiernan JJ.

75 Code, s 668D.

76 See *R v Lennard* [1984] 1 Qd R 1.

77 *Ollis and Andersen v The Queen* (1986) 21 A Crim R 256 (findings in relation to Mr Ollis); cf *Nelson v The Queen* (1991) 65 ALJR 240.

(1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred".

119 It will be noted that there are three limbs to s 668E(1), although there is an inevitable overlap between them. The first directs attention to the evidence. It asks whether, having regard to the evidence, the jury's verdict is unreasonable or cannot be supported. The second directs attention to the judgment of the court of trial. It asks whether that judgment is affected by a wrong decision on any question of law on the basis of which the judgment should be set aside. The third is a residual provision which requires consideration, additionally, of whether "on any ground whatsoever" there has been a miscarriage of justice. From the structure of s 668E(1) it must be contemplated that there will be cases where the verdict of the jury is not unreasonable and can be supported having regard to the evidence; the judgment of the trial court is not affected by error of law; but there is nonetheless a miscarriage of justice which warrants allowing the appeal. Reading the last words of sub-s (1) with those of sub-s (1A) it is plain that the "miscarriage of justice" to which the appellate court's attention is directed must be a "substantial" one which "has actually occurred", ie it is not one that is insubstantial or merely theoretical. Once the appellate court comes to the conclusion that any of the pre-conditions to the exercise of its jurisdiction is made out under s 668E(1), it is obliged to ("shall") allow the appeal. The exercise of the power to provide relief against insubstantial error under s 668E(1A) is discretionary. It is confined to the limited cases there mentioned⁷⁸.

2. *"Unsafe or unsatisfactory" verdicts*

120 Notwithstanding the three grounds stated in the common form of statutory provisions in Australia, exemplified by the Code, it has become usual for practitioners and courts, including this Court, to refer to the appellate function in reviewing verdicts in criminal trials as one of considering whether the verdict is "unsafe or unsatisfactory". The way this phrase came into modern use in this country is curious, given that the common statutory formula draws attention to three questions and not one⁷⁹. In this Court sixty years ago the shorthand formula of "unjust or unsafe" was used to describe a verdict warranting appellate

78 cf *KBT v The Queen* (1997) 72 ALJR 116 at 119-120, 126; 149 ALR 693 at 697-698, 706.

79 Descriptions of verdicts as "unsatisfactory" is not entirely recent. See *Jackman v The King* (1914) 16 WALR 8 at 10; *R v Tamblyn* [1967] SASR 140 at 143.

intervention⁸⁰. Later the phrase "dangerous or unsafe" was used⁸¹. The formula "unsafe or unsatisfactory" seems to have its origins in a provision of the *Criminal Appeal Act* 1966 (UK)⁸², the relevant section of which was later re-enacted as s 2(1)(a) of the *Criminal Appeal Act* 1968 (UK). By that provision the appellate court in England was obliged to ("shall") allow an appeal against conviction if the court concluded⁸³:

"(a) [T]hat the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is *unsafe or unsatisfactory*".

The section contained two other grounds, namely that there had occurred a "wrong decision of any question of law" or a "material irregularity in the course of the trial". However, it is only the first stated ground that appears to have been adopted, in terms, in Australian practice. There is a certain irony in the fact that, in 1995, the phrase "unsafe or unsatisfactory" was removed from English legislation⁸⁴. The previous three grounds for appeal have now been replaced by a single ground - that the conviction is "unsafe". Yet the old English formula lingers on, loyally applied, in Australian courts.

- 121 The provisions of the former English section were interpreted as significantly broadening the functions of the appellate court in that jurisdiction. Soon after its enactment, Widgery LJ in the Court of Appeal remarked that, until the passing of the 1966 Act, "it was almost unheard of for this court to interfere"⁸⁵ in a case where the summing up was fair, the jury properly instructed and all relevant evidence placed before them. Following the amendment in 1966, the powers were "somewhat different"⁸⁶. Thereafter, the attention of the appellate court was to be addressed to "whether there is not some lurking doubt ... which makes us wonder whether an injustice has been done"⁸⁷. Such a doubt might arise notwithstanding the advantages which the jury enjoyed and which the appellate court did not enjoy.

80 *Davies and Cody v The King* (1937) 57 CLR 170 at 180.

81 *Ratten v The Queen* (1974) 131 CLR 510 at 515.

82 s 4(1), which amended the *Criminal Appeal Act* 1907 (UK).

83 Emphasis added.

84 By the *Criminal Appeal Act* 1995 (UK), s 2(1), which amended the *Criminal Appeal Act* 1968 (UK). See discussion in *R v Chalkley* [1998] 2 All ER 155 at 172-173.

85 *R v Cooper (Sean)* [1969] 1 QB 267 at 271.

86 *R v Cooper (Sean)* [1969] 1 QB 267 at 271.

87 *R v Cooper (Sean)* [1969] 1 QB 267 at 271.

The statutory amendment thus introduced a change in the practice of appellate review of criminal convictions in England. But, in Australia a wide remit had long existed to reconsider the verdicts of a jury against the touchstone of "a miscarriage of justice". As interpreted in this country, that provision had armed courts of criminal appeal with very large powers. In *Hargan v The King*⁸⁸, nearly eighty years ago, Isaacs J pointed out:

"If [the appellant] can show a miscarriage of justice, that is sufficient. That is the greatest innovation made by the Act, and to lose sight of that is to miss the point of the legislative advance."

122 Despite the fact that the common form legislative provisions in Australia differed from the amended legislation in England, a practice developed here of referring to the question as being whether a verdict of conviction was "unsafe or unsatisfactory". This practice secured the approval of this Court in *M v The Queen*⁸⁹. It did so notwithstanding the recognition that it had originated in the amended form of the *Criminal Appeal Act* 1968 (UK) and had no express foundation, as such, in the legislation in force in Australian jurisdictions. In this way, the criterion of "unsafe or unsatisfactory" came to be used in many cases⁹⁰. It has remained in use after its removal from the English statute books⁹¹. I have used it myself, including recently⁹².

123 The convenience of a shorthand expression is undeniable. However, it would, in my view, be preferable not to persist with it. There are three reasons for this conclusion. As I shall show they are relevant to what happened in these proceedings.

124 First, the phrase has no source in Australian legislation. This country has long since abandoned subservience to the law of the United Kingdom. It is not apparent to me why a legislative phrase, operative in that country from 1966 to 1995, should be adopted so uncritically and applied by Australian courts. This is especially so given that earlier Australian legislation, in common form throughout

88 (1919) 27 CLR 13 at 23 referring to *Criminal Appeal Act* 1912 (NSW), s 6 (not relevantly different from s 668E of the Code). See also *M v The Queen* (1994) 181 CLR 487 at 493.

89 (1994) 181 CLR 487 at 491-493.

90 See eg *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 531; *Morris v The Queen* (1987) 163 CLR 454 at 473; *Chidiac v The Queen* (1991) 171 CLR 432 at 451; *Knight v The Queen* (1992) 175 CLR 495 at 503, 511.

91 See eg *Jones v The Queen* (1997) 72 ALJR 78 at 85; 149 ALR 598 at 606-607.

92 See eg *Palmer v The Queen* (1998) 72 ALJR 254 at 272; 151 ALR 16 at 40-41.

the nation, was differently expressed and for the better part of a century had been interpreted as introducing an "innovation" amounting to a "legislative advance" in the scrutiny of jury convictions in criminal trials. In short, we have our own broad legislative provisions. There is no need to borrow a legislative phrase from another country.

