

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW AND HAYNE JJ

HG

APPELLANT

AND

THE QUEEN

RESPONDENT

HG v The Queen (S67-1998) [1999] HCA 2
9 February 1999

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation:

S J Odgers with H K Dhanji for the appellant (instructed by Legal Aid Commission of New South Wales)

G S Hosking SC with M C Marien for the respondent (instructed by Director of Public Prosecutions (New South Wales))

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

CATCHWORDS

HG v The Queen

Criminal law – Evidence – Sexual assault – Expert evidence excluded under s 409B of *Crimes Act* 1900 (NSW) – Whether evidence of prior sexual assault is evidence of prior sexual activity or experience – Whether s 409B applies only to evidence of consensual prior sexual activity or experience.

Evidence – Admissibility of expert opinion under *Evidence Act* 1995 (NSW) – Expert opinion must be within field of specialised knowledge – Whether expert opinion must be based on facts themselves admissible – Whether parts of opinion severable.

Criminal law – Practice and procedure – Refusal to grant adjournment for purposes of calling expert evidence – Whether refusal constituted miscarriage of justice.

Crimes Act 1900 (NSW), s 409B.

Evidence Act 1995 (NSW), ss 76, 79, 102.

1 GLEESON CJ. Following a trial before Kirkham DCJ, sitting without a jury, the appellant was convicted of two offences of having sexual intercourse with a child under the age of 10 years. He was sentenced to a term of penal servitude. He appealed to the Court of Criminal Appeal against his convictions.

2 Each of the acts of sexual intercourse charged involved fellatio. The first was said to have occurred in September 1992 and the second in October 1993. The complainant, C, was the daughter of the appellant's de facto wife.

3 Although the charges related only to two specific occasions, the complainant said that on many occasions the appellant had entered her bedroom and put his penis into or around her mouth. The complainant's mother gave evidence that the complainant had told her of this. The mother had not believed the allegation when it was first made. The mother also said that, following the events the subject of the second charge, the complainant had given her a detailed account of what the appellant had done to her. She told her mother that following the act of fellatio she spat into a bowl. The mother saw such a bowl in the complainant's bedroom. It contained what appeared to be saliva. The mother washed out the bowl.

4 It is unnecessary to go into further detail about the evidence in the case. The issue in the appeal concerns a ruling of the trial judge in relation to certain opinion evidence upon which the appellant attempted to rely.

5 At the commencement of the trial, counsel for the appellant applied for an adjournment, to enable him to have available, as a witness for the defence, a psychologist, Mr McCombie. The application for adjournment was resisted by the Crown, which disputed the admissibility of Mr McCombie's evidence. Trial counsel sought a ruling on admissibility. The trial judge was provided with a written report prepared by Mr McCombie, together with the transcript of some evidence he had given at the committal proceedings. The argument about the adjournment was conducted upon the common understanding that the written report, considered in the light of certain explanations of its contents given by Mr McCombie at the committal proceedings, contained the evidence upon which the appellant would seek to rely. The trial judge ruled that the evidence was inadmissible and for that reason refused the adjournment. The Court of Criminal Appeal¹ agreed with the trial judge's ruling, and rejected a ground of appeal complaining of the failure to grant an adjournment.

6 Before considering the reasoning of the trial judge, and the Court of Criminal Appeal, it is convenient to refer to the background to, and the contents of, Mr McCombie's report.

1 Mason P, Stein JA, Sperling J.

7 The complainant was born in May 1984. Her complaints were made known to the police in 1994, when she was 10. The trial occurred in 1996 when the complainant was 12.

8 After the complainant's allegations of sexual abuse became known to the police, she was referred to a general practitioner who, in turn, referred her to Mr McCombie for "assessment". Mr McCombie has degrees in Arts, Education and Psychology. He has had experience in counselling emotionally disturbed children, and in dealing with, and counselling, victims of child sex abuse.

9 Mr McCombie's report showed that, from the outset, he approached the complainant's story with scepticism. His report recorded that the medical practitioner who referred the complainant to him expressed concern that the complainant's account of the assaults, "although graphic, (was) internally inconsistent". Mr McCombie, at the beginning of his report, also said that the information which the complainant gave him about the conduct of the appellant contained numerous and important internal inconsistencies. Next, the report referred to the troubled background of the complainant in her early childhood, and her disturbed relationship with her natural father, who had since died. The complainant's father was described as a substance abuser, and a person who was violent, and was treated for a time in a psychiatric hospital. He had custody of the complainant for a period of about one month when she was a very young child. This was in 1987. After legal proceedings, the complainant was returned to her mother. The mother told the psychologist that, following such return, the complainant was extremely upset, and suffered from disturbed sleep and nightmares, and would often call out in her sleep, saying "stop it daddy". This behaviour continued until about 18 months before the reporting of the alleged sexual offences by the appellant.

10 The report then referred to information the psychologist had received about the complainant's difficulties at school and at home. Mr McCombie attached considerable significance to what he understood to be the fact that, whilst there had been substantial changes in the complainant's behaviour shortly after the time she was exposed to her natural father, there had not been substantial changes in her behaviour over the period during which the appellant was allegedly sexually assaulting her.

11 This led Mr McCombie to the conclusion that, although the complainant had been sexually assaulted, the perpetrator of the assaults had been her natural father and not the appellant. The father had died when the complainant was about four and a half years old. Mr McCombie considered that, although the complainant had been sexually abused, it was at a much earlier age than she was claiming. It is desirable to quote the concluding portions of the report, because it contains the substance of the evidence the defence sought to lead:

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"My view of (C) is that she is a girl who has been exposed to sexual assault. Her behaviour following her month with her natural father, according to her mother, changed her significantly. Following it, she developed both significant behaviour disturbance and obvious signs of emotional disturbance. The behaviour disturbance continued, at a lower level, after (the family) had moved in with (the appellant). However, the night terrors and sleep disturbance ceased.

(C) did not report any signs of exposure to trauma after the alleged assault by (the appellant). I would have expected some significant increase in behaviour and emotional disturbance as a result of this trauma. However this was not reported by either (C) or (her mother). In spite of this (C) continued to state that (the appellant) had assaulted her, stating that she was sure he did. This produced the notification.

So, then, as indicated above, I do think that (C) was assaulted. However, I think that the assault happened during her time with her natural father. Certainly the behaviour change she produced after her visit with him was consistent with this. I think that (C) accused (the appellant) of sexual assault in response to her resentment at his attempt to help her mother to manage her behaviour and in response to the lecture on sexual assault and 'stranger danger' which she had also attended just prior to the accusation being made. (C) was able to tell me a story from this lecture which she changed as she told it to me, to reflect her situation.

In the light of the above information, I formed the opinion that (C) had been sexually assaulted as a young child. I felt that this sexual assault had been buried in response to the trauma of it. I felt that the trauma had been resurrected by both the 'stranger danger' lecture and by her resentment at (the appellant) for his attempts at controlling her in the home. I feel that (C's) inconsistency in her retelling of her story was a response to her confused memories about her past experiences and to a conscious attempt to implicate (the appellant) to punish him."

12 It was not suggested to Kirkham DCJ, or to the Court of Criminal Appeal, or to this Court, that the purpose, or a purpose, of calling Mr McCombie would have been to seek to prove the making by the complainant of prior inconsistent statements. That possible use of his evidence has not been an issue in the appeal.

13 The forensic purpose for which trial counsel sought, or indicated he would seek, to use the evidence of Mr McCombie emerges reasonably clearly both from the transcript of argument on the adjournment application, and from the reasons given by Kirkham DCJ in ruling on the matter. It needs to be understood in the light of one aspect of the Crown case. The complainant, a young girl who was only about 8 or 9 when she complained to her mother, about 10 when she spoke to the police, and 12 when she was giving evidence, was not merely alleging sexual

abuse, but was also giving a detailed description of what the alleged acts of fellatio entailed. A trial judge or jury might well regard that description as lending weight to her allegations. The defence wished to be able to explain the complainant's ability to give such a description, in a manner consistent with the innocence of the only adult male with whom she had shared a home over a substantial period. The theory that she had, in truth, been a victim of sexual abuse, but that the abuser was her natural father (since deceased) would have been important to the defence case, if there could be found an evidentiary basis for such a theory.

14 In his reasons for refusing the adjournment, Kirkham DCJ summarised the effect of the proposed evidence of Mr McCombie as being that in his expert opinion the sexual assault upon the complainant was committed, not by the appellant, but by her natural father some years before the time of the events alleged in the charges. It was not suggested to Kirkham DCJ by trial counsel, and it was not suggested in the Court of Criminal Appeal, that this reflected some erroneous or incomplete understanding of the substance of the evidence upon which the defence sought to rely.

15 When he was first shown the report of Mr McCombie, Kirkham DCJ, understandably, expressed doubt as to whether opinion evidence of this kind was properly admissible.

16 Although the judge's initial response to the report was to doubt its admissibility as opinion evidence the transcript of argument shows that both the Crown prosecutor and trial counsel for the appellant told the judge that they saw the critical issue as involving the application of s 409B of the *Crimes Act* 1900 (NSW) ("the Crimes Act"). They said that what was sought was a ruling on "a s 409B argument in terms of prior sexual activity involving the complainant." That was the issue addressed by counsel in their submissions on the adjournment application and the related question of the admissibility of Mr McCombie's evidence. Kirkham DCJ's judgment refusing the adjournment was headed: "On application for a ruling under s 409B". The judgment began by stating: "The accused seeks a ruling under s 409B of the Crimes Act." The judge ruled that the evidence was excluded by s 409B. He gave counsel an opportunity to raise any other arguments relevant to the application for adjournment. No such arguments were raised. The trial then proceeded in the absence of Mr McCombie.

17 It has been necessary to refer in some detail to the course of proceedings at the trial because an argument was advanced in this Court which amounted to a submission that, even if part, or even most, of Mr McCombie's evidence was inadmissible, either by reason of the opinion rule², or s 409B, or both, nevertheless

2 *Evidence Act* 1995 (NSW), s 76.

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there was some relevant and admissible evidence he could have given and, therefore, an adjournment should have been granted.

18 A number of observations may be made about this.

19 First, that is not the way the adjournment application was made at the trial. It is not a matter that was adverted to, either in counsel's submissions or in the reasons for refusing the adjournment application given by the trial judge. There was nothing to prevent trial counsel from raising such an argument, even after Kirkham DCJ had given his "s 409B ruling". (There was an attempt to obtain an adjournment on another ground having nothing to do with Mr McCombie, but that is presently irrelevant).

20 Second, it is far from clear that Mr McCombie's evidence, stripped of the opinions held to be excluded by s 409B, would have been of significant assistance to the defence case. It is theoretically possible to re-cast Mr McCombie's views, excluding (under s 409B) any reference to inferred sexual abuse of the complainant by her natural father during 1987, and excluding (under s 76 of the *Evidence Act* 1995 (NSW)) ("the Evidence Act") expressions of opinion that did not satisfy the requirements of s 79, and the views of Mr McCombie and others as to the credibility of the complainant. Whether what was left would have been worth having may be doubted. In any event, that was a matter for the judgment of trial counsel. The view might well have been taken that, if counsel could not have the evidence implicating the father, the rest was not worth pursuing. That would be consistent with the way the proceedings were conducted.

