

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, KIRBY AND HAYNE JJ

CHRISTOS PAPAKOSMAS

APPELLANT

AND

THE QUEEN

RESPONDENT

Papakosmas v The Queen [1999] HCA 37
12 August 1999
S139/1998

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation:

G P Craddock with H K Dhanji for the appellant (instructed by T A Murphy,
Legal Aid Commission of New South Wales)

A M Blackmore with G E Smith for the respondent (instructed by
S E O'Connor, Solicitor for Public Prosecutions (New South Wales))

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CATCHWORDS

Papakosmas v The Queen

Evidence – Criminal trial – Sexual assault – Evidence of recent complaint – Hearsay evidence – Whether evidence of recent complaint relevant to facts in issue – Relationship between common law and *Evidence Act* 1995 (NSW) – Whether use of evidence unfairly prejudicial or misleading or confusing – Limiting use of evidence – Direction to jury.

Criminal law and procedure – Appeal – Criminal trial – Objection not taken at first instance – Whether leave to argue should have been granted.

Words and phrases – "relevance", "unfairly prejudicial".

Evidence Act 1995 (NSW), ss 9, 55, 56, 59, 66, 136.
Criminal Appeal Rules (NSW), r 4.

1 GLEESON CJ AND HAYNE J. The principal issue in this appeal concerns the
effect of the *Evidence Act* 1995 (NSW) ("the Act") on evidence of recent complaint
in sexual assault cases.

2 Following a trial before Gibson DCJ and a jury in the District Court at
Wollongong, the appellant was convicted of having sexual intercourse with the
complainant, without her consent, knowing she was not consenting. He was
sentenced to imprisonment for a minimum term of three years and an additional
term of one year. An appeal to the Court of Criminal Appeal of New South Wales
against conviction was unsuccessful.

3 For the purpose of dealing with the issues before this Court, it suffices to give
a relatively brief account of the facts of the case.

4 In December 1995 both the appellant and the complainant worked for a
television company; the appellant as a producer, and the complainant as a
secretary. They were both present at a Christmas party held by their employer on
the evening of 16 December 1995. During the course of the evening, when both
were affected by drink, there was some jocular conversation between them about
sexual matters in the presence of other people. Later, as the complainant was
leaving a toilet, she encountered the appellant in a corridor. They spoke to one
another and he guided her into a small room. He tried to kiss her, and attempted
unsuccessfully to persuade her to engage in an act of fellatio. This was not
disputed. According to the complainant, the appellant then forced her to have
sexual intercourse with him, despite her resistance and protests. The appellant
agreed that he had sexual intercourse with the complainant, but said that she
consented. The complainant said that she asked the appellant to let her go, and
told him that she was going to be sick. She said the appellant then left the room
and closed the door behind him, and she fell on to the floor and vomited into a
waste bin. She then went to a bathroom where she washed her face and her
underwear.

5 The complainant, and a number of other witnesses, gave evidence, without
objection, of virtually immediate complaint. According to that evidence, as the
complainant was leaving the bathroom she saw a workmate, Ms Ovadia. The
complainant was crying. Ms Ovadia asked her what was wrong, and the
complainant said she had been raped by the appellant. That evidence was
supported by Ms Ovadia. Ms Ovadia took the complainant outside to a table where
she repeated her complaint to Ms Stephens. She was crying and holding her head
in her hands, and appeared distressed. Shortly afterwards the complainant repeated
her complaint to Ms Fahey. The evidence of Ms Fahey was that the complainant
was crying uncontrollably and appeared extremely distressed. Soon afterwards,
the complainant attended a hospital and was examined by a doctor, who took a
history and made clinical observations.

6 The issue at the trial was not whether sexual intercourse between the appellant and the complainant had occurred, but whether the complainant was a consenting party.

7 The trial judge gave the jury the following directions about the evidence of complaint:

"Stephens, Fahey and Ovadia give what is called 'hearsay evidence' because the [complainant] complains to them that she has been raped by the accused. ...

Under the law in this State, the hearsay evidence, as it is called, is some evidence of the fact that the incident did take place. Once again, you have got to be careful because you will understand that, if you are lying about it originally, then the fact that you keep repeating it does not make it any less of a lie but, if you are telling the truth about it, then it is some evidence of the fact. It is a matter for you as to whether you accept it or not, but it is evidence of the fact of the proof of the truth of the allegation that was being made – that is, that she had not consented to having intercourse with this man, that she had been raped.

There is criticism concerning her and the details of what was said to the various women in that Counsel for the accused says there were inconsistencies, and there were. You heard the evidence as it was given here and I am not going to go through it again, but you will remember he pointed to those inconsistencies that occurred in the evidence between what she had said to one woman and another. Is it important in the circumstances of this particular case that there were some inconsistencies in the evidence – if you find there to have been some inconsistencies? When I say there were, it is a matter for you to decide if there were or were not inconsistencies concerning it. So that you have got that evidence concerning the complaint, as I say, that is hearsay evidence but it is some evidence of the fact. If you accept it, in relation to what took place on this night, that goes to support what the complainant says occurred."

8 It is clear that the learned judge treated the provisions of s 66 of the Act as the basis for that direction. No request for redirection was made by trial counsel. There was no application by trial counsel for the judge to exercise his discretion under s 136 of the Act to limit the use that might be made of the evidence of complaint.

9 Three arguments are advanced in this Court on behalf of the appellant. The first is that the directions concerning the use which the jury could make of the evidence of complaint involved a fundamental error, and resulted in a miscarriage of justice. The error is said to lie in the proposition that the evidence of complaint

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constituted some evidence that the complainant did not consent to the sexual intercourse. The second argument is that, in any event, as a general rule, where evidence of recent complaint in a sexual assault case is admitted, then the trial judge should limit the use that can be made of such evidence in a manner that conforms to the way in which the common law permitted such evidence to be used, and that the trial judge, even though not asked to do so, should have so limited the use that could be made of the evidence in this case. The third argument is that the directions given were confusing and misleading, and that a new trial is warranted.

- 10 It is clear from the language of the Act, and from its legislative history, that it was intended to make, and that it has made, substantial changes to the law of evidence in New South Wales. Similar legislation has been enacted by the Parliament of the Commonwealth¹. Section 9 of the Act provides that it does not affect the operation of the common law except so far as the Act provides otherwise expressly or by necessary intendment. Even so, the sections of the Act relevant to this case undoubtedly make express provision different from the common law. It is the language of the statute which now determines the manner in which evidence of the kind presently in question is to be treated. The appellant argues that the meaning and effect of that language, properly understood, is to be determined in the light of, and in a manner that conforms to, the pre-existing common law. For reasons that will appear, that argument must be rejected. In order to explain it, however, it is necessary to refer to the position at common law.

The position at common law – the hearsay rule and evidence of recent complaint

- 11 The rule against hearsay was once described as the pride of the Anglo-American system of jurisprudence². More recently, however, an Australian scholar, commenting on the Bill which became the Act, said that the hearsay rule was becoming so unworkable that the courts were about to create either a series of new exceptions to it or a generalised judicial discretion to admit

1 *Evidence Act 1995 (Cth)*.

2 Wigmore, *The Principles of Judicial Proof*, 2nd ed (1931) at 970.

reliable hearsay evidence³. Cases such as *R v Kearley*⁴ and *Pollitt v The Queen*⁵ examined the uncertainties surrounding some aspects of the rule. There was no better example of the refined, and, to some minds, unduly subtle, distinctions drawn in this area than the way in which the law dealt with evidence of recent complaint in sexual assault cases.