125 Secondly, there is a danger that the use of the former English statutory formula may mislead. Instead of directing attention to the three-fold criteria expressed in the common form statutory provisions of Australia, application of an "unsafe or unsatisfactory" test might encourage the view that there is but one consideration to be judged. As the Court pointed out in *M*⁹³, the Australian legislation provides for questions of law to be separately dealt with. In a sense, the phrase "unsafe or unsatisfactory" is apt to the first limb of the common form provisions. It may also be relevant to the third limb. However, it is potentially misleading as a criterion for intervention on the ground of a wrong decision on any question of law. A judgment which is affected by a wrong decision of law may indeed be "unsatisfactory". It may also be legally "unsafe". Yet, in this country, that is not the applicable ground for appellate intervention in relation to it.

126 Thirdly, and most fundamentally, the duty of any court is to conform to its own legislative charter. In England, until recently, this was provided by the "unsafe or unsatisfactory" criterion included in the *Criminal Appeal Act* 1968 (UK). In Australia, the statutory provisions are differently expressed. It is those provisions which must be applied. An advantage of returning to the language of the Australian legislation is that it may replace some of the loose thinking which has accompanied the use of the borrowed shorthand. Above all, it may direct attention to the issue of whether a wrong decision on any question of law has occurred which requires that the judgment, resting on the verdict of the jury, should be set aside. Whether a sharpening of focus on the three limbs of provisions such as s 668E of the Code occurs or not, it is those provisions, and not borrowed language, which govern the outcome of appeals against conviction in this country.

127 The foregoing conclusion does not mean that every case in which an Australian appellate court has used the phrase "unsafe or unsatisfactory" necessarily demonstrates error requiring correction. Far from it. In most cases, the phrase will have been used in relation to the first limb of the common form provision, namely that the jury's verdict was unreasonable or cannot be supported, having regard to the evidence. That, indeed, appears to have been the way in which the present appellant's case was argued before, and decided by, the Court of Appeal. The ground of appeal relied upon in this case was itself rather unsatisfactory. But it would hardly be fair to the appellant to dispose of the appeal

93 (1994) 181 CLR 487 at 492.

on that footing given that, until now, it has been very common to use this shorthand phrase to cover a multitude of complaints.

3. *Limits of appellate process*

128 In *Jones v The Queen*⁹⁴, the majority of this Court⁹⁵, reviewing the competing formulations by which members of this Court had expressed "the test for an unsafe or unsatisfactory verdict"⁹⁶, held that "the test formulated by the majority in *M* must now be accepted as the appropriate test for determining whether a verdict is unsafe or unsatisfactory"⁹⁷. In *M*, the majority repeated the importance of having regard to the jury's primary responsibility for determining guilt, and the advantages which they enjoy in seeing and hearing the witnesses⁹⁸. The majority, in an apparent reference to the first limb of the common form provision, then went on⁹⁹:

"If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence."

129 Although it is true that, in the appellant's written submissions to the Court of Appeal, mention was made of the circumstances in which the prosecutor had entered a nolle prosequi on counts 1 and 2, no argument was advanced suggesting any irregularity in that procedure or its consequences for the lawfulness of the trial¹⁰⁰. There was no objection to the accuracy of the primary judge's directions

94 (1997) 72 ALJR 78; 149 ALR 598.

95 Gaudron, McHugh and Gummow JJ.

96 (1997) 72 ALJR 78 at 85; 149 ALR 598 at 606.

97 (1997) 72 ALJR 78 at 85; 149 ALR 598 at 607.

98 (1994) 181 CLR 487 at 493.

99 (1994) 181 CLR 487 at 494 (footnote omitted). In that case the *Criminal Appeal Act* 1912 (NSW), s 6(1).

100 The only point made was that the variations in the complainant's evidence were "a compounding factor telling against the complainant's veracity and reliability" (Appellant's written submissions to the Court of Appeal of Queensland at par 5(c)). There was no hint of a submission that an error of law had occurred in the procedures followed in respect of the "nolle prosequi".

to the jury concerning the evidence of general behaviour. Nor was there any complaint about the failure of the judge to assist the jury on the use which they might make of "those background facts". In the absence of a specific ground of appeal addressed to these matters, the Crown submitted that this Court should not permit them to be raised under the generalised ground complaining that the jury's verdict was "unsafe or unsatisfactory".

130 There is obvious force in the Crown's stance. Not until the hearing of the special leave application were the objections formulated and then only under the rubric of a ground of appeal which, to the last, is expressed in terms that the jury's verdicts were "unsafe or unsatisfactory". The failure of an appellant's legal representatives to raise an objection to the admission of evidence, to the procedures at a trial or to judicial directions or lack of directions to a jury are relevant but not necessarily fatal to reliance on such objections in a subsequent appeal¹⁰¹. Furthermore, where a challenge is raised to a verdict having regard to the evidence, courts of criminal appeal are required by authority to undertake an independent assessment of the evidence in order to determine whether it was open to the jury to be satisfied beyond reasonable doubt as to the guilt of the accused¹⁰². These principles do not mean that such courts are obliged to accept belated "second round" points of objection, conceived for the first time in an appeal, sometimes by new counsel, possibly overlooking tactical decisions taken at the trial which might explain the failure to press the points earlier. Cases of established incompetence in the professional representation of an accused person apart¹⁰³, it is inherent in the statutory process of "appeal" that a court must rely on the parties' legal representatives to raise the points that may reasonably and properly be argued. It would be grossly inefficient, and also unjust, if a want of vigilance on the part of legal representatives at trial or on a first level appeal were now to count for nothing on the footing that this Court could ultimately fix things up. That possibility may exist in the imaginative world of film and fiction. It has no place in the serious business of criminal appeals.

131 The requirement of an independent examination of the evidence was not intended by this Court to impose upon courts of criminal appeal duties to reconsider every ruling on a point of law or procedure made by a trial judge and every sentence of that judge's charge to the jury against the possibility that a "wrong decision of any question of law" might be discovered lurking somewhere

101 *Giannarelli v The Queen* (1983) 154 CLR 212 at 230; *De Jesus v The Queen* (1986) 61 ALJR 1 at 3; 68 ALR 1 at 5; *Bahri Kural v The Queen* (1987) 162 CLR 502 at 512; *KBT v The Queen* (1997) 72 ALJR 116 at 119, 126; 149 ALR 693 at 697, 706.

102 *Morris v The Queen* (1987) 163 CLR 454 at 463, 473, 478.

103 See eg *Re Knowles* [1984] VR 751 at 766-770; *R v Birks* (1990) 19 NSWLR 677 at 685.

which the legal representatives have not identified. In this case, the evidence was extremely sparse. But in many criminal trials, a court of criminal appeal will be faced with multiple appeal books. The transcript will cover thousands of pages. There may be a hundred rulings on evidence and on legal questions. Even if legally permissible, it would be completely unrealistic to expect of, or impose upon, appellate courts duties of detailed independent analysis of judicial rulings and directions on the chance footing that they might find an error which had eluded everyone else. The workload of courts of criminal appeal is extremely onerous. Current arrangements are essential to keep the backlog and delays in such courts within tolerable proportions. In these circumstances, the imposition of such an additional duty would be unreasonable and unrealistic. The judges in such appeals are entitled to rely on the legal profession to raise expressly legal objections as to misdirections and non-directions or as to procedures followed. Such courts hold in reserve relief for the exceptional case where professional incompetence or negligence is clearly demonstrated. It was not suggested that the omissions in this case rose to that level.

