SGT v The Queen [1999] NTCCA 72

PARTIES:	SGT
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 13 of 1998
DELIVERED:	20 July 1999
HEARING DATES:	23, 24 and 25 March 1999
JUDGMENT OF:	MARTIN CJ, MILDREN AND RILEY JJ

CATCHWORDS:

APPEAL AND NEW TRIAL – PRACTICE AND PROCEDURE – COURT OF CRIMINAL APPEAL

Appeal against conviction – whether jury verdict unsafe and unsatisfactory – Appellate Court to make independent assessment of evidence – Court not to substitute own view of quality of evidence for that which the jury was entitled to take – uncorroborated evidence of prosecutrix – whether an inconsistent guilty verdict is unreasonable or unsafe – duplicitous indictment.

Criminal Code 1983 (NT), s 129(1), s 129(2), s 132(2)(a), s 132(2)(e), s 132(2)(f), s 192(2)(3), and s 411(1)

M v The Queen (1994) 181 CLR 487, applied
R v Apostilides (1984) 154 CLR 563, applied
Palmer v The Queen (1998) 193 CLR 1, considered
Hoessinger (1992) 622 A Crim R 146, considered
Johnson v Miller (1937) 59 CLR 467, applied
Walsh v Tattersall (1996) 188 CLR 77, considered

REPRESENTATION:

Counsel:

Appellant:	Mr R Kent QC
Respondent:	Mr R Wild QC, Ms J Blokland

Solicitors:

Appellant:	Murray J L Preston
Respondent:	Office of the Director of Public Prosecution

Judgment category classification:	B
Judgment ID Number:	mil99193
Number of pages:	59

IN THE COURT OF CRIMINAL
APPEAL OF THE NORTHERN TERRITORY
OF AUSTRALIA

SGT v The Queen [1999] NTCCA 72
No CA13 of 1998

BETWEEN:

SGT
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ, MILDREN AND RILEY JJ.

REASONS FOR JUDGMENT

(Delivered 20 July 1999)

MARTIN CJ:

[1] I disagree with the conclusions reached by the majority that the findings of guilt were unsafe and unsatisfactory. In arriving at that view, I am instructed by what was said by the majority in the decision of the High Court in *M v The Queen* (1994) 181 CLR 487 at p494, affirmed in *Jones v The Queen* (1989) 166 CLR 409 at p 451, as set out in the judgment of Mildren J.

[2] The jury had the advantage of seeing and hearing the evidence of the complainant and of the appellant. They arrived at their verdicts after a retirement of over 22 hours. The transcript shows they retired after

conclusion of the learned trial Judge's summing up at 3.43pm on 23 April, and finally retired on that day at 11.53pm. It is uncertain as to when they returned to their deliberations, but they were back in court at 9.28am the following day, and returned their verdict at 2.20pm. On my reckoning, they spent at least 13 hours together, including some periods in court, presumably for further directions or reading of transcript.

[3] Excepting count 7, where absence of consent was an element of the offence, they chose not to accept such of the evidence of the complainant as there was going to that issue. They accepted so much of her evidence as made out the elements necessary to justify the alternative guilty verdicts. In so doing, the jury must be taken to have rejected so much of the evidence of the appellant as amounted to denials going to the commission of all of the offences whether charged or open to alternative verdicts. The jury must have been taken to have come to the view, without reasonable doubt, that he did what she said he did. In my view there is a rational explanation for that.

[4] It was undoubtedly open to the jury to find that part of the complainant's evidence lacked credibility. The detailed reasons are given by their Honours. Her lies, inconsistencies, mistakes and embellishments were capable of casting reasonable doubt upon some of her evidence. They may have even led to some of the evidence being rejected. In addition, there was no evidence of a recent complaint and no independent support for any important part of her story.

[5] Notwithstanding all that, I consider that what has been largely overlooked is that she was an adolescent when the offending is said to have taken place, the appellant was her stepfather and her mother had married him after the allegations were raised. They were important relevant matters before the jury and in my opinion would rightly have weighed heavily upon them.

[6] As to the first count, the legal issue of consent does not arise. Her evidence was that at the relevant time she was in Alice Springs with the appellant staying alone with him in a motel room. He got into the shower with her and thereafter rubbed baby oil all over her body, telling her that it was to stop her from stressing out because of her involvement with the World Vision Summit Meeting she was about to attend. She was then but nearly 14 years of age. Other offences were said to have been committed over a period of about six months thereafter.

[7] Counts 3 and 4 related to the incident when the complainant was obliged to arrange her nightdress so as to expose her body and then to watch pornographic videos. Consent was not an issue, but she did not leave or attempt to leave the room when the appellant was absent. The jury could well have come to the view that either she was a willing participant in watching the material, or that she was so much under the influence of the appellant that she was not prepared to leave when the opportunity was available.

[8] Count 6 alleged sexual intercourse by anal penetration without the complainant's consent. The appellant was acquitted of that, but found guilty of attempted unlawful sexual intercourse with a child under the age of 16 years. The evidence as to penetration was unsatisfactory, and the jury rightly rejected it. They must also have had doubt about the absence of the complainant's consent to the appellant's act, or as to his criminal mental state.

[9] Upon the evidence it appears that it was after that event that the complainant sent the affectionate card to the appellant. It may well have been that that incident cast doubt in the minds of the members of the jury on the question of her consent to the attempted unlawful anal intercourse.

[10] The convictions on count 7 must be set aside for the reasons given by Riley J. However, leaving that aside, it is of some importance to look at the outcome of the jury's deliberations. The appellant and the complainant were alone at Docker River. It was open to the jury to find that the appellant had by that time received the card and that he could well have been encouraged to proceed further with his unlawful conduct with the complainant. The jury may well have been of the view that he realised by that time that his stepdaughter was amenable to his venereal approaches or at least would not strongly resist. It must be taken that the majority of the members of the jury were satisfied that the complainant did not consent to the acts alleged. In my view there was nothing inconsistent in the jury coming to that view, notwithstanding the verdicts of not guilty in respect of the charges on the

indictment earlier dealt with. It was too much to expect that she would willingly accept penile penetration.

[11] For the reasons given by the majority, it was well open to the jury to have reasonable doubt about the question of the complainant's consent to the acts of fellatio and cunnilingus.

[12] In my view it would be unlikely that a girl of that age, in the circumstances in which she was placed, would have been willing to publicly admit that she had freely engaged in sexual activity of the kind alleged or that she had not made her lack of consent sufficiently clear to have impressed itself upon the appellant. The verdicts in respect of those offences where absence of consent was an element do not mean that the jury has positively found that she was a willing participant, but that they were not satisfied that the evidence sufficiently made out that element of the offence.

[13] It does not follow that because such of the evidence of the complainant as there may have been on the issue of consent was not accepted beyond reasonable doubt, the evidence going to the other elements of the offences of which the appellant was found guilty, must also be doubted or rejected. With respect, I do not agree with Mildren J. that because the jury had a doubt about part of the complainant's account, then they ought to have entered a verdict of not guilty. The facts and the outcome of the charges under consideration in *Jones v The Queen* are distinguishable. There, it was the view of the majority in the High Court that upon the evidence in that

case it was not open to the jury to be satisfied beyond reasonable doubt of the guilt of the accused on two counts where he had been found not guilty of another. It is contrary to common sense that in all cases the evidence of a complainant must be wholly accepted or else wholly rejected.

[14] As to the delay in complaining, her Honour instructed the jury in accordance with the law contained in s 5(5) of the *Sexual Offences (Evidence and Procedure) Amendment Act* by warning that delay in complaining did not necessarily indicate that the allegations were false and informing them that there may be good reasons why a victim of sexual offences may hesitate in complaining. As for delay, on the part of a young complainant in bringing to notice complaints of sexual misconduct, see the references given by Kirby J. in *Jones v The Queen* at p463. Furthermore, in the view of the majority at p 453: "… Recent complaint or its absence is a factor which is ordinarily of limited assistance". It must be remembered that the victim was a girl of the age of about 14 years, who was under the influence of her stepfather.

[15] There was no independent support for her evidence, but her Honour gave the jury a strong direction and warning as to accepting the evidence of the complainant in the circumstances of the case. It cannot be suggested that her Honour failed to alert the members of the jury to the dangers of convicting based upon the unsupported evidence of the complainant, and nor should it be considered that the jury would disregard such a warning.

[16] With respect, I agree with the observations of Kirby J. in *Jones v The Queen* at p 465:

> "To adopt a position that a case which comes down to "word against word" is necessarily, and without more, unsafe would be to contradict both common experience and the reforms which the legislatures in this country and elsewhere have adopted in recent years. It is of the nature of many crimes, most sexual crimes and virtually all sexual crimes against children that they are committed in a way designed to escape detection and the prying eyes of potential corroborating witnesses. Offenders take pains to cover their tracks and to avoid detection. The absence of corroboration was therefore not unique. It was not fatal to the prosecution's case."

