PARTIES:	HARE, John Earl
	v
	MALEY, Kevin Gerard
TITLE OF COURT:	SUPREME COURT OF THE NT
JURISDICTION:	SUPREME COURT OF THE NT
FILE NO:	JA 29 OF 1994
DELIVERED:	7 JUNE 1995
HEARING DATES:	THURSDAY, 30 MARCH 1995
JUDGMENT OF:	MARTIN CJ.

CATCHWORDS:

Appeal - Justices - Appeal against conviction - Unlawful and indecent dealing with a child -

Justices Act (NT)
Criminal Code (NT), ss132(2)(a) & (3)

Criminal Law - Sexual offences - Appeal - Facts - Oral evidence at trial - Children - Credibility - Findings of fact based on demeanour of witness -

Devries and Another v Australian National Railways (1993) 177 CLR 472, followed.
M v R (1994) 126 ALR 325, followed.

Criminal Law - Evidence - Corroboration by children - Factors to be considered - The adequate degree of independence - Risk of joint concoction or contamination - Credibility of the witness -

Kehagias, Leone and Durkic (1984) 13 A Crim R 82, considered.
DPP v Hester [1973] AC 296, considered.
DPP v Kilbourne [1973] AC 729, considered.

Criminal Law - Evidence - Child - Whether uncorroborated evidence of a child is capable of corroborating evidence of another child -

DPP v Kilbourne [1973] AC 727, considered.
R v Manser (1934) 25 Cr App R 18, considered.
DPP v Hester [1973] AC 296, considered.
R v Rima (1892) 14 ALT 353, considered.
Croft v R (1917) 19 WALR 49, considered.
Kehagias, Leone and Durkic (1984) A Crim R 82, distinguished.

Criminal Law and Procedure - Uncorroborated evidence of children - Matters involving sexual allegations -

Child giving sworn evidence - Considerations - Warning must be issued -

Pahuja (1987) 30 A Crim R 118, followed.
R v Atkins (1988) 50 SASR 272, followed.
R v Corkin (No.2) (1988) 50 SASR 285, followed.

Statutes - Interpretation - Meaning of 'unsworn' evidence - Includes absence of oath and affirmation -

Evidence Act (NT), s9C
Evidence Amendment Act (No.3 of 1994), s9C
Oaths Act (NT), s8
Interpretation Act (NT), s33

REPRESENTATION:

Counsel:

Appellant: Mr Odgers
Respondent: Mr Cato

Solicitors:

Appellant: Mr Bruxner
Respondent: Ms Channells

Judgment category classification: B
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Number of pages: 31

mar95012

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. JA 29 of 1994

BETWEEN:

JOHN EARL HARE
Appellant

AND:

KEVIN GERARD MALEY
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 7 June 1995)

The appellant appeals against convictions suffered by him in the Court of Summary Jurisdiction at Darwin on 25 August 1994 for that he, on 2 February 1994, did unlawfully and indecently deal with S and J, both at the relevant time girls under the age of 9 years (s132(2)(a) and (3) *Criminal Code*). He was at that time found not guilty of identical charges in relation to two other girls, one of them K, arising in similar circumstances.

The offences arose out of incidents which were alleged to have occurred whilst the appellant, a schoolteacher with qualifications to teach gymnastics, was instructing a class

of 26 children, boys and girls, in the use of various types of gymnastic equipment, as part of the school physical education curriculum, during normal school hours in the school grounds. There was nothing unusual or untoward concerning the arrangements for the children to receive instructions from the appellant, but it was the first time upon which the appellant, who was then aged 56, had given such instruction to those children, and it was fortuitous that he was in charge of a class at that particular time. Another teacher was to have taken the class but was detained. Furthermore, it was the first time upon which the children had received the instruction and participated in the exercises, and it was also the first time upon which they had had a male teacher. The appellant was described as being a big man with big hands. He said that he was 185 to 190 centimetres in height, weighing about 95 kilograms, with hands "larger than most men".

The evidence of both complainants was to much the same affect. They each, in their turn, were instructed in an exercise on "monkey bars", one of the various apparatus used in the course of the lesson. The circumstances are best understood by looking at photographs and a video placed in evidence. Doing the best I can, the apparatus comprised a ladder-like support a few feet high at each end, and at the top and between the supports, a series of round metal bars, some running parallel to, and others at right angles to, the tops of the ladders forming a series of squares or

rectangles horizontal to the ground. The object of the particular exercise was to climb the ladder at one end, hang by the hands from a bar, swing the legs up and over the next bar so that that bar passed under the backs of the knees, and then manoeuvre upwards so as to finish on top of the apparatus. The participant would then move over the bars to the other end and descend. When the legs first swing up and over the bar, with the torso and thighs hanging down, the participant is in what has been described as a "V" shape with his or her bottom at the lowest point. Assistance may then be required to enable the student to move his or her bottom upwards so that the body can reach the top of the cross-bars and that stage of the exercise is completed. Two female specialist education teachers gave evidence in the appellant's case that when required, for safety reasons or to assist a child make the upwards movement, it was standard practice for the instructor to do so by placing one or both hands, palms up, on the child's bottom and to push upwards. The appellant said that in each of these cases he used both hands, palms up, one on each buttock, to push the child upwards. He said his hands would have easily encompassed the bottom of each child as well as part of her back and side.