132 The failure of earlier counsel to raise the two points agitated in this Court was at one stage said by the Crown to have been the result of tactical decisions taken at the trial. Clearly this will sometimes be the case. It would then be rare that the issue would be reopened on appeal. But here, although some tactical advantages may have accrued to the appellant from the decision to permit the trial to continue following withdrawal of the first two counts, it is difficult to see any tactical advantage in allowing evidence to be adduced of the "background facts" of his alleged molestation of his step-daughter. Still less is it easy to see any tactical advantage to him in allowing to pass, unchallenged, the judge's direction to the jury as to the way in which they should use such evidence. The realistic explanation for the failure to raise these points earlier, whether at trial or in the Court of Appeal, appears to be that they were not perceived by those who then represented the appellant. It was for that reason, and no other, that they were not litigated.

133 The Crown submitted that this Court should not now permit such points to be raised. To do so, it urged, would involve upholding an appeal from the Court of Appeal although no real error had been shown in its disposal of the appeal to it within the ambit of the single ground of appeal argued. To permit such a course might discourage accuracy in the performance by legal representatives of their professional responsibilities. It would sanction departure from the requirements of precision in the specification of grounds of appeal and in the argument of appeals, compliance with which is essential to the efficient discharge of the responsibilities of appellate courts. Most importantly, it would overlook the nature of the process provided by statute. This is an appeal, disposing of identified grounds of appeal, not a roving judiciary enquiry to discover and correct error in the trial, undiscovered or uncomplained about by those representing the appellant. The Crown expressed concern about the implications of the course adopted by the appellant. It urged that, if rewarded with success, it would have large potential

consequences for the finite judicial and forensic resources available to the community for disposing of proceedings of this kind. There is obviously force in the Crown's submissions.

4. *Miscarriage of justice - the proper approach*

134 It would be tempting to dispose of the appellant's new complaints before this Court on the technical footing that they were not argued before the Court of Appeal, are different from the matters determined there and lie outside the ground of appeal filed, referring solely to the complaint that the verdicts were "unsafe or unsatisfactory". But such a result would, in my view, condone a serious miscarriage of justice which has now been brought to light. The appellant personally was clearly not responsible for the failure earlier to raise the objections to the trial which have now been expressed. The mistake or oversight was that of the legal representatives who earlier appeared for him. I cannot bring myself to conclude that there was a mistake on the part of the Court of Appeal. That Court cannot, in my view, be criticised for having failed to detect the points of objection now relied on in this Court. Nor could I accept that the Court of Appeal had an independent duty to scrutinise each and every ruling of the primary judge or the entirety of his charge to the jury in case it found an error in the proceedings or in the directions to the jury which required appellate intervention. Nor, in my view, would a general scrutiny of the evidence reasonably turn up the procedural point or the complaints about the misdirection and non-direction now argued.

135 Nevertheless, pursuant to special leave, this Court now has the appeal before it. One of the grounds upon which the Parliament has provided for the grant of special leave is that the interests of the administration of justice in the particular case require consideration of the judgment to which the application relates¹⁰⁴. The appeal certainly raises one point of general importance for the administration of justice in criminal appeals. This concerns the care which must be exercised in the use of the undifferentiated criterion of "unsafe or unsatisfactory" to describe the circumstances in which a court of criminal appeal will disturb a jury's verdict. Such use might, in this case, have masked the matters of substance on which the appellant now relies. But beyond that general consideration there are features of this particular case which produce a firm conclusion in my mind that a miscarriage of justice has occurred.

136 The Court is not obliged to ignore a manifest miscarriage of justice demonstrated to it simply because the grounds to demonstrate it were not earlier raised. Ultimately, what is under review in this Court is not the reasons of the Court of Appeal, but its order and judgment. Defensive of the liberty and other rights of those convicted of criminal offences, courts of criminal appeal in Australia have always been ready, more so than in civil matters, to take a lenient

104 *Judiciary Act* 1903 (Cth), s 35A(b).

view of procedural failures where that course is deemed appropriate and just. In exceptional cases, where serious error is brought to light, such courts regularly allow a ground to be raised belatedly which concerns a "manifest miscarriage of justice". This has certainly been the approach in criminal appeals in Queensland¹⁰⁵. In my view it is the correct approach. Any other rule would give priority to form over substance. It would permit procedural rules to defeat correction of a serious miscarriage of justice that has come to the notice of a court of justice.

137 Rigidities of pleading or procedure do not prevent evaluation of substantial arguments that a manifest miscarriage of justice has occurred, particularly, but not only, where such miscarriage has resulted in a custodial sentence. This Court has adequate means to defend itself from insubstantial attempts to raise for the first time points of objection earlier neglected or overlooked¹⁰⁶. It can readily rebuff such endeavours where no injustice is demonstrated or where the course taken below is shown to have followed a deliberate tactical decision. But where an argument is raised which appears to involve a manifest miscarriage of justice, it should not be ignored because the argument ought properly to have been expressed earlier. The Code and its equivalents in other jurisdictions require that, in criminal appeals, all courts should be vigilant to miscarriages of justice brought to their notice. When a manifest miscarriage can be shown, Australian courts, unless forbidden by statute, do not turn a blind eye.

138 Nothing in *Mickelberg v The Queen*¹⁰⁷ or any other authority of the Court forbids the course which I favour. In *Mickelberg*, the Court construed the "appeal" provided for in s 73 of the Constitution as excluding the reception, in this Court, of fresh evidence which was not before the courts below. It restated the proposition that an appellate court is called upon to "redress error on the part of the court below"¹⁰⁸. In deciding whether error is demonstrated the appellate court looks to, and not outside, the materials that were before the court *a quo*. Otherwise, *Mickelberg* simply confirms the principle that the powers of this Court in an appeal "are of the widest character which true appellate jurisdiction may possess"¹⁰⁹. The

105 See *R v Brown* [1985] 2 Qd R 126 at 132.

106 *Bataillard v The King* (1907) 4 CLR 1282 at 1289; *Liberato v The Queen* (1985) 159 CLR 507 at 509; *Morris v The Queen* (1987) 163 CLR 454 at 475-476; *Pantorno v The Queen* (1989) 166 CLR 466 at 475; *Baraghith v The Queen* (1991) 66 ALJR 212; *Warner v The Queen* (1995) 69 ALJR 557.

107 (1989) 167 CLR 259.

108 (1989) 167 CLR 259 at 267.

109 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 87.

decision does not prevent this Court, within the record, from reconsidering the judgment, decree, order or sentence from which the appeal comes¹¹⁰. Doing so, on a matter not called expressly to the attention of the court below, does not, as such, involve this Court in a "rehearing". It does not take this Court "beyond the jurisdiction or capacity of the Court appealed from"¹¹¹. It does not partake of an impermissible exercise of the original jurisdiction of this Court. From the earliest days, in the determination of appeals, this Court has asserted a jurisdiction, held in reserve, to avoid an injustice brought to its notice, although not raised at the trial or in the court of appeal¹¹². In truly exceptional cases¹¹³, to avoid the risk of a serious miscarriage of justice, to vindicate the law¹¹⁴ or to prevent the repetition of similar mistakes of law¹¹⁵, the Court has upheld a prisoner's appeal although the point ultimately successful was never taken below, whether at trial or in the court of criminal appeal. The present is such a case.