[17] In the circumstances it is not necessary for me to go into the other grounds of appeal, except in relation to the conviction on count 7. I consider it ought to be quashed. I have made full allowance for the advantages enjoyed by the jury and in my view there is no significant possibility that an innocent person has been convicted on the other counts upon the grounds that they were unsafe and unsatisfactory.

MILDREN J*:*

Introduction

[18] The appellant was charged with the following offences:

Count 1:	Gross indecency upon RMP, a female under 14 years of age (*Criminal Code*, s129(1) & (2)).
Counts 2 and 3:	Indecently dealing with RMP, a female under 16 years of age (*Criminal Code*, s132(2)(a)).
Count 4:	Exposing RMP, a child under 16 years, to indecent videotapes (*Criminal Code*, s132(2)(e)).
Count 5:	Taking indecent visual images of RMP, a child under 16 years (*Criminal Code* s132(2)(f)).

Count 6: Having sexual intercourse, namely anal penetration, with RMP without her consent (*Criminal Code*, s192(3)).

Count 7: Having sexual intercourse, namely anal and vaginal intercourse, with RMP without her consent (*Criminal Code* s192(3)).

Count 8: Having sexual intercourse, namely fellatio, with RMP without her consent (*Criminal Code*, s192(3)).

Count 9: Taking an indecent image of RMP, a child under the age of 16 years (*Criminal Code*, s132(2)(f)).

Count 10: Having sexual intercourse, namely cunnilingus, with RMP without her consent (*Criminal Code*, s192(3)).

Three alternative counts not on the indictment were left to the jury by the learned trial judge in respect of counts 6 and 7, one alternative was left in relation to count 8, and five alternative counts were left in relation to count 10.

[19] Counts 1 and 2 were alleged to have occurred in Alice Springs between 1st and 31st March 1995. The remaining counts were alleged to have occurred at Docker River, a remote township near the border of Western Australia, due west of Alice Springs, between various dates extending from March 1995 to August 1995.

[20] The appellant was convicted as follows:

Count 1: Guilty.

Count 2: This was an alternative to count 1 and no verdict was required.

Count 3: Guilty.

Count 4: Guilty.

Count 5: There was a directed verdict of not guilty on this count.

Count 6: The appellant was found not guilty of this count, not guilty of attempted sexual intercourse without consent, not guilty of sexual intercourse with a child under 16 years of age, but guilty of attempted anal penetration of a child under the age of 16 years.

Count 7: Guilty (by a majority verdict).

Count 8: Not guilty, but guilty of the alternative count of having sexual intercourse with a female under the age of 16 years.

Count 9: There was a directed verdict of not guilty on this count.

Count 10: The appellant was found not guilty of this count, but guilty of having cunnilingus with a female under the age of 16 years.

[21] The appellant received individual sentences, which resulted in a total head sentence of ten years' imprisonment. A non-parole period of six years was fixed.

[22] The appellant has sought leave to appeal on a number of grounds. On 8 October 1998 Bailey J granted leave to appeal on grounds 9 & 10 (which were different ways of expressing the "unsafe and unsatisfactory" ground, and held (correctly) that ground 7 did not require leave. That ground complained that the count on the indictment and the subsequent conviction in respect of Count 7 was bad for duplicity. His Honour concluded that the other grounds ought to be dealt with at the hearing of the substantive appeal.

It does not appear that the appellant ever filed a notice of appeal in relation to ground 7. No notice of appeal was required for any of the other grounds (see O.86.14); however, a separate notice of appeal was strictly required for ground 7. No point was taken at the hearing in relation to that matter, and in view of the ultimate result of this appeal, that matter can be overlooked.

[23] The principal ground of appeal is that the verdicts of guilty are unsafe and unsatisfactory. Most of the other individual grounds argued were urged in support of this ground, which, in my opinion, has been made out. Accordingly, I do not intend to dwell on these other grounds at any length, but will refer to them briefly, later, in these reasons.

The Background Facts

[24] The accused is the prosecutrix's stepfather. At the time of trial the prosecutrix was sixteen years of age. The matters of which she complains occurred when she was fourteen years of age. Her mother, DMP, met the appellant when the prosecutrix was about six years of age. She has a younger brother James, who was fourteen years of age at the time of trial. Initially the family lived in New South Wales. The appellant is a mechanic by trade. In 1992, the family moved to Docker River where the appellant was employed by the Community Council as an essential services officer. The family was supplied with a house. From 1992 to 1995 the prosecutrix attended school through School of the Air and a correspondence school, apart from one year (1993) when she attended a boarding school in Alice

Springs. In 1995, the family decided to move to Alice Springs in order to advance James' schooling. The prosecutrix did not want to leave Docker River, as she had established friendships there, despite close restrictions placed upon her by the appellant and her mother, which were designed to preclude her from associating with those friends. The family lived in Docker River until the middle of 1995, when the prosecutrix, her mother and her brother moved to Alice Springs. The appellant remained in Docker River, intending to join the rest of the family as soon as circumstances permitted. He was still in Docker River up to early September 1995.

Count 1

[25] In March 1995, whilst the appellant's family were still living in Docker River, the prosecutrix and the appellant drove to Alice Springs in connection with a fundraiser known as the "40-Hour Famine", with which the prosecutrix became involved, and in order to collect a tutor, Ena, who was to return to Docker River with them. A room was booked at the Alice Springs Tourist Apartments on Gap Road. Before leaving so to return, Ena spent part of one day and one evening with the appellant and the prosecutrix in the room. The prosecutrix's evidence was that on the day prior to Ena's arrival, the appellant sent her to a nearby shop to purchase some baby oil. Subsequently, when she was having a shower, the appellant got into the shower with her. She said to him that she can shower by herself and got out of the shower. The appellant also got out and attempted to dry her off. She said to him, "Look, I can dry myself. And I don't need you to dry me". The

appellant ignored this. After that he took the prosecutrix and lay her on a single bed in the room, and massaged the baby oil over "every single part of my body apart from my face and where my hair covers my head". This took half an hour. Nothing was said until he finished when he told her to go to bed. The next night, after Ena arrived, her evidence was that Ena slept in the single bed and the appellant slept in the double bed. She was to sleep on the floor, but the appellant insisted that she get into the double bed with him. She claims to have got into and out of the bed on three occasions, preferring to sleep on the floor, but when he woke up the appellant would insist that she sleep with him. These events, particularly the episode with the baby oil, form the subject of count 1. No complaint was made to anyone concerning that episode, and all three returned to Docker River the next morning.

Counts 3 and 4

[26] The prosecutrix's evidence was that about a month later, in April 1995, she was at home one evening watching the television in the living room. Her mother had gone to Alice Springs on a shopping trip and her brother was in bed. The appellant came into the room and said that he wanted to show her something. He took her into his bedroom. She was wearing a blue flannelette shirt which buttoned up at the front. He told her that her mother used to watch pornographic movies, laying naked on the bed, that he wanted to know if this was normal behaviour for a woman, and that he wanted her to watch such a movie and tell him what she thought. In the room facing the

bed was a TV set and video machine. On top of the TV was a video camera, which she later noticed had no lens cap on.

She was told to lie down on the bed. The appellant undid the buttons on her nightshirt and the shirt was pulled away so that apart from her arms, she was naked. He forced open her legs, and switched the video on. As she watched the videos, which she described, the appellant left the room, but returned from time to time to fast-forward or rewind so that she would see scenes he particularly wanted to watch. Her evidence was to the effect that she did not want to watch the films or expose herself to him, that when he left the room she would cover herself again, but when he re-entered he put her shirt down and forced her legs open on more than one occasion. She said she watched the films for about half an hour to an hour. She said that she was disgusted by what she saw, that she was crying and told the appellant she did not want to watch them, and was then told to go to bed, which she did. Subsequently, police located two videos matching the description given by the prosecutrix in the appellant's home which were tendered in evidence. The accused, who gave evidence, admitted that the films were owned by his wife or himself, but denied the episode entirely.

Count 6

[27] The substance of the prosecutrix's case was that in early June 1995, one night whilst asleep in bed at her home in Docker River, she was awakened from her sleep by the appellant rubbing his penis up and down her back, and

then on her bottom. He tried to have anal sex with her. She told him to leave her alone, which he ultimately did. At the time, her mother was in Alice Springs on a shopping trip and her brother was asleep in his own bedroom.

Count 7

[28] In June or July 1995, the prosecutrix and her mother and brother moved to Alice Springs. The prosecutrix there attended a local high school, and her brother also attended school there. The appellant remained in Docker River. The prosecutrix's evidence was that, at a time unspecified in her evidence-in-chief, she returned to Docker River in order to assist the appellant, who had an injured hand, with his work. She said that she remained in Docker River alone with the appellant for about a week. She said that one night, she was awoken in her sleep by the appellant trying to have anal sex with her, but that this time he entered her anus. She screamed, cried out and told him to leave her alone, and eventually he left the room. She then rolled over and found a wet condom on her bed. The appellant later returned, collected the condom and left the room again. Subsequently, he came back into her room and tried to have vaginal intercourse with her. She said that she kept pushing him off and telling him to go away and he kept saying that he would never hurt her and would be gone soon. Eventually he left the room. No evidence was led in examination-in-chief to the effect that his penis entered her vagina, but the prosecutrix alleged partial vaginal penetration in cross-examination (cf. AB90-91; AB223).