S and J however, each gave evidence that when hanging in the V position and the appellant assisted them, he had one hand on her bottom and the other on her vagina at much the same time or shortly thereafter.

As to S her evidence in examination-in-chief was:

"What happened to you at the monkey bars? --- Well, Mr Hare told us to climb on top, and I was halfway - they were about this far away from each other, the monkey bars, and I had my head through there and my feet, and then he grabbed me up by the bottom, pushed me up and then on top, my vagina.

When he was touching you, how many - was he just using one hand or two hands? --- Two.

Whereabouts was one of his hands; was it on your bottom? --- Mm mm.

And where was his other hand? --- On the vagina.

And could you see either of his hands? --- No."

In cross-examination her evidence proceeded as follows:

"MR DAVIES: And she said to you: 'Was Mr Hare helping you?' Do you remember that? --- No.

Well, do you remember if you told her this: 'I'm not really sure what, but I was all right, I was getting up and he just took me by the bottom'. Do you remember saying that? --- Yes.

And then she said: 'And when he took you by the bottom, what did he do?' And you said: 'He lifted me up and I was all - just halfway up, getting up'. Do you remember saying that? --- Mm mm.

Okay. See, that's what he was doing, wasn't it, he was helping you to get up to the top? --- No. He - he lifted. I was about to get up but he pushed me from the bottom, he lifted my bottom up and then he touched me on the vagina.

Yes, but what I'm saying to you is, he was helping you up? --- No.

Well, didn't you tell the police that? 'Was Mr Hare helping you?' 'I'm not really sure', you said? --- But I didn't need any help.

You didn't see his hands at all? --- No.

....

> Well, I suggest to you, in fact, Mr Hare put his hand - one hand on your bottom area and you were pushed up that way and he helped you up? --- No, he lifted me up by the bottom. He lifted me up, then put his hand on top.
>
> So you're saying one hand was on the bottom? --- Yes, and he lifted me up.
>
> That hand was open like this? --- Lifted me up.
>
> Yes? --- And then, when he lifted me up, I was straight, then he put his hand on me.
>
> ...
>
> Yes, okay. You remember one hand was on your bottom, when that hand was on your bottom, where was the other hand? --- Well, he had both of - well, one of them and then he pushed it up. And then put his other hand on top."

During the course of her evidence a video was played depicting the appellant going through the exercise on the monkey bars and assisting a boy so as to demonstrate what he said he did. The video was played in the presence of the witness and it was interrupted periodically so that she could be asked further questions in cross-examination and at one stage the following appears in the transcript:

> "THE WITNESS: There - oh, no, no, down a bit. There - oh, down, down.
>
> HIS WORSHIP: Well, I think we've got a grasp of the situation.
>
> THE WITNESS: There. I was like this.
>
> HIS WORSHIP: Somewhere about that stage? --- Yes, somewhere about there.
>
> MR DAVIES: Somewhere at that stage? --- I think.
>
> Now, what are you saying about his hands at that stage? --- Well, then he had one hand there - I'm not quite

sure which hand it was.

Sorry, what hand where? --- On my bottom.

Yes, and where was the other one? --- Then he lifted his other one and put in (sic) on - on my vagina.

What I'm going to say to you, Marianne, is, he only ever had one hand in the area of your bottom and vagina? --- No, he had one there and one on top.

HIS WORSHIP: The witness there has indicated the lower palm facing upwards and fairly flat and her other hand held 6 inches or so about that, with the palm facing downwards. Yes, is that - - - "

As to J, in examination-in-chief she said:

"Can you tell us what he did when he felt you? --- Well, he grabbed my chest and my bottom and he moved his hands to the front and helped me up.

Do you remember which hand he had on your chest? --- No.

Can you indicate on your own body where abouts his hand was? --- Just here.

Just across the front of you - - -

HIS WORSHIP: The witness has demonstrated with her right hand held flat across the middle of the upper chest.

MR BIRCH: Do you remember what hand that was? --- No.

Whether it was right or left hand, that's what I mean? --- No.

Where abouts was his other hand? --- On my bottom.

Can you tell us where abouts on your bottom the hand was? --- No - well, just on top.

On the top. Was it in the middle or on either side at the top? --- In the middle.

What happened to the hand that was on your bottom? --- It stayed there and that until I started crawling across.

You said it went to the front, what do you mean by that? --- I don't understand.

Do you understand my question? --- Well, yes, but I don't know what to say.