General history of molestation - conclusion

139 Before this Court, the Crown properly conceded that the reference by the primary judge to the standard of proof relating to the evidence of prior molestation was "undesirable and should not have been made". It was "unfortunate". I entirely agree with these epithets. Where such facts may constitute "indispensable links in a chain of reasoning towards an inference of guilt"¹¹⁶, it may be appropriate (and would have been appropriate in this case) to warn the jury that each "link" must be proved beyond a reasonable doubt.

140 Additionally, where evidence of the kind admitted in this trial is received, special care must be exercised in the use to which it is put because of its significant potential to cause prejudice to the accused. This type of evidence has been classified in various ways. It has been called "dispositional", "background",

110 Constitution, s 73.

111 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 109; cf *Wollongong Corporation v Cowan* (1955) 93 CLR 435 at 444.

112 See eg *Scott Fell v Lloyd* (1911) 13 CLR 230; *Pantorno v The Queen* (1989) 166 CLR 466.

113 See eg *Giannarelli v The Queen* (1983) 154 CLR 212 at 221 per Gibbs CJ.

114 *Giannarelli v The Queen* (1983) 154 CLR 212 at 222 per Murphy J.

115 See *Giannarelli v The Queen* (1983) 154 CLR 212 at 230 per Brennan J.

116 *Shepherd v The Queen* (1990) 170 CLR 573 at 579.

"tendency"¹¹⁷, "propensity"¹¹⁸, "relationship"¹¹⁹ or in some circumstances, "similar fact"¹²⁰ evidence. Although each of these terms has its own drawbacks, and whilst each has been used differently, in my view, all are apposite to the present case. My own preference, on the basis that it is harmonious with the wording of the Uniform Evidence Acts¹²¹, is to use the term "tendency" evidence.

- 141 Evidence of this kind is only admissible if its probative value outweighs its prejudicial effect¹²². This Court has repeatedly warned of the dangers of allowing such evidence to be admitted, of permitting it to be received without immediate warnings as to the limited basis upon which it may be considered and then of the need to direct the jury, in the concluding charge, on the way in which, if at all, they

117 See s 97 of both the *Evidence Act* 1995 (Cth) and the *Evidence Act* 1995 (NSW), which provides that such evidence is inadmissible unless it would have significant probative value, and s 101, which provides that it may not be adduced by the prosecution in a criminal trial unless its probative value substantially outweighs any prejudicial effect it may have on the defendant. See also *Zaknic Pty Ltd v Svelte Corporation* (1995) 61 FCR 171 at 175; 140 ALR 701 at 705; *Lock v The Queen* (1997) 91 A Crim R 356 at 360-363. Analogous rules apply to "coincidence" evidence: ss 98, 101.

118 *S v The Queen* (1989) 168 CLR 266 at 275.

119 *S v The Queen* (1989) 168 CLR 266 at 279; cf *R v Ball* [1911] AC 47 at 71; *Perry v The Queen* (1982) 150 CLR 580 at 586.

120 *Hoch v The Queen* (1988) 165 CLR 292 at 294.

121 Being the *Evidence Act* 1995 (Cth) and the *Evidence Act* 1995 (NSW). Whilst these Acts do not, of course, apply in this case, it is useful to consider how they have expressed the relevant test: *R v Swaffield* (1998) 72 ALJR 339 at 365; 151 ALR 98 at 132.

122 *Sutton v The Queen* (1984) 152 CLR 528 at 534, 565; *Harriman v The Queen* (1989) 167 CLR 590 at 594-595, 609-610; *C v The Queen* (1991) 59 A Crim R 46 at 57; *B v The Queen* (1992) 175 CLR 599 at 618.

should use such evidence¹²³. I accept what was recently said in this regard by the Court of Appeal of Victoria in *R v Vonarx*¹²⁴:

"[W]here evidence of criminal conduct, other than that which is charged, is being introduced into the evidence on the trial, the jury ought to be clearly told that evidence of such conduct can be used by them only if they are satisfied that it occurred and only for the limited purpose of determining whether a sexual relationship existed between the complainant and the accused, thereby enabling the evidence relied upon by the Crown in proof of the offences charged to be assessed and evaluated within a realistic contextual setting. They should be told not to reason that the accused is the kind of person likely to commit the offence charged.

The jury should also be clearly instructed that evidence of other sexual activity does not itself prove the offences charged. It is of the utmost importance that the jury be told that the accused can be convicted on any count alleged against him ... only if they are satisfied beyond reasonable doubt that the facts alleged in that count occurred. It is impermissible to convict the accused on the basis that, although the conduct so identified has not been proved to the requisite standard, some other conduct alleged by the victim has occurred".

142 In the present trial it is doubtful that the probative value of the evidence of the complainant concerning alleged events outside the offences charged outweighed the substantial prejudicial effect of such evidence. However, assuming that it did, and that the evidence was therefore admissible as tendency evidence, far from giving the stringent warnings required by law at the point that the evidence was received and at the point at which the concluding instruction was given to the jury, the primary judge gave absolutely no warnings about the dangers of the use of such evidence. On the contrary, he instructed the jury that they could be satisfied on the evidence otherwise than beyond reasonable doubt. Read in context, such instruction was a most serious misdirection. Nor was there any direction to the jury that they should disregard the evidence given by the complainant in relation to the first two counts which had been "withdrawn". It is perfectly possible that, in this case, the jury reasoned to the appellant's guilt of the offences charged from satisfaction that the appellant did have an ongoing sexual relationship with the complainant, going back, as she had stated in her evidence,

123 *BRS v The Queen* (1997) 71 ALJR 1512 at 1519-1520, 1525, 1528, 1539-1543; 148 ALR 101 at 111-112, 119, 122, 138-143 and cases there cited. See esp *R v Dolan* (1992) 58 SASR 501 at 503 per King CJ; *R v Beserick* (1993) 30 NSWLR 510 at 516 per Hunt CJ at CL.

124 Unreported, Court of Appeal of Victoria, 15 November 1995 at 12-13 per Winneke P, Callaway JA and Southwell AJA.

years before the times alleged in the counts of the indictment. It is equally possible that the jury, conforming to the judge's directions, reached their satisfaction on a link in the chain of their reasoning other than according to the criminal standard of proof.

- 143 As it happens, there is, in this case, an indication that the jury were concerned about the directions which they had been given about the use they might make of the evidence. At the beginning of the second day of the trial, the primary judge indicated that he had received a request from the jury asking "to hear [the] summing up again"¹²⁵. This request was refused. However, the jury were then brought in and asked the matter upon which they wished further assistance. The foreman is recorded as saying¹²⁶:

"I feel that we're very close to a verdict on some of the counts, your Honour. But we'd appreciate a little bit more guidance on what, in fact, we're required to base our decisions on, whether it should be facts that were provided or more or less the evidence through the sworn testimony that the people have given in evidence here."