Count 8

[29] The prosecutrix's account was that during this period of a week whilst at Docker River, she had a cold and asked the appellant for a drink. What she thought to be water turned out to be rum. She told the appellant that she didn't want it, but he made her consume it, together with two further glasses of rum. Her next recollection is a flash from a camera, and she was in the appellant's bedroom performing oral sex on the appellant. He ejaculated into her mouth. She spat it out, went to wash her mouth out and then went to her room. Later in cross-examination she said that the rum was "normal red Bundaberg Rum". The next day she claimed in cross-examination to have been sick from the alcohol and medicine taken the previous day and gave a story of having fallen out of a car, which she was driving at the time (AB 208-213).

Count 10

[30] This related to another incident which occurred towards the end of the same week whilst staying alone with the appellant at Docker River. The prosecutrix claimed that she awoke from her sleep to find the appellant between her legs giving her oral sex. She kicked at him, hurting his shoulder and back. He offered to return a photograph he had previously taken from her if she gave him oral sex. She refused. This episode took some twenty minutes. After he left, she cried herself to sleep.

Subsequent Events

[31] At the end of the week, the prosecutrix returned to Alice Springs, having been driven there by a Mr and Mrs Hill who ran the Aged Care Centre in Docker River. Subsequently, on 1 September 1995, the prosecutrix returned home from school late. According to her evidence-in-chief, she was upset when she arrived home, her mother asked why, and she said, "Have a guess. Can't you see what's happening?" The appellant at this time was still in Docker River. This led to a chain of events resulting in the prosecutrix being interviewed by the police.

The Appropriate Test

[32] The considerations for determining whether a verdict is unsafe or unsatisfactory were stated by the majority of the High Court in *M v The Queen* (1994) 181 CLR 487 at 492-494. They may be summarised as follows:

1. Provisions such as s.411(1) of the *Criminal Code* allow a verdict to be set aside as unsafe and unsatisfactory notwithstanding that those words do not appear in the legislation.

2. The question is one of fact, which the appeal court must decide by making its own independent assessment of the evidence.

3. The question is whether, notwithstanding that there is evidence upon which a jury might convict, nonetheless it would be dangerous in all

the circumstances to allow the verdicts of guilt to stand. The court must ask itself whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

4. In answering the questions posed in paragraph 3 the court must not disregard or discount either the fact that the jury is the body entrusted with primary responsibility for determining guilt or innocence, or the consideration that the jury has had the benefit of having seen or heard the witnesses.

[33] These principles were restated and re-affirmed by a majority of Justices in *Jones v The Queen* (1997) 191 CLR 439 at 450-452.

[34] Of particular significance is the passage in *M v The Queen*, at p.494, adopted by the majority in *Jones v The Queen* at 451:

> In most cases a doubt experienced by an appellate court will be doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. *If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon the evidence.* (emphasis added).

Mr Kent Q.C. on behalf of the appellant put his case in a number of ways, but the most powerful of his submissions rested upon the words in the passage which I have italicised.

The Appellant's Case on Appeal

[35] Mr Kent Q.C.'s submissions fall into three broad classifications. First, he relied on a number of matters relating to the conduct of the trial which were argued as separate grounds of appeal, but which he said also supported the conclusion that the verdicts were unsafe and unsatisfactory. Secondly, he relied upon the verdicts themselves as demonstrating that the jury ought to have had a reasonable doubt. Thirdly, he relied upon a number of specific matters in support of the proposition that the evidence contained discrepancies, displayed inadequacies, was tainted and lacked probative force.

[36] As to matters of the first kind, Mr Kent Q.C. submitted as follows. First, it was put that the prosecutor in his opening told the jury that the prosecutrix had been taken to the police station on 1 September 1995, that she had made a number of statements to the police, that since then she had lived in various welfare foster households and institutions, but that her mother, brother and the appellant have maintained the family unit, and that they, some two years and five months later, lived as a family at Haast's Bluff. I do not consider that there was any prejudice to the appellant in relation to the fact that the prosecutor told the jury that the appellant had made a number of statements

to the police. It must have been obvious to the jury that the complainant would have spoken to the police, probably on more than one occasion, given the number of charges the appellant faced. It was not suggested that these statements amounted to recent complaint. However, the other matters opened by the prosecutor were irrelevant, inadmissible and prejudicial. It was not inevitable that the jury would learn that the prosecutrix had left the family. Such matters were likely to cause sympathy for the prosecutrix and prejudice against the accused, and offer the explanation, by way of inference, that the prosecutor chose not to call the prosecutrix's mother and brother as witnesses for the Crown as they were in the accused's camp, a view which may not have been justified. Evidence to this general effect was later permitted to be led by the prosecutor over objection from counsel for the accused. Although it did not cover all of the detail of the matters opened by the prosecutor, it served to remind the jury of the matters opened by the prosecutor. There was no proper basis for the admission of this evidence, limited though it may have been, in any event. These matters were compounded by the failure of the Crown to call the mother and brother, whom the prosecutor had told the jury panel would be called to give evidence. The Director of Public Prosecutions, Mr Wild Q.C., submitted that the reading of the witness list does not bind the Crown to call all of those witnesses, and that the prosecutor's decision not to call these witnesses was justified. Whether that be so or not, unless the accused made some point to the jury that they were not called, the jury ought not to have

been left with the impression that they were not called because they were, in the prosecutor's opinion, unreliable witnesses. This became particularly important as the prosecutrix asserted in evidence that lack of support was due to their unreliability.

[37] Moreover, I do not consider that the prosecutor advanced adequate reasons for his refusal either to call the prosecutrix's mother, or at least to make her available for cross-examination. The explanation the prosecutor gave to the learned trial judge (AB 252-257) was, in substance, that following a ruling by the trial judge she was no longer a material witness, but, in any event, as she had married the appellant subsequently, she was in the accused's camp and partisan to the accused. The prosecutor went on to say that

> *she contradicts the Crown* case and we would say that *in our system adversarial that it would confuse the jury if I was to bring in as a witness someone who will undermine on the peripheral aspects the credibility of the prosecutrix upon which the Crown rests its case.* Now she doesn't have any material evidence, it would appear on Your Honour's ruling, and therefore we've decided not to call her. Physically of course she's here. The DPP flew her in and she's in Alice Springs and *the defence can, if they want, call her as a witness. There's nothing that they would seek from her evidence, I would anticipate, that can't be elicited from her if they call her as a witness*. (emphasis added).

[38] The passages italicised do not suggest to me that the witness's evidence is wholly inadmissible and irrelevant, as otherwise, why suggest that the defence can call her, and can elicit from her what they want; nor does it suggest that any proper basis existed for deciding that the witness was unreliable or untruthful. In *The Queen v Apostilides* (1984) 154 CLR 563 at 576, it was said (per Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ):

> A decision whether or not to call a person whose name appears on the indictment and from whom the defence wish to lead evidence must be made with due sensitivity to the dictates of fairness towards an accused person. A refusal to call the witness will be justified only by reference to the overriding interests of justice. Such occasions are likely to be rare. The unreliability of the evidence will only suffice where there are identifiable circumstances which clearly establish it; it will not be enough that the prosecutor merely has a suspicion about the unreliability of the evidence. In most cases where a prosecutor does not wish to lead evidence from a person named on the indictment but the defence wishes that person to be called, it will be sufficient for the prosecutor simply to call the person so that he may be cross-examined by the defence and then, if necessary, be re-examined.

[39] The failure by the prosecutor to call a witness so that the witness may be cross-examined may, in itself, amount to a substantial miscarriage of justice, even if the defence decides to call that witness: see *Apostilides, supra*, at 578. In this case, the witness was not called by counsel for the appellant, but it is significant and troubling that the prosecutor conceded that her evidence would contradict the Crown case, and undermine the credibility of the prosecutrix. Moreover, the decision not to call the mother or the brother was apparently not made known to Mr Kent Q.C. until after he had completed his cross-examination of the prosecutrix, and he had deliberately chosen, for tactical reasons, not to cross-examine the prosecutrix on certain areas which he expected to be able to elicit from these other witnesses. This necessitated the prosecutrix being recalled for further (and lengthy) cross-examination, although the jury was told why this had occurred (AB 349). Mr Kent Q.C. submitted that he was prejudiced by this change of course. Notwithstanding that the witness, DMP, was made available to the appellant and the decision was made not to call her, I consider that in the light of the

prosecutor's concessions, the failure to make the witness available for cross-examination probably did prejudice the appellant's case. I do not consider that the recalling of the prosecutrix, by itself, prejudiced the appellant's case, but it is understandable that counsel for the accused, in a case such as this, would not wish to embark upon a lengthy cross-examination of the prosecutrix if this could be avoided.