Did the hand that was on your bottom stay in one place all the time or did it move? --- It stayed - -
MR DAVIES: Well, I know it's very difficult to ask these things sir, but what I'm worried about is the witness is put into a position of saying something that she wouldn't say if it was more open.

HIS WORSHIP: The answer is 'it stayed', Mr Davies, are you unhappy with that answer? Sorry?

MR DAVIES: No.

HIS WORSHIP: You're not unhappy?

MR DAVIES: Well, that's the evidence now sir. I appreciate my learned friend's difficulty, but I've got my own anxieties of course.

HIS WORSHIP: Yes.

MR DAVIES: But I am happy with the answer.

HIS WORSHIP: Aime, you said earlier that one of the hands moved, which one was that? --- The hand that was on my chest.

That's what I thought the first time around I must say, Mr Birch, although I could well understand someone else interpreting it.

So where did that move from and where did it move it? --- It moved from my chest to the front.

What do you mean by the front? --- To - I don't know what to say.

Well, if you don't know what to say, do you want to point to the area you mean by the front? Do you want to stand up and point there? --- No.

MR BIRCH: Perhaps the witness might like to draw a diagram? Are you able to do that and mark on the diagram where abouts the hand moved to? --- Yes.

All right.

HIS WORSHIP: Would you show that to Mr Birch and Mr Davies please?

MR BIRCH: You've put a cross on the diagram, what does the cross represent? --- Where his hand was.

All right. That's after he moved it from your chest area? All right."

The diagram is a clear representation of the body and the indication as to where the hand was was on the vagina. Shortly after the witness was asked:

> "MR BIRCH:Do you have a word for that area that you have indicated with the cross? --- Yes.
>
> What do you call that? --- I call it a fanny.
>
> How did you feel when you were being touched by Mr Hare? --- Not very nice.
>
> Did you want him to touch you either on the bottom or - - - ? --- Nowhere."

In cross-examination the following exchange took place:

> "What I'm suggesting to you is, Aime, and if you can't remember that's what you've got to say, what I'm suggesting to you that he only ever had one hand on your bottom? --- Yes.
>
> And the other hand was in your back, around there? --- On my chest.
>
> On your chest. Well, could you be mistaken about that? --- I don't know where - - -
>
> Remember when you came into this court, you told His Worship that you were going to tell a true story? --- Yes.
>
> Now, it's very very important. One hand was on your bottom? --- Yes.
>
> Can you honestly say where the other hand was? --- No.
>
> This exercise was a very quick one? --- Yes."

In re-examination at p84 the following:

> MR BIRCH: "You agreed that you couldn't honestly

remember where Mr Hare's other hand was? --- Yes.

Was that all of the time that he had his hands on you, or just some of the time? --- Some of the time."

Counsel for the appellant was given leave to put further questions in cross-examination arising from those responses and the transcript proceeds as follows:

MR DAVIES:"Aime, I just want to go back to something that I asked you about before. Remember I showed you some photographs? --- Yes.

I showed you photograph number 4? --- Yes.

I think that you agreed with me that you were in this position? --- Yes.

Then you ended up in the position in photograph number 3? --- Yes.

Photograph number 4, when you were in that position? --- Yes.

Mr Hare didn't have his hands on your bottom or on your chest at that time did he? --- I can't remember.

When you come to photograph number 3, right? --- Yes.

You can remember that he had his hand - one hand on your bottom, when you were in that position, in that 'V' shape? --- Yes.

Now, when you were in that 'V' shape and he had one hand on your bottom? --- Yes.

What I'm suggesting to you is now you can't remember where he had his other hand? --- No.

When you said in your evidence, when Mr Birth was asking you questions, before I ever jumped up and asked you anything, that he had one hand on your chest - Mr Hare had one hand on your chest, right? ---Yes, I can remember that, but I'm not really that sure.

Well, when did that happen - - -

HIS WORSHIP: What are you not sure about Aime? --- I'm - I can sort of remember that his hand was on my chest, but then - then I just can't remember any more.

Do you know what position you were in when you sort

of remember the hand was on your chest? --- In the 'V' shape.

MR DAVIES:When you were in that 'V' shape, had his hand ever been on your chest before that? --- No.

Can you remember after his hand was on your chest, where it ended up? --- On the - where I showed you before on the picture.

HIS WORSHIP Is that this picture, Aime, exhibit A?

MR DAVIES:So what you're saying is he had one hand on your bottom; where was the other hand when you were in this 'V' shape in photograph number 3? --- What I drew.

Can you just show us what position his hand was in at that time? --- I can't really remember.

You couldn't see his hand? --- No.

Isn't the truth of this, Aime, that you really can't remember about this hand on the front, where it was at all? --- No."

His Worship then indicated that the answer as stood was ambiguous. There were further interchanges between counsel for the prosecution and the appellant and his Worship, and later at p89 the following further additional cross-examination was permitted:

MR DAVIES:"Aime, you've mentioned in your evidence - you've said that the hand - there's one on the bottom and the other hand was in your chest area? --- Yes.