Although this request is not entirely clear, it is certainly consistent with confusion on the part of this jury about the evidence upon which they were required, and entitled, to act. In his redirection, the primary judge did not address specifically the tendency evidence. He did not refer to the great care that was to be exercised in the use made of such evidence and in reasoning from it. Accordingly, to the end of the trial, that matter was left in the state in which the direction had been given, namely that the jury did not need to be satisfied beyond reasonable doubt of the truth of such background facts. The ultimate questions are whether this clear misdirection, and the related non-directions give rise to a miscarriage of justice. If so, were they within the grounds of appeal argued in the Court of Appeal and now, without amendment, before this Court?

- 144 There can be no doubt that a misdirection by a trial judge can occasion a miscarriage of justice where such misdirection means that the accused has not had a fair trial according to law or where the relevant law has not been correctly explained to the jury. Where the accused has thereby lost a chance, which was fairly open, of being acquitted, such failures are, in the eye of the law, a miscarriage of justice¹²⁷. For the intervention of the appellate court, nothing more need be shown to attract the third limb of the statutory grounds. In the context, the

¹²⁵ *R v Gipp*, Trial transcript, District Court of Queensland, 30 May 1996 at 83.

¹²⁶ *R v Gipp*, Trial transcript, District Court of Queensland, 30 May 1996 at 83.

¹²⁷ *Mraz v The Queen* (1955) 93 CLR 493 at 514; *KBT v The Queen* (1997) 72 ALJR 116 at 119; 149 ALR 693 at 697.

misdirection in this trial assumed a particular significance because of the brevity of the trial, the difficulty which the appellant faced in meeting the charges (save by denial) and the generalised terms in which the alleged history of abuse was given without the specificity which might lend itself to scrutiny and effective forensic contradiction. In the context, therefore, a manifest miscarriage of justice has occurred. The case is not one for the application of s 668E(1A) of the Code.

145 It is true that the complaint concerning the alleged miscarriage of justice resulting from the directions given by the primary judge was not expressly raised in the notice of appeal to the Court of Appeal or indeed to this Court, as it should have been. However, in the way the "unsafe or unsatisfactory" shorthand has sometimes been permitted to extend not only to the first limb of the common form statutory provision but also to the third, I would not exclude the appellant from now raising his complaint. The procedures have been most imperfect. But they do not ultimately disguise a serious risk of miscarriage of justice demonstrated to this Court which it cannot allow to stand.

Orders

146 The appellant asked that, if his appeal were allowed, the convictions should be quashed and verdicts of acquittal entered. That is ordinarily appropriate where the verdict entered at the trial is unreasonable or cannot be supported having regard to the evidence. But where, as here, the real objection which ultimately succeeds concerns errors of judicial misdirection and non-direction resulting in a miscarriage of justice, the proper course is to quash the convictions and to order a new trial¹²⁸. It will then be for the prosecuting authorities to decide whether, in the circumstances, a retrial should be had. Any retrial of the appellant should obviously be confined to the counts which went to the first jury. The Crown ought not have a second opportunity to breathe life into, or to amend, counts 1 and 2 which it "withdrew".

147 It was for these reasons that I joined in the orders pronounced by the Court on 1 April 1998 as set out in the reasons of Gaudron J.

128 Code, s 669.

148 CALLINAN J. On 29 May 1996 the appellant, Gregory Bernard Gipp, was
arraigned before a jury in the District Court of Queensland at Southport. The
indictment contained four counts of unlawful and indecent assault and three counts
of rape. The complainant was his step-daughter. The appellant denied the
allegations.

149 The offences were alleged to have occurred between 7 and 14 years before
the hearing, that is, between December 1982 and January 1989. During this period
the complainant was aged between 10 and 16 years. The events were not reported
to the police until 1995. The complainant was 23 at the time of the trial.

150 The complainant's evidence was uncorroborated in respect of all counts.
Except for two of the counts on the indictment the occasions on which the alleged
offences took place were identified only by reference to a period, rather than a
specific date.

151 During the course of her evidence-in-chief the complainant was confused in
her accounts of the first and second counts on the indictment. This led to the
"withdrawal" of those counts from the jury. Count 1 was one of the only two
counts on the indictment identified by reference to a specific date. The remaining
count which identified the time of the incident by reference to a specific date was
count 5.

152 The offence the subject of count 5 was alleged to have occurred on
11 May 1986, Mother's Day. The complainant's mother was called by the Crown.
She verified the appellant's account which, if accepted, would have established that
at the time of the alleged offence, the complainant was either on the way to, or at
a public hospital with the appellant, rather than at home with him and an infant
child.

153 Hospital records tendered in evidence and noting the time of the
complainant's admission to hospital for an emergency appendectomy were
corroborative of the appellant and his wife.

154 In the complainant's examination-in-chief, before eliciting an account of the
actual offences, the Crown introduced evidence of a history of sexual abuse of the
complainant by the appellant. No objection was taken to this evidence. Further
evidence of abuse was introduced in cross-examination of the complainant. The
appellant now complains that he had no opportunity to refute this evidence, other
than by a bare denial of it.

155 The evidence on trial was all heard in two and three quarter hours on 29 May
1996. The trial was conducted as a contest of credit between the complainant and
the appellant. In the course of his summing up, the trial judge referred to the
evidence of a history of sexual abuse in the following terms:

"There is also overall evidence of ongoing conduct by the accused over many years.... That evidence of general behaviour is led to show the nature of the relationship between the complainant and the accused, rather than present a picture of isolated events from time to time. There is no need for you to be satisfied beyond reasonable doubt of those background facts because they are given generally, provided that you accept the complainant's account that it occurred".

156 That the jury was almost certainly left in a state of confusion about this direction appears from a question which they asked after they had been deliberating for some time. The foreman sought the assistance of the trial judge by making this request:

"I feel that we're very close to a verdict on some of the counts, your Honour. But we'd appreciate a little bit more guidance on what, in fact, we're required to base our decisions on, whether it should be facts that were provided or more or less the evidence through the sworn testimony that the people have given in evidence here."

157 On the morning of 30 May 1996 the jury returned a verdict of guilty on each of the five counts which were left for their consideration.

158 The appellant was sentenced to ten years imprisonment on each count of rape and five years imprisonment on each count of indecent assault. All sentences were to be served concurrently.

Proceedings in the Court of Appeal

159 On 27 August 1996, the Queensland Court of Appeal heard and dismissed the appellant's appeal against conviction without calling on the respondent.

160 There was only one ground of appeal stated in the notice of appeal:

"That the verdict was unsafe and unsatisfactory and against the weight of the evidence in particular the complainant's evidence which was uncorroborated."

161 The focus of the appellant's submissions on appeal was on the evidence relating to count 5, the charge of indecent assault which allegedly occurred before the visit to the hospital. The Court of Appeal dealt with the hospital records in this way:

"the hospital records [as to time of admission] were not necessarily inconsistent with [the complainant's] evidence. Alternatively, the jury could have concluded that the complainant was mistaken as to the times on that day

but nevertheless have accepted her evidence as to the indecent assault on that day and to have rejected the evidence of the appellant and his wife."

162 The Court of Appeal expressed its conclusion by saying:

"In the end ... the jury were left with a conflict of evidence between the complainant on the one hand and the appellant and his wife on the other. In resolving that, the jury had the advantage, which this Court lacks, of observing each of them give evidence and from that observation forming a view as to their credibility. There is no basis ... for concluding that the jury should have had a reasonable doubt on that question."