- 12 From ancient times, the common law permitted a court to receive evidence of recent complaint in cases involving alleged sexual offences. However, if such evidence had been treated as evidence of the truth of the facts asserted in the complaint, then it would have infringed the rule against hearsay. Whether or not evidence of a statement made out of court is hearsay depends upon the use that is sought to be made of the evidence⁶. Under the rules of evidence developed by the common law, it was the potential use of evidence of a statement made out of court as evidence of the truth of what was asserted in the statement that made it hearsay. The common law did not create an exception to the rule against hearsay by permitting evidence of complaint to be used for a hearsay purpose. Rather, it permitted such evidence to be used for another purpose. The rule permitting such use was an exception to the rule relating to the admissibility of evidence of prior consistent statements⁷.

- 13 The purpose for which such evidence could be received was explained in *R v Lillyman*⁸:

"It is necessary, in the first place, to have a clear understanding as to the principles upon which evidence of such a complaint, not on oath, nor made in the presence of the prisoner, nor forming part of the *res gestae*, can be admitted. It clearly is not admissible as evidence of the facts complained of: those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The

3 Aronson, *An Overview of the NSW Evidence Bill 1991*, paper delivered at the University of Sydney, Continuing Legal Education, 9 August 1991.

4 [1992] 2 AC 228.

5 (1992) 174 CLR 558.

6 The Honourable Mr Justice Ferguson, "*Hearsay Evidence*", (1927) 1 *Australian Law Journal* 195; *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at 969.

7 That is the way in which the matter is treated in *Cross on Evidence*, 5th Aust ed (1996) at 429-440. See also *Phipson on Evidence*, 14th ed (1990) at 286-290.

8 [1896] 2 QB 167 at 170.

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complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, *and as being inconsistent with her consent to that of which she complains.*" (emphasis added)

- 14 Hawkins J, who delivered the judgment of the Court in *Lillyman*, referred to a passage in Blackstone's *Commentaries* in relation to the testimony of a woman claiming to have been raped⁹:

"And, first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance: if the witness be of good fame; if she presently discovered the offence, and made search for the offender ... these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned."

- 15 Later in his judgment, Hawkins J said¹⁰:

"The evidence is admissible only upon the ground that it was a complaint of that which is charged against the prisoner, and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box negating her consent, and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her. The jury, and they only, are the persons to be satisfied whether the woman's conduct was so consistent or not. Without proof of her condition, demeanour, and verbal expressions, all of which are of vital importance in the consideration of that question, how is it possible for them satisfactorily to determine it?"

9 [1896] 2 QB 167 at 171.

10 [1896] 2 QB 167 at 177.

- 16 In the later case of *R v Osborne*¹¹ the Court had to consider the admissibility of evidence of complaint in a case where consent was not in issue. That was because of the age of the complainant. It was argued on behalf of the prisoner that the essential purpose of the reception of evidence of complaint was to negative consent, and that, consequently, such evidence was inadmissible in a case in which consent was not in issue. That argument was rejected. Ridley J pointed out that there were two grounds upon which the evidence had been held admissible in *Lillyman*, and that the first ground covered the instant case. He said¹²:

"We are, at the same time, not insensible of the great importance of carefully observing the proper limits within which such evidence should be given. It is only to cases of this kind that the authorities on which our judgment rests apply; and our judgment also is to them restricted. It applies only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself. Within such bounds, we think the evidence should be put before the jury, the judge being careful to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroborative of the complainant's credibility, and, when consent is in issue, of the absence of consent."

- 17 His Lordship's reference to corroboration was, strictly speaking, inaccurate. Evidence of complaint cannot constitute corroboration in the technical sense, because it is not independent of the complainant.
- 18 Evidence of this kind was not received only in relation to complaints made by females. In *R v Camelleri*¹³ the same rule was applied in the case of a complaint of sexual assault made by a boy of the age of 15. Lord Hewart CJ said¹⁴ that if the complainant were "an abandoned male person of mature years" it may be that little attention would be paid to the complaint, but his Lordship thought that observation probably went to the weight, rather than to the admissibility, of the evidence of complaint.

11 [1905] 1 KB 551.

12 [1905] 1 KB 551 at 561.

13 [1922] 2 KB 122.

14 [1922] 2 KB 122 at 125.

19 The English authorities were considered by this Court in *Kilby v The Queen*¹⁵. In that case, the Court considered, and rejected, a submission that a trial judge should direct a jury that failure of a prosecutrix to complain is evidence of her consent to the intercourse. In rejecting that argument, Barwick CJ said¹⁶ that there was some ambiguity about the proposition, stated in *Lillyman*, that evidence of a proximate complaint may be used to negative consent. His Honour was prepared to accept that if that simply meant that a complaint "tends to buttress the evidence of the prosecutrix that what occurred did occur without her consent" it may be acceptable, but it could not be taken to mean that evidence of complaint was "direct evidence negating consent". If by "direct evidence" the Chief Justice was referring to the fact that evidence of this kind could not be used at common law for a hearsay purpose, then there can be no question about it. At common law, the rule against hearsay did not yield to evidence of complaint, and judicial comments as to the use of such evidence need to be understood in that light.

20 Insisting upon the observance of the common law rule against hearsay, whilst, at the same time, receiving evidence of recent complaint, and instructing juries, consistently with *Lillyman* and *Kilby*, as to the use that could be made of such evidence, involved the drawing of a distinction which juries might not have found easy to comprehend or apply. The facts of the present case provide a good example. The issue was that of consent. There was no dispute that sexual intercourse had occurred between the appellant and the complainant. There was evidence, from the complainant herself, and from a number of witnesses, that almost immediately after the intercourse had occurred, the complainant was in a very distressed condition, crying uncontrollably, and saying that she had been raped. Evidence of her condition, and her distress, was admissible, and in the circumstances could be considered by the jury in determining whether or not she was telling the truth when she said that she had not consented to what occurred. However, when it came to the matter of her statements that she had been raped, at common law a jury would have been directed that they could consider such evidence, not as evidence of the truth of what she was asserting, but as evidence which had a bearing upon her credibility, and in particular, upon the consistency of her behaviour and her allegations.

21 None of these questions would have arisen, and none of these distinctions would have been drawn, if evidence of complaint were simply irrelevant. Rules of exclusion of evidence, such as the hearsay rule, only arise in the case of evidence which is otherwise relevant. If evidence of complaint were irrelevant, it would not be necessary to invoke the rule against hearsay in order to exclude it, and reception

15 (1973) 129 CLR 460. See also *Crofts v The Queen* (1996) 186 CLR 427 at 449; *Jones v The Queen* (1997) 191 CLR 439 at 454.

16 (1973) 129 CLR 460 at 469-470.

of the evidence could not possibly be regarded as involving an exception to the hearsay rule or to the rule against reception of prior consistent statements. The primary rule of evidence is that what is not relevant is not admissible. It would have been unnecessary to go past that rule. The reason why evidence of complaint could not be treated as evidence of the facts asserted in the complaint was not that such evidence was irrelevant, but that to receive it for that purpose would be to receive it for a hearsay purpose. It was the rule against hearsay which produced the consequence that evidence of complaint could not be used in proof of the truth of the facts asserted in the complaint. When such evidence was received, it was dealt with in a manner regarded as consistent with the hearsay rule.

- 22 That evidence of complaint is at least potentially relevant, and is capable, depending upon the circumstances of the case, of having substantial probative value if it is received as evidence of the truth of what is asserted by the complainant, may be illustrated by reference to cases which were treated by the common law as a true exception to the hearsay rule: cases involving receipt of evidence as part of the *res gestae*. The law on this subject was considered by the House of Lords in *R v Andrews*¹⁷. In his speech, Lord Ackner referred to the opinion given by Lord Wilberforce in *Ratten v The Queen*¹⁸. He also referred to the well-known case of *R v Bedingfield*¹⁹. In that case the accused was charged with murder. The defence was suicide. There was an attempt to lead evidence that the victim, who had been in a house with the accused, rushed out of the house with her throat cut, and said: "See what Harry has done". That evidence was excluded, but Lord Ackner said that *Bedingfield* would be decided differently today²⁰. He also remarked that there could "hardly be a case where the words uttered carried more clearly the mark of spontaneity and intense involvement"²¹. Although it may be necessary to exercise caution to guard against the possibility of fabrication, it cannot be doubted that the evidence in *Bedingfield* was evidence that could rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding. Whatever view may be taken as to the policy of the law in relation to the reception of evidence that a mortally wounded woman immediately asserts that a named person did it, an argument that such evidence was irrelevant would be surprising.