And then it was down further where you've indicated on your diagram? --- Yes.

Now what I'm suggesting to you is there was one hand on your bottom, but in truth you really do not remember if Mr Hare's hand was either on your chest or in that lower area where you've previously said it was? --- I do remember.

Finally, can you please show us how his hand was? --- Like that.

HIS WORSHIP: Sorry, do you want to show us again Aime? That's what, one hand on the bottom and one

on the chest is it? --- No. It's where I've shown you on the picture.

MR BIRCH: One hand on the bottom and one hand - - -

HIS WORSHIP: Note that the answer is no to that.

So, is your bottom hand meant to be Mr Hare's hand on your bottom? --- Yes.

And the upper hand is meant to be the hand as in the place shown on the picture, is that - - -? --- Yes".

His Worship rejected a prosecution submission that placing a hand on a child's bottom in the circumstances described was an indecent dealing with the child, which was, his Worship found, "necessary and proper". As to the placing of a hand on the vagina, his Worship held it would be unnecessary and there was no professional reason for it.

The appellant's evidence as to placing a hand on each of the girls' vagina in chief was as follows:

"Would you have lifted these girls up if they had not appeared to need that? --- No, sir.

What do you say in relation to the allegation that somehow you had a sandwich-type position of your hands - - -? --- No, that is not true at all.

And as far as you're aware, was there any contact between your hands and any of the three girls' vaginas? --- No, sir, there wasn't.

Was there any attempt by you in relation to Charlene or any of the three girls to gain any kind of sexual gratification? --- No, none whatsoever.

Was there any deliberate or conscious attempt by you to indecently deal with any of these children? --- None whatsoever."

And at p193 the following:

"What is your safety record as a PE teacher of such long-standing? --- Mine is a good one, yeah.

How in fact did you endeavour to ensure that there were no accidents on this particular occasion in relation to the monkey bars? --- Well, I made sure that I was close by to move in if there was any accident about to take place. One has to kind of pre-empt a situation. I would be following the children with my hands fairly closely with - with regard to where they were going, and just be alert, really, to what might happen.

How inevitable is physical contact in the course of doing that exercise on the monkey bars that you did? --- Well, I think it's a normal part and parcel of doing any sort of physical activity where children are expected to climb up and squeeze through and move along, etcetera.

And is that the same in relation to the horizontal bars? --- Yes, well, they need - yes, it is, yes.

And the fact that the children were moving at the time that they were on pieces of equipment, does that make a difference to the amount of physical contact? --- Yes, it does, yes.

What is the difference? --- Well, of course, the kids are moving their legs and there is a possibility of some contact in an area not - not intended. It would only be a very fleeting one and inadvertent."

In cross-examination the following emerged:

"Well, for example, take the video that we've seen. You were assisting the boy on the horizontal bars and the parallel bars? --- There was physical contact there, yes.

And that contact was deliberate on your part to provide safety? --- Yes.

And no doubt during activities when you're providing safety assistance, there's some inadvertent contact? --- Yes, I - could say that".

At the conclusion of his cross-examination he specifically denied touching either of the girls on their

vagina.

As to the act which he found to constitute the offence, the placing of one of the appellant's hands on the vagina of each child, his Worship looked to see if there was any corroboration of the evidence of each of the complainants, considered the issue of prompt complaint and made findings as to credibility. He undertook a very thorough review of the evidence before expressing himself satisfied beyond reasonable doubt as to the guilt of the accused on the two charges. Similar processes of examination of evidence and consideration of legal issues were applied to the other two charges leading to acquittal.

The grounds of appeal are:

1. That the Learned Magistrate's finding the two charges proved was against the weight of the evidence.

2. That the Learned Magistrate misdirected himself as to the burden and standard of proof.

3. That the Learned Magistrate misdirected himself as to the law in respect of corroboration.

4. That the Learned Magistrate misdirected himself as to the law in respect of unwilled acts and accidents as contained in section 31 of the Criminal Code.

5. That the Learned Magistrate misdirected himself as to the requisite mental element required to be established before the information might be found proved.

The question of corroboration was argued first.

It is plain that his Worship was very conscious of the requirement to determine whether there was any evidence capable of amounting to corroboration and, if so, whether it did, "... the general law of corroboration applies ... I must direct myself twice to be cautious ... first I must be careful because the matter is a sexual offence and secondly I must be careful because the complainant in each case is a child".