[40] The next matter to be considered is the nature of the verdicts reached, which are said to illustrate that the jury ought to have had a reasonable doubt about all of the charges the accused faced. It is necessary, in discussing this issue, to bear in mind the following matters. First, there was no evidence led by the Crown amounting to recent complaint. Secondly, the Crown case depended entirely on the evidence of the prosecutrix, whose credibility was essential to a successful prosecution. Thirdly, there was no evidence led amounting to corroboration of the prosecutrix's account. Fourthly, the learned trial judge saw fit to give a corroboration warning to the jury, (notwithstanding s.4(5)(a) of the *Sexual Offences (Evidence & Procedure) Act*), presumably in accordance with the principles discussed in *Longman v The Queen* (1989) 168 CLR 79 to which her Honour was referred by counsel. No complaint was made to her Honour or to this court about that direction, or the need for it in the circumstances of this case. Fifthly, the Crown led no medical evidence. Finally, the appellant gave a record of interview with the police, which was videotaped and played to the jury, in which he denied all of the allegations, and in addition, he gave evidence on

oath to the same effect, and to which he adhered in cross-examination. I will return to this matter again later.

[41] It is apparent from the verdict in relation to count 6 that the jury did not accept that there was any penetration of the anus. That is not surprising, given that the prosecutrix never gave any evidence of that. She did, however, allege non-consensual attempted penetration of the anus. The jury's verdict means that they were satisfied beyond reasonable doubt that the appellant attempted to penetrate her anus, but were not satisfied either that the appellant intended to penetrate the prosecutrix without her consent or that the prosecutrix did not consent. This was not a case where the question of consent or a mistaken belief as to consent might have been open or that the question of intent was in issue. These questions were not in issue because the appellant denied the allegations in their entirety. It is therefore difficult to see how, if the prosecutrix's account is to be believed, and she was asleep at the time, the appellant could have lacked the requisite intent or the prosecutrix could have consented. It is difficult to see how this verdict could have been arrived at. Obviously the jury did not accept the prosecutrix's evidence on this count in its entirety, but if there was a reasonable doubt about any part of her account, the jury ought to have entered a verdict of not guilty: cf. *Jones v The Queen, supra*, esp. at p 453.

[42] The verdict in relation to count 8 is also difficult to understand. The prosecutrix's account was to the effect that she was induced by the appellant to drink a quantity of rum such that she performed fellatio on the appellant

without knowing what she was doing. The verdict meant that either the jury was not satisfied that the appellant intended to have her fellate him without her consent, or that she in fact consented. It is difficult to see how this verdict could have been arrived at, for the same reasons as are discussed in relation to count 6. The prosecutrix's account is inherently improbable, but in addition, she gave evidence, inconsistent with what she had told the police, that the next day she felt ill, and went so far as to suggest that this caused her to fall out a car whilst driving it – an even more improbable event. In my opinion this verdict is unreasonable, and the jury ought to have a reasonable doubt about the alternative counts.

[43] The verdict in relation to count 10 is in the same position as count 8. If the prosecutrix was asleep, as she claimed, how could she have consented to cunnilingus being performed on her? If the whole of the prosecutrix's account was not to be accepted, the jury ought to have entertained a reasonable doubt about the alternative counts and entered a verdict of not guilty.

[44] Moreover, once the position is reached that the prosecutrix's account on counts 6, 8 and 10 is unreliable, there is no basis for distinguishing those counts from any of the others, as there is nothing in the complainant's evidence or the surrounding circumstances which gives any ground for supposing that her evidence was more reliable in relation to the remaining counts. Indeed there was much to suggest that her credibility as a witness was so severely shaken on other issues as well that the jury ought to have

had a reasonable doubt about all of the charges. First, there was evidence that, whilst in Alice Springs after the initial alleged offences occurred and before she returned to Docker River where the last series of alleged offences occurred, she sent a postcard to the appellant in endearing terms. The prosecutrix admitted that the handwriting on the card was hers, but claimed to have no memory of it or the contents of it or of even posting it (AB 361-367). Be that as it may, what was written on the card was not consistent with her complaints in relation to counts 1 to 6, and she denied the truth of some of the matters which she had herself written. Secondly, the prosecutrix gave an account in cross-examination, for the first time, of having an Aboriginal female friend, called DC, whom she claimed had given birth to a child fathered by DC's white stepfather; that DC had been left without family support and was looking after the baby that looked like DC's father, and that DC's story had shown her what she did not want to be. The evidence concerning this (AB 229) is a non-responsive answer to a question put by the cross-examiner (a not infrequent occurrence) and it is not entirely clear, initially, what point the prosecutrix was trying to make – as to whether, for instance, this story motivated her to bring the matter to her mother's attention, or whether it was the reason for not complaining earlier. Attempts by the prosecutor to elucidate that issue resulted in more non-responsive answers (AB 231). Subsequently, the prosecutrix was further cross-examined, and agreed that it was one of the reasons she had had for complaining to her mother when she did (AB 394). Her account then was

that the child had not been born at that stage, but that she had seen the child at a later time. She denied having seen DC recently (it was put that she last saw her only the previous Friday) (AB 395-397). It was put to her that this story was a lie, "that DC had never had a child"; this was denied (AB 398). She later conceded, when confronted with evidence she gave at the committal, that she had no recollection of DC's story being told to her before 1 September 1995 (AB 400-402). DC gave evidence on behalf of the appellant that she had never been pregnant, had never told the complainant that she was pregnant or had been sexually abused by her stepfather, that her stepfather had not lived with her since she was young, and that she had never been sexually interfered with by anybody. She did not depart from this evidence in cross-examination. There is no basis upon which the jury could have discounted this evidence, particularly in the light of the eventual concession that the prosecutrix was probably not aware of the allegations made by DC before 1 September 1995. There was also an admitted lie told to the police by the prosecutrix about a peripheral matter because

> I didn't want to risk getting myself in trouble or mucking up my case just because of an accident that happened with Lee Cooper that wasn't all that serious. (AB 230)

There was also the troubling fact that during the initial account given by the prosecutrix to the police in relation to counts 3 and 4, she described and identified a particular nightdress as the one she had worn on this occasion which could not have been undone to expose her body in the manner she described. She later changed her evidence as to which nightdress she had

been wearing, claiming that her original statement to the police was mistaken.

[45] On the other hand, an innocent man could have done no more than he did, in co-operating with the police, by agreeing to participate in a record of interview, and by giving evidence on oath at the trial. Clearly, the jury disbelieved the appellant's evidence and accepted, at least in part, the prosecutrix's evidence, and did so having seen and heard both. But even making full allowance for the advantages which the jury had in seeing and hearing the witnesses, and the fact that it is the jury which is normally entrusted with deciding questions of guilt or otherwise, the matters which cast doubt upon the convictions, the prosecution case, and the fairness of the trial, remain. It is not relevant to speculate what motive, if any, the prosecutrix may have had for giving a false account. As was pointed out in *Palmer v The Queen* (1998) 193 CLR 1, the prosecutrix's account can gain no legitimate credibility even if the appellant could not offer any motive for her to lie. In any event, the question for this court is not whether the prosecutrix has lied, but whether the convictions are unsafe and unsatisfactory having regard to the tests laid down in *M v The Queen*. For the reasons expressed above, including the absence of corroboration, I consider that the verdicts of guilty are unsafe and unsatisfactory. The appeal should be allowed, the convictions quashed and verdicts of not guilty entered in their place. It is unnecessary to consider the other grounds of

appeal and, in particular, whether the conviction on count 7 was bad for duplicity.

RILEY J:

[46] The appellant was convicted of seven offences relating to his step-daughter who was, at relevant times, a child under the age of 14 years and a child under the age of 16 years. On 4 June 1998 he was sentenced to a total effective period of imprisonment of 10 years, with a direction that he not be eligible to be released on parole for a period of six years. The appellant appeals against his convictions and the sentences imposed.

[47] At the relevant time the appellant lived in a de facto relationship with the mother of the complainant. They have subsequently married. The family unit consisted of the appellant, the complainant's mother, the complainant and her younger brother. At the time of the offences the family had been together for some years and in approximately 1992 had moved to Docker River, a remote community in the Northern Territory. They remained there until the end of 1995 and, during that period, the appellant was employed as an essential services officer in the community.

[48] The first of the offences of which the appellant was found guilty was an act of gross indecency which was alleged to have occurred in March 1995 when the complainant was almost 14 years of age. She gave evidence that she was in Alice Springs with the appellant staying at some tourist apartments when, after she had showered, the appellant rubbed baby oil "all over the front of

my body while I was laying on my back. Then I was rolled onto my front. And while I was laying on my front it was rubbed all over the back".

[49] Each of the other offences is alleged to have occurred at Docker River in the house occupied by the family.

[50] The appellant in counts 3 (indecent dealing) and 4 (exposing a child to an indecent video tape) is alleged to have made the complainant enter the appellant's bedroom and watch pornographic video tapes. She alleged that her legs were opened by the appellant so as to expose her vagina. A verdict of not guilty was entered by direction in relation to a charge that he took, by means of a video camera, indecent visual images of the complainant.