17 [1987] AC 281.

18 [1972] AC 378.

19 (1879) 14 Cox CC 341.

20 *R v Andrews* [1987] AC 281 at 300.

21 *R v Andrews* [1987] AC 281 at 300.

The Evidence Act 1995 (NSW)

- 23 Consistently with the common law, and with common sense, the scheme of Ch 3 of the Act, which deals with admissibility of evidence, begins with the proposition, stated in s 56, that, subject to the other provisions of the Act, evidence that is relevant in a proceeding is admissible, and evidence that is not relevant is not admissible. Section 55 states that evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
- 24 Having established those fundamental propositions, the Act goes on to deal, amongst other things, with various exclusionary rules, and exceptions to those exclusionary rules. Part 3.2 of the Act deals with the subject of hearsay. Section 59 provides that evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation. Consistently with the common law, the operation of the exclusion depends upon the use which is sought to be made of the evidence in question. Evidence of a statement made out of court by a person, or other evidence that falls within the concept of evidence of a "previous representation", is not admissible for what at common law would have been described as a hearsay purpose.
- 25 The Act then creates a number of exceptions to that exclusionary rule. The exception of present relevance is contained in s 66, which provides:
- "(1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
- (2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
- (a) that person, or
- (b) a person who saw, heard or otherwise perceived the representation being made,
- if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.
- (3) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced

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by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.

- (4) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave."

26 The fact that hearsay evidence falls within one of the exceptions to the exclusionary rule contained in s 59 does not necessarily mean that it will be received, or used for a hearsay purpose. The Act confers on courts a general discretion to refuse to admit evidence in certain circumstances (s 135), and it obliges a court, in a criminal proceeding, to refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant (s 137). Neither of those provisions was invoked on behalf of the appellant in this case.

27 Furthermore, there is a general discretion to limit the use of evidence. Section 136 provides:

"The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

- (a) be unfairly prejudicial to a party, or
- (b) be misleading or confusing."

28 Although this section was not invoked at the trial, it is now relied upon in support of a submission to which further reference will be made below.

29 There are other provisions of the Act which, depending upon the circumstances of an individual case, may affect the admissibility and use of complaint evidence, but the provisions set out above are those which bear directly upon the arguments advanced in the present case. The manner in which the legislation was interpreted and applied in this case, both at trial and in the Court of Criminal Appeal, was consistent with the decision of the Court of Criminal Appeal in *R v BD*²² and the course of authority in New South Wales. For the reasons that follow, the decision in *BD* was correct.

30 The evidence of the witnesses Stephens, Fahey and Ovadia as to what the complainant said to them was relevant. The evidence, if accepted, could rationally affect the assessment of the probability of a fact in issue in the proceedings, the

22 (1997) 94 A Crim R 131.

fact being that the complainant did not consent to have intercourse with the appellant.

31 The legislative provisions in question, insofar as they apply to evidence of complaint, are not limited in such application to evidence of complaint in cases of alleged sexual assault. In that respect, as in other respects, they involve a significant departure from the common law. It is possible to imagine circumstances in which evidence of the fact that a complaint of an alleged crime has been made might be evidence that could not rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue. For example, the nature of the complaint, the circumstances in which it was made, or matters personal to the complainant, might provide a reason why that could be so. However, the present case does not raise an issue of that kind. As the trial judge warned the jury, the fact that an assertion is repeated does not make it any less untrue if it were untrue to begin with. Furthermore, some complaints may be made in circumstances which require particular attention to be given to the danger of fabrication. However, in the circumstances of the present case, it is impossible to deny that the evidence of the complaints made to the three witnesses in question could be regarded by the jury as affecting their assessment of the probability that there was no consent to the intercourse.

32 An argument was developed on behalf of the appellant which took as its starting point the common law on the subject, and which then relied upon sub-s (2) of s 55, which provides that evidence is not to be taken to be irrelevant only because it relates to the credibility of a witness. It was pointed out that, at common law, the evidence in question would only have been used for a purpose relating to the credibility of the complainant. The argument, however, in the context of the statute, leads nowhere. The reason why, at common law, the evidence could only be used for a purpose relating to the credibility of the complainant was the hearsay rule. It was not that such evidence could not rationally affect the probability that there was no consent to the intercourse. It was that to use the evidence as evidence of the truth of what the complainant was alleging would be to use it for a hearsay purpose. That was the background against which judicial statements as to the probative significance of complaint evidence were made.

33 The Act has changed that. Such evidence, if relevant, may now be used for a hearsay purpose if it falls within an exception to the exclusionary rule (subject to other provisions of the Act such as ss 135, 136 and 137).

34 It is to be noted that, if the exception to the hearsay rule created by s 66 is to apply, certain conditions need to be fulfilled. The person who made the representation, (in a case such as the present, the complainant), of which evidence is to be given must be available to give evidence about the asserted fact. That condition was fulfilled because the complainant herself gave evidence that she did not consent to the intercourse. If the complainant had, for some reason, been

unavailable as a witness, and the defence had not been able to cross-examine her, then the evidence of her out-of-court representations would not have been admissible under s 66. (Whether the evidence would have been admissible under s 65, which permits hearsay evidence to be adduced in criminal proceedings where the maker of the representation is not available in certain circumstances, is a matter that does not arise for decision.) Secondly, by reason of s 62, the operation of Div 2 of Pt 3.2 of the Act is restricted to first-hand hearsay, a condition that was satisfied in the present case. Thirdly, by reason of s 66(2), it is necessary that the occurrence of the asserted fact was fresh in the memory of the complainant²³.

35 These are important safeguards against two of the dangers which led the common law to exclude hearsay: unreliability; and unfairness to an accused person who may not have an opportunity to test an unsworn assertion made out of court. However, they are not the only safeguards provided by the Act.

36 The appellant's second submission is that, even assuming the hearsay evidence in the present case was relevant, and fell within the exception created by s 66, nevertheless there was a miscarriage of justice because the trial judge (although not asked to do so) failed to apply one of the additional safeguards, being that expressed in s 136.

37 In brief, the appellant contends that this was a case in which s 136 should have been applied to limit the use that could be made of the evidence of complaint to the use which could have been made of such evidence at common law, as explained in cases such as *Lillyman* and *Kilby*. The jury, it is argued, should have been given the standard common law direction in relation to the use of evidence of recent complaint in sexual assault cases.

38 Counsel went so far as to argue that, as a general rule, a court which receives evidence of complaint in any criminal case should limit its use under s 136 so that it is not used for a hearsay purpose.

39 The submissions must be rejected. They amount to an unacceptable attempt to constrain the legislative policy underlying the statute by reference to common law rules, and distinctions, which the legislature has discarded.

40 There may well arise circumstances in which a court, in the exercise of a discretion enlivened by the requirements of justice in the facts and circumstances of the particular case, will see fit to limit the use of complaint evidence, and, in some instances, it may be appropriate to effect that limitation in a manner which corresponds to the previous common law. To assert a general principle of the kind

23 As to the meaning of "fresh" see *Graham v The Queen* (1998) 72 ALJR 1491; 157 ALR 404.

for which the appellant contends, however, would be to subvert the policy of the legislation.