The complaint was that his Worship erred in finding that the evidence of another child, K, was capable of corroborating that of S and J, upon the basis that it lacked "the adequate degree of independence". K was one of the children in respect of whom a charge was brought but dismissed. She, together with S and J, were good friends as was G, another child in respect of whom a charge was brought but dismissed and P, another girl of about the same age who was also in the group and gave evidence but in respect of whom no charge was brought. His Worship adverted to the possibility that the girls could have deliberately or

subconsciously got their evidence together, as they had all admitted to being a group of friends, and to having spoken or taken part in discussions about the events amongst themselves. They had all had counselling and there were occasions during the course of the police investigation when some of them may have had an opportunity to see others demonstrate the nature of their complaints. His Worship was aware of the difficulties in relation to corroboration which could arise if the evidence of those relied upon to corroborate the evidence of the alleged victims of the assaults had become "contaminated" as a result of discussions or what they had heard.

In respect of the evidence of J, his Worship held that there was insufficient evidence from K to amount to corroboration. Her evidence as to what she saw was unsatisfactory. J was not sworn on oath to give her evidence and s9C of the *Evidence Act,* in operation at the relevant time, provided that a person shall not be convicted of an offence on the unsworn evidence of a child or children, unless that evidence is corroborated by some other material evidence in support thereof implicating the accused. That provision was repealed by the *Evidence Amendment Act (No.3 of 1994)*. However, given the provisions of s8 of the *Oaths Act* and s33 of the *Interpretation Act* it is accepted that to be "unsworn" embraces not only the absence of an oath, but also an affirmation. The transcript indicated that this complainant witness was affirmed. His Worship found that

she was a most impressive witness who struck him as a witness of truth and that on her evidence alone he would be satisfied, and was satisfied, beyond reasonable doubt of the case in respect of her. He found that she was the object of an indecent dealing by the appellant.

In respect of the evidence of S., who was sworn, his Worship found that the evidence of K, who had also been sworn, was corroborative and accepted it. Before doing so he reminded himself that K was a person who, on her own story, had reason to have a grievance against the appellant and that she was talking about evidence of offences against her friends by a man whom she had cause to dislike. He also expressed himself to bear in mind the issues going to contamination, as they came to bear upon her evidence as a corroborator. Turning to the evidence itself and the credibility of K, his Worship said that although really upset when talking about what it was alleged the appellant did to her, she spoke about events as they touched upon the other children with great indifference, "... she almost could not understand why anyone was asking these questions ..... it seems to me that from watching K give her evidence that she was not showing any sign of spreading malice towards Mr Hare or anything of that sort". As to the evidence of S, the transcript shows his Worship concluded:

> "I was very impressed with her evidence and with her as a witness. And notwithstanding all of the matters in favour of Mr Hare that I referred to a few moments ago, I believe I would have been persuaded beyond reasonable doubt of her evidence even if she had not

> been corroborated and I believe it would be (incomprehensible) of the corroboration as I characterised it from K that I can be satisfied of that complaint beyond reasonable doubt and I am so satisfied". (Emphasis added).

It does not appear that the words missing from the transcript have any significance upon the outcome, as determined by his Worship's findings.

Notwithstanding his Worship's plain indication that he would have convicted without corroboration, the appellant argued that he misdirected himself on the law of corroboration, and thus fell into error. His acceptance of the evidence of S was influenced by that misdirection and he ought not to have convicted on the evidence of J standing alone. The appellant's submission as to the law is that it is clearly established that two complainants who allege sexual assaults at the same time and place cannot corroborate each other because the risk of joint concoction or contamination means that the requirement of independence is not satisfied. That submission is based upon consideration of a number of cases, particularly *Kehagias, Leone and Durkic* (1984) 13 A Crim R 82; *DPP v Hester* [1973] AC 296 and *DPP v Kilbourne* [1973] AC 729. The problem is whether a witness in a case like this, where the law as to corroboration calls to be applied, can be corroborated by another witness who in turn needs to be corroborated, and the corroboration in the second case is said to arise from the evidence of the first witness, that is, the two witnesses

corroborate each other.

In the case of a child giving sworn evidence in criminal cases for the prosecution before a jury, it has been the practice to give a warning that there is a risk in acting on the uncorroborated evidence of young boys or girls, although they may do so if convinced that the witness is telling the truth (se new s9C *Evidence Act* as enacted in 1994). Furthermore, this was a case involving an allegation of a commission of a sexual offence and because of that a similar warning was also required as a matter of practice (*Pahuja* (1987) 30 A Crim R 118; *R v Atkins* (1988) 50 SASR 272; *R v Corkin (No.2)* (1988) 50 SASR 285). It is not suggested that a Magistrate, as trier of fact, would be at liberty to disregard those rules and the reason behind them.