163 The approach of the Court of Appeal and its conclusions were consistent with the way in which the case there was argued on behalf of the appellant.

164 It is for the first time that the points argued before us here have been raised in a Court.

165 At the outset, counsel for the appellant in this Court (who was not counsel at the trial or in the Court of Appeal) mindful of no doubt what was said by Gleeson CJ in *R v Birks*¹²⁹, was anxious to dispel any impression that points taken before us were deliberately not taken at the trial for tactical reasons. I would be prepared to accept that this is so. The appellant's counsel took no exception to the "withdrawal" of the two counts, or the way in which that occurred. The speeches of counsel to the jury have been transcribed and defence counsel on trial made only the most passing of references to the "withdrawal" of the two counts:

"They [the Crown] have not further proceeded in respect of counts 1 and 2 and, as you will have remembered, there was a lot of evidence about who slept where and all the rest of it. That's really not relevant in respect of the counts upon which you have to now deliberate."

129 (1990) 19 NSWLR 677 at 686:

"The failure to deal with the matter [a failure to cross-examine on important issues] was not the result of a deliberate, even if perhaps unwise, tactical decision to make as little fuss as possible about subjects on which it was thought that the less that was said the better. This was not a matter of taking a calculated risk. The barrister simply did not know what to do, and so, until it was too late, he did nothing.

It should not be thought, however, that the failures of the appellant's counsel to which attention has been drawn constituted the only respect in which the proceedings were affected by error. There was, unfortunately, a combination of circumstances which together resulted in what I regard as a miscarriage of justice. They all related in one way or another to the original inadequacy of the cross-examination of the complainant, and the consequences that flowed from that."

The Appeal to this Court

166 The ground of appeal upon which the appellant was granted special leave is expressed in the following terms:

"The Court of Appeal failed to apply, or incorrectly applied, the principles which govern an appellate court's assessment and determination of whether a verdict is unsafe and unsatisfactory."

167 The criminal appeal provisions in this country do not contain the words "unsafe and unsatisfactory". Resort to the expression, an "unsafe and unsatisfactory" verdict, as a ground of appeal should therefore generally be discouraged, but the requirement that Courts of Appeal consider the substance of such a ground when it is properly raised, by an independent assessment of the case remains. Appeals should preferably be framed by reference to the terms of the appeal provisions.

168 The appeal provision in Queensland, s 668E of the *Criminal Code Act* 1899 (Qld) ("the Criminal Code"), is analogous to appeal provisions in other Australian States¹³⁰:

"(1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.

(1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Chapter, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

..."

130 See *Criminal Appeal Act* 1912 (NSW), s 6; *Criminal Code Act* 1983 (NT), s 411; *Criminal Law Consolidation Act* 1935 (SA), s 353; *Criminal Code Act* 1924 (Tas), s 402; *Crimes Act* 1958 (Vic), s 568; *Criminal Code Act* 1913 (WA), s 689.

169 In *M v The Queen*, this Court recently considered the relationship between a conclusion that a verdict was unsafe and unsatisfactory and the language of s 668E and like provisions in other states¹³¹:

"Where a court of criminal appeal sets aside a verdict on the ground that it is unreasonable or cannot be supported having regard to the evidence, it frequently does so expressing its conclusion in terms of a verdict which is unsafe or unsatisfactory. Other terms may be used such as 'unjust or unsafe'¹³², or 'dangerous or unsafe'¹³³. In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict¹³⁴. Questions of law are separately dealt with by s 6(1) [of the *Criminal Appeal Act* 1912 (NSW)]. The question is one of fact which the court must decide by making its own independent assessment of the evidence¹³⁵ and determining whether, notwithstanding that there is evidence upon which a jury might convict, 'none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand'¹³⁶. But a verdict may be unsafe or unsatisfactory for reasons which lie outside the formula requiring that it not be 'unreasonable' or incapable of being 'supported having regard to the evidence'. A verdict which is unsafe or unsatisfactory for any other reason must also constitute a miscarriage of justice requiring the verdict to be set aside. In speaking of the *Criminal Appeal Act* in *Hargan v The King*, Isaacs J said¹³⁷:

'If [the appellant] can show a miscarriage of justice, that is sufficient. That is the greatest innovation made by the Act, and to lose sight of that is to miss the point of the legislative advance.'

131 (1994) 181 CLR 487 at 492-493 per Mason CJ, Deane, Dawson and Toohey JJ.

132 See *Davies and Cody v The King* (1937) 57 CLR 170 at 180 per Latham CJ, Rich, Dixon, Evatt and McTiernan JJ.

133 See *Ratten v The Queen* (1974) 131 CLR 510 at 515 per Barwick CJ.

134 See *Raspor v The Queen* (1958) 99 CLR 346 at 350-351 per Dixon CJ, Fullagar and Taylor JJ; *Plomp v The Queen* (1963) 110 CLR 234 at 246, 250 per Menzies J.

135 *Morris v The Queen* (1987) 163 CLR 454.

136 See *Hayes v The Queen* (1973) 47 ALJR 603 at 604 per Barwick CJ.

137 (1919) 27 CLR 13 at 23.

And as the Court observed in *Davies and Cody v The King*¹³⁸, the duty imposed on a court of appeal to quash a conviction when it thinks that on any ground there was a miscarriage of justice covers:

'not only cases where there is affirmative reason to suppose that the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled.'

Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty¹³⁹. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations.¹⁴⁰

- 170 So long as the ground that the verdict is unsafe and unsatisfactory is truly raised it is now accordingly well settled that a Court of Appeal should undertake "an independent examination of the relevant evidence to determine whether it was open to the jury to be satisfied beyond reasonable doubt as to the guilt of the accused".¹⁴¹

138 (1937) 57 CLR 170 at 180 per Latham CJ, Rich, Dixon, Evatt and McTiernan JJ.

139 See *Whitehorn v The Queen* (1983) 152 CLR 657 at 686 per Dawson J; *Chamberlain v The Queen [No. 2]* (1984) 153 CLR 521 at 532 per Gibbs CJ and Mason J; *Knight v The Queen* (1992) 175 CLR 495 at 504-505 per Mason CJ, Dawson and Toohey JJ, 511 per Brennan and Gaudron JJ.

140 *Chamberlain v The Queen [No. 2]* (1984) 153 CLR 521 at 621 per Deane J.

141 *Morris v The Queen* (1987) 163 CLR 454 at 473 per Deane, Toohey and Gaudron JJ; *Chidiac v The Queen* (1991) 171 CLR 432 at 451 per Dawson J; *Knight v The Queen* (1992) 175 CLR 495 at 503 per Mason CJ, Dawson and Toohey JJ, 511 per Brennan and Gaudron JJ; *M v The Queen* (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ; *Jones v The Queen* (1997) 72 ALJR 78; 149 ALR 598.

171 It almost goes without saying that the independent assessment of the relevant evidence has to be made in the context of the whole trial, including rulings on evidence and directions to the jury.

172 With respect to the direction by the trial judge here regarding the so-called "background facts" (the evidence of prolonged abuse), the respondent argues, that although it was admittedly defective, it was cured by a direction in these terms:

"you must be entirely satisfied of the honesty and reliability of the complainant before you act on that evidence alone".