41 In the instant case, the facts and circumstances surrounding the complaint were not such as to make the use of the evidence for a hearsay purpose either unfairly prejudicial to the appellant, or misleading or confusing. The recency and spontaneity of the complaint, and its consistency with other aspects of the complainant's appearance and demeanour, meant that it was not unfairly prejudicial. There is nothing to suggest such evidence was either misleading or confusing in its use for a hearsay purpose.

42 Finally, it was argued that the directions given by the trial judge, although not the subject of complaint at the trial, were inadequate, misleading and confusing. This submission has not been made good. The judge, appropriately, warned the jury against treating mere repetition as adding weight to the complainant's allegations. He pointed out that a falsehood does not lose that character by repetition. To describe the hearsay evidence as "some evidence" in support of the charge was accurate, and did not overstate its importance. As to the possibility of fabrication, the judge, in other parts of his summing-up, directed the jury concerning the arguments advanced on either side about the central issue in the case. The defence case, which necessarily involved the proposition that the allegations of rape were fabricated, was fairly put to the jury.

43 The appeal must be dismissed.

44 GAUDRON AND KIRBY JJ. The facts and the issues which fall for decision in this appeal are set out in the judgment of Gleeson CJ and Hayne J. We agree with their Honours that the appeal should be dismissed and, save for one matter, we agree with and adopt their reasons. On the question of the relevance of the statements made by the complainant to Ms Ovadia, Ms Stephens and Ms Fahey, we shall state our own reasons. Before doing that, however, it is convenient to note that we do not share the opinion of McHugh J with respect to r 4 of the Criminal Appeal Rules (NSW). Generally speaking, the application of that rule is a matter for the Court of Criminal Appeal and a rigid approach should not be adopted.

45 As Gleeson CJ and Hayne J point out, the statements in question were admissible to prove the fact or facts asserted in them only if two conditions were satisfied. First, they had to be relevant, in the sense in which that word is used in s 55 of the *Evidence Act* 1995 (NSW) ("the Act"). Secondly, they had to fall within one or other of the exceptions to the hearsay rule. The statutory equivalent to that rule is now contained in s 59 of the Act²⁴. It is not in issue that the statements fall within the exception set out in s 66²⁵.

24 The rule is expressed in s 59(1) as follows:

" Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation."

25 Section 66 provides:

"(1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

(2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

(a) that person, or

(b) a person who saw, heard or otherwise perceived the representation being made,

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

(3) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced by the
(Footnote continues on next page)

- 46 The Act specifies new rules of evidence in place of those developed by the common law. However, the statutory concept of relevance does not involve any real departure from the common law. By s 55(1) of the Act, relevant evidence is "evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding."
- 47 Although the statutory concept of relevance can fairly be equated with the common law concept, the statutory exceptions to the hearsay rule extend beyond the true common law exceptions. By "true", we mean those exceptions which allow that certain statements are probative of the facts asserted in them. To the extent of those true exceptions, the statements are probative of their contents and are, thus, relevant for the purposes of s 55 of the Act. To the extent that the statutory exceptions are wider, however, it is necessary to determine whether a statement tendered in proof of the facts rationally bears on the assessment of the probability of those facts having occurred and, thus, also falls within s 55.
- 48 Before turning to the precise question in issue in this appeal, it is convenient to note that the common law does not exclude all evidence of statements made outside court. If relevant, evidence is admissible to prove that a statement was made and, also, to prove its contents. And from that evidence, inferences may be drawn. Commonly, inferences may be drawn as to the speaker's intention²⁶, emotion²⁷, or knowledge of or belief in the facts stated²⁸.

prosecutor of the representation unless the representation concerns the identity of a person, place or thing.

(4) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave."

As to the operation of s 66, see *Graham v The Queen* (1998) 72 ALJR 1491; 157 ALR 404.

- 26 See, with respect to statements of intention which accompany an act in issue or an act relevant to an act in issue, *Walton v The Queen* (1989) 166 CLR 283 at 290-291 per Mason CJ and the cases there cited.
- 27 See *Ratten v The Queen* [1972] AC 378 at 388 per Lord Wilberforce speaking for the Privy Council.
- 28 See *R v Christie* [1914] AC 545 at 553 per Lord Atkinson. See also *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134 (Footnote continues on next page)

49 Further, evidence that a statement was made may counter an inference that could otherwise be drawn. Thus, the common law permits evidence of early complaint in sexual cases to counter an adverse inference that might be drawn with respect to the complainant's credit "because of the tendency of people to assume ... that the victim of a sexual offence will complain at the first reasonable opportunity and that, if complaint is not then made, a subsequent complaint is likely to be false."²⁹

50 It was argued on behalf of the appellant that the statements made to Ms Ovadia, Ms Stephens and Ms Fahey have no probative value beyond that which they would have had at common law. Reduced to its essentials, the argument is that the evidence of Ms Ovadia, Ms Stephens and Ms Fahey can prove no more than that the statements were made and, in the circumstances, could only be used by the jury to rebut an adverse inference that might otherwise be drawn with respect to the complainant's credit.

51 Notwithstanding considerable criticism of the operation of the common law rule against hearsay, particularly following the decision in *R v Bedingfield*³⁰, it was said in *Myers v Director of Public Prosecutions*³¹ that it was too late to admit further exceptions to the rule, otherwise than by legislation. And no exceptions have since been admitted by the common law. That has the consequence that the question whether the statements to Ms Ovadia, Ms Stephens and Ms Fahey are in any way probative of the facts contained in them is not one that could have been answered by reference to common law principles. However, that is not to say that the common law cannot provide guidance on the issue.

52 What does emerge from the common law as a reflection of elementary logic is that, without more, evidence that a particular statement was made is probative only of its making and its contents and those inferences which, in the

at 137 per Barwick CJ; *Walton v The Queen* (1989) 166 CLR 283 at 301-302 per Wilson, Dawson and Toohey JJ.

29 *Suresh v The Queen* (1998) 72 ALJR 769 at 770 per Gaudron and Gummow JJ; 153 ALR 145 at 147. See also *R v Lillyman* [1896] 2 QB 167 at 177 per Hawkins J; *R v Osborne* [1905] 1 KB 551 at 558-561 per Ridley J; *Kilby v The Queen* (1973) 129 CLR 460 at 469, 472 per Barwick CJ; *Ugle v The Queen* (1989) 167 CLR 647 at 649 per Brennan, Dawson, Toohey, Gaudron and McHugh JJ and the cases there cited.

30 (1879) 14 Cox CC 341. For criticism of this decision, see *Ratten v The Queen* [1972] AC 378 at 390 per Lord Wilberforce; *R v Andrews* [1987] AC 281 at 300 per Lord Ackner.

31 [1965] AC 1001 at 1022 per Lord Reid, 1028 per Lord Morris of Borth-y-Gest, 1034 per Lord Hodson. See also *R v Andrews* [1987] AC 281 at 300.

circumstances, may be drawn. On the other hand, it also emerges from the common law, and, again, as a matter of logic, that the circumstances in which a statement is made may sometimes render it probative of the facts asserted. The common law position may be illustrated by reference to the *res gestae* doctrine, notwithstanding that that doctrine has been criticised by reason of the imprecision of the Latin phrase by which it is described³² and the uncertainty of its content³³.

- 53 In its early application, the *res gestae* doctrine was generally confined to statements "forming a portion of or an incident in the transaction which in all its parts and details constitutes one of the matters in issue."³⁴ A broader application was acknowledged in *Ratten v The Queen*, it being said in that case that if "the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received."³⁵ The approach taken in *Ratten* was expressly accepted as correct by Mason CJ in *Walton v The Queen* and impliedly so in the joint majority judgment of Wilson, Dawson and Toohey JJ³⁶.