21 Third, as Mason P pointed out in the Court of Criminal Appeal, there was an interrelationship between the steps in the reasoning process adopted by Mr McCombie that makes it difficult to sever various aspects of his opinion. That may explain why no attempt was made by trial counsel to persuade Kirkham DCJ to consider the matter apart from s 409B.

22 Fourth, the fact that the admissibility of Mr McCombie's evidence was addressed by trial counsel, and the judge, in terms of s 409B demonstrates that the crucial aspect of that evidence upon which the defence wished to rely was the identification of the complainant's natural father as the real culprit. If counsel had wished to rely, alternatively, on only so much of Mr McCombie's opinion as exonerated the appellant and said nothing about the father, (assuming there to have been a cogent, severable, portion of it to that effect), then s 409B would have had nothing to say to that question. Yet the problem was presented to, and dealt with by, the judge as one turning upon the meaning and effect of s 409B.

Crimes Act, s 409B

23 Section 409B(3) provides that, in prescribed sexual offence proceedings (of which the trial before Kirkham DCJ was an example) evidence which discloses

or implies that the complainant has or may have had sexual experience or a lack of sexual experience or has or may have taken part or not taken part in any sexual activity is inadmissible unless the case falls within certain specified exceptions.

24 This legislation was enacted in 1981. It was explained to Parliament³ as being "designed to ease, so far as is possible, the humiliation experienced by sexual assault victims, to remove the stigma attached to the rape victim, to encourage victims to report the offences, and to bring the offenders to justice as justice demands." Both at common law, and now under s 56 of the Evidence Act, evidence which is not relevant is inadmissible. One only comes to consider and, if necessary, apply a rule of exclusion, such as that contained in s 409B, if the evidence in question is relevant. If it were irrelevant, that would be the end of the matter. There would be no occasion to consider s 409B.

25 The essence of Mr McCombie's opinion is set out in the four paragraphs from his written report quoted above. He considered that the complainant had in truth been sexually abused, but that the assault had occurred in 1987, when she was with her natural father, and not in 1992 and 1993 as she claimed. She had "buried" the assault in response to the trauma of it and the trauma had been "resurrected" at a later date in circumstances which led her to blame the wrong person.

26 Questions of the cogency of Mr McCombie's views, and the reasons he advanced for them, may be put to one side for present purposes. Further, it may be accepted that, if otherwise admissible as opinions, Mr McCombie's conclusions were relevant.

27 It is difficult to dispute that Mr McCombie's evidence discloses or implies that the complainant has or may have had sexual experience in the form of a sexual encounter with her father or has or may have taken part in sexual activity involving her father, unless the words "sexual experience" and "sexual activity" are given some narrower interpretation than they appear at first sight to bear.

28 One such narrower interpretation was advanced by counsel for the appellant. It was argued that s 409B(3) applies only to prior consensual sexual episodes. Such a possibility had been tentatively suggested by Sperling J in *R v PJE*⁴, but was rejected by the Court of Criminal Appeal in the present case. Sperling J was a member of the Court, and expressly resiled from his earlier suggestion.

29 The reasons given by Mason P in the Court of Criminal Appeal for rejecting this contention, agreed in by Stein JA and Sperling J, are compelling. They

3 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 1981 at 4759-4760.

4 Unreported, Court of Criminal Appeal of New South Wales, 9 October 1995.

conform to earlier decisions of the Court of Criminal Appeal on s 409B⁵. As Mason P observed, in the case of victims of child sexual abuse, a distinction between "consensual" and "non-consensual" activity is hardly likely to have been intended to be decisive as to the operation of the section. In such a context it is often a distinction of little, if any, meaning. How, for example, would it be applied in the present case where, at the relevant time, the victim was aged three?

30 As Mason P pointed out:

"To limit s 409B to consensual sexual activity would lead to a most invidious distinction in the case of child sexual assault victims. Proof of lack of consent is no part of the statutory offence yet it would become part of a forensic dispute touching admissibility of evidence. Indeed, the search for evidence of consent becomes grotesque in the case of a young child who is made to participate in sexual activity initiated by an adult who is in a parental relationship."⁶

31 Furthermore, in relation to adult complainants, evidence of prior non-consensual sexual experience or activity might, depending upon the circumstances, be just as humiliating as evidence of prior consensual activity. As the Premier said in Parliament when this legislation was introduced⁷, "rape is an act of violence aimed at subjugation, debasement and humiliation." Having regard to the legislative purpose of s 409B, it is impossible to accept that Parliament intended that only evidence of consensual experience or activity would be excluded.

32 On the assumption that the present case was held to fall within the general words of exclusion in s 409B(3), reliance was then placed on two exceptions to the exclusionary rule, which are expressed as follows:

"...

- (b) where it is evidence relating to a relationship which was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant;

5 eg, *R v Beserick* (1993) 30 NSWLR 510; *R v M* (1993) 67 A Crim R 549.

6 (1997) 42 NSWLR 451 at 458

7 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard) 18 March 1981 at 4758.

(c) where:

- (i) the accused person is alleged to have had sexual intercourse, as defined in s 61H(1), with the complainant and the accused person does not concede the sexual intercourse so alleged; and
- (ii) it is evidence relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged to have been had by the accused person."

33 As to par (b), questions have arisen in previous cases as to the scope of the term "relationship"⁸. However, such questions do not require determination in the present case. Assuming there to have been a relevant relationship between the appellant and the complainant, existing at the time of the alleged offences, the evidence disclosing or implying an earlier sexual encounter between the complainant and her natural father (which was the evidence attracting the s 409B(3) exclusion) did not relate to that relationship.

34 As to par (c), it was no part of the Crown case that the complainant suffered some form of injury, physical or psychological, which was attributable to the alleged offences committed by the appellant.

35 Kirkham DCJ and the Court of Criminal Appeal were right to hold that s 409B(3) operated to exclude evidence of Mr McCombie's opinion that the complainant had been sexually abused, in 1987, by her natural father, and that it was this abuse which she was actually recounting when she made allegations against the appellant.

Evidence Act, ss 76, 79

36 When defence counsel at the trial first invited Kirkham DCJ to rule upon the admissibility of Mr McCombie's evidence, in the context of an adjournment application, and handed the judge a copy of Mr McCombie's report, the judge's reaction was to question its admissibility as opinion evidence. However, as the transcript indicates, and as the written submissions for the appellant in this Court state, "the question raised by defence counsel was the possible application of s 409B *Crimes Act* 1900 (NSW) to the evidence". That became the question upon which the judge ruled. Nevertheless, the Crown contended in the Court of Criminal Appeal, and in this Court, that the judge's initial reservations were correct, and that, quite apart from s 409B, the evidence was inadmissible. It is necessary to deal with that contention because, if correct, it disposes of an

8 See, for example, *R v White* (1989) 18 NSWLR 332; *R v Henning*, unreported Court of Criminal Appeal of New South Wales, 11 May 1990; *R v Beserick* (1993) 30 NSWLR 510 at 517-518.

alternative argument put on behalf of the appellant on the assumption that s 409B, and only s 409B, rendered the evidence inadmissible.

37 Once again, this contention is directed to the aspects of Mr McCombie's report upon which trial counsel sought to rely. It was Mr McCombie's opinions that were in issue, and the critical parts of those opinions have been set out above. The opinions had both positive and negative aspects, formed in the context of the complainant having been referred to him for assessment: the complainant had been sexually abused; the abuse was not recent, as she claimed, but had happened several years earlier than she said; the perpetrator of the abuse was not the appellant, but the complainant's natural father.

38 It was common ground on this appeal that, by reason of s 76, evidence of these opinions was not admissible unless it could be brought within the exception provided by s 79. That section provides:

" If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge."

39 The opinions of Mr McCombie were never expressed in admissible form. An expert whose opinion is sought to be tendered should differentiate between the assumed facts upon which the opinion is based, and the opinion in question.⁹ Argument in this Court proceeded upon the basis that it was possible to identify from Mr McCombie's written report some facts which he either observed or accepted, and which could be distinguished from his expressions of expert opinion. Even so, the provisions of s 79 will often have the practical effect of emphasising the need for attention to requirements of form. By directing attention to whether an opinion is wholly or substantially based on specialised knowledge based on training, study or experience, the section requires that the opinion is presented in a form which makes it possible to answer that question.

40 Mr McCombie's report referred to a number of matters he took into account in reaching the conclusions he expressed: things he was told by the complainant, by her mother, and by the general practitioner who referred the complainant for assessment; his training as a psychologist; his experience in counselling victims of sexual abuse; and his knowledge of patterns of behaviour of disturbed children. It is not in dispute that psychology is a field of specialised knowledge,¹⁰ and that a

9 *Ramsay v Watson* (1961) 108 CLR 642; *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 at 347-348.

10 It is unnecessary for present purposes to enter into issues of the kind considered in *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993). It is the language (Footnote continues on next page)

psychologist may be in a position to express an opinion based on his or her specialised knowledge as a psychologist.¹¹ However, the witness had to identify the expertise he could bring to bear¹², and as *Clark v Ryan*¹³ illustrates, his opinions had to be related to his expertise.

41 If all that Mr McCombie had said was that, based on his study, training and experience, he considered that the behaviour of the complainant during 1992 and 1993, as recounted to him by others, appeared to be inconsistent with her having been sexually abused during that time, (the plausibility of such a proposition is not now in issue), then that might have been one thing. It would have required identification of the facts he was assuming to be true, so that they could be measured against the evidence; and it would have required or invited demonstration or examination of the scientific basis of the conclusion. However, that was not what the defence wanted from him; if it were, no question of s 409B would have arisen. What defence counsel wanted was evidence of his opinion that, although the complainant had been abused, the abuse had occurred back in 1987 when, for a period of a month, she was in the custody of her father, and that it was the father who was the abuser. That opinion was not shown to have been based, either wholly or substantially, on Mr McCombie's specialised knowledge as a psychologist. On the contrary, a reading of his report, and his evidence at the committal, reveals that it was based on a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise of a psychologist. He did not put to the complainant, for her comment, the suggestion that she had been abused by her father; the complainant told him she could not remember her father. He does not appear to have considered or investigated the possibility of abuse by some third party. He appears to have inferred, for no apparent reason, that the words "stop it daddy", attributed to the complainant by her mother, referred to sexual as distinct from some other form of abuse.