The question of mutual corroboration arises because of the requirement that the evidence of S, being a child giving evidence in relation to a sexual offence upon her, be corroborated and, because of the requirement that the evidence of K, being a child, be corroborated. The corroboration is mutual because it is sought to have the evidence of K as to what she saw the appellant do to S used to corroborate the evidence of S as to what the appellant did, and because it is sought to have the evidence of S, as to what the appellant did to her, used to corroborate the evidence of K as to what she saw the appellant do to

S. For another well known example of a similar situation see the citation by Lord Hailsham L.C. in *DPP v Kilbourne* [1973] A.C. 727 at 747, of what was put by Lord Hewart C.J. in *R v Manser* (1934) 25 Cr App R 18:

> "The argument for the prosecution is therefore an argument in a circle. Let it be granted that the evidence of Barbara [the elder child witness for the prosecution who may have been sworn or unsworn] has to be corroborated: it is corroborated by the evidence of Doris [the younger child witness who was unsworn]. She, however, also needs to be corroborated. The answer is that she is corroborated by the evidence of Barbara, and that is called "mutual corroboration". In truth and in fact the evidence of the girl Doris ought to have been obliterated altogether from the case, inasmuch as it was not corroborated."

But, Lord Morris, in *DPP v Hester* [1973] AC 296 at 315 enquired: "But why, I ask, is this an argument in a circle?" and continued:

> "If child A gives evidence and says "I was assaulted by X" and if child B gives evidence and says "I saw X assault A" I would have thought that each corroborates the other. Each gives evidence implicating X. The evidence of each one is parallel with the evidence of the other. The evidence of A of having been assaulted by X is confirmed by the evidence of B of having seen X assault A. The evidence of B of having seen X assault A is confirmed by the evidence of A of having been assaulted by X. One of the elements supplied by corroborative evidence is that there are two witnesses rather than one. The weight of the evidence is for the jury - in cases where there is a trial by jury."

The contention that there was a general rule of law to the effect that witnesses of a class requiring corroboration could not corroborate one another was also

rejected in *DPP v Kilbourne* [1973] A.C. 729. (The rule may well apply in the case of accomplices and in cases in which the equivalent of the old s9C of the *Evidence Act* applies (see for example *R v Rima* (1892) 14 ALT 353; *Croft v R* (1917) 19 WALR 49). Neither consideration arises in relation to the complaint of S and the evidence of K. Nor is this a case in which considerations relating to similar fact evidence apply.

Although the distinction may not carry much weight, the ultimate position reached in this case was, that having found in favour of the accused in relation to the complaint by K, K's evidence was only relied upon by his Worship as to what she said she saw the appellant do to S, that was much the same position as in *Hester*. The Appellant relies on the majority decision in *Kehagias*, where Starke and Hampel JJ., having considered the English cases and the provisions of the Victorian statute abolishing the requirement for a direction relating to corroboration in regard to sexual offences, held that the learned Trial Judge, having decided to give such a direction, erred in the direction which he gave. It was a case in which the appellants had been convicted of the rape and attempted rape of two girls (not being children). It seems the only evidence which was sought to be relied upon as corroboration of the evidence of each complainant by the other, was the general evidence that they were each the victim of an assault occurring at the same time and place. Their Honours said of that at p90:

> "In that situation each of the two complainants may well have a particular motive to support and bolster up the evidence of the other in order to make her own complaint more credible and so different considerations apply".

The evidence in this case goes further, in that K says that she saw what the appellant did to S. Murphy J., in dissent on this point in *Kehagias*, although not expressly adopting *Hester* or *Kilbourne* and other similar authorities, said at p105:

> "Nor can I see, as a matter of logic, that the evidence of one credible complainant is incapable of supporting that of another credible complainant. The rule (if it ever was a rule) that the evidence of one complainant could not amount to corroboration of the evidence of another, was not the product of logic, but rather of what was termed "the experience of the court", leading it to view as unsafe such a process of reasoning based on possibly tainted evidence. Once it is decided that the evidence of each complainant is credible (in the sense of being truthful and reliable) then logically they do tend to support one another".

I agree.

So long as the trier of fact is aware of the influences which may arise deriving from, for example, fantasy, the desire of a witness to make his or her evidence more credible, peer group influence (particularly when the peers are friends and a number of them raise allegations of similar indecent dealings), and other factors which may tend to diminish the credibility or reliability of the particular witness in the

circumstances of the case, it is open to the tribunal to reject or accept the evidence, and, if accepted, proceed to its findings of fact. If they are adverse to an accused, then on appeal the same considerations apply in relation to those findings as to any other which are called in question.

His Worship clearly directed himself to the submissions made on behalf of the appellant at trial including what has been described as "20 indicia of doubt", some of which his Worship categorised as reasons to be cautious about the evidence. He rejected the evidence of P, put forward as corroboration, upon grounds advanced by counsel for the appellant and his observations of her as she gave her evidence. However, he accepted the evidence of K in so far as it was capable of being regarded as corroborative of the evidence of S, based upon what she said and how she said it. His Worship made a very careful analysis of the evidence of all of the witnesses and assessed their respective credibility. I have read the whole of the evidence. There is nothing to show that his Worship failed to use or palpably misused his advantage, or acted on evidence which was inconsistent with facts in controvertibly established by the evidence or which was glaringly improbable (*Devries and Another v Australian National Railways* (1993) 177 CLR 472 and *M v R* (1994) 126 ALR 325). His Worship did not err in accepting the evidence of K as being corroborative of the evidence of S. It was open to him to find beyond

reasonable doubt that the appellant had placed a hand on the vagina of each of J and S upon consideration of the evidence of each of them standing alone.