173 I do not think this was adequate. The nature and significance of the evidence and the use to which it might be put were never explained to the jury. I think they should have been. Presumably the evidence was tendered as evidence of propensity. It may have had relevance on other bases, for example, as explaining an absence of earlier complaint to the extent that there was any issue in that regard. However it does not seem to have been put in either of these ways at the trial.

174 The need for care in receiving and explaining the significance of propensity evidence was emphasized by McHugh J in *BRS v The Queen*¹⁴²:

"It is true, as I pointed out in *Pfennig v The Queen*¹⁴³, that there are cases where the interests of justice require that evidence should be admitted even though it reveals that the accused has a criminal or reprehensible propensity. It is also true that in some cases evidence may be admitted even though the sole basis for its admission is that it reveals a criminal or reprehensible propensity on the part of the accused which the Crown will rely on to prove the guilt of the accused¹⁴⁴. Before evidence revealing such a propensity is admitted, however, the judge, according to numerous decisions of this Court¹⁴⁵, must be satisfied that the probative value of the evidence outweighs its prejudicial value.

142 (1997) 71 ALJR 1512 at 1527-1528; 148 ALR 101 at 122.

143 (1995) 182 CLR 461 at 523.

144 *Pfennig v The Queen* (1995) 182 CLR 461 at 526-527 per McHugh J.

145 See, eg *Perry v The Queen* (1982) 150 CLR 580 at 604 per Wilson J, 609 per Brennan J; *Sutton v The Queen* (1984) 152 CLR 528 at 547 per Brennan J, 560 per Deane J, 564 per Dawson J; *Hoch v The Queen* (1988) 165 CLR 292 at 300 per Brennan and Dawson JJ; *Harriman v The Queen* (1989) 167 CLR 590 at 598 per Dawson J, 633 per McHugh J; *Thompson v The Queen* (1989) 169 CLR 1 at 16 per Mason CJ and Dawson J; *B v The Queen* (1992) 175 CLR 599 at 608 per Brennan J, 618 per Dawson and Gaudron JJ.

If evidence revealing a criminal or reprehensible propensity is admitted, the trial judge must give the jury careful directions concerning the use which they can make of the evidence. If the evidence is admitted for a reason other than reliance on propensity, the judge must direct the jury that they can use the evidence for the relevant purpose and for no other purpose. In some cases, the judge may need to be more specific. He or she may need to direct the jurors that they cannot use the evidence for an identified purpose. If the evidence is admitted because the Crown wishes to rely on the accused's propensity as an element in the chain of proof, it is especially necessary that the judge give the jurors clear directions as to the manner in which they may use the propensity evidence.

In the present case, the trial judge was not asked to rule on the admissibility of W's evidence even though it disclosed criminal or reprehensible conduct on the part of the appellant. This was because it was conceded that it was relevant to rebut evidence that the appellant was a person of good character¹⁴⁶. Some of it was also admissible, as I have said, because it corroborated the evidence of the complainant. Nevertheless, because the evidence of W did disclose criminal or reprehensible conduct on the part of the appellant, absent some countervailing circumstance of sufficient cogency, the trial judge was bound to direct the jurors as to how they could use the evidence of W."

175 Kirby J in the same case made these observations¹⁴⁷:

"It is important to take into account the statutory authorisation for briefer directions to juries of which Judge Court availed himself in this case. It is also necessary to remind oneself that a judge's direction to a jury must be considered in the context of the entire trial and in the light of the issues litigated and the submissions made¹⁴⁸. This Court should exercise restraint before adding to the catalogue of warnings required of judges conducting criminal trials. If overlooked, or considered unnecessary in a particular trial, they may simply give rise to unmeritorious appeals. But, in certain fundamental matters, the judge carries an unavoidable obligation to provide directions which are necessary to prevent a perceptible risk of a miscarriage

146 The fact that the trial judge was not asked to rule on it also underlines the point that [McHugh J] made in *Pfennig* ((1995) 182 CLR 461 at 530) that not all evidence revealing criminal or reprehensible propensity must pass the no rational explanation consistent with innocence test to be admissible.

147 (1997) 71 ALJR 1512 at 1542; 148 ALR 101 at 142.

148 *R v Tripodina & Morabito* (1988) 35 A Crim R 183 at 191-192 per Yeldham J; *R v Lawrence* (1996) 86 A Crim R 412 at 424-425 per Callaway JA.

of justice¹⁴⁹. The risk must be a real, and not a fanciful one to attract the intervention of an appellate court¹⁵⁰. It is not enough that a conclusion is reached that a particular warning would have been desirable. It must be shown to have been necessary in order to avoid the risk of a miscarriage of justice. If directions on the jury's legal duties are incorrect or seriously inadequate a new trial will ordinarily be ordered unless the appellate court can affirmatively conclude that the error or omission was in favour of the appellant and that no jury could have failed to convict had they been properly instructed¹⁵¹. This was the conclusion which the Court of Criminal Appeal reached. With respect, I disagree."

176 The dangers of admitting evidence of criminal conduct not the subject of specific charges are obvious. I am concerned also about the danger of admitting so called "background" evidence. Its reception, and the need to explain its purpose and utility, have the tendency to introduce into a trial, particularly a criminal trial, undesirable complications, and the notion that there may be various lesser grades of evidence calling for different standards of satisfaction in the minds of the jurors.

177 In *Harriman v The Queen*¹⁵², McHugh J reviewed a series of cases in which evidence of other criminal conduct (mainly sexual misconduct) was received. His Honour there said that circumstantial evidence was a more apt categorisation of evidence of that kind. However, as his Honour's discussion of the cases shows, the evidence in those cases had a special value and went beyond being mere background evidence: (eg *R v Garner*¹⁵³, to prove an atmosphere of hostility; *R v Hissey*¹⁵⁴, to prove malice; *R v Etherington*¹⁵⁵, to explain the complainant's

149 *Pemble v The Queen* (1971) 124 CLR 107 at 116-118 per Barwick CJ.

150 *R v Johnson* unreported, Court of Appeal of Victoria, 27 February 1997 at 17 per Callaway JA.

151 *Pfennig v The Queen* (1995) 182 CLR 461 at 542 per McHugh J; *R v Zorad* (1990) 19 NSWLR 91 at 108-109 per Hunt, Enderby and Sharpe JJ; cf Odgers "Case and Comment – Martin" (1991) 15 *Criminal Law Journal* 57 at 59.

152 (1989) 167 CLR 590 at 630-631.

153 (1963) 81 WN (Pt 1) (NSW) 120.

154 (1973) 6 SASR 280.

155 (1982) 32 SASR 230.

submission to the accused; *Sutton v The Queen*¹⁵⁶, *Perry v The Queen*¹⁵⁷, *Hoch v The Queen*¹⁵⁸ and *Thompson v The Queen*¹⁵⁹ on the basis of striking similarity of the conduct). His Honour expressed the opinion that the better view of *R v Ball*¹⁶⁰, in which the prosecution attempted to introduce evidence of previous acts of intercourse, is that the evidence there was admissible as tending to prove the nature of the relationship between the brother and sister.