32 See *Ratten v The Queen* [1972] AC 378 at 388.

33 For example, see *Homes v Newman* [1931] 2 Ch 112 at 120 per Lord Tomlin; *United States v Matot* 146 F 2d 197 at 198 (1944) per Learned Hand J; Morgan, "A Suggested Classification of Utterances Admissible as Res Gestae", (1922) 31 *Yale Law Journal* 229 at 229; Letter from Sir Frederick Pollock to Mr Justice Holmes, 23 April 1931, *The Pollock-Holmes Letters*, (1942), vol II at 284-285; *Wigmore on Evidence*, (1976), vol 6 at §1767.

34 *Adelaide Chemical and Fertilizer Co Ltd v Carlyle* (1940) 64 CLR 514 at 530. See also *O'Leary v The King* (1946) 73 CLR 566 at 577-578 per Dixon J. But cf *Thompson v Trevanion* (1693) Skin 402 per Holt CJ at nisi prius [90 ER 1057]; *O'Hara v Central SMT Co* [1941] SC 363 at 381 per the Lord President (Normand), 386 per Lord Fleming.

35 [1972] AC 378 at 389-390.

36 (1989) 166 CLR 283 at 295 and 304 respectively. See also *Pollitt v The Queen* (1992) 174 CLR 558 at 582-583 per Brennan J. But cf *Vocisano v Vocisano* (1974) 130 CLR 267 at 273 per Barwick CJ (with whom Stephen and Jacobs JJ agreed).

54 The more general statement of the principle in *Ratten* is in these terms:

"[H]earsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused."³⁷

55 The principle expressed in *Ratten* is crucially dependent on the virtual certainty of the statement in question being true and, to that extent, it reflects the common law's bias against the reception of hearsay evidence. That is because it is not logically necessary for the possibility of concoction to be excluded before a statement is probative of the fact asserted in it. Rather, all that is necessary is that the statement be consistent with the fact to be proved and its making so connected to that fact that, when taken in conjunction with other evidence in the case, it bears on the probability of that fact having occurred.

56 The nature and degree of the connection necessary before a statement is probative of the fact asserted in it will, of course, depend on the nature of that fact and, if it be different, the fact ultimately to be proved. Even so, the connection will ordinarily be found in the close contemporaneity of the statement with the fact in issue and the consideration that the statement is a statement of the kind that might ordinarily be expected from the maker if the fact were true. Similarly, a statement that is closely contemporaneous with the fact in issue and is contrary to what would ordinarily be expected if that fact were true rationally bears on the improbability of its having occurred.

57 The question whether, in the particular circumstances, a statement that is not closely contemporaneous (for example, a subsequent statement to police) is probative of the facts asserted in it can logically only be answered in a case in which those circumstances arise. However, there must be some connecting circumstances because, otherwise, evidence that a particular statement was made is probative only of its making and its contents and such inferences as, in the circumstances, may be properly drawn.

58 As a matter of logic, the statement is not, as such, proof of the facts asserted. People do make false statements of fact and false accusations. Nothing in the Act requires the admission of a statement unless, in the terms of s 55, it could rationally

37 [1972] AC 378 at 391 per Lord Wilberforce. This statement of the principle in *Ratten* was subsequently affirmed by the House of Lords in *R v Andrews* [1987] AC 281 and has been applied by the Privy Council in *Mills v The Queen* [1995] 1 WLR 511; [1995] 3 All ER 865 and by the English Court of Appeal in *R v Gilfoyle* [1996] 3 All ER 883.

affect, directly or indirectly, the assessment of the probability of the facts asserted. There has to be more than the fact that the statement is made to produce the conclusion required by s 55 as the price of admissibility. Rationality connotes logical reasoning.

- 59 In the present case, the statements to Ms Ovadia, Ms Stephens and Ms Fahey were closely contemporaneous with the events alleged by the complainant and were of a kind that might ordinarily be expected if those events occurred. That being so, they rationally bear on the probability of the occurrence of those events and, thus, were admissible as evidence of the facts asserted in them.

60 McHUGH J. Three issues arise in this appeal against an order of the Court of Criminal Appeal of New South Wales which dismissed the appellant's appeal to that Court against his conviction by a jury for sexual intercourse with a woman without her consent, knowing she was not consenting³⁸. Those issues, as framed by the appellant, are:

1. Whether s 66 of the *Evidence Act* 1995 (NSW) ("the Act") makes evidence of a recent complaint of sexual assault admissible as "first-hand hearsay" evidence.
2. Whether, in the exercise of the power given by s 136 of the Act, the trial judge should limit the use the jury may make of evidence of a complaint of sexual assault when the complaint would be evidence of the facts in issue by reason of s 66 or s 108 of the Act.
3. Whether the directions given by the trial judge to the jury in the present case were appropriate having regard to the questions raised in issues 1 and 2.

The trial judge's directions concerning the complaint evidence

61 In support of the charge against the appellant, the Crown tendered evidence that the complainant had complained to various persons that she had been sexually assaulted by the appellant. That evidence is set out in the judgment of Gleeson CJ and Hayne J. I need not repeat it. The appellant conceded that he had had sexual intercourse with the complainant on the night in question. But he claimed that she had consented to the intercourse. The learned trial judge directed the jury as to the use they could make of the complaint evidence as follows:

"You have heard that, Counsel for the accused suggests to you that [the complainant] is telling lies ...

Stephens, Fahey and Ovadia give [sic] what is called 'hearsay evidence' because the accused complains to them that she has been raped by the accused. ...

Under the law in this State, the hearsay evidence, as it is called, is some evidence of the fact that the incident did take place. Once again, you have got to be careful because you will understand that, if you are lying about it originally, then the fact that you keep repeating it does not make it any less of a lie but, if you are telling the truth about it, then it is some evidence of the fact. It is a matter for you as to whether you accept it or not, but it is evidence of the fact of the proof of the truth of the allegation that was being made –

38 s 61I *Crimes Act* 1900 (NSW).

21.

that is, that she had not consented to having intercourse with this man, that she had been raped.

There is criticism concerning her and the details of what was said to the various women in that Counsel for the accused says there were inconsistencies, and there were. You heard the evidence as it was given here and I am not going to go through it again, but you will remember he pointed to those inconsistencies that occurred in the evidence between what she had said to one [woman] and another. Is it important in the circumstances of this particular case that there were some inconsistencies in the evidence – if you find there to have been some inconsistencies? When I say there were, it is a matter for you to decide if there were or were not inconsistencies concerning it. So that you have got that evidence concerning the complaint, as I say, that is hearsay evidence but it is some evidence of the fact. If you accept it, in relation to what took place on this night, that goes to support what the complainant says occurred."

- 62 These directions indicate that the learned judge had admitted the complaint evidence pursuant to s 66 of the Act which relevantly provides:

- "(1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
- (2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
- (a) that person, or
- (b) a person who saw, heard or otherwise perceived the representation being made,
- if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation."

The appellant's submissions

- 63 The appellant concedes that the complaint evidence was admissible, but he contends that it was relevant only to the credibility of the complainant. He submits that that evidence was not relevant to the issue of consent and that the trial judge erred in directing the jury that it was. The appellant also submits that a trial judge should allow recent complaint evidence in sexual assault trials to be used only to support the credibility of the complainant.

- 64 In support of these propositions, the appellant relies on the common law which prevailed prior to the Act: *R v Lillyman*³⁹, *R v Osborne*⁴⁰ and *Kilby v The Queen*⁴¹. He submits that the Act must be read in light of the common law, particularly having regard to s 9(1), which provides:

"This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment."

- 65 The question then is whether the terms of the Act have abolished the common law rule that recent complaint evidence in sexual assault cases is relevant only to the credibility of the complainant and is not relevant to any fact in issue including consent.