42 Logically, there were a number of competing possibilities. The complainant may have been sexually abused by nobody; she may have been abused as she claimed, by the appellant; she may have been abused by her father; she may have been abused by both her father and the appellant; she may have been abused by

of s 79 which has to be applied. Even so, warnings have been expressed as to the care to be taken in the use in cases such as the present of certain aspects of the behavioural sciences: see, for example *R v F* (1995) 83 A Crim R 502; R Underwager and H Wakefield, "A Paradigm Shift for Expert Witnesses", *Issues in Child Abuse Accusations*, (1993), vol 5 at 156-167.

11 *Murphy v The Queen* (1989) 167 CLR 94.

12 *Murphy v The Queen* (1989) 167 CLR 94 at 111.

13 (1960) 103 CLR 486.

some person or persons unknown. It was not demonstrated, and it is unlikely, that it is within the field of expertise of a psychologist to form and express an opinion as to which of those alternatives was to be preferred.

43 To paraphrase what was said by Dixon CJ in *Clark v Ryan*¹⁴ about the expert witness in that case, the evidence the defence sought to lead from Mr McCombie really amounted to putting from the witness box the inferences and hypotheses on which the defence case wished to rely.

44 This was not a trial by jury, but in trials before judges alone, as well as in trials by jury, it is important that the opinions of expert witnesses be confined, in accordance with s 79, to opinions which are wholly or substantially based on their specialised knowledge. Experts who venture "opinions", (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted. The opinions which Mr McCombie was to be invited to express appear to provide a good example of the mischief which is to be avoided.

45 The evidence in question was not admissible as opinion evidence.

Section 409B and unfair trial

46 The conclusion expressed above makes it unnecessary to deal with an argument advanced on behalf of the appellant upon the assumption that Mr McCombie's evidence was excluded by s 409B of the Crimes Act but not by s 76 of the Evidence Act.

47 Notwithstanding what was said in *Grills v The Queen*¹⁵, counsel argued that a Court of Criminal Appeal may hold a trial to be unfair where relevant evidence is excluded under s 409B, even though such trial is conducted strictly in accordance with the legislature's stipulation as to evidence which may not be received. However, he conceded that no such argument could succeed if the evidence in question were also excluded by s 76 of the Evidence Act. The reason for the difference is not entirely clear, but, because of the concession, the point need not be pursued.

Conclusion

48 The appeal should be dismissed.

14 (1960) 103 CLR 486 at 492.

15 (1996) 70 ALJR 905.

49 GAUDRON J. The appellant stood trial in the District Court of New South Wales charged with two counts of sexual intercourse with a person under the age of 10¹⁶. The complainant was the daughter of his de facto wife. The offences were alleged to have occurred in September 1992 and October 1993 when the complainant was eight and nine years of age, respectively. The appellant, who elected to stand trial before a judge alone, was convicted on both counts¹⁷. He appealed unsuccessfully to the Court of Criminal Appeal of New South Wales¹⁸. He now appeals to this Court¹⁹.

50 The appeal arises out of an unsuccessful application for the adjournment of the appellant's trial so that evidence could be called from a psychologist, Mr Ian McCombie. The adjournment was refused by the trial judge, Kirkham DCJ, on the ground that the evidence was inadmissible. It is common ground that, if the evidence was admissible in its entirety, the adjournment should have been granted, although not that this appeal should be allowed.

51 The nature of the evidence which it was intended Mr McCombie should give was disclosed in a written report and in a transcript of evidence given by him in committal proceedings relating to the offences charged. From that material, it is apparent that Mr McCombie is a member of the Australian Psychological Society, a Bachelor of Arts and Psychology, a Master of Arts and Psychology and has a Diploma of Education. He has practised as a psychologist since 1976 and has worked with a number of children, including victims of sexual assault and other trauma.

52 The complainant's doctor referred her to Mr McCombie for assessment. She was interviewed by him in company with her mother on two occasions. The first interview took place in November 1993, not long after the second of the offences charged. At that interview, the mother gave Mr McCombie a history of the child's behaviour following a period of approximately one month spent with her natural father when she was 3½ years old.

53 After the complainant returned from her father, according to the mother's account, she was a "changed child ... more moody, aggressive, less cooperative ... she had sleep disturbance and nightmares". Moreover, she would often call out in her sleep, saying "stop it daddy". According to her mother, the child did not

16 See s 66A, *Crimes Act* 1900 (NSW). Note, there was an alternative charge of aggravated indecent assault under s 61M(2) in relation to the first count.

17 See ss 32 and 33 of *Criminal Procedure Act* 1986 (NSW).

18 *R v G* (1997) 42 NSWLR 451.

19 The appeal is brought pursuant to a grant of special leave given on 19 May 1998.

discuss the time spent with her natural father. And, after her father's death, when she was 4½, she denied for some time that he was dead.

54 The mother told Mr McCombie that her daughter's behaviour improved over time, with her sleep disturbances and nightmares abating about four months prior to the first of the offences charged²⁰. She continued to have some disturbed behaviour, but that was decreasing when she was seen by Mr McCombie in November 1993. The mother did not report any increase in behavioural or emotional disturbance during the period when the offences were alleged to have occurred. At the committal proceedings, Mr McCombie gave evidence that trauma of the kind involved in a sexual assault always results in "a clear behaviour change".

55 In his report, Mr McCombie referred to inconsistencies in the account given to him by the complainant and, also, to a "stranger danger" lecture she attended. He concluded his report by saying:

"I formed the opinion that [the complainant] had been sexually assaulted as a young child. I felt that this sexual assault had been buried in response to the trauma of it. I felt that the trauma had been resurrected by both the 'stranger danger' lecture and by her resentment at the [appellant] for his attempts at controlling her in the home. I felt that [the complainant's] inconsistency in her retelling of her story was a response to her confused memories about her past experiences and to a conscious attempt to implicate [the appellant], to punish him."

Earlier in his report, Mr McCombie expressed the opinion that the complainant may have been sexually assaulted "during her time with her natural father."

56 As earlier indicated, Kirkham DCJ refused the appellant's application for an adjournment on the basis that Mr McCombie's evidence was inadmissible. In his Honour's view, it was rendered inadmissible by s 409B(3) of the *Crimes Act 1900* (NSW) ("the Act"). For present purposes, it is sufficient to note that, in certain cases, of which this is one, and, subject to certain exceptions, s 409B(3) excludes evidence of a complainant's sexual history. In this Court, however, it was also contended that the evidence was inadmissible opinion evidence. It is convenient to deal with that issue first.

20 The report states that the nightmares and sleep disturbances "continued until some eighteen months before the present sexual offences were reported" and the transcript reads that they continued "up till about eighteen months before I saw her in November [19]93."

Opinion evidence

57 Putting relevance to one side²¹, the admissibility of expert or opinion evidence is governed by Pt 3.3 of the *Evidence Act* 1995 (NSW) ("Evidence Act"). The "opinion rule" is set out in s 76 of that Act in these terms:

" Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed."

There then follow three exceptions to the rule. For present purposes, it is necessary to refer only to the exception specified in s 79. That section provides:

" If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion that is wholly or substantially based on that knowledge."

And s 80 provides:

" Evidence of an opinion is not inadmissible only because it is about:

- (a) a fact in issue or an ultimate issue, or
- (b) a matter of common knowledge."

58 So far as this case is concerned, the first question that arises with respect to the exception in s 79 of the Evidence Act is whether psychology or some relevant field of psychological study amounts to "specialised knowledge". The position at common law is that, if relevant, expert or opinion evidence is admissible with respect to matters about which ordinary persons are unable "to form a sound judgment ... without the assistance of [those] possessing special knowledge or experience ... which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience"²². There is no reason to think that the expression "specialised knowledge" gives rise to a test which is in any respect narrower or more restrictive than the position at common law.

59 It may be assumed, for the moment, that, if Mr McCombie had been permitted to give evidence, he would have testified that there is a body of knowledge with respect to the behavioural patterns of children who have been the

21 See Pt 3.1 of the *Evidence Act* 1995 (NSW).

22 *R v Bonython* (1984) 38 SASR 45 at 46-47 per King CJ; *Clark v Ryan* (1960) 103 CLR 486 at 491 per Dixon CJ; *Murphy v The Queen* (1989) 167 CLR 94 at 111 per Mason CJ and Toohey J, 130 per Dawson J; *Farrell v The Queen* (1998) 72 ALJR 1292 at 1295 per Gaudron J; 155 ALR 652 at 655; *Osland v The Queen* (1998) 159 ALR 170 at 184 per Gaudron and Gummow JJ.

victims of trauma or sexual abuse and that that body of knowledge is sufficiently recognised to be accepted as a reliable body of knowledge or expertise. And it is not a matter of ordinary knowledge – as distinct from expert or specialised knowledge – that children who have been the victims of trauma or sexual assault manifest "a clear behaviour change".

60 The first argument advanced by the respondent with respect to the admissibility of the evidence it was intended to lead from Mr McCombie as opinion evidence was that "he did not describe the nature and extent of his expertise in relation to identifying who had sexually assaulted the complainant or in being able to eliminate the appellant as someone who had done so." That argument misunderstands the expertise which Mr McCombie was claiming. He was not claiming expertise with respect to the identification of persons who did or did not sexually abuse the complainant. Rather, he was claiming expertise – knowledge or experience of some matter "outside the experience and knowledge of the judge and jury"²³ – with respect to the changed behaviour of children who have been exposed to trauma or sexual abuse.

61 It was on the basis of his opinion that trauma always results in "a clear behaviour change" and the statements of the complainant's mother that there was no deterioration in her behaviour in the period during which the sexual assaults by the appellant allegedly took place, that Mr McCombie concluded that she was not assaulted during that time. It followed, therefore, that, in his opinion, she was not sexually assaulted by the appellant.

62 Moreover, it was on the basis of the opinion earlier referred to and the history given to him of a change in the complainant's behaviour after she spent time with her father that Mr McCombie concluded that she may have been sexually assaulted whilst with him. A fair reading of his report indicates that that is all that he asserted, the statement that "the assault happened during [the complainant's] time with her natural father" being qualified by the further statement that "[c]ertainly the behaviour change she produced after her visit with him was consistent with this."

63 The respondent raised a number of other criticisms of Mr McCombie's report and, also, of his evidence at the committal proceedings. Save for one matter, the criticisms were concerned with his failure to expose his reasoning process, his failure to identify the precise factual matters upon which his conclusions with respect to the complainant were based and the want of complete consistency between his assumptions and the evidence given by the complainant's mother at trial. These are matters that might persuade a judge, in the case of trial by judge

23 *Murphy v The Queen* (1989) 167 CLR 94 at 111.

alone, or a jury not to accept Mr McCombie's evidence. They are not matters bearing on its admissibility as opinion evidence.

- 64 The only other argument put by the respondent with respect to the admissibility of Mr McCombie's evidence as opinion evidence was put in these terms:

"There may in fact exist ... a recognised area of expertise in identifying and analysing symptoms of trauma exhibited by children who have been sexually assaulted. However, this was not demonstrated by Mr McCombie and could not have been simply assumed."