Grounds 4 and 5 were argued together, the appellant's submission being that his Worship failed properly to determine the issue whether, if the appellant touched the vaginal areas of the complainants, that touching was deliberate, that is, his Worship failed to consider whether the appellant intended to do that act. A selection of some passages from his Worship's very detailed and thorough reasons might indicate that he had not borne in mind the necessity that there be proof of intent. For example, at p228, he refers to "the actual issue in the three cases is the question whether the defendant did use his other hand in the manner described by each of the complainants" or later at p242 where he spoke of "the specific, crucial, essential, events, was the second hand involved in these cases?" in the context of discussing corroboration. The appellant concedes that if his Worship considered "the" factual issue was whether the appellant had deliberately placed his hand over the vaginal area of the complainants, then criticism under these grounds could not be advanced, but then goes on to argue that his remarks should not be so construed; when his Worship referred to the factual issue, he only meant to refer to the alleged acts said to constitute the dealing and did not include the required mental element, that is, whether the event was deliberate. Clearly that issue was

before his Worship in the course of the proceedings. The prosecution case was that the touching on the vaginal area was deliberate and conscious, whereas the defence case was that if any such touching took place it would have been fleeting and entirely accidental. Although it was plainly not the primary line of defence, there are suggestions in the evidence of the accused himself to support a fleeting or accidental act, and one of the expert witnesses called in his case when asked about the possibility of there being some kind of contact with the genital areas of girls of these ages in the course of such an exercise, said, "its not uncommon to prop a child and grab them in an - in an inappropriate body area - what they would consider to be inappropriate, but totally unintentional on the part of the teacher". Similar evidence was given by the other expert witness for the appellant.

It is true, as counsel for the appellant argues, that at no stage did his Worship expressly find beyond reasonable doubt that any contact alleged to be indecent was deliberate, but the issue of the impugned conduct being accidental was expressly referred to. At p229, when referring to the submissions of counsel for the appellant at trial, there was included, amongst the range of matters to be considered, "the possibility of the complained of contact from the girls being accidental" and at p230:

> "Its perhaps relevant in this context to take a look at the evidence also that the defendant in his supervision of gymnastic exercises was described as

> a very cautious, safety conscious, protective, interventionist type of teacher and a teacher therefore who might be more prone to laying on hands in a precautionary manner before anything could go seriously wrong in a fast way with a big hand on a small bottom in a quick exercise and so on leading to a possibility of an accidental contact".

At p247 his Worship rejected the submission going to the "improbability that anyone having it in mind to commit such offences would do so in the place where they were committed". Whether or not the accused had the necessary intent was an issue at the trial. Although the appellant denied that he had placed one of his hands upon the vagina of either of the girls, the possibility of there having been some inadvertent or accidental touching of that area was a live issue. Submissions were made about it at the close of the evidence, his Worship plainly adverted to that question and his findings on the point are implicit in his verdicts.

The ground of appeal argued last was that the findings were against the weight of evidence, in essence, the findings were unsafe and unsatisfactory. Although there is much benefit to be derived from *M v R* (1994) 126 ALR 325 as to the responsibility upon a Criminal Appeal Court when faced with a finding of a jury which is said to be unsafe and unsatisfactory, there is a distinction between that situation and that which faces a single Judge of this Court hearing an appeal from the Court of Summary Jurisdiction. In that situation this Court has the benefit of the reasoning

of the trier of fact and, where relevant, findings going to the credibility of witnesses. The question remains, however, as to whether this Court, on appeal, thinks that upon the whole of the evidence it was open to the trier of fact to be satisfied beyond reasonable doubt that the accused was guilty, and in so doing this Court will not disregard or discount either the consideration that the Magistrate is the person entrusted with the primary responsibility of determining guilt or innocence, or the consideration that he or she has had the benefit of having seen and heard the witnesses and must pay full regard to those considerations (see *M v R* pp328-329). Those considerations are of particular importance where the credibility in question is that of young children, who are not likely to be so practiced in the art to successfully effect a deception upon the trial Court. His Worship was most thorough in his explanations as to why he was unable to accept the evidence of some of the children and did accept the evidence of others based upon their demeanour. That was a great advantage for his Worship. To adopt the words of the majority of the High Court at p329 the evidence, upon the record itself, does not contain discrepancies, or display inadequacies, or is tainted or otherwise lacks probative force in such a way as to lead me to conclude that, even making full allowance for the advantages enjoyed by his Worship, there is a significant possibility that an innocent person has been convicted.