- 66 The appellant conceded that a court should not approach the admissibility of evidence in a sexual assault trial by examining the pre-existing common law and seeing whether the Act conformed to that law. He accepted that, in trials governed by the Act, the admissibility of evidence depends on the natural and ordinary meaning of the Act. But he submits that recent complaint evidence in sexual assault trials is not relevant to the facts in issue – only to the credibility of the complainant – because the evidence is self-serving and because of the danger that such evidence, not ordinarily being part of the *res gestae*, is concocted. As a result, he contends that recent complaint evidence is *prima facie* inadmissible by virtue of the credibility rule contained in s 102 of the Act which declares that "[e]vidence that is relevant only to a witness's credibility is not admissible."

- 67 In this case, however, the appellant alleged that the complainant had fabricated her evidence. With the leave of the trial judge, s 108(3)(b) of the Act would have permitted the Crown to rely on that evidence to prove sexual intercourse and lack of consent. That paragraph declares:

"(3) The credibility rule does not apply to evidence of a prior consistent statement of a witness if:

...

39 [1896] 2 QB 167.

40 [1905] 1 KB 551.

41 (1973) 129 CLR 460.

23.

- (b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion,

and the court gives leave to adduce the evidence of the prior consistent statement."

68 Because the appellant took no objection to the admissibility of the complaint evidence at the trial or sought to limit its use, the trial judge was not asked to give leave under this paragraph. It is difficult to see any reason why the judge would have refused leave. The appellant did not argue that leave would have been refused. Indeed, in this Court he conceded that "there was a ready case to be made by the Crown for the introduction of the evidence under section 108." If leave had been given, the complaint evidence would have been admissible to prove issues other than credibility; it would have been admissible to prove sexual intercourse with the appellant and lack of consent to the intercourse.

69 The appellant submits that, even if the complaint evidence was relevant to more than credibility, the trial judge erred in not using his discretion under s 136 of the Act to limit the evidence to its credibility purpose. Section 136 declares:

"The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

- (a) be unfairly prejudicial to a party, or
- (b) be misleading or confusing."

70 However, the appellant did not ask the trial judge to limit the use of the complaint evidence.

71 Against the background of the appellant's failure to object to the directions given by the judge or to ask the judge to direct the jury that they could use the complaint evidence only on the issue of credibility, it is surprising that the judgment of the Court of Criminal Appeal does not state whether it gave leave under r 4 of the Criminal Appeal Rules (NSW) to raise these points in that Court. I would have thought that it was a clear case for refusing to grant leave to raise points involving directions and the use of evidence which were not raised at the trial.

72 There is no case for the grant of leave under r 4 unless the Court of Criminal Appeal is satisfied that the appellant has an arguable case that the trial judge has made an error of law or is satisfied that the appellant's conviction is otherwise a miscarriage of justice. Satisfying the Court that there is an arguable case is extremely difficult where the appellant has failed to object to evidence or failed to ask for a direction concerning evidence. In such cases, the trial judge has made no error of law because he or she has not been asked for a ruling. Consequently, an

appeal can only succeed if the Court of Criminal Appeal is satisfied that the admission of the evidence or the failure to give the direction has caused a miscarriage of justice, proof of which lies on the appellant. Where the evidence was admissible, but the trial judge had a discretion to limit its use, the burden on the appellant is greater: the appeal can succeed only if the Court of Criminal Appeal is satisfied that the discretion would have been exercised in favour of the appellant and that, if it had, it is more likely than not that the appellant would have been acquitted. Any other view would mean that there was always a miscarriage of justice when the trial judge might have exercised a discretion in favour of the appellant.

- 73 Whatever else may be said about this case, it is not reasonably arguable that the trial judge must have exercised his discretion in favour of limiting the evidence and that the failure to do so has probably resulted in the appellant being wrongly convicted. That being so, the Court of Criminal Appeal should have refused to give leave to argue the point. However, the Court made no reference to r 4. The appellant may be right when he asserts that it must have given leave although it did not say that it had. In the result, it makes no difference whether his appeal on the s 136 discretion should have been dismissed by applying r 4 or on the ground that, leave being given, the trial judge was not bound to limit the use that the jury could make of the complaint evidence. The appeal fails whatever course is taken.

Relevance

- 74 The appellant claims that the pre-existing common law establishes that using complaint evidence to prove lack of consent or sexual intercourse is ordinarily unfairly prejudicial to a person accused of sexual assault and was so in the present case. As the judgment of Gleeson CJ and Hayne J demonstrates, it is doubtful whether the common law cases establish the major premise of the appellant's argument. But, whether that be so or not, the scheme of the Act evinces a legislative purpose that evidence of recent complaint in sexual assault cases was henceforth to be admitted as evidence of sexual intercourse and as evidence of lack of consent to that intercourse. Once that is understood, few, if any, cases would require the trial judge to exercise the power conferred by s 136 of the Act and limit the use that the jury may make of the complaint evidence.
- 75 To understand the legislative scheme with respect to the admissibility of evidence, one must begin with ss 55 and 56 of the Act which provide:

"55 Relevant evidence

- (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
- (2) In particular, evidence is not taken to be irrelevant only because it relates only to:
 - (a) the credibility of a witness, or
 - (b) the admissibility of other evidence, or
 - (c) a failure to adduce evidence.

56 Relevant evidence to be admissible

- (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
- (2) Evidence that is not relevant in the proceeding is not admissible."

76 Recent complaint evidence or its absence is relevant to, but not decisive of, the credibility of the complainant's evidence in sexual assault cases because the making of an early complaint is regarded as being consistent with what a complainant would do if he or she had been assaulted as alleged. At all events, the common law judges took that view of complaint evidence⁴². Whether the credibility reason for admitting complaint evidence remains, or ever was, valid may be doubted. In *R v King*⁴³, Fitzgerald P pointed out, correctly in my opinion, that the admissibility of complaint evidence "is based on male assumptions, in earlier times, concerning the behaviour to be expected of a female who is raped, although human behaviour following such a traumatic experience seems likely to be influenced by a variety of factors, and vary accordingly." However, the appellant did not dispute that complaint evidence was relevant to credibility. And the view that it is relevant to credibility has been stated so many times by judges that that aspect of the rule can probably only be changed by legislation, not judicial innovation.

42 *R v Lillyman* [1896] 2 QB 167 at 170, 177; *R v Osborne* [1905] 1 KB 551 at 561; *R v Camelleri* [1922] 2 KB 122 at 125; *Kilby v The Queen* (1973) 129 CLR 460 at 469 per Barwick CJ (McTiernan, Stephen and Mason JJ agreeing).

43 (1995) 78 A Crim R 53 at 54 (Queensland Court of Appeal).