- 65 As the respondent's argument accepts, it may fairly be assumed that there is a recognised field of expertise with respect to the behavioural patterns of children who have been victims of trauma or, more to the point, that Mr McCombie would have given evidence to that effect. In circumstances where what was sought was an adjournment to enable Mr McCombie to give evidence, it can hardly be complained that there was no evidence as to the existence of a recognised field of expertise of the kind indicated. That being so, and given that Mr McCombie's evidence with respect to the changed behaviour of children who have been sexually assaulted or exposed to trauma was not otherwise inadmissible opinion evidence, it cannot be held that "the opinion rule" in s 76 of the Evidence Act justifies the trial judge's refusal to adjourn the appellant's trial.

Section 409B of the Act

- 66 As earlier indicated, Kirkham DCJ held that Mr McCombie's evidence was rendered inadmissible by s 409B(3) of the Act. That sub-section provides, subject to certain exceptions, that:

" In prescribed sexual offence proceedings, evidence which discloses or implies that the complainant has or may have had sexual experience or a lack of sexual experience or has or may have taken part or not taken part in any sexual activity is inadmissible".

It is not in issue that the proceedings before Kirkham DCJ were "prescribed sexual offence proceedings"²⁴.

- 67 As a matter of ordinary language, the general prohibition in s 409B(3) against evidence that a complainant "has or may have had sexual experience ... or has or

24 See par (a) of the definition of "prescribed sexual offence" in s 4(1) of the Act, which includes offences under s 66A (with which the appellant was charged on two counts) and s 61M (with which the appellant was charged as an alternative to the first count under s 66A).

may have taken part in ... sexual activity" clearly extends to evidence that he or she was or may have been sexually assaulted on an occasion other than that alleged in the indictment. And as a matter of ordinary language, the prohibition also extends to evidence that a complainant was or was not party to the sexual activity charged.

68 There are six exceptions to the general prohibition effected by s 409B(3) of the Act. The first relates to evidence which, although disclosing sexual activity or lack thereof, is evidence "of events which are alleged to form part of a connected set of circumstances in which the ... offence was committed"²⁵; the second concerns evidence of "a relationship between the accused person and the complainant"²⁶; the third deals with evidence as to "the presence of semen, pregnancy, disease or injury ... attribut[ed] to the [offence] alleged"²⁷; the fourth relates to evidence of disease at the time of the offence²⁸; the fifth to the discovery of pregnancy or disease after the alleged offence²⁹ and the sixth to evidence given by the complainant, by leave, in cross-examination, after "it has been disclosed or implied in the case for the prosecution" that the complainant has or has not, or, may or may not have had sexual experience or taken part in sexual activity³⁰.

69 The exceptions to the general prohibition effected by s 409B(3) are within a narrow compass. Moreover, they do not extend to evidence that the offence was or was not committed, that being evidence which, as already indicated, falls within the terms of the general prohibition in sub-s (3). Clearly, for the sub-section to be given any sensible operation, it must be read down to enable that evidence to be led. When read down in that way, s 409B(3) does not render inadmissible evidence that discloses or implies that a complainant was not sexually assaulted as alleged in the indictment. It follows that it does not exclude the opinion evidence of Mr McCombie that the complainant was not sexually assaulted on the occasions alleged in the indictment.

70 It was contended for the appellant that the general prohibition in s 409B(3) is also to be read down to apply only to consensual sexual activity. Thus, it was

25 Section 409B(3)(a)(ii).

26 Section 409B(3)(b).

27 Section 409B(3)(c).

28 Section 409B(3)(d).

29 Section 409B(3)(e).

30 Sections 409B(3)(f), 409B(5)(a). Presumably, the reference in s 409B(5)(a) to a disclosure or implication "in the case for the prosecution" refers to evidence which falls within one of the other exceptions in s 409B(3).

put that it did not render inadmissible Mr McCombie's opinion that the complainant may have been sexually assaulted during the time she spent with her father. Alternatively, it was put that his opinion to that effect falls within the second or third of the exceptions earlier referred to, namely, those effected by ss 409B(3)(b) and (c). I agree with the Chief Justice and with Hayne J, for the reasons that they each give, that those arguments must be rejected. However, in my view, the evidence that the complainant may have been assaulted during the period she spent with her natural father is inadmissible for another and different reason. To explain why that is so, it is necessary to say something as to the significance of the evidence in question.

71 A judge, in the case of trial by judge alone, or a jury might well reason in a case in which a young child claims to have been the victim of a sexual assault that he or she would not have sufficient knowledge of sexual matters to give an account of the offences charged unless those offences, in fact, occurred. In the present case, Mr McCombie's opinion that the complainant may have been sexually assaulted on another occasion may explain her knowledge of such matters. Accordingly, it is capable of detracting from the credibility which might otherwise attach to her evidence. However, it has no other significance.

72 The position with respect to the admissibility of evidence that is relevant only to a witness's credibility is set out in Pt 3.7 of the Evidence Act. Section 102 of that Act, which enacts "the credibility rule", renders that evidence inadmissible unless it arises in the course of cross-examination or re-examination as allowed by ss 103³¹, 104³² and 108(1)³³, or falls within one of the exceptions in ss 106, 108(3) or 108A. As ss 108(3) and 108A are concerned only with prior consistent statements and prior representations, it is necessary to refer only to s 106.

31 Section 103(1) provides that the credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence has substantial "probative value" (as that phrase is defined in the Dictionary to the Act).

32 Subject to ss 104(4) and (6), s 104(2) prohibits the cross-examination of an accused on a matter relevant only to his or her credibility unless the court gives leave or one of the exceptions in s 104(3) applies.

33 Section 108(1) provides that the credibility rule does not apply to evidence adduced in re-examination.

73 In general terms, s 106 of the Evidence Act allows for evidence of the kind admitted at common law by way of exception to the general rule that evidence was not admissible in chief if it was relevant only as to credit³⁴. Section 106 provides:

" The credibility rule does not apply to evidence that tends to prove that a witness:

- (a) is biased or has a motive for being untruthful, or
- (b) has been convicted of an offence, including an offence against the law of a foreign country, or
- (c) has made a prior inconsistent statement, or
- (d) is, or was, unable to be aware of matters to which his or her evidence relates, or
- (e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth,

if the evidence is adduced otherwise than from the witness and the witness has denied the substance of the evidence."

74 Of the exceptions to the credibility rule specified in s 106 of the Evidence Act, only two could be thought to have any possible bearing on the present matter. The first is the exception with respect to prior inconsistent statements. Although Mr McCombie made reference in his report to inconsistencies in the complainant's account, it was not contended that Mr McCombie's evidence was admissible on the basis that he would give evidence of a statement or statements by the complainant which were inconsistent with the account given by the complainant at trial.

75 The other exception to the credibility rule which might be thought to bear on Mr McCombie's evidence is that concerned with the existence of "a motive for being untruthful". In his report, Mr McCombie suggests a possible motive for the complainant's making false allegations against the appellant, namely, "resentment at his attempt to help her mother to manage her behaviour". However, I do not

34 As to the position at common law, see for example *R v Phillips* (1936) 26 Cr App R 17; *Smith v The Queen* (1993) 9 WAR 99 (bias); *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 at 545 per Latham CJ (motive for being untruthful); *Bugg v Day* (1949) 79 CLR 442 (convictions); *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 at 545 per Latham CJ (prior inconsistent statements); *R v Toohey* [1965] AC 595; *Farrell v The Queen* (1998) 72 ALJR 1292 at 1295 per Gaudron J; 155 ALR 652 at 655 (medical or physical disability affecting witness' capacity to know matters of which evidence given); *R v Richardson* [1969] 1 QB 299 (false representation made when under legal obligation to tell the truth). See also *Cross on Evidence*, 5th Aust ed (1996) at 518-530.

read his report as asserting that that was, in fact, her motive or, even, that, in his opinion, that was, in truth, her motive. Whether or not that is so, the possibility that she was assaulted during the period when she was with her natural father is not evidence that tends to prove that the complainant had "a motive for being untruthful". Accordingly, Mr McCombie's evidence that the complainant may have been sexually assaulted during the time spent with her natural father was rendered inadmissible by s 102 of the Evidence Act.

Partial admissibility of Mr McCombie's evidence

76 It was contended for the respondent that, even if Mr McCombie's opinion that the complainant was not sexually assaulted by the appellant was admissible, the trial judge's refusal of an adjournment involved neither error nor a miscarriage of justice. In this regard, it was put that Mr McCombie's view that the complainant was not sexually assaulted by the appellant was "inextricably linked" with his view that she may have been assaulted during the period she spent with her natural father. As the latter was inadmissible, there was no foundation, according to the argument, for the former. Additionally, it was emphasised that no application was made to the trial judge for an adjournment "on the basis that part of the report might be admissible."

77 The argument that Mr McCombie's opinion that the complainant was not sexually assaulted by the appellant was dependent on his view that she may have been sexually assaulted during her time with her natural father found favour in the Court of Criminal Appeal. That Court identified "two related steps" in Mr McCombie's reasoning:

- "1. The complainant had been sexually assaulted during her time with her natural father, when she was aged about three.
2. The trauma of this assault caused it to be buried until it was resurrected by both the 'stranger danger' lecture and the complainant's resentment of the appellant for his attempts at controlling her at home."³⁵

That analysis mistakes Mr McCombie's reasoning process.

78 Certainly, Mr McCombie's explanation for the complainant's allegations against the appellant is dependent upon his view that she was assaulted during the time spent with her father. But that explanation is no more than an addendum to his central thesis. And, as already pointed out, his central thesis is that, as sexual assault always produces some change in a child's behaviour and there was none reported in the period covered by the indictment but there was some after the complainant returned from her father, she was not sexually assaulted by the

35 *R v G* (1997) 42 NSWLR 451 at 457 per Mason P.

appellant but may have been during the period spent with her father. Those conclusions are related, in the sense that they derive from the same major premise, but they are not dependent on each other. Evidence of the former can readily be given without any reference to the latter.

- 79 It was also argued for the respondent that, as the appellant did not seek an adjournment to enable Mr McCombie to give evidence confined to his opinion that the complainant was not assaulted as alleged in the indictment, the trial judge did not err in not adjourning the matter of his own motion. That argument must be rejected. An adjournment was sought to call Mr McCombie as a witness. He was in a position to give relevant and admissible evidence, notwithstanding that some parts of the evidence intended to be called were not admissible. The trial judge erred in ruling that it was wholly inadmissible and, thus, in refusing the adjournment.

Miscarriage of justice

- 80 The respondent also relied on the appellant's failure to press for an adjournment to call Mr McCombie to give evidence confined to his opinion that the complainant was not assaulted by the appellant to argue that the refusal of the adjournment did not result in a "substantial miscarriage of justice"³⁶. That argument must also be rejected. The evidence was ruled wholly inadmissible and there was no obligation on counsel to canvass that ruling, even in part. However, even if the matter be approached on the basis that counsel should have pressed for the adjournment on the basis that part of Mr McCombie's evidence was admissible, that would not necessarily involve the consequence that there was no miscarriage of justice.