[51] In relation to count 6 the appellant was charged with having performed sexual intercourse, namely anal penetration, with the complainant without her consent. He was acquitted of rape and attempted rape, but was convicted of attempted unlawful intercourse on this count. The evidence of the complainant was as follows:

> "I was in bed asleep and I woke up to Steve behind me rubbing his penis up and down my back and then on my bottom, and then he tried to have anal sex with me and I was trying to push him off … I was telling him to leave me alone, and I was upset. Eventually he did leave me alone."

[52] In relation count 7 the appellant was found guilty by majority verdict of having had sexual intercourse "namely anal or vaginal intercourse" with the

complainant without her consent. In relation to that occasion the evidence of the complainant was as follows:

> "I remember waking up to much the same circumstances as the first time, and Steve was behind me again. He tried to have anal sex with me again and this time he got further than what he got last time. I was screaming and crying and telling him to leave me alone and he kept saying that he wasn't going to hurt me and he'd never hurt me and he'd be gone in a minute and it was just – you know, it was going to be over in a minute. I eventually got him away from me and I rolled over. Steve left the room, I rolled over and there was a wet condom. I don't know if it was used or what, but it was wet. Then Steve came back in the room. He got that and then he left the room. He came back in again and then he tried to have sex with me – vaginal sex with me, and I just kept pushing him off and telling him to go away and he just kept saying to me, 'I would never hurt you. I will be gone soon'. Eventually he left."

[53] In cross-examination the evidence of the complainant in relation to these matters was as follows:

> "And he didn't have sex with you?---I don't know. What does the Court say? I mean, I think he did but - - -
>
> But you're not sure?---Well, not that I'm not sure. I mean what qualifies as sex?
>
> Well, you tell us what happened?---Well, he penetrated my bottom and then when I got off him and got rid of him, he came back and – not long after and tried for vaginal sex as well.
>
> He tried for but did not have vaginal sex?---Well, he did – he – I mean, his penis did go in but not all the way. So I mean is that still sex? I don't know."

[54] Count 8 was an allegation that the appellant had sexual intercourse, namely fellatio, with the complainant without her consent. She gave evidence that she had asked the appellant for a glass of water and he returned with rum. He made her drink two or three glasses of rum. She then said "I don't

remember anything from after that until I see a flash from a camera and I'm in Steve's bedroom on Steve's bed and giving him oral sex." The jury found the appellant not guilty on this count but guilty of the alternative count of having sexual intercourse with a female under the age of 16 years (s129(1)(a)) which did not require proof of the absence of consent. A verdict of not guilty was entered by direction to a charge relating to the alleged taking of that photograph.

[55] The final count upon which the appellant was convicted, count 10, alleged that he had sexual intercourse, namely cunnilingus, with the complainant without her consent. She gave evidence that she had been asleep and woke up to find the appellant performing cunnilingus on her. She said she kicked him and hurt "his shoulder or his back or something". Again the jury found the appellant not guilty on this count but guilty of the alternative count of having sexual intercourse with a female under the age of 16 years (s129(1)(a)) which did not require proof of the absence of consent.

[56] In relation to the appeals against conviction the appellant raised numerous complaints relating to the conduct of the trial by the learned Crown prosecutor, complaints regarding findings on individual counts and, in addition, submitted that the credibility of the complainant was so substantially affected that a jury acting reasonably ought to have entertained a reasonable doubt as to the guilt of the appellant. The attack on the credibility of the complainant was based upon a number of identified matters. However the main thrust of the appeal was that a combination of

all of the matters complained of led to a conclusion that the verdict of the jury was unsafe and unsatisfactory and resulted in a miscarriage of justice.

[57] On 8 October 1998 Bailey J granted leave to appeal on grounds 9 and 10 and correctly held that ground 7 did not require leave. His Honour concluded that the other grounds ought to be dealt with at the hearing of the substantive appeal. In the circumstances addressed below I would grant leave to appeal in respect of the remaining grounds.

Ground 7

[58] It will be convenient to deal with count 7 on the indictment separately. The appellant complains that count 7 was bad for duplicity. There is some confusion surrounding the count and how it was put to the jury. Originally it read:

> "Between 1 August 1995 and 31 August 1995 at Docker River in the Northern Territory of Australia had sexual intercourse, namely anal and vaginal intercourse, with (the complainant) without her consent."

[59] The aide memoire which went to the jury used the expression "anal *or* vaginal intercourse".

[60] At the time of sentencing there was discussion between her Honour and counsel for the parties in which it was suggested that the indictment was not amended but that the matter was left to the jury on the basis that they had to be satisfied that either anal or vaginal sexual intercourse occurred and not that both occurred.

[61] When the jury returned and was asked to deliver its verdict the foreman indicated that the jury was not unanimously agreed but that 10 or more members were agreed to enable the delivery of a majority verdict. The count was put to the jury in the form of an allegation of sexual intercourse being "anal *or* vaginal intercourse". The majority verdict was guilty.

[62] At the end of the day the appellant and the Court could not know whether the jury had returned a verdict of guilty of having anal sexual intercourse, vaginal sexual intercourse or both anal and vaginal sexual intercourse with the complainant without her consent.

[63] The problem is exacerbated by the fact that there was, in relation to this count, a majority verdict. This means that it is possible that a minority of the members of the jury found there was sexual intercourse being anal intercourse, and a minority found that there was sexual intercourse being vaginal intercourse, combining to give a majority verdict of guilty of "anal or vaginal intercourse".

[64] As was observed by Dawson and Toohey JJ in *Walsh v Tattersall* (1996) 188 CLR 77 at 84 in relation to the proscription against duplicity:

> "The rule has been described as one of elementary fairness, to enable the defendant to know what it is of which he has been charged or found guilty so that he has the opportunity of making a no case submission or a sensible plea in mitigation."

[65] In *Lapthorne v The Queen* (1990) WAR 207 the Court of Criminal Appeal in Western Australia considered a similar problem to that which arises here. In

that case the appellant was convicted of one count of unlawful carnal knowledge of a girl under the age of 13 years. There was evidence of two acts of sexual intercourse within a short space of time. Malcolm CJ said (211):

> "In the present case it remained uncertain throughout which was the act of intercourse relied upon as constituting the offence charged in the indictment or any alternative offence. It is possible, for example, that some members of the jury were convinced there was penetration in relation to the first act and the remaining members of the jury were not, but those remaining members of the jury were convinced that there was penetration in relation to the second act. Had there been two counts of unlawful carnal knowledge the position would then have been that the jury was unable to agree and the appellant would have been discharged. … In my view, these considerations, both those which apply generally and those which apply to the particular facts in this case, provide compelling reasons why the prosecution should have been required to identify the act of intercourse on which it relied."

[66] In *Trotter* (1982) 7 A Crim R 8 it was held that a jury should not be invited to reach a verdict in relation to a single count of indecent assault on the basis of evidence of two separate and distinct assaults.

[67] The Court of Criminal Appeal considered the issue of duplicity in *Hoessinger* (1992) 62 A Crim R 146 where Gallop J said at 149:

> "Where an offence is charged in the alternative there is duplicity (*Cotterill v Lempriere* (1890) 24 QBD 634). It is a fundamental rule that the conviction itself shall be free of duplicity: *Iannella v French* (1968) 119 CLR 84; *Burton v Samuels* (1973) 5 SASR 201. The authorities even go so far as to assert that such a conviction must be set aside by an appellate court even though the point was not taken by the appellant at the trial: see, for example, *Molloy* (1921) 2 KB 364."

[68] In that case Gallop J went on to refer to the judgment of Dixon J in *Johnson v Miller* (1937) 59 CLR 467 and commented:

> "The prosecutor clearly should be required to identify the transaction on which he relies, and he should be so required as soon as it appears that his complaint, in spite of its apparent particularity, is equally capable of referring to a number of occurrences each of which constitutes the offence, the legal nature of which is described in the complaint."

[69] It was submitted on behalf of the respondent that the appellant was better off by virtue of the way in which the matter was left to the jury because he faced only one conviction instead of possibly two for the separate offences. In one sense that is so if one assumes his guilt in relation to both matters. However, having been convicted, it cannot be known whether the conviction related to one or other or a combination of both allegations. The difficulty is highlighted by a consideration of the sentencing process. How is the sentencing Judge to resolve the differing positions of whether there was anal penetration or vaginal penetration or both?

[70] The respondent submitted that the two acts of penetration were so closely connected that it was legitimate to deal with them in one count. I am unable to accept this proposition. Reference to the evidence of the complainant (see par [7] and [8] above) demonstrates that there were two quite separate allegations. The first was that the appellant tried to have anal sex with the complainant causing her to scream and cry and she eventually "got him away from me". That incident was completed and the appellant is said to have left the room. He then returned (the period of absence being

imprecisely described as "not long") and tried to have vaginal sex with the complainant, but she pushed him off telling him to go away. In relation to the first matter there was some evidence of penetration in that she said that "he got further than what he got last time" and he "penetrated my bottom" and penetration was "further than the head of his penis". In relation to the second incident the evidence of penetration is arguably equivocal.