178 In *S v The Queen*¹⁶¹, Toohey J referred to relationship evidence in these terms:

"Objection was taken at trial to evidence concerning other acts of an indecent nature, but not to the generalized evidence of intercourse between the applicant and complainant. Therefore it is not possible to identify with certainty the basis on which the latter evidence was admitted. While evidence of similar facts ordinarily involves conduct relating to persons other than the complainant, it is not necessarily so confined. In *R v Ball*¹⁶² where a brother and sister were each charged with counts of incest, evidence was admitted to show that they had previously lived together as husband and wife and that the female defendant had given birth to a child which she registered, describing herself as the mother and the male defendant as the father. Lord Loreburn LC, with whom the other members of the House of Lords agreed, applied *Makin v Attorney-General (NSW)*¹⁶³ in upholding the admissibility of the evidence of the earlier relationship. However, evidence which bears on the relationship between an accused and a complainant over a period of time may not in truth be similar fact evidence where it is admitted, not to show propensity but rather the relationship between the parties: see the discussion by McHugh J in *Harriman v The Queen*¹⁶⁴.

156 (1984) 152 CLR 528.

157 (1982) 150 CLR 580.

158 (1988) 165 CLR 292.

159 (1989) 169 CLR 1.

160 [1911] AC 47.

161 (1989) 168 CLR 266 at 279-280.

162 [1911] AC 47.

163 [1894] AC 57.

164 (1989) 167 CLR 590.

In the present case, the real difficulty with treating the generalized evidence as evidence of similar facts or relationship is the problem of identifying the alleged offence on which the similar conduct or relationship is said to bear."

179 In the second paragraph of the passage I have quoted, Toohey J identifies the further problem with respect to evidence of this kind, the difficulty of associating it with a particular offence or offences charged. His Honour also makes the point that propensity evidence is not necessarily confined to acts of misconduct with third parties.

180 Evidence of uncharged, like conduct was recently discussed by the Victorian Court of Appeal in *R v Vonarx*¹⁶⁵. The Court said of the evidence there:

"It was not being led to establish the identity of the offender, as was the case in *Pfennig*¹⁶⁶, or to negative some defence of accident or mistake. It was being led for the purpose of proving an improper sexual relationship or guilty passion which existed between the accused and the victim, tending to make it more likely that the offence charged in the indictment was in fact

¹⁶⁵ Unreported, 15 November 1995 at 7 per Winneke P, Callaway JA and Southwell AJA.

¹⁶⁶ (1995) 182 CLR 461.

committed (see *R v Ball*¹⁶⁷; *R v Beserick*¹⁶⁸; *S v The Queen*¹⁶⁹; *Harriman v The Queen*¹⁷⁰); or, as Deane J put it in *B v The Queen*¹⁷¹, such evidence can be used by the jury as 'the key to an assessment of the relationship between the applicant and [the victim] and, as such, constitute[s] part of the essential background against which both the [victim's] and the applicant's evidence of the alleged offences necessarily [falls] to be evaluated' (see also *R v Etherington*¹⁷²)."

181 I do not accept that non-specific highly prejudicial evidence may be lead by the prosecution, and juries told that it might provide "part of the essential background"¹⁷³ against which the other evidence is to be evaluated.

182 I would, with respect, therefore reject the notion that there is a special category of background evidence that may be adduced by the prosecution in a criminal case (absent, that is, any forensic conduct by the defence that may make it admissible). If such evidence is to be received it must owe its admissibility to some, quite specific, other purpose, including for example, in an appropriate case, proof of a guilty passion, intention, or propensity, or opportunity, or motive. There may also be cases in which a relationship between people may be directly relevant to an issue in a trial and in those circumstances admissible as such.

183 Here I think that the evidence is admissible as propensity evidence. The way in which the appellant approached the complainant, what he told her and how he abused her over the years were all acts sufficiently similar to warrant the introduction of evidence of them. The evidence, if tendered at a subsequent trial of the appellant, should be the subject of careful directions of the type discussed by McHugh J in *BRS*¹⁷⁴ as to the use to which it may be put by the jury. It would also be subject to appropriate comment as to its non-specificity if it is sought to be tendered in the vague form that it assumed at the trial. So too, the trial judge will

167 [1911] AC 47.

168 (1993) 30 NSWLR 510.

169 (1989) 168 CLR 266.

170 (1989) 167 CLR 590.

171 (1992) 175 CLR 599 at 610.

172 (1982) 32 SASR 230.

173 *B v The Queen* (1992) 175 CLR 599 at 610 per Deane J.

174 (1997) 71 ALJR 1512; 148 ALR 101.

still have a discretion to exclude it, if, in all of the circumstances, including the conduct of the trial, its prejudicial effect outweighs its probative value.

184 In this case I would conclude that the verdict is unsafe and unsatisfactory in the sense in which that expression is used and explained in *M's* case. In doing so, I add that there is a duty cast upon prosecutors, as well as defence counsel, on trial, to be vigilant to assist the trial judge in the whole conduct of the trial, that is, in tendering evidence, making clear the basis upon which it should be received, used, and is the subject of directions by the trial judge.

185 The other defect in the proceedings at the trial, the "withdrawal of the two counts" is relevant to the ground that the verdict was unsafe and unsatisfactory. The prosecutor made his decision, "in view of the variation in the evidence", meaning the departure in the complainant's evidence as to specific dates from the dates alleged in the counts. This matter, the question asked by the jury, the failure of the answer to it to address adequately the absence of explanation of the relevance and significance of the evidence of prolonged abuse, and the defect in the summing up are all factors which combine to make the verdict here unsafe and unsatisfactory. It is impossible to say that the appellant did not lose a chance which was fairly open to him of being acquitted. Had the attention of the Court of Appeal been drawn to these matters or had their Honours themselves noticed them, the Court may well, and should have set aside the verdict and ordered a retrial. Furthermore, had the Court of Appeal undertaken the independent assessment of the evidence in the context of the trial as a whole as required of Courts of Appeal it would, I think, inevitably have reached this conclusion. The Court of Appeal was in error in failing to make that assessment in that context in this case.

186 I turn to the other point argued in this Court, that the Crown should have either entered a nolle prosequi as required by s 563 of the Criminal Code, as it then stood and had the appellant formally discharged from the indictment, or should have acceded to a directed acquittal on those counts. I think that the argument is right. Indeed it is effectively conceded to be so by counsel for the respondent who says correctly, that the appellant's counsel at trial took no exception to the course adopted, and that the course corresponded with long standing Queensland practice.

187 At the time of trial, s 563 of the Criminal Code (now amended to accommodate the practice) provided as follows:

"(1) A Crown Law Officer may inform any court, by writing under the officer's hand, that the Crown will not further proceed upon any indictment then pending in the court.

(2) An officer appointed by the Governor in Council to present indictments in any court of criminal jurisdiction may inform that court, by signed writing, that the Crown will not further proceed upon any indictment then pending in that court.

(3) When such information is given to the court the accused person is to be discharged from any further proceedings upon that indictment."

188 Where an accused person has entered a plea of not guilty, he or she is deemed to have demanded, by virtue of s 604 of the Criminal Code¹⁷⁵, that the issues raised by the plea be tried accordingly. That did not happen. The trial record is, on that account, defective. It is unnecessary to decide whether in the circumstances of this case, this defect should lead to an invalidation of the whole trial in view of the conclusion that I have already stated with respect to the other ground.

Order

189 I would quash the verdicts on counts 3 to 7 and direct a retrial on them.

175 "If the accused person pleads any plea or pleas other than the plea of guilty or a plea to the jurisdiction of the court, the person is by such plea, without any further form, deemed to have demanded that the issues raised by such plea or pleas shall be tried by a jury, and is entitled to have them tried accordingly."