- 81 Failure to take a point at trial may result in the refusal by a court of criminal appeal of leave to appeal, if that is necessary, or refusal of special leave to appeal to this Court. But once an appeal is on foot in a court of criminal appeal, the question to be decided is whether there was some defect in the trial process which resulted in a miscarriage of justice. And in this Court, the issue is whether that question was or was not correctly decided. That is why it has been consistently held by this Court that the failure to take a point at trial is not necessarily fatal to the success of an appeal³⁷. The only question for this Court, assuming error to

36 Section 6(1), *Criminal Appeal Act* 1912 (NSW).

37 See *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; *BRS v The Queen* (1997) 191 CLR 275 at 295 per Toohey J, 302 per Gaudron J; *KBT v The Queen* (1997) 191 CLR 417 at 423 per Brennan CJ, Toohey, Gaudron and
(Footnote continues on next page)

have been established, is whether the appellant was deprived of a chance of acquittal that was fairly open³⁸.

- 82 In the present case, the question whether the appellant was deprived of a chance of acquittal depends on the nature of the evidence it was intended to call from Mr McCombie. In this regard, it was put that the report "lack[ed] an acceptable factual basis and process of reasoning for its conclusions" and that it "was so lacking in reliability and therefore in weight, it is highly unlikely that the trial judge would have been influenced by it so as to have raised any reasonable doubt in his mind." That argument must be rejected. Mr McCombie's assertion that sexual assault always results in some change in behaviour is not inherently improbable. And if that evidence had been available and there had been evidence that there was no change in the complainant's behaviour during the period covered by the indictment, such evidence might well have raised a reasonable doubt as to the appellant's guilt.

Conclusion and Order

- 83 Although Mr McCombie's evidence might have raised a reasonable doubt, it is also possible that his evidence might not have been accepted. Accordingly, the contention that that evidence renders the appellant's convictions unsafe and unsatisfactory and necessitates the entry of verdicts of acquittal must be rejected.
- 84 The appeal should be allowed and the order of the Court of Criminal Appeal set aside. In lieu of that order, it should be ordered that the appeal to that Court be allowed, the convictions quashed and a new trial ordered.

Gummow JJ, 435 per Kirby J; *Gipp v The Queen* (1998) 72 ALJR 1012 at 1017 per Gaudron J, 1038 per Kirby J; 155 ALR 15 at 23, 50-51.

38 *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J.

85 McHUGH J. In my opinion this appeal should be dismissed.

86 The facts in the appeal are set out in other judgments. So far as is presently relevant, the question for determination by the trial judge was whether he should adjourn the appellant's trial to permit evidence to be given by Mr McCombie. His Honour refused the application. The question then for the Court of Criminal Appeal was whether, in all the circumstances, the refusal of the adjournment amounted to a miscarriage of justice or, more particularly, a denial of natural justice in that the appellant was denied a fair opportunity to present his defence³⁹. That question could only be answered after examining the evidence that the defence intended to adduce from Mr McCombie.

The evidence of Mr McCombie

87 The learned trial judge and the Crown Prosecutor clearly understood that Mr McCombie would be called to give an opinion that the complainant had not been assaulted by the appellant but had been assaulted at an earlier time - almost certainly by the complainant's father. At the commencement of the discussion, the Crown Prosecutor said that Mr Roser, who was then appearing for the appellant, "wishes to raise a s 409B argument in terms of prior sexual activity involving the complainant." The reference to s 409B made no sense unless the Crown Prosecutor believed that the theory of the defence case was that the complainant had been sexually assaulted prior to the incidents alleged in the indictment and that it was the father of the child and not the appellant who had sexually assaulted her. That belief was powerfully reinforced by the opinion contained at the end of Mr McCombie's report where, after reciting the history of the matter as he understood it, he said:

"In the light of the above information, I formed the opinion that [C] had been sexually assaulted as a young child. I felt that this sexual assault had been buried in response to the trauma of it. I felt that the trauma had been resurrected by both the 'stranger danger' lecture and by her resentment at [the appellant] for his attempts at controlling her in the home. I felt that [C]'s inconsistency in her retelling of her story was a response to her confused memories about her past experiences and to a conscious attempt to implicate [the appellant], to punish him."

88 Earlier in his report, Mr McCombie had said:

"So, then, as indicated above, I do think that [C] was assaulted. However, I think that the assault happened during her time with her natural father.

39 *R v McGill* [1967] VR 683 at 686; *R v Jones* [1971] VR 72 at 76.

Certainly the behaviour change she produced after her visit with him was consistent with this."

89 During the discussion of the adjournment application, the following exchange between the learned trial judge and the Crown Prosecutor occurred:

"HIS HONOUR: First of all on the s 409B subject Mr Crown, do you want to say anything about that?

CROWN PROSECUTOR: Your Honour as I understand what my friend is seeking to do, he's seeking to call Mr McCombie to say that in his opinion--

HIS HONOUR: It was the deceased father.

CROWN PROSECUTOR: --at some stage indeterminately in the past, this girl had been the subject of a sexual assault by her natural father who is now deceased. Your Honour if that evidence is what Mr McCombie is purporting to say, then it must be caught by s 409B(3), because it discloses or implies the complainant has or may have had sexual experience or may have taken part in any sexual activity.

HIS HONOUR: What do you say Mr Roser?"

90 Mr Roser then referred to a *dictum* of Sperling J in an unreported case⁴⁰ in support of the contention that s 409B only applied to consensual sexual activity. Mr Roser said that s 409B was "not designed and would not apply to the factual circumstances of this case, where a child of three at the time can hardly have been taken to consent". The following exchange then took place:

"HIS HONOUR: So I'm not bound by [the dictum].

MR ROSER: You're not bound by it, but it would provide a legitimate basis upon which one could conclude that s 409B has no application to any activity where the complainant as a participant was not a willing participant, either because it was non-consensual or because of her age."

91 In the light of the discussion, there can be no doubt that the defence wished to call Mr McCombie to support the defence theory that the complainant had been assaulted by her father and not by the appellant. That was how the Crown Prosecutor and the learned trial judge understood the nature of the application. Indeed, his Honour's judgment began with the statement: "[T]he accused seeks a ruling under s 409B of the *Crimes Act*." Furthermore, the appellant's counsel gave

40 *R v PJE* (unreported) Court of Criminal Appeal of New South Wales, 9 October 1995.

no indication that he was seeking to call Mr McCombie for any purpose other than to seek to show that the natural father, and not the appellant, was the person who had sexually assaulted the complainant.

- 92 For the reasons given by Gleeson CJ, s 409B prevented Mr McCombie giving evidence that, in his opinion, the complainant had been sexually assaulted prior to the assault alleged against the appellant. It also necessarily prevented Mr McCombie expressing the opinion that it was the natural father who had assaulted the complainant. That being so, there was no denial of natural justice in refusing the adjournment. This part⁴¹ of the adjournment application was grounded on the submission that Mr McCombie would be called to give evidence that, although the complainant had been sexually assaulted, it had occurred at an earlier point of time and that it was the natural father, and not the appellant, who was the offender. Once his Honour held that Mr McCombie could not give this evidence, there was no basis for upholding the application to adjourn the trial.

The alternative case

- 93 In this Court, however, counsel for the appellant has argued that Mr McCombie could have given admissible evidence even if the trial judge was correct in holding that s 409B made the most important part of his evidence inadmissible. Counsel contended that Mr McCombie's evidence contained two independent opinions. One was that the natural father had assaulted the complainant when she was only three years old. The second was that the appellant had not assaulted her. Counsel for the appellant contended that this second opinion was admissible even if the first was not.
- 94 However, I do not think that these two opinions were independent of one another. The opinion that the appellant had not assaulted the complainant was arrived at as a result of four sequential steps in reasoning. First, an acceptance of the complainant's assertion that she had been sexually assaulted. Second, a conclusion that the fact that the complainant's behaviour changed after she returned from residing with her natural father indicated that she had been sexually assaulted during that time. Third, a conclusion that the trauma of the assault caused it to be buried in the complainant's memory until it was resurrected by the "stranger danger" lecture and the complainant's resentment of the appellant. Fourth, the fact that there was no evidence of any change of behaviour in the complainant after the appellant was alleged to have assaulted the complainant. This process of reasoning led Mr McCombie to the conclusion that it was the natural father and not the appellant who had sexually assaulted the complainant.

41 The appellant relied on a number of other grounds to support his application for an adjournment. None of them is relevant to the issues in this appeal.

- 95 It is difficult to see how, once s 409B operated to exclude the central thesis of Mr McCombie's evidence, the trial judge could have allowed him to give evidence that in his opinion the appellant had not assaulted the complainant. Section 409B would have precluded him from expressing the opinion that she had been assaulted at the age of three while she was in the care of her natural father, that she had "buried" the assault, and that it was her resentment of the appellant and the "stranger danger" lecture which had resurrected the assault in her mind and caused her to attribute it to the appellant. His opinion that the complainant had not been sexually assaulted by the appellant was dependent on the four steps in reasoning to which I have referred. His evidence would be quite misleading if he was allowed to express the opinion that the appellant had not assaulted the complainant when s 409B prevented him giving evidence as to how he arrived at that opinion. If an expert gives an opinion and it later appears that the opinion is based on matters that the law prevents being the subject of evidence, the proper course for the judge is to reject the opinion⁴². To allow the opinion to stand would mean that it would be based on material that could not be the subject of curial examination. Indeed, Mr McCombie may not have wished to express an opinion about the case at all once essential steps in his reasoning process were held to be inadmissible in a court.
- 96 However, whether or not Mr McCombie could express the opinion that the appellant had not assaulted the complainant probably does not matter for present purposes. If called as a witness, Mr McCombie could certainly have given expert evidence that sexual assault always produces some change in a child's behaviour. If the evidence at the trial established that no change in the behaviour of the complainant was observed after the time of the alleged assaults, his opinion would have provided some evidence to support the appellant's case that he had not sexually assaulted the complainant.
- 97 Nevertheless, the fact that he might have given this evidence, if asked, does not mean that the failure to grant the adjournment amounted to a denial of natural justice. Denying a person the right to call admissible evidence which that person wishes to call to rebut a claim or charge is a denial of natural justice. But the trial judge was never asked to adjourn the proceedings so that Mr McCombie could give evidence that sexual assault always produces some change in a child's behaviour. Nor was he asked to adjourn the proceedings so that Mr McCombie could give evidence of the bare fact that the appellant had not sexually assaulted the complainant. That being so, the learned trial judge did not deny the appellant the right to call evidence which he wanted to call. An examination of the transcript shows that the only evidence which counsel for the appellant wished to call was

42 cf *Steffen v Ruban* (1966) 84 WN (Pt 1) (NSW) 264 at 269; *Pownall v Conlan Management Pty Ltd* (1995) 12 WAR 370 at 376-377.

inadmissible. Accordingly, the appellant has failed to show even a *prima facie* case of a miscarriage of justice.