[71] Mr Wild QC referred to the provisions of s 310(1) of the *Criminal Code* which provide as follows:

> "In an indictment against a person for an assault the accused person may be charged and proceeded against notwithstanding that such assault is alleged to be constituted by a number of assaults provided they were committed on the same person in the prosecution of a single purpose or at about the same time."

[72] He indicated that the respondent relied upon that provision. He also submitted that it was open for the appellant to attack the indictment pursuant to the power contained within s 339 of the *Criminal Code* and, not having done so, he should not be permitted to do so on appeal.

[73] The situation with which we are confronted is not of "an assault" constituted by a number of assaults committed in the prosecution of a single purpose or at about the same time. Mr Wild relied only upon the submission that the offences occurred "at about the same time". In this case there were allegations of distinct sexual assaults separated by a period of time when the appellant is said to have left the room. They involved quite different actions on the part of the appellant. The offences were, in general terms, proximate

in time but whether they occurred "at about the same time" for the purposes of s 310(1) must be a matter of fact and degree depending upon the prevailing circumstances. Here the alleged offences were disparate and discrete; they were separate and distinct in time and circumstance. To my mind the incidents in this case are not sufficiently connected as to purpose or time so as to enable the whole occurrence to be treated as "an assault" for the purposes of the section. The incidents were not a series of connected acts so closely connected in time and space as to amount to a single discrete episode. See the discussion (in another context) in *Sanby v The Queen* (1993) 117 FLR 218 at 234; and see *Morrow and Flynn* (1990) 48 A Crim R 232 at 235.

[74] The mere fact that the appellant did not avail himself of the power under the *Criminal Code* to challenge the indictment does not mean that upon conviction under an indictment which is bad for duplicity he cannot appeal. If the count is duplex then it remains duplex, whether or not a challenge was mounted to it at the time of trial.

[75] There is no suggestion in the *Criminal Code* that a failure to exercise such a right will affect the right of appeal. As was observed by Kirby J in *Walsh v Tattersall* (supra at 109):

> "8. Although some writers have suggested that the law should be changed to prevent a duplicity objection being first taken on appeal (see eg Glanville Williams (118)), this is not the common law. There are many cases in England and Australia where the accused has been permitted to raise the point for the first time on appeal. The availability of this facility is sometimes explained on the basis that

> duplicity in the originating charge affects all that follows and hence the jurisdiction of the court of trial. Other authorities doubt this explanation. Still others are content to explain the entitlement to raise the point belatedly on the footing that it challenges an essential requirement of the law that "goes to the root of the proceedings". No useful purpose is served in exploring the doctrinal foundation for the right of belated challenge on the ground of duplicity of the charges. In this appeal the availability of the challenge to the appellant was never contested."

[76] Dawson and Toohey JJ, in that case, said:

> "The appeal was brought essentially on the ground that the complaint and conviction with respect to count 1 were bad for duplicity. That point was first taken on appeal against conviction, before the Full Court of the Supreme Court of South Australia. It had not been raised in the proceedings in the Court of Summary Jurisdiction in which the appellant was convicted. Nevertheless, failure to take the objection at trial does not preclude the appellant from raising it on appeal: *R v Traino* (1987) 45 SASR 473 at 475."

[77] Whether the conviction in this matter is to be described as duplicitous or uncertain or as having a latent ambiguity, it is bad and must be set aside. In my view the conviction under count 7 is uncertain and there has been a consequent miscarriage of justice.

Grounds 1 and 2

[78] The appellant complains that the trial was prejudiced by impermissible statements made by the learned Crown prosecutor in his opening, and that the trial Judge ought to have discharged the jury without verdict following the opening of the prosecution case. The complaints centred upon three categories of matters:

[79] (a) the prosecutor ought not have opened, as he did, by firstly referring to a statement of the complainant having been taken by the police on the occasion when this matter came to light and then having referred to several other statements taken over a period of time subsequent to that occasion;

[80] (b) the reference by the prosecutor to the complainant being "on welfare, in foster homes and separated from her family and being in an institution", and

[81] (c) emotive statements calculated to prejudice the fair trial of the appellant.

[82] Mr Kent QC complained that by detailing that a number of statements had been made by the complainant, as opposed to a simple reference to the fact that the matter had been reported to police and that they had acted upon it, may have suggested the evidence "gains greater credibility because it went on over a period of time and she goes back and back to make further statements about it".

[83] I am unable to see how such an observation would cause prejudice to the appellant. It must have been obvious that complaint had been made to the police and that at least one statement would be taken. I am unable to see how the reference to there having been a number of statements taken would alter that position. It was obvious to all, including the jury, that the complainant must have spent a lengthy period with the police in order to

provide the information which resulted in her step-father being charged with a series of offences which were said to have occurred over a significant period of time. The fact that that information was gathered and recorded in a number of statements does not add to or detract from the situation that would have applied had she provided the information in one statement obtained in one session. The prosecutor did not open by addressing the content of the statements made on the different occasions. It is worthy of note that, as was expected by the prosecutor, there was extensive cross-examination on each of the statements made by the prosecutrix. There can be little doubt that the information complained of would have been before the jury in any event.

[84] Mr Kent submitted that the jury may have thought that there was something being kept from them because a number of statements had been taken. This does not follow. The jury had the lengthy evidence of the complainant and, whether the proofs for that evidence were obtained in one session or a number of sessions cannot give rise to any such suspicion.

[85] In his opening the learned Crown prosecutor made reference to the complainant having never returned to her former home subsequent to making her complaint and that she had, between the ages of 14 and 16, "lived in various welfare foster households and institutions". It is difficult to see what legitimate purpose was served in identifying and emphasising those matters. He went on to refer to her evidence and invited the jury to "watch and listen and consider" because "its really [the complainant's] story and

it's important that you judge her. You don't get influenced by what I say she's going to say; it's just like the old hearsay rule, it's what the witness says."

[86] It was submitted that the effect of mentioning these matters in the opening was to place before the jury in an emotive way matters which arguably ought not be before them. In addition it was submitted that the opening suggested the role of the jury was to "judge" the complainant rather than to determine on the basis of all of the evidence before the jury whether or not they could be satisfied beyond reasonable doubt of the guilt of the accused.

[87] The use of the expression "it's important that you judge her" is unfortunate. However it must be seen in its context. It was followed immediately by a warning not to be influenced by what the prosecutor had to say but rather to look at what the witness said in circumstances where the jury was informed by the prosecutor about the presumption of innocence, the need for proof beyond reasonable doubt, and that any findings must be based upon the evidence presented in the case.

[88] In her summing up her Honour gave direction to the jury which effectively dealt with any possible misconception the jury may have had arising out of the use of the word "judge" by the learned Crown prosecutor in the course of his opening. She said:

> "The accused doesn't have to prove anything at all. It's not a situation where you say to yourselves, we think we probably prefer the evidence of [the complainant] to the evidence of Steven, so we'll

> convict Steven. That's not the exercise you go about. The exercise is that you have to be satisfied beyond reasonable doubt of each and every element of the offence. … However what you must do, is subject the evidence of [the complainant] to close and careful scrutiny. You may only convict the accused on such unsupported evidence if after giving it close and careful scrutiny, you are fully satisfied as to the truth of it, and satisfied that it is safe to act upon it."

[89] Mr Wild did not seek to defend the reference by the learned Crown prosecutor to the complainant being in care and away from her family. However he submitted that there was no prejudice suffered by the appellant as a consequence. He points to the fact that there was cross-examination directed to her relationship with a boyfriend (with whom she lived subsequent to departing from the family) which was a matter which was always going to emerge in the course of the trial. Whilst that is likely to have been the case the fact that the learned prosecutor mentioned it in opening made it necessary for the defence to address the issue.

[90] In my opinion the reference to these matters by the prosecutor was unfortunate and inappropriate however I agree with Mr Wild that no real prejudice was caused to the appellant and no injustice can be said to have resulted from the occurrence. Her Honour's summing up directed the jury appropriately as to emotional responses and in regard to the lack of support for the complainant's evidence.

Grounds 3 to 6

[91] In these grounds the appellant complained that his trial was prejudiced by the changing of the course of the conduct of the trial when the Crown

refused to call as witnesses in its case the mother and brother of the complainant, having previously indicated that it was proposed to call them.

[92] There is no dispute that the Crown indicated prior to the commencement of the trial that it intended to call both of the witnesses referred to, and there is no dispute that they were not called. There is some dispute as to when it was that the Crown advised the appellant that it was not intended to call the brother. However it seems clear that it was not until after the complainant had given her evidence in chief, and had been cross-examined on that evidence, that it was indicated the mother would not be called. It was submitted that this was a "tactic" by the prosecution. An explanation was provided to the Court by the learned Crown prosecutor as follows:

> "Up to yesterday the Crown was intent on calling (the mother) in relation to her evidence about the photographs and the video. We considered that relevant evidence to the charges, and we argued it yesterday unsuccessfully. In view of your Honour's ruling, we now consider that (the mother) is now no longer a material witness. And what's more, of course, which was always in our ken when we were still prepared to call her in relation to the material aspect, was that she's coming from the camp – as the term is often used in the authorities – of the accused. So she's a partisan witness to the accused. She contradicts the Crown case and we say that in our system adversarial that it would confuse the jury if I was to bring in as a witness someone who will undermine on the peripheral aspects the credibility of the prosecutrix upon which the Crown rests its case."