- 77 In a trial for sexual assault, therefore, ss 55(2)(a) and 56(1) permit evidence to be adduced that, within a reasonable period of the alleged assault, the complainant had told one or more persons that she had been sexually assaulted. Having regard to the terms of s 55(1), it is difficult to see why complaint evidence is not also "relevant" to the issues of consent and intercourse. In almost every conceivable instance of sexual assault, evidence that the victim had complained about the assault at the first reasonable opportunity, would "rationally affect ... the assessment of the probability of the existence" of intercourse having taken place and of a lack of consent to that intercourse having been given.
- 78 So far as relevance is concerned, no distinction can be drawn between complaint of sexual assault and other forms of evidence that are always regarded as relevant to proof of the charge. Evidence of distress on the part of a complainant is always relevant, within the meaning of s 55(1), to a charge of sexual assault. A complainant who has been sexually assaulted may, but will not necessarily, display outward signs of distress after the assault. Evidence of distress tends to prove that the complainant had been sexually assaulted. Indeed, so much was conceded by the appellant, who also conceded that evidence by a complainant to the effect that "I did not consent" was also relevant and admissible, as was an out-of-court statement to that effect that was part of the *res gestae*. Yet in terms of relevance, it is difficult to see any distinction between the content of these concessions and the content of recent complaint evidence.
- 79 The appellant sought to distinguish recent complaint evidence from his concessions about evidence going to the issues on the ground that complaint evidence is self-serving and made in circumstances which permit fabrication. Consequently, he contended that complaint evidence is not as capable of rationally affecting the assessment of probabilities as other evidence which is accepted as going to the probability that the offence occurred. He argued that evidence falling within the *res gestae* exception is admitted because concoction is unlikely and that evidence of distress, by its very nature, is harder to fabricate than an out-of-court assertion. Pressed to explain why the law should treat the complainant's in-court statement that he or she did not consent as going to the issues but not the complainant's out-of-court statement to the same effect, the appellant said that it is to be found in the nature of our adversarial system of justice which requires that "the determination of criminal liability [be] based upon proceedings in court on the basis of sworn evidence."
- 80 In my opinion, these arguments of the appellant must be rejected. The scheme and terms of the Act, the Law Reform Commission Reports which were its basis and the common law rules show that the reliability of out-of-court statements is primarily addressed by the hearsay rule and is not the concern of relevance, a concept that is concerned with logic and experience.
- 81 Section 55 itself is a decisive answer to the appellant's contentions. The words "if it were accepted" in that section make it clear that a court assesses "the probability

of the existence of a fact in issue" on the assumption that the evidence is reliable. In the Interim Report of the Australian Law Reform Commission that led to the enactment of the Act, the Commission pointed out that distinguishing between "legal" and "logical" relevance disguised the myriad policy considerations that contributed to the former⁴⁴. The Commission thought that, as a threshold test, relevance should require only a logical connection between evidence and a fact in issue. To the extent that other policies of evidence law, such as procedural fairness and reliability, required the strict logic of the relevance rule to be modified, that could best be done by the exclusionary rules – such as the hearsay rule and the credibility rule – and by conferring discretions on the court as in ss 135-137⁴⁵. The terms of s 55 indicate that it was intended to give effect to the Commission's view as to the proper approach for determining the relevance of evidence.

- 82 However, in making recommendations concerning complaint evidence, the Commission was not prepared to let the admissibility of such evidence be determined by applying the general principles of relevance set out in s 55. The Commission argued that the law in this area should be reformed by permitting complaint evidence to be received in certain circumstances as evidence of the facts in issue. The Commission said⁴⁶:

"The proposal would have the effect that complaints in rape trials which are at present received only as showing the consistency of the rape victim could be received as evidence of the matters stated, as long as they were made when the facts were fresh in the memory."

- 83 Section 66 of the Act gives effect to this proposal by making it a "first-hand" exception to the hearsay rule in s 59(1) which is headed "The hearsay rule – exclusion of hearsay evidence", and declares that "[e]vidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation."
- 84 Over the years courts and commentators have disagreed over the history of, and the rationale for, the hearsay rule⁴⁷, but one reason often given is that hearsay

44 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1, pars 314-315.

45 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1, pars 638-644.

46 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1, par 693.

47 See eg *Cross on Evidence*, 5th Aust ed (1996) at [31015]-[31020]; Baker, *The Hearsay Rule* (1950) at 7-24.

evidence is inherently less reliable than other evidence because it is not made on oath and is not subject to testing by cross-examination⁴⁸. Whatever the true rationale for the hearsay rule may have been at common law, the Act assumes that the rationales for excluding hearsay evidence are its potential unreliability and the threat that hearsay evidence poses to procedural fairness. Unreliability is seen as a problem in s 66 itself because the section makes it a condition of admissibility that "the occurrence of the asserted fact was fresh in the memory" of the person who made the statement. The threat to procedural fairness is also seen as a problem in s 66(1) because that sub-section states that s 66 "applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact." The purpose of this statement and other conditions in the section is to ensure that the defendant has an opportunity to cross-examine on the representation.

- 85 Further illustrations of these rationales of the hearsay rule formulated by the Act are found in s 65 which applies to "first-hand hearsay" where the maker of the representation is unavailable, s 67 which addresses the issue of procedural unfairness by providing that notice must be given before adducing some hearsay evidence including that admitted via s 65(2) and (3), though not s 66(2), and s 165 which addresses the reliability issue by providing that in a jury trial the judge may warn the jury of the dangers inherent in certain types of evidence, including hearsay evidence. Section 165 relevantly provides:

(1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:

(a) evidence in relation to which Part 3.2 (hearsay evidence) or 3.4 (admissions) applies,

...

(2) If there is a jury and a party so requests, the judge is to:

(a) warn the jury that the evidence may be unreliable, and

(b) inform the jury of matters that may cause it to be unreliable, and

(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it."

- 86 The distinction which the Act makes between relevance and probative value also supports the view that relevance is not concerned with reliability. Probative value is defined in the Dictionary of the Act as being "the extent to which the evidence

48 Baker, *The Hearsay Rule* (1950) at 17.

could rationally affect the assessment of the probability of the existence of a fact in issue." That assessment, of course, would necessarily involve considerations of reliability. "Probative value" is an important consideration in the exercise of the powers conferred by ss 135 and 137. An assessment of probative value, however, must always depend on the circumstances of the particular case at hand.

- 87 Whatever the dangers of admitting out-of-court statements into evidence may be, the scheme of the Act is to deal with them by the hearsay rule (s 59), by the discretions conferred by ss 135-137 and by the warning provision in s 165, not by reference to notions of relevance. Notions of reliability and procedural fairness play no part in testing the relevance of evidence for the purpose of s 55 of the Act.
- 88 In support of his argument that complaint evidence is relevant only to credibility, the appellant relied on a number of common law decisions, particularly *R v Lillyman*⁴⁹ and *Kilby v The Queen*⁵⁰. But those decisions predated the Act. In my opinion, the plain words of Part 3 of the Act indicate that the legislature intended to change the law with regard to complaint evidence by permitting such evidence to be admitted for the purpose of proving the facts in issue even though that meant proving guilt by hearsay evidence. When the hearsay rule was at its zenith, it is understandable that the common law judges would refuse to admit complaint evidence as evidence of the facts in issue. That does not mean that the common law judges had held or even thought that complaint evidence was not relevant to the facts in issue. As Gleeson CJ and Hayne J point out in their judgment, two of the cases upon which the appellant relies as establishing the modern rule regarding complaint evidence at common law, *Lillyman* and *Osborne*, themselves cast doubt on the appellant's submissions, at least in so far as the issue of consent is concerned. The Act has made substantial changes to the law of evidence. Notwithstanding s 9, reference to pre-existing common law concepts will often be unhelpful.
- 89 It follows that, in this case, the recent complaint evidence was relevant and satisfied the requirements of s 66(2). The complainant gave evidence and she made the complaints virtually immediately, thus satisfying the "fresh in the memory" test⁵¹.

Discretionary limitation of evidence

- 90 The appellant submitted that the trial judge erred in not exercising the power conferred by s 136 and directing the jury that the recent complaint evidence could only be used on the issue of the complainant's credibility. Section 136 authorises

49 [1896] 2 QB 167.

50 (1973) 129 CLR 460.

51 See *Graham v The Queen* (1998) 72 ALJR 1491; 157 ALR 404.

the judge to limit the use of evidence if a particular use of that evidence might be unfairly prejudicial to a party or be misleading or confusing. The appellant submitted that the self-serving nature of recent complaint evidence and the possibility of concoction raise the possibility that the jury would not be able to fairly assess the evidence. He submitted that a warning under s 165 is insufficient to provide adequate protection to an accused because a warning provides no basis by which the jury could "expose" the concoction. He contended that the judge erred in not limiting the use of the complaint evidence whether it was admitted pursuant to s 108(3)(b) as an exception to the credibility rule or pursuant to s 66(2) as an exception to the hearsay rule. The appellant conceded that the case for a discretionary limitation was much stronger if the evidence was admitted by way of s 108(3)(b) than by way of s 66(2). That was because admissibility under s 66(2) meant that the evidence was relevant to the facts in issue. He contended that the need for the limitation applied not only in the present trial but in all sexual assault trials.