98 Furthermore, this was a case in which the appellant bore the onus of showing that the refusal of the adjournment was a "miscarriage of justice" within the meaning of s 6(1) of the *Criminal Appeal Act* 1912 (NSW). It is not a case where a judge has wrongly rejected evidence in the course of a trial. In that situation, "the judgment of the court of trial [may] be set aside on the ground of the wrong decision of any question of law" within the meaning of s 6(1) of that Act. To wrongly reject material evidence is an error which entitles an appellant to have his or her conviction quashed, unless the Crown can bring the case within the proviso⁴³ to s 6(1) by establishing that the error did not lead to a "miscarriage of justice". When an appellant claims that the refusal of an adjournment is a "miscarriage of justice" for the purpose of s 6(1) and cannot point to any error of law on the part of the trial judge in refusing the adjournment, however, the onus is on the appellant to prove that the refusal has led to a miscarriage of justice.

99 In this case, there has been no error of law on the part of the judge. Furthermore, there was no evidence before the Court of Criminal Appeal that, if Mr McCombie had been present at the trial and the judge had then made his ruling concerning s 409B, counsel for the appellant would have persisted in seeking to adduce evidence from him concerning the effect of sexual assault on children. One can only speculate as to what course the then counsel for the appellant would have pursued. Nevertheless, I am prepared to assume in favour of the appellant that counsel would have sought to call evidence from Mr McCombie about the matter.

100 Even on this assumption, however, the appeal must fail unless this Court is satisfied that *the effect* of the refusal of the adjournment has probably resulted in the wrongful conviction of the appellant. Without such a finding there can be no basis for concluding that the refusal of the adjournment brought about a miscarriage of justice. Where a jury has convicted an appellant, it is enough that the relevant error may have affected the outcome. But where a judge has convicted the appellant and given reasons, the appellate court is in a position to examine the likely effect of the error. If the court is not satisfied that the error affected the outcome, it should dismiss the appeal.

101 I am satisfied that no admissible evidence could have been given by Mr McCombie that would have affected the trial judge's findings. The learned judge's findings were clearly based on credibility. It is sufficient to refer to the following statement in his Honour's reasons:

43 "provided that the court may, notwithstanding that it is of 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."

"I formed the opinion that [C]'s mother was doing her best to give truthful evidence. She readily admitted that she did not want to believe the allegations that [C] made. This is understandable following the unfortunate events related to her first marriage. She was in a sound relationship with the accused whose conduct, to her observations at least, one may reasonably infer had not given rise to any fear of misconduct towards her children. I accept her evidence of her observations of the accused being naked, coming out of her daughter's bedroom. Her evidence of grabbing the accused's penis for reasons which she was unable at the trial to articulate, seemed to me to be spontaneous and not fabricated and even in the absence of an explanation, understandable. It is clear that she was suspicious but again she did not wish to believe the worst of the accused and accepted his explanation. No doubt her suspicions were aroused because of the accused's nakedness, given that her evidence and that of the accused was always that he wore underpants to bed. I pause to note that even in his own evidence, the accused said that whenever he went into the girls' bedroom, he always put shorts on over his underpants and sometimes even donned a T-shirt as well. I do not accept the accused's evidence that this hallway incident never occurred. In so finding that he was less than truthful on this point, his credibility as a witness is irreparably damaged."

102 His Honour also said:

"I believe [C's] evidence that she has not told any lies in Court.

In so concluding, I acknowledge that although the weighing of evidence is to be done clinically and judicially, without emotion, bias, prejudice or sympathy, much of it involves an intuitive process. I acknowledge the burden of proof beyond reasonable doubt rests upon the shoulders of the Crown in respect to establishing the elements of the offences with which the accused has been charged. The accused bears no burden of proof in any respect. He is not obliged to establish his innocence, it is for the Crown to establish his guilt beyond reasonable doubt. For me to convict the accused of either or both offences alleged, the Crown must positively persuade me of the guilt of the accused beyond reasonable doubt.

As I have indicated, having scrutinised it carefully, I accept [C's] evidence as truthful. There is a strong thread of consistency on important issues to which I have referred and which can be found in her evidence in Court and in exhibits 1 and 2, and in the supportive evidence of her mother which I also accept. The accused's evidence, apart from some background material, consisted largely of denials. I have already referred to one instance where I have concluded that the accused was being untruthful and that was when [C's] mother saw him coming out of the girls' bedroom naked. I acknowledge that the accused does not bear any burden of proof to establish anything, particularly his innocence, however having decided to give evidence, the

accused's evidence must be evaluated in the same way as that of other witnesses. My finding of his unreliability on the point that I have mentioned leads me to conclude that his evidence on other contentious matters is highly suspect."

103 In the light of these findings, I am satisfied that no admissible evidence of Mr McCombie would have caused the trial judge to reach a different conclusion. What seems to have persuaded Mr McCombie that the complainant had not been assaulted by the appellant was the difference between her changed conduct after she had visited her natural father and the absence of any change in her conduct after the alleged assaults by the appellant. In his report, he stated that the complainant's mother had informed him that, after returning from the father, the complainant "was very upset", that she "suffered from disturbed sleep and nightmares" and that she "would often call out in her sleep, saying 'stop it daddy'." Mr McCombie also reported that the complainant's mother said that this behaviour had stopped about eighteen months before the offences alleged against the appellant were reported. According to his evidence at the committal proceedings, Mr McCombie saw the mother in November 1993 and was told that the disturbed sleep had stopped about eighteen months before, that is to say, about May 1992. The first offence against the complainant was alleged to have occurred in September 1992 and the second in October 1993. The mother's account as reported by Mr McCombie indicated, therefore, that the disturbed sleep had stopped several months before the first offence. This history led Mr McCombie to conclude:

"My view of [C] is that she is a girl who has been exposed to sexual assault. Her behaviour following her month with her natural father, according to her mother, changed her significantly. Following it, she developed both significant behaviour disturbance and obvious signs of emotional disturbance. The behaviour disturbance continued, at a lower level, after [the family] had moved in with [the appellant]. However, the night terrors and sleep disturbance ceased."

104 The evidence at the trial did not support this conclusion. It suggested that the complainant's disturbed sleep pattern had remained constant until well after the happening of the offences alleged against the appellant. In evidence at the appellant's trial, heard in September 1996, the mother said that the disturbed sleep and nightmares had not stopped completely although they had diminished. She said that the complainant suffered from disturbed sleep "[n]ot often at all now" and that she had not had nightmares "for quite a while." In re-examination, she said that the disturbed sleep had started diminishing about eighteen months before and that the complainant "would've had two nightmares in the last 18 months." Prior to that, they "were constant". On this evidence, it would seem that the nightmares and disturbed sleep had continued constantly until about March 1995, almost eighteen months after the last of the two offences alleged against the appellant. In these circumstances, it is difficult to see how Mr McCombie's expert opinion about

the effect of sexual trauma on victims would have had any influence on the trial judge if Mr McCombie had been called at the trial. This was particularly so given that the evidence of the complainant indicated that the offences charged were only two in a pattern of conduct. Moreover, there was other evidence that the complainant was, and had been for some time, a disturbed child.

105 Thus, Mr McCombie's report stated:

"[Her mother] indicated that [C] was, and had been for a considerable time, behaviour disturbed, attention seeking, violent with her siblings, isolated from her peers at school and untruthful. She stated that [C] refused to accept responsibility for her actions and always wanted to be the 'boss'."

The mother's evidence at the trial confirmed the accuracy of this part of the report. The evidence does not reveal whether there had been any change in the degree of this disturbed behaviour after the alleged assaults by the appellant. Mr McCombie seems to have assumed that there had been no change in this type of behaviour. Nevertheless, the overall effect of the evidence was that, right up to the date of the trial, the complainant was "behaviour disturbed".

106 Upon the evidence, I do not think that the learned trial judge would have concluded that the complainant's conduct after the alleged assaults by the appellant was inconsistent with her being assaulted by him. The evidence at the trial strongly suggested that the complainant had been before, and continued after, the offences alleged against the appellant to be a deeply disturbed child, suffering from nightmares and otherwise behaving badly. Once s 409B operated so as to prevent Mr McCombie giving evidence that the natural father was the likely offender, I do not think that his expert opinion or opinions would have influenced the judge's decision that the appellant had sexually assaulted the complainant. The trial judge's findings concerning the complainant's credibility and the mother's evidence as to what she saw and what the complainant reported to her put the matter beyond doubt.

107 In evidence, the mother said that the appellant's practice was to "wear underpants to bed." About June 1992, however, she awoke and found that the appellant was not in bed with her and that she saw him coming out of "the girls' room totally naked." The mother also said that the complainant had come into the bathroom one morning and said to her that "Daddy keeps coming in my room and rubbing his penis on my face." When confronted with this allegation, the appellant denied it.

108 The mother also gave evidence that on the night of 9 October 1993 she went to a social gathering and left the children in the company of the appellant and her father. The following morning the complainant spoke to her:

"Q. What did she say?

31.

A. She said 'Mum, [the appellant] took me in your bed last night. He put his penis in my mouth and there was white frothy stuff and he'll kill me if I tell you, Mum' and she was really upset, she was crying.

Q. Was there more conversation than that?

A. I can't remember.

Q. What did you do when [C] said that to you?

A. I reassured her, cuddled her.

Q. At some stage did you go into her room?

A. Yes.

Q. What did you do in there?

A. I went into her room and pulled the sheets off her bed and noticed a bowl on the top bunk next to the pillow.

Q. Did you observe anything in the bowl?

A. It had what appeared to be saliva, spit, in it.

Q. Did you have any conversation with [C] about the bowl?

A. I asked her about the bowl, she told me there was a yucky taste in her mouth and she took it to bed to spit in it."

109 The appellant again denied the allegation when it was put to him. However, despite his denials to the complainant's mother and his evidence at the trial, the learned trial judge was convinced beyond a reasonable doubt that he had assaulted the complainant.

110 I am satisfied that no evidence of Mr McCombie would have affected the trial judge's findings on the complainant's credibility. That being so, his Honour would still have convicted the appellant even if Mr McCombie had given evidence.

111 For all the foregoing reasons, I am also satisfied that the appellant has failed to prove that the refusal of the adjournment constituted a miscarriage of justice.

Order

112 The appeal should be dismissed.

113 GUMMOW J. The appellant stood trial in the New South Wales District Court at Coffs Harbour before a judge alone⁴⁴ and was convicted on two counts of sexual intercourse with a person – the daughter of his de facto wife – under 10 years of age. An appeal to the Court of Criminal Appeal was dismissed⁴⁵. The appellant had sought and was refused an adjournment of the trial. It is that denial of the adjournment which, on the appellant's case, led to a miscarriage of justice to which the proviso in s 6(1) of the *Criminal Appeal Act* 1912 (NSW) does not apply.