[93] He went on to say that the decision not to call the witness was made on the previous evening because "she doesn't have any material evidence". He indicated that the witness was in Alice Springs, having been flown to Alice Springs "and the defence can, if they want, call her as a witness".

[94] In relation to the brother the learned Crown prosecutor indicated that the decision not to call him was made prior to the trial commencing because he "considered him an unreliable witness". He set out the foundation for reaching that conclusion.

[95] The complaint of the appellant centred upon the lateness of the advice. It was submitted that the appellant had structured the cross-examination of the complainant in a certain way because of the understanding that the mother and brother would be called and could be asked questions regarding matters which it would then not be necessary to raise with the complainant.

[96] In fact the complainant was recalled following the failure to call the mother and the brother and was subjected to further and wide-ranging cross-examination. In addition the witnesses who were not called were made available to the defence and a decision was made on behalf of the defence not to call those witnesses. There was no suggestion that the witnesses, being the wife of the appellant and the stepson of the appellant, were in any way hostile to the appellant. Indeed the evidence was to the contrary. In the circumstances it is difficult to see that any real prejudice was suffered by the appellant. Some slight tactical advantage may have been impaired but nothing more.

[97] A decision of a prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed

against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice: *The Queen v Apostilides* (1984) 154 CLR 563 at 575.

[98] In my view in the circumstances of the case the fact that the learned trial Judge allowed the recalling of the complainant and the fact that both witnesses who were not called were made available to the appellant to be called in his case, was sufficient to resolve any potential for prejudice.

Ground 8

[99] At the commencement of the trial a member of the jury panel indicated in the presence of the panel that she did not think she could be impartial and went on to say: "I think people who commit these crimes should be castrated. I have very strong feelings - - -". There was some further conversation which took the matter no further and then her Honour excused the person from jury service in this trial.

[100] The appellant complains that such an incident, occurring in the presence of the jury, may result in prejudice to an accused charged with offences of the type charged here, and went on to say that the appearance of impartiality of the jury is affected by this incident.

[101] Comments made by the individual concerned were not made in relation to the specific matter then before the Court, but rather relating to "people who commit these crimes" in a general sense. It would be most surprising if at least some of the members of the jury panel had not come across similar comments in the course of their daily lives. Members of jury panels come

from all walks of life and have been exposed to expressions of all kinds of views. The system of administration of justice which we enjoy proceeds on the basis that the warnings given to the jury regarding the putting aside of prejudices and dealing with the matter in hand on the basis of the evidence placed before the jury, are effective.

[102] In the present case the learned trial Judge provided a warning to the jury as follows:

> "I am asking you to put from your mind anything that you may have heard about this matter, or anything you may have read. You all heard a lady earlier this afternoon express her feelings about these sorts of matters. Could I ask you to put aside those feelings and those comments which you do hear in the community, and you may hear from people that you associate with. You're here to make a decision based solely on the evidence that you see and you hear in this Courtroom. The opinions of other people are entirely irrelevant to that process. It's what you think that's important and it's your assessment of the evidence, that is all that matters."

[103] In the circumstances I am unable to accept the submission that the verdict is unsafe and unsatisfactory or that there has been a miscarriage of justice based upon the matters complained of in relation to this ground.

Grounds 9 and 10

[104] The appellant complained that the verdict was unsafe and unsatisfactory in that it was unreasonable or could not be supported having regard to the evidence. He also complained that a jury, acting reasonably, ought to have entertained a reasonable doubt as to the guilt of the appellant.

[105] In this regard the appellant referred to and relied upon the matters discussed in relation to the earlier grounds of appeal. In addition he referred to a number of other matters. He addressed each of the counts in relation to which there was a conviction in turn. I will do likewise.

(a) Count 1

[106] In relation to count 1 it was submitted that the conduct complained of was not sufficient to support a conviction for gross indecency. The evidence from the complainant was that the appellant had:

> "Rubbed the baby oil all over the front of my body while I was laying on my back, then I was rolled onto my front and while I was laying on my front, it was rubbed all over the back … every single part of my body apart from my face and where my hair covers my head."

[107] It was submitted that this evidence was so vague and general as not to permit a finding of gross indecency.

[108] The submission of the respondent was that gross indecency is capable of covering a wide range of conduct and need not involve physical contact at all: eg *R v Hunt* (1950) 2 All ER 291; *R v Preece* (1976) 2 WLR 745 and reference was also made to *R v Bryant* (1984) 2 Qd R 545 which referred to indecency as connoting conduct which is lewd or prurient or involves moral turpitude. Mr Kent responded by submitting that for there to be gross indecency there must be something which elevates the act complained of and takes it beyond being an indecent dealing to being a grossly indecent act.

[109] The aide memoire which was provided to the jury noted that there was an alternative count to count 1 relating to the same conduct which charged the appellant with "unlawfully and indecently" dealing with the complainant. The aide memoire noted that there was no fixed or defined legal meaning for the terms "gross indecency" and "indecent" and set out some definitions extracted from dictionaries. Gross was said to mean "glaring", "flagrant" or "monstrous", and indecent was said to mean "unbecoming", "in extremely bad taste", "offending against propriety or delicacy", "immodest". The criteria having been spelled out it seems to me that it is an issue for the jury to resolve whether what occurred was so offensive to contemporary standards of modesty as to be indecent or grossly indecent: *R v Court* (1989) AC 28 at 42. There was a basis for finding that this conduct amounted to gross indecency and their verdict ought not be interfered with on this ground.

Counts 3 and 4

[110] Counts 3 and 4 allege that the appellant made the complainant enter the appellant's bedroom and watch pornographic video tapes whilst her legs were opened by the appellant so as to expose her vagina.

[111] The appellant complains that there was a significant discrepancy in the evidence of the complainant. The nightgown which she told the police she was wearing differed from that which she referred to in her evidence. The submission was made that this change occurred because the complainant

realised that the original nightgown could not have been opened in the manner she had described to the police and she therefore changed her evidence to refer to a different nightgown.

[112] She was cross-examined about this and her evidence was:

> "You weren't wearing that on this night, were you, that you watched the videos?---No. I think – I think that's what I told the police that I wasn't sure. But I thought I was wearing that one. But I was actually wearing the blue one."

[113] She said she gave a deliberate description of the garment that she thought she had been wearing and she must have been confused.

[114] The appellant submitted that the inconsistency of the evidence with the earlier account demonstrated a capacity on behalf of the complainant to tailor her evidence and ought to have given rise to a reasonable doubt being held by the jury as to the offences. With respect this is not the only explanation. It would seem from the verdict that the jury was prepared to accept that the complainant had satisfactorily explained the discrepancy as they were entitled to do.

[115] A further complaint regarding this count is that the descriptions provided of the period of time during which the incident occurred varied from twenty minutes to two hours. This discrepancy was said to give rise to a reasonable doubt about the incident. However it must be observed that the time frame was always given in an imprecise manner. When she gave her evidence to the jury the complainant said it was "half an hour to an hour" and it was put

to her that at the committal she had said that they were in the bedroom "an hour, an hour and a half, maybe two hours".

[116] It seems there was never any attempt at precision and, although there is a relatively wide range of times given, in the circumstances this would not make the account unreliable.

Count 6

[117] In relation to count 6 the appellant points out that he was acquitted of rape and attempted rape and convicted of attempted unlawful intercourse. It was submitted that this allegation (ie her suggestion that she was asleep in bed and woke to find the appellant behind her rubbing his penis up and down her back and then attempting anal sex) is fundamentally unlikely. If the jury accepted that description of events then one would expect the verdict to be guilty of rape or attempted rape. It can only be because the jury refused to accept that the allegation of the absence of consent had been established beyond reasonable doubt that would permit the conviction of attempted unlawful intercourse.

[118] The respondent sought to explain this verdict by submitting that the jury accepted a version of events which involved accepting the account given by the complainant of the actual sexual conduct, but being unsure as to the level of consent involved. However the only available evidence in relation to the offence is from the complainant and is quite inconsistent with the existence of consent.

(d) Count 8

[119] The circumstances of count 8 are set out in par [54]above. The appellant says that the allegation made by the complainant is inherently improbable and, in that regard, points to the circumstance that after the appellant had given her rum to drink she said:

> "And I don't remember anything from after that until I see a flash from a camera and I'm in Steve's bedroom on Steve's bed and giving him oral sex."

[120] There was no explanation as to how she came to be in this position and how it could be that she moved from her bedroom to the bed in the appellant's bedroom and commenced "giving him oral sex" whilst not being aware of so doing.