- 91 Evidence is not unfairly prejudicial merely because it makes it more likely that the defendant will be convicted. In *R v BD*, Hunt CJ at CL pointed out⁵²:

"The prejudice to which each of the sections [ss 135, 136 and 137] refers is *not* that the evidence merely tends to establish the Crown case; it means prejudice which is unfair because there is a real risk that the evidence will be misused by the jury in some unfair way." (footnote omitted)

- 92 In its Interim Report, the Australian Law Reform Commission explained⁵³:

"By risk of unfair prejudice is meant the danger that the fact-finder may use the evidence to make a decision on an improper, perhaps emotional, basis, ie on a basis logically unconnected with the issues in the case. Thus evidence that appeals to the fact-finder's sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action may cause the fact-finder to base his decision on something other than the established propositions in the case. Similarly, on hearing the evidence the fact-finder may be satisfied with a lower degree of probability than would otherwise be required."

- 93 Some recent decisions suggest that the term "unfair prejudice" may have a broader meaning than that suggested by the Australian Law Reform Commission and that it may cover procedural disadvantages which a party may suffer as the result of

52 (1997) 94 A Crim R 131 at 139 (emphasis in the original).

53 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1, par 644.

admitting evidence under the provisions of the Act⁵⁴. In *Gordon (Bankrupt), Official Trustee in Bankruptcy v Pike (No 1)*⁵⁵, Beaumont J used his discretion under s 135(a) to exclude the transcript of a bankrupt, which would otherwise have been admitted as an exception to the hearsay rule pursuant to s 63, on the basis that the prejudicial effect of being unable to cross-examine the maker of the representation on a crucial issue in the litigation substantially outweighed the probative value of the evidence. In *Commonwealth of Australia v McLean*⁵⁶, the New South Wales Court of Appeal also used s 135(a) to exclude hearsay evidence otherwise admitted via the exception contained in s 64 on the basis that the defendants were prevented by other evidentiary rulings from effectively challenging the evidence. It is unnecessary to express a concluded opinion on the correctness of these decisions, although I am inclined to think that the learned judges have been too much influenced by the common law attitude to hearsay evidence, have not given sufficient weight to the change that the Act has brought about in making hearsay evidence admissible to prove facts in issue, and have not given sufficient weight to the traditional meaning of "prejudice" in a context of rejecting evidence for discretionary reasons.

- 94 As Hunt CJ at CL and Bruce J pointed out in *R v BD*⁵⁷, it is artificial and wrong to admit evidence pursuant to s 66(2) and then limit the use of the evidence to credibility issues by exercising the power conferred by s 136. In the ordinary case, a warning under s 165 should be sufficient to alert the jury to the dangers of hearsay evidence. For that reason, s 136 should only be invoked in cases where the danger could not be cured by such a warning⁵⁸. No doubt the judge is more likely to limit the evidence to credibility issues when it has been admitted by way of s 108(3)(b) rather than by way of an exception to the hearsay rule. It is a *sine qua non* for admission via s 108(3)(b) that it is only relevant to credibility – s 102 of the Act. Nevertheless, directions under s 136 should not be made as a matter of course.

54 See Einstein, "Reining in the judges"? – An examination of the discretions conferred by the Evidence Acts 1995", (1996) 19 *University of New South Wales Law Journal* 268 at 273-274.

55 Unreported, Federal Court of Australia, 1 September 1995; but see *Colonial Mutual Life Assurance Society Ltd v Donnelly* (1998) 82 FCR 418 at 434-436 per Wilcox, O'Connor and Sackville JJ, a decision of the Full Court of the Federal Court.

56 (1996) 41 NSWLR 389 at 401-402 per Handley and Beazley JJA, Santow A-JA agreeing.

57 (1997) 94 A Crim R 131 at 140 per Hunt CJ at CL, 151 per Bruce J.

58 *R v BD* (1997) 94 A Crim R 131 at 139-140 per Hunt CJ at CL, 151 per Bruce J.

- 95 In support of his submissions that the trial judge should have directed the jury to use the complaint evidence only on the credibility issue, the appellant relied on the dissenting judgment of Smart J in *R v BD*⁵⁹ where his Honour said:

"Notwithstanding the warning which the judge gives under s 165 that the hearsay evidence may be unreliable it is my view that to admit complaint evidence as evidence of the fact contained in it is usually unfairly prejudicial to an accused as it allows a complainant to shore up the Crown case. Evidence of a complaint should not be elevated. At the very least there is a danger that the use of the statements in the complaint as evidence of the truth of the facts will be unfairly prejudicial.

...

A mild dilemma may arise. If evidence of the complaint is admitted because it does not fall within the prohibition in s 102 or because s 108 applies that evidence would be admitted as evidence of the statements made and not as evidence of the truth of the facts in the statement. Assuming the same complaints are also admissible under s 66, then in the absence of a direction under s 136, the statements would be evidence of the facts which they assert. In such a case the better course will usually be to admit the statements or representations and direct that they are to be used as evidence that such statements were made and not of [the] truth of the facts asserted in the statements."

59 (1997) 94 A Crim R 131 at 147-148.

- 96 To use s 136 in this general fashion is to subvert the intention of the legislature. The principles relating to statutory discretions have been articulated on many occasions. In *Hyman v Rose* the House of Lords said⁶⁰:

"[T]he discretion given by the section is very wide. The Court is to consider all the circumstances and the conduct of the parties. Now it seems to me that when the Act is so express to provide a wide discretion ... it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated ... in the present case are useful maxims in general ... But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise the free discretion given by the statute would be fettered by limitations which have nowhere been enacted."

- 97 Sections 135, 136 and 137 contain powers which are to be applied on a case by case basis because of considerations peculiar to the evidence in the particular case. It may be proper for appellate courts to develop guidelines for exercising the powers conferred by these sections so that certain classes of evidence are usually excluded or limited⁶¹. But those sections confer no authority to emasculate provisions in the Act to make them conform with common law notions of relevance or admissibility.

The case did not call for a direction under s 136 of the Act

- 98 Nothing in the present case required the judge to exercise the power conferred by s 136. Indeed, the learned judge would have exercised his discretion erroneously if he had limited the use of the complaint evidence to the credibility issue. The complainant gave evidence and was vigorously cross-examined by counsel for the appellant. Three witnesses gave evidence that the complainant had complained that the appellant had raped her. Those witnesses were cross-examined. The complainant complained almost immediately after sexual intercourse had occurred. Her complaints were accompanied by significant signs of distress. It could only have confused the jury to direct them that the distress was evidence that the complainant had not consented to the intercourse but that her complaints were not evidence of lack of consent even though they were made when she was distressed. In addition, there is no ground for thinking that in some way the failure to limit the use of the complaint evidence to credibility might have diverted the jury from the real issues in the case. In the circumstances of this case, the complaint evidence was not only relevant to the issues of consent and sexual

60 [1912] AC 623 at 631 per Earl Loreburn LC with whom Lords Macnaghten and Atkinson and Lord Shaw of Dumfermline agreed; see also *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387 at 400-402 per Kirby P.

61 See *Norbis v Norbis* (1986) 161 CLR 513 at 517-520 per Mason and Deane JJ; cf 536-538 per Brennan J.

intercourse but highly probative of the critical issues and likely to be reliable. The case for the Crown was a strong one, as the appellant conceded. The only "prejudice" which the appellant suffered as the result of the complaint evidence is that it made what was a strong Crown case an even stronger one. That is not prejudice within the meaning of s 136.

99 I would dismiss the appeal.