114 Mr I F McCombie has been practising as a psychologist since 1976. At one stage in his career he worked for the New South Wales Department of Education for seven years and spent the majority of his time in primary schools dealing with the emotional and learning problems of children. He was involved in a number of cases during that period involving children who were sexually assaulted and who were involved in other traumas. Mr McCombie had prepared a report dated 31 March 1995 for a police officer with the Child Protection and Investigation Unit. He prepared the report on a referral by a general medical practitioner who attended the child and mother. The medical practitioner had been concerned that the child's account of assaults upon her "was, although graphic, internally inconsistent".

115 Part 53 of the District Court Rules 1973 (NSW) is headed "Criminal procedure rules" and r 10(2)(a) thereof provides that an application may be made and the court may make orders with regard to the application, before the day appointed for the hearing, where the application is for an adjournment. The adjournment application was made on Monday, 23 September 1996. Counsel for the appellant wished to call Mr McCombie but the witness was not available in that week. Counsel told the court:

"Your Honour perhaps if I make clear at the outset that this is an application for an adjournment, pursuant to Pt 53 r 10 and as I understand it, it's not the wish of the parties that your Honour go into the amount of detail that [would be] necessary to determine this issue if the trial proceeds, but the material is put before you to indicate the basis upon which the accused seeks the adjournment, so far as it relates specifically to the absence of Mr McCombie."

Counsel submitted that what Mr McCombie had to say could, if accepted, affect the probabilities and could affect the way in which the tribunal of fact looked at the question of whether or not the child was the victim of the activity alleged against the accused.

44 See *Fleming v The Queen* (1998) 73 ALJR 1; 158 ALR 379.

45 *R v G* (1997) 42 NSWLR 451.

116 However, in his judgment delivered on 23 September 1996, the judge treated the application as one to introduce evidence through Mr McCombie "about the allegations he makes in that report" and as turning upon the construction of s 409B of the *Crimes Act* 1900 (NSW) ("the Crimes Act"). His Honour gave what he identified as a ruling under that provision and refused the application.

117 His Honour indicated that, in addition to reading the report dated 31 March 1995, he had read the transcript of evidence given by Mr McCombie in committal proceedings relating to the offences charged.

118 The question on the adjournment application was not whether at trial the evidence from Mr McCombie to the precise effect of that to be gleaned from these materials would be admissible. It was whether sufficient evidence had been shown to demonstrate that Mr McCombie was a material witness, whose unavailability, when considered with other relevant circumstances, provided sufficient ground for an adjournment. The application thus involved a question as to the prejudice to the appellant's case which would be engendered by refusal of the adjournment.

119 His Honour treated the application as turning upon whether s 409B of the Crimes Act would render inadmissible evidence of Mr McCombie tending to show that the sexual assault alleged against the appellant was committed not by him but by the natural father some three or four years earlier.

120 However, the material put forward on the adjournment application was not advanced as being in the nature of a proof of evidence. It was put to indicate the basis upon which the adjournment was sought. Yet, in argument in this Court, as would seem to have been the case in the Court of Criminal Appeal, the material was treated as if it fell for assessment as evidence tendered for admission and was subjected to an analysis of a nature which might be expected on such an occasion.

121 The Crown Prosecutor opposed the adjournment application and pointed out that the accused had been committed for trial more than 12 months earlier, in August 1995, and that the complainant, who had been nine at the time of the alleged offences, was now 12 years old. The matter had been adjourned in July 1996 because the Crown Prosecutor had been taken ill.

122 The judge then delivered an oral judgment upon what he identified as an application for a ruling under s 409B of the Crimes Act immediately after hearing from the Crown Prosecutor as to the opposition to the adjournment. After delivering the oral judgment, the Court returned to further submissions on the adjournment application.

123 The course of proceedings on 23 September 1996 thus is unclear. However, what is apparent is that a ruling in the course of an unsuccessful adjournment application, in respect of materials put forward on the basis then advanced by the applicant for the adjournment, provides a dubious foundation for the determination of the particular issues of statutory construction which were debated in this Court.

124 Upon those issues, I agree with Gaudron J, for the reasons given by her Honour, that "[t]he opinion rule" in s 76 of the *Evidence Act* 1995 (NSW) ("the Evidence Act") did not support the refusal of the adjournment. As to s 409B(3) of the Crimes Act, I agree with Gaudron J that this provision would not have excluded opinion evidence led from Mr McCombie that the complainant was not sexually assaulted on the occasions alleged in the indictment. Like Gaudron J, I agree with the Chief Justice and Hayne J with respect to the construction placed by them upon pars (b) and (c) of s 409B(3).

125 Finally, I would apply the reasoning of Gaudron J with respect to the construction of s 102 of the Evidence Act to support the conclusion that evidence led from Mr McCombie that the complainant may have been sexually assaulted during the time she spent with her natural father would have been rendered inadmissible by s 102 of the Evidence Act.

126 I would reject, for the reasons given by Gaudron J, the submissions designed to establish that, even if the opinion of Mr McCombie that the complainant was not sexually assaulted by the appellant would have been admissible, the refusal of an adjournment involved neither error nor a miscarriage of justice. I would add that in a case such as the present the question whether the appellant was deprived of a chance of acquittal is not to be looked at as if the outline given by the materials to which the judge had regard in refusing the adjournment was in the form of evidence sought to be tendered at the trial. The fundamental question is whether, as the Full Court of the Supreme Court of Victoria explained in *R v Jones*⁴⁶ with reference to the proviso to s 568 of the *Crimes Act* 1958 (Vic), the denial of the adjournment meant that the accused was not given a full opportunity to present his defence, a "basic standard required for a proper administration of justice".

127 I agree with the orders proposed by Gaudron J.

46 [1971] VR 72 at 76, citing *R v McGill* [1967] VR 683 at 686.

128 HAYNE J. The appellant was charged under s 66A of the *Crimes Act* 1900 (NSW) with two counts of sexual intercourse with a child under the age of 10 years. He was also charged, as an alternative count, with indecent assault. The offences were alleged to have been committed against the daughter of his then de facto wife and to have taken place in September 1992 and October 1993.

129 On 23 September 1996, the matter was called on for hearing in the District Court of New South Wales sitting at Coffs Harbour. Counsel then appearing for the appellant applied for the adjournment of the trial because a psychologist, Mr Ian McCombie, whom he wished to call as a witness, was not available. That application was refused, and the trial proceeded before Kirkham DCJ sitting alone⁴⁷.

130 The appellant was found guilty on each count of sexual intercourse and was sentenced to a minimum term of 2 years' imprisonment with an additional term of 8 months. He appealed to the Court of Criminal Appeal against his conviction and his sentence, but those appeals were dismissed⁴⁸. He now appeals to this Court by special leave on grounds alleging that the Court of Criminal Appeal:

- (a) erred in holding that the trial judge did not err in excluding evidence from Mr Ian McCombie; and
- (b) erred in holding that no miscarriage of justice arose from the failure of the trial judge to grant an adjournment of the trial; and
- (c) erred in failing to take into account the evidence of Mr McCombie in deciding whether the convictions were unsafe and unsatisfactory.

131 Much of the argument in this Court, and in the Court of Criminal Appeal, focused upon whether admissible evidence could have been given by Mr McCombie. There was, therefore, much debate about the effect of s 409B of the *Crimes Act* and the provisions of the *Evidence Act* 1995 (NSW) that deal with opinion evidence.

132 Section 409B provides that in "prescribed sexual offence proceedings" (which these proceedings were) evidence relating to the sexual reputation of the complainant is inadmissible⁴⁹. It further provides that in such proceedings "evidence which discloses or implies that the complainant has or may have had

47 Pursuant to the *Criminal Procedure Act* 1986 (NSW), ss 32-33, the appellant elected to stand trial before a judge alone.

48 (1997) 42 NSWLR 451.

49 s 409B(2).

sexual experience or a lack of sexual experience or has or may have taken part or not taken part in any sexual activity is inadmissible" except in the circumstances prescribed by pars (a) to (f) of s 409B(3) and then only if "its probative value outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission"⁵⁰. It will be necessary to deal further with s 409B and the relevant provisions of the *Evidence Act* but before doing so, it is important to notice in more detail the course of proceedings before the primary judge.

133 When the matter was mentioned to the primary judge, counsel then appearing for the prosecution said that as he understood what was to be put by counsel for the appellant "he wishes to raise a s 409B argument in terms of prior sexual activity involving the complainant" and that "if he's allowed to have the evidence in then the trial will have to be adjourned" to enable Mr McCombie to be called. The primary judge read the transcript of evidence that Mr McCombie gave at committal and read a report, dated 31 March 1995, that Mr McCombie had written about the complainant for the Child Protection and Investigation Unit of the New South Wales Police. In his report Mr McCombie said a number of things including:

"I do think that [the complainant] was assaulted. However, I think that the assault happened during her time with her natural father. Certainly the behaviour change she produced after her visit with him was consistent with this"⁵¹

and that

"My view of [the complainant] is that she is a girl who has been exposed to sexual assault. Her behaviour following her month with her natural father, according to her mother, changed her significantly. Following it, she developed both significant behaviour disturbance and obvious signs of emotional disturbance ...

[The complainant] did not report any signs of exposure to trauma after the alleged assault by [the appellant]. I would have expected some significant increase in behaviour and emotional disturbance as a result of this trauma. However this was not reported by either [the complainant] or [her mother]. In spite of this, [the complainant] continued to state that [the appellant] had assaulted her, stating that she was sure he did ..."

His evidence at committal was generally to the same effect: that signs of emotional disturbance that Mr McCombie would expect to identify soon after an episode of

⁵⁰ s 409B(3).

⁵¹ The natural father of the complainant had died some years before the trial.

sexual assault were not described by the complainant or her mother as having been apparent after the alleged assaults by the appellant but were present after the complainant had spent time with her natural father. He also made a number of references in his written report, and in his evidence at committal, to what he considered to be inconsistencies in the complainant's account of events.

134 The first impression of the primary judge was that the material went only to credit (presumably the credit of the complainant). Trial counsel for the appellant responded:

"That is a view of the evidence that's open. Your Honour perhaps if I make clear at the outset that this is an application for an adjournment, pursuant to Pt 53 r 10 and as I understand it, it's not the wish of the parties that your Honour go into the amount of detail that was necessary to determine this issue if the trial proceeds, but the material is put before you to indicate the basis upon which the accused seeks the adjournment, so far as it relates specifically to the absence of Mr McCombie."

Debate continued and focused upon the application of s 409B and, in particular, whether evidence that the complainant's natural father had assaulted her would fall within any of the exceptions to the prohibitions of s 409B(3). Neither before the primary judge nor in this Court was it suggested that the evidence of Mr McCombie should have been treated as admissible evidence because it went to the complainant's credit.