[121] The appellant points out that he was acquitted of the offence of rape on this count and convicted of an alternative count which did not require proof of the absence of consent.

[122] When spoken to by police at an earlier time she denied having been ill following that event. She said "I wasn't sick or anything and I didn't have any headaches". When she gave evidence before the jury the complainant referred to having been ill on the day following the alleged incident. She said she vomited and suffered a headache. In her evidence before the jury she said, apparently for the first time, that she had fallen out of a car whilst she was driving it and that this was a consequence of her being ill. The appellant suggests this is an improbable event indicating an ability to

manufacture elaborate stories. It was submitted that it significantly affected the credibility of the complainant and in combination with other matters rendered the conviction of the appellant unsafe and unsatisfactory.

[123] On behalf of the respondent it was submitted that the members of the jury were entitled to take the view that the memory of the complainant may have been impaired due to the rum the appellant had given her, her illness or tiredness. It was open for the jury to accept her evidence on the particulars of the incident she was able to recall. It was submitted that the Court "must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the Court must pay full regard to those considerations": *M v The Queen* (1994) 181 CLR 487 at 493.

[124] This story is quite improbable. There is no logical explanation for what is said to have occurred. It is most unlikely that a 14 year old girl, who professed to having had no knowledge or experience of alcohol would or could "quickly" drink two and a half glasses of a powerful spirit in the manner she describes ie having woken to find her stepfather in her room, having asked for a glass of water and then having been provided with the alcohol. She does not allege that she was in any way forced to consume the alcohol which she described as "normal red Bundaberg rum". She says she complained that it was rum and was told "Oh well just drink it", which she did.

[125] If she were ill (as she now says and as one would have expected) she would be expected to have reported this to the police when she complained. Similarly if she had fallen out of the vehicle in the manner she described and because of her illness (a fairly dramatic event) one would expect she would have reported that to the police at the same time. She did neither.

Count 10

[126] The appellant points out that the evidence of the complainant was that he had sexual intercourse, namely cunnilingus, with her without her consent. The jury found the appellant not guilty on that count and found him guilty of the alternative count which did not require proof of the absence of consent. In the circumstances described it is difficult to see how there could be a finding of absence of consent if the evidence of the complainant was accepted. Her evidence was that when she woke up "I looked down and there was Steve in between my legs, and he was giving me oral sex. … he didn't say anything to me straight away. …then I was kicking at him. … I hurt his shoulder or his back, or something." If this evidence be accepted there can be no suggestion that she consented to what was occurring. It is difficult to see any basis upon which there could be a finding that the event occurred as described without there being an accompanying proof of the absence of consent.

Other matters

[127] The appellant referred to other matters which it was submitted must have reflected adversely upon the credit of the complainant and must have led to there being at least a reasonable doubt regarding her evidence.

[128] The most significant matter related to the witness DC. DC attended school with the complainant and the complainant gave evidence that DC had told her that her stepfather was sexually abusing her. She went on to say:

> "No, and if you're referring to (DC), the reason I listened to (DC's) complaint – and my complaint was made shortly after (DC's) complaint, is because (DC's) stepfather, who was a white guy and (DC) was an Aboriginal girl, she now lives in Charles Creek Camp away from her mother with a baby that looks like her father. She has to look at her baby every day and see her dad. You know, a half caste baby. All her family don't want to talk to her and she sure showed me that that's what I didn't want to be. She – she's got no family support. She's got a kid she has to look after that's her – basically her blood and there was no way I was letting that happen to me."

[129] The evidence was given to explain why it was that the complainant raised the issue of the appellant's conduct with her mother at that particular time. She gave further evidence that she had seen the baby.

[130] DC was called to give evidence. She said that she knew the complainant from school. She denied that she had ever had a baby, that she had ever been pregnant, that she had ever told anybody that she had had a baby or had been pregnant and in particular had not told the complainant those things. She said she had a stepfather but that he had not ever sexually interfered with her and she had not told anybody that he had done so. Her stepfather

lived with her "only when I was young". When she was cross-examined she said that she did have a baby with her on one occasion but that the child belonged to her cousin. Again she denied that she had ever told the complainant that she was interfered with by her stepfather.

[131] The evidence of the complainant set out above must have been a dramatic moment in the proceedings. It was the first occasion on which it had been mentioned by the complainant. The subsequent evidence of DC must have raised considerable doubt as to the veracity of the complainant.

[132] Whilst it is possible for a jury to accept some parts of the evidence of a witness and to reject other parts, this evidence must have raised a significant doubt as to the credibility of the complainant in a general sense. It must have raised a reasonable doubt as to the overall credibility of the witness.

[133] In the course of cross-examination and then re-examination the complainant conceded that she lied to her mother and then to the police regarding a peripheral matter being how she obtained a "love bite" or "hickey" on her neck from a person named Lee Cooper. In explaining why she lied she said:

> "I didn't want to risk getting myself in trouble or mucking up my case just because of an accident that happened with Lee Cooper that wasn't even that serious".

[134] This is another demonstration of why the evidence of the complainant should have been treated with great caution in the circumstances of this

matter. It contributes to the ultimate submission that the convictions were unsafe and unsatisfactory.

[135] The appellant also relies upon a card sent by the complainant from Alice Springs to the appellant at Docker River as being significant in assessing the reliability of the evidence of the complainant. The card was sent after the matters referred to in counts 1 to 6 were said to have occurred, ie after she alleged the appellant had indecently dealt with her and had sexual intercourse with her without her consent. The card contained the line "I love you and miss you", and below that were "kisses". That card was sent on 20 July 1995 and, it was submitted, is inconsistent with the complainant's evidence that her stepfather had committed the earlier offences against her. It was submitted that this must give rise to "grave doubt about the accuracy of these allegations". It must at least give rise to a reasonable doubt about the allegation that events occurred without her consent.

Unsafe and unsatisfactory

[136] The test for determining whether a verdict is unsafe and unsatisfactory was stated by a majority in the High Court in *M v The Queen* (1994) 181 CLR 487 as being whether, upon the whole of the evidence, the court is persuaded that it was not open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty. In making this assessment the Court must pay full regard to the consideration that the jury is the body entrusted with the

primary responsibility of determining guilt or innocence and has had the benefit of having seen and heard the witnesses. See also *Gipp v The Queen* (1998) 72 ALJR 1012.

[137] In relation to counts 6 and 10 it is impossible to reconcile the verdicts reached by the jury with the evidence placed before it. In each of those matters the finding was consistent with the jury not having been satisfied that the absence of consent had been established beyond reasonable doubt. Yet in each the evidence of lack of consent was an integral part of the description of the occurrence provided by the complainant. In count 6 she said that she woke to find the appellant behind her and she pushed him off and told him to leave. In count 10 she woke to find him performing cunnilingus on her without her consent and she kicked and hurt him.

[138] As I have observed above, the evidence of the complainant in relation to count 8 is quite improbable.

[139] In addition the evidence of the complainant regarding DC casts doubt upon the whole of her evidence going, as it does, to the circumstances in which all of the matters complained of were revealed. DC's evidence does not appear to have been discredited in any way. There would appear to be no basis upon which the jury could reject the evidence of DC, and no basis for finding that the complainant was mistaken as to the essential matters arising from that evidence.

[140] Finally the evidence of the complainant in which she acknowledges the proposition that she lied regarding the "love bite", and the fact that the reason provided by her for the lie was that she did not want it "mucking up my case", is also a matter of concern. It demonstrates a willingness to lie in relation to matters affecting the case against the appellant.

[141] If one takes all of these matters together the jury ought to have been left with a reasonable doubt regarding the veracity of the complainant in all matters. There is no corroborative evidence. The evidence of the complainant was not the subject of support. Whilst some discrepancies and inconsistencies may be expected in the evidence of a young girl in the circumstances which applied, those which have been discussed above are quite significant.

[142] On the other hand there was a flat denial by the appellant. The denial was given by him in his evidence at the trial and in his earlier record of interview. The case was one of oath against oath. The jury therefore had to be satisfied beyond reasonable doubt of the matters complained of by the appellant. It had to do so in light of, and notwithstanding, the sworn denials of the appellant. The jury did not have to believe the appellant was telling the truth in order for him to be entitled to an acquittal.

[143] It is clear that the jury believed the complainant and, it must follow, that they did not accept the evidence of the appellant. They formed these views having seen and heard each of the witnesses. However the observations of

the majority in *M v The Queen* (supra at 500) have application here. They said:

> "But even making full allowance for the manner in which both gave their evidence, the matters which cast doubt upon the prosecution case, to which we have referred, remain unanswered. In those circumstances, in the absence of corroboration of the complainant's allegations, it would, in our view, be unsafe and unsatisfactory to allow the verdicts to stand."

[144] Given the matters discussed above, which must have raised a reasonable doubt as to the reliability of the evidence of the complainant, the verdicts must be regarded as unsafe and unsatisfactory.

[145] I would allow the appeal, quash the convictions and enter verdicts of acquittal in all matters.

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