It was submitted that the findings were unsafe for two major reasons, firstly the reasonable possibility that the complainants, whilst truthful, were mistaken about the touching of the vaginal area, and secondly, the reasonable possibility that if such touching occurred it was not deliberate. It is necessary to deal with each point if only summarily. Although it would appear that, for these purposes, the appellant was accepting that S and J had been truthful, there was an inherent attack upon that proposition. His Worship's assessment of credibility was essential to his acceptance of their evidence. In addition, he noted that S had made a prompt complaint to her mother. In relation to J, it was noted that she had also made a prompt complaint to her mother, but she did not tell her mother that the appellant had touched her in the vaginal area, and in opening the prosecution counsel made no reference to such an allegation. It would thus have appeared to have emerged for the first time at the hearing. His Worship dealt with that at p237 "Taking into account her paralysed shyness when it came to describing that episode (touching on the vagina) it does not strike me as being at all suspicious that she did not mention that to her mother. Indeed, its an item that had to be dragged out of her in this Court with the greatest of difficulty and against her extreme modesty". Her evidence in that regard is set out above. It eventually led to her preparing the sketch. That was a credibility issue and his Worship found in her favour based upon her evidence in Court. The question of mistake about touching

in the vaginal area is sought to be supported by reiterating the following matters. The complainants were young children, the complaints were of a sexual nature, there was no independent corroboration of the offences, the exercises in which they were engaged was quick and the opportunity for contact was short, none of the complainants saw the appellant touch her in the vaginal area but relied upon a sense of touch, the exercise was scary and having the appellant as a teacher was a novelty, none of them had been touched by any teacher let alone a male teacher on the bottom before, they would have received instruction to protect themselves against possible sexual abuse, priming them to be suspicious of conduct of the type involved, the risk of contamination derived from the discussions between themselves after school and the possibility that they could have deliberately or subconsciously put their evidence together, physical difficulty in the appellant engaging in the alleged conduct, practical difficulty of witnesses seeing what they said they saw and the improbability of the offences being committed in the circumstances in which they were alleged to have occurred. Many of these prospective doubts were resolved by his Worship's findings as to credibility, for example, those going to the age of the children, the nature of the complaint, corroboration, going by the sense of touch rather than vision, possibilities of them having made up the stories, the risk of contamination and difficulties in seeing. The fact that the exercise was quick does not detract from the opportunity for the act to

have occurred. The fact that the exercise was demanding, the appellant was a male teacher and that none of the children had ever been touched by any teacher on the bottom before, do not either alone or taken together raise any distinct possibility in my mind that the girls were mistaken. That it may have been difficult for the appellant to do what he is alleged to have done does not raise a distinct possibility that he could not have done it. The improbability of the offences occurring in all the circumstances in which they are alleged to have taken place depends upon the factual situation at the time and there was no evidence that in fact there were members of the public, including parents of the children, in sufficient proximity to the place where the offences were alleged to have taken place to have given rise to the risk. The improbability was based upon supposition. Taken together these matters do not raise a distinct possibility of mistake.

As to the reasonable possibility that if the touching occurred, it was not deliberate, it was put that the exercise was quick and the opportunity of a contact of short duration, the complainants were young girls with small bottoms and the appellant had big hands with the possibility of overlap, the evidence that unintentional contact was possible, that at the relevant time each complainant would have been wriggling about, the evidence that the appellant was clumsy, and he might be more prone to laying on hands in a precautionary manner before anything could go seriously

wrong, the improbability, again, of the offence being committed in the circumstances in which they were alleged to have taken place and the appellant's good character. As to the time during which contact could take place and the improbability of the offence being committed no more needs to be said than the answer to the same propositions in support of the first argument. As to some other issues, they are resolved by his Worship's findings on credibility, such as the relevant size of the girls bottoms and the appellant's hands. Their evidence went to a contact by a hand on top of the vagina and not overlapping from underneath. That accidental contact could take place does not give rise to a distinct possibility that it did nor does the fact that the girls may have been wriggling about. As to the evidence from one of the defence witnesses that the appellant was clumsy, thus leading to the interference that he might accidentally do what was alleged, it is noted that in the video placed in evidence by the defendant he does not seem to be at all clumsy and he did not claim for himself that he was. It does not impress me to suggest that because a person is cautious, safety conscious, protective and interventionist, more prone to laying on hands in a precautionary manner, that raises the distinct possibility of accidental contact as here alleged. As to the appellant's good character and the effect it has bearing upon his credibility, his Worship has made his findings which favour the evidence of the girls. In so far as it goes to the likelihood that he committed the offence as charged, it does

not raise a distinct possibility that he did not. This was the first time upon which the appellant was assisting those female children in exercises of this type.

The verdicts were not unsafe or unsatisfactory. Upon the whole of the evidence it was open to his Worship to be satisfied beyond reasonable doubt that the accused was guilty.

The appeal is dismissed.