135 The primary judge gave a ruling which he described as a "ruling under s 409B of the *Crimes Act*" refusing "[t]he application to introduce evidence through Mr McCombie about the allegations he makes in that report", that is, the written report of 31 March 1995. The trial proceeded on the next day.

Adjournment and opinion evidence

136 If a witness whom the accused wishes to call to give evidence is not available, and if (as was the case here) there is no suggestion that the accused is seeking simply to delay the trial, a trial judge would ordinarily not refuse the adjournment sought. If, however, it is clear that the witness can give no admissible evidence, adjourning the trial would be futile. If the witness whom it is sought to call is to give opinion evidence, there may be difficulty in deciding whether the evidence is admissible and it may well be possible to decide that question only after holding a voir dire.

137 No voir dire was held in this case. The primary judge had available only the written report of Mr McCombie and the transcript of what he had said at committal. To decide whether opinion evidence is admissible it is necessary to know what opinion is being tendered, what factual basis for that opinion is asserted or assumed

by the witness and what "specialised knowledge"⁵² the witness calls on in expressing the opinion concerned. None of those matters emerged, except in the most general way, from the written report and committal evidence of Mr McCombie.

More than one opinion?

138 The appellant submitted in this Court that Mr McCombie expressed more than one opinion and a conclusion that one of those opinions was inadmissible did not necessarily mean that his other opinions were to be excluded. It is necessary to examine this contention in the light of what happened at first instance.

139 The primary judge understood that Mr McCombie was to be called to give evidence "that it was not the accused, but it was [the complainant's] natural father" who had assaulted the complainant. On its face, the evidence identified by the trial judge was a composite of two separate opinions apparently held by Mr McCombie. And those two opinions appear to have been based on different factual foundations: that some signs and symptoms were reported as occurring at one time (consistent with or indicating assault by the natural father) but were not reported as occurring at another time (a fact not consistent with assault by the appellant).

140 Several things should be noted about these opinions. First, the form in which they are tendered in evidence is governed by what questions are put to the witness, not by how the witness may have chosen to express them in a written report. (It was not suggested that the written report would be tendered in evidence.) Secondly, whether an adequate factual foundation for their tender is established may well depend upon what other evidence is called (in particular, in this case, upon what evidence was called from the complainant's mother about the complainant's behaviour at various times). Thirdly, whether the opinion that is expressed is, in the words of s 79 of the *Evidence Act*, "wholly or substantially based on" specialised knowledge that the witness has, is a question that may depend greatly on what opinion is being expressed. Thus for Mr McCombie to say that a child who has been sexually assaulted will (or will usually) exhibit certain behavioural changes is an opinion that might be linked to Mr McCombie's training as a psychologist or his study of published literature in the field, or his experience in examining young victims of sexual abuse (or some combination of these factors). By contrast, for Mr McCombie to say that the complainant in this case had been assaulted by her natural father as opposed to some third party is an opinion that, on its face, appears not to be based at all on any specialised knowledge of Mr McCombie. Rather, on its face, it appears to be based only on his reasoning from his earlier (possibly admissible) conclusion that the child was

52 *Evidence Act* (1995) NSW, s 79.

assaulted at a particular time (when she was in the custody of her natural father) to the conclusion that the father was the most likely perpetrator.

- 141 I mention these matters because ordinarily they would suggest that the primary judge had insufficient material in this case on which to base a conclusion that the witness could give no admissible opinion evidence. If that were so, it would follow that the adjournment sought should have been granted. But in this case, there are other considerations that intrude.

The basis of the adjournment application

- 142 As I have noted earlier, the debate before the primary judge focused on the application of s 409B of the *Crimes Act*. What is of special significance is that the primary judge said to trial counsel for the appellant, towards the end of argument about s 409B, "If I rule against you on 409B that's the end of the story isn't it[?]". Trial counsel for the appellant replied, "Yes, but so far as the adjournment application is concerned there are other grounds." The primary judge gave his ruling on the application of s 409B and then returned to the question whether the trial should be adjourned. Trial counsel for the appellant submitted that it should be adjourned, but appears not to have sought to make any separate argument for adjournment based on the wish to call Mr McCombie. Rather, he referred to entirely separate considerations, the detail of which does not now matter.

- 143 In these circumstances, then, I can conclude only that in so far as the application for adjournment depended upon the wish to call Mr McCombie, trial counsel (and for that matter the primary judge) proceeded on the basis that Mr McCombie was to be called to give evidence *only* if he could express an opinion that the complainant had been assaulted by her natural father. If he could not give that evidence he was not to be called. Whether he could express this opinion was rightly held to depend upon the application of s 409B.

- 144 Trial counsel having adopted the course he did, (and there being no suggestion of incompetence or other exceptional considerations⁵³) it cannot be said that there is, or may be, some miscarriage of justice because some other course *might* have been adopted at trial with different results. Such a conclusion would be entirely speculative and ill-founded; it would be made without any of

53 See, for example, *R v Birks* (1990) 19 NSWLR 677.

the information that is critical to the making of a decision of this kind by trial counsel, such as the assessment made by counsel of a witness and the place that particular evidence may have in the overall conduct of a trial. Even accepting that the adoption of a particular course at trial may not conclude in every case whether a point is open on appeal, it is as well to recall that trial and the verdict of a jury are the central features in the administration of criminal justice and that trial and verdict are not merely stopping places on the path to appeal⁵⁴.

Crimes Act, s 409B

145 So far as relevant to this matter, this provides:

"(3) In prescribed sexual offence proceedings, evidence which discloses or implies that the complainant has or may have had sexual experience or a lack of sexual experience or has or may have taken part or not taken part in any sexual activity is inadmissible except:

- (a) where it is evidence:
 - (i) of sexual experience or a lack of sexual experience of, or sexual activity or a lack of sexual activity taken part in by, the complainant at or about the time of the commission of the alleged prescribed sexual offence; and
 - (ii) of events which are alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed;
- (b) where it is evidence relating to a relationship which was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant;
- (c) where:
 - (i) the accused person is alleged to have had sexual intercourse, as defined in section 61H (1), with the complainant and the accused person does not concede the sexual intercourse so alleged; and

⁵⁴ cf *Chamberlain v The Queen* [No 1] (1983) 153 CLR 514 at 520 per Brennan J.

41.

- (ii) it is evidence relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged to have been had by the accused person;

..."

The reach of the provision is broad. It is directed to evidence "which discloses or implies" that the complainant "has or may have had sexual experience or a lack of sexual experience" or that the complainant "has or may have taken part or not taken part in any sexual activity". On its face, evidence that the complainant had been sexually assaulted by her natural father is evidence that discloses that she has or may have had sexual experience or has or may have taken part in sexual activity.

146 It was submitted, on the hearing of the appeal in this Court, that the expressions "sexual experience" and "sexual activity" should be confined to "consensual" experiences and activity. Thus, so the argument proceeded, the complainant being incapable of consenting to the conduct that was alleged against her natural father, s 409B did not apply.

147 There is no warrant for reading the provision as confined to consensual acts. Nothing in the language used suggests any intention other than to extend the reach of the provisions as broadly as possible. It was submitted that the provisions should be read in the manner suggested because the mischief to which s 409B is directed is the prevention of distress, humiliation and embarrassment of complainants of sexual crime. Accepting that this is so, it by no means follows that a distinction between consensual and non-consensual sexual acts is warranted. Distress, humiliation and embarrassment are very likely present for any person required to describe, in a public forum, sexual activity in which they have engaged. There is no basis for suggesting that the distress, humiliation or embarrassment felt in having to describe these matters would be less if the activity occurred as a result of the unlawful conduct of another or others.

148 The appellant contended that the exceptions in pars (b) and (c) of s 409B(3) applied. These contentions must be rejected. As to par (b) it is enough to note that evidence of what was said to be her natural father's actions was not evidence relating to a relationship between the accused person and the complainant. As to par (c), it is again enough to note that the requirements of sub-pars (i) and (ii) are cumulative. The "injury" alleged in this case (namely, the behavioural symptoms of the complainant) was not said to be attributable to the sexual intercourse alleged to have been had by the accused person with the complainant. The appellant's case was that these symptoms were attributable to the conduct of another person: the natural father. (It is then not necessary to consider whether the symptoms described amounted to an "injury" for the purposes of s 409B(3)(c)(ii).)

149 The evidence that the appellant sought to call, to the effect that the complainant had been abused by a person other than the appellant (her natural

father), was inadmissible by operation of s 409B(3). That being so, I do not consider it necessary to examine further the questions that were debated on the hearing of the appeal about the operation of s 79 of the *Evidence Act*.

Miscarriage of justice?

150 The appellant's third ground of appeal (that the Court of Criminal Appeal erred in not taking into account the evidence of Mr McCombie in deciding whether the convictions were unsafe and unsatisfactory) must also be rejected. The contention proceeded from the premise that the primary judge had rightly rejected the evidence of Mr McCombie as inadmissible by operation of s 409B. It was suggested that nevertheless the Court of Criminal Appeal should have received and acted upon the evidence of Mr McCombie in disposing of the appeal to that Court. Counsel for the appellant acknowledged that if the Court of Criminal Appeal were to receive the evidence of Mr McCombie, the respondent to the appeal (the prosecution) would necessarily be entitled to test his evidence and to call evidence in answer to it. The result would be, of course, that the Court of Criminal Appeal would conduct the very kind of enquiry that s 409B directs should not be undertaken at trial. Such argument, if right, would apply to every appeal in which evidence had been excluded by giving effect to s 409B. The consequence would necessarily be that complainants of sexual crime would be exposed, on the hearing of an appeal, to the very risks of distress, humiliation and embarrassment that the legislation intends to avoid.

151 The result suggests that the contention is wrong. And it is no answer to say, as the appellant submitted, that the section speaks only of a person who stands charged in the proceedings with a prescribed sexual offence⁵⁵, not of a person who has been convicted of such an offence. The oddity of the result that flows from the appellant's contention is, perhaps, reason enough to reject the submission. But there is a more fundamental flaw in it.

152 Section 6(1) of the *Criminal Appeal Act* 1912 (NSW) provides:

"The court on any appeal under section 5 (1) 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 other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in

55 s 409B(1) definition of "the accused person".

43.

favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

153 The hypothesis is that the primary judge rightly applied s 409B and rejected the evidence that the complainant had been sexually abused by a person other than the appellant. The verdict of the jury (or in this case the judge sitting alone) cannot be said to be "unreasonable" or not able to be supported "having regard to the evidence". It cannot be said that there was some "wrong decision of any question of law". The question, then, is whether "on any other ground whatsoever there was a miscarriage of justice". Accepting, for present purposes, that this ground may cover many kinds of circumstances and that it is not possible (and would not be right to attempt) to restrict its generality, it is not a ground that requires, or permits, the Court of Criminal Appeal to retry an appellant on evidence not admissible at trial or to determine the appeal otherwise than according to law. And reduced to its essentials, that is what the appellant contends should have been done in this case.

154 The appeal to this Court should be dismissed.