The Queen v PDW [2009] NTSCFC 38;
PDW v The Queen [2009] NTCCA 10

PARTIES:	THE QUEEN v PDW
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
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JUDGMENT OF:	MARTIN (BR) CJ, RILEY and SOUTHWOOD JJ

CATCHWORDS:

REFERENCE TO THE FULL COURT – INTERPRETATION OF s 131A CRIMINAL CODE – "three or more illegal acts" – evidence of maintenance of a relationship of a sexual nature not required – autrefois convict not available – double punishment – court may intervene to avoid abuse

KBT v The Queen (1997) 191 CLR 417; *KRM v The Queen* (2001) 206 CLR 221, followed

GJB (2002) 129 A Crim R 479; *Pearce v The Queen* (1998) 194 CLR 610, considered

Connelly v DPP [1964] AC 1255; *R v Kent-Newbold* (1939) 62 CLR 398; *Maxwell v The Queen* (1996) 184 CLR 501; *Rogers v The Queen* (1994) 181 CLR 251; *S v The Queen* (1989) 168 CLR 266*; R v Stone* (2005) 64 NSWLR 413, *Williams v Spautz* (1992) 174 CLR 509; referred to

Supreme Court Act (NT) s 21
Sentencing Act (NT) s 78BB
Criminal Code (NT) s 31, s 131A, s 339

CRIMINAL LAW – APPEAL – opinion as to the veracity of the witness should have been allowed – opinion evidence of veracity of witness should have been left to the jury – allowing prejudicial evidence given by the complainant to go to the jury may have led to impermissible reasoning by members of the jury – verdict of the jury was not unreasonable on the evidence – appeal allowed – retrial ordered

R v BDX [2009] VSCA 28; *Bell v The Queen* (1985) 7 FCR 555; *R v Hanrahan* [1967] 2 NSWR 717; *R v Richardson; R v Longman* [1969] 1 QB 299, referred to

Supreme Court Rules r 86.08

REPRESENTATION:

Counsel:

Applicant:	I Read
Respondent:	M Stoddart

Solicitors:

Applicant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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IN THE FULL COURT
OF THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

AND

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

The Queen v PDW [2009] NTSC 38;
PDW v The Queen [2009] NTCCA 10
Nos (20713041)
CA 3 of 2009 (20713041)

BETWEEN:

THE QUEEN
Applicant/Respondent

AND:

PDW
Respondent/Appellant

CORAM: MARTIN (BR) CJ, RILEY and SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 31 July 2009)

MARTIN (BR) CJ:

[1] I agree with the answers proposed by Riley J and with his Honour's reasons. For the reasons given by Riley J, I also agree that the appeal should be allowed and a retrial ordered.

RILEY J

[2] The Court constituted as both the Full Court and the Court of Criminal Appeal heard a reference from the learned trial Judge and an appeal against conviction at the same time.

The Reference

[3] Pursuant to s 21 of the *Supreme Court Act* the Full Court heard a reference relating to the interpretation of s 131A(2) of the *Criminal Code*.

[4] On 16 March 2009 the accused was arraigned before a jury panel and pleaded not guilty to six charges contained in the one indictment. The charges all related to the one victim, a female child under the age of 16 years, and were as follows:

(a) indecently dealing with the child by touching his penis to her vagina contrary to s 132(2)(a) of the *Criminal Code* (count 1);

(b) gross indecency upon the child by ejaculating on her leg contrary to s 192(4) of the *Criminal Code* (count 2);

(c) sexual intercourse, namely cunnilingus, with the child without her consent contrary to s192(3) of the *Criminal Code* (count 3);

(d) sexual intercourse, namely digital/vaginal penetration, with the child without her consent contrary to s192(3) of the *Criminal Code* (count 4);

(e) indecently dealing with the child by touching her breast contrary to s132(2)(a) of the *Criminal Code* (count 5);

(f) maintaining a relationship of a sexual nature with the child who was under the age of 16 years with circumstances of aggravation contrary to s 131A(2) and (4) of the *Criminal Code* (count 6).

[5] Before the respondent was called upon to plead his counsel objected to count 6 in the indictment on the basis that the three or more acts particularised by the Crown and upon which the Crown intended to rely in order to support count 6, were any three or more of counts 1 to 5 in the indictment. The learned trial Judge overruled the objection and the respondent then entered a plea of not guilty to all counts.

[6] Following the trial the jury returned a verdict of not guilty in relation to count 1, guilty in relation to counts 2, 4, 5 and 6 and they were unable to agree in relation to count 3. The learned trial Judge has not yet recorded a conviction in relation to any count.

[7] After the verdict, and before proceeding to sentence, the learned trial Judge posed the following questions for the consideration of the Full Court:

Question 1

> In the circumstances, was I correct in allowing the charge against s 131A(2) to be left to the jury where:
>
> (a) the acts constituting the offence relied upon by the prosecution were all pleaded as counts in the indictment;

(b) no evidence was led of an act constituting an offence of the kind referred to in s 131A(1) which was not the subject of a charge in the indictment;

(c) there were no three acts constituting an offence referred to in s 131A(1) which were substantially the same or against the same section of the Criminal Code?

Question 2

If the answer to each part of (the previous question) is yes,

(a) as the acts constituting the offences to which the prisoner has been found guilty in relation to counts 2, 4 and 5 are the same acts which constitute the finding of guilt in relation to count 6, should I now call upon the prosecution to elect before recording a conviction?

(b) if the answer to (a) is no, am I obliged to record a conviction and impose a mandatory sentence of imprisonment in relation to the findings of guilt concerning count 6, as well as record convictions and impose mandatory sentences of imprisonment in relation to counts 2, 4 and 5?

The offence under s 131A

[8] Section 131A of the *Criminal Code* creates the offence of maintaining a relationship of a sexual nature with a child under the age of 16 years. Although described in those terms the section goes on to provide that the offence is not committed unless it is shown that the offender has “done an act defined to constitute an offence of a sexual nature in relation to the child on 3 or more occasions". Section 131A is in the following terms:

(1) For the purposes of this section, ***offence of a sexual nature*** means an offence defined by section 127, 128, 130, 132, 134, 188(1) and (2)(k), 192 or 192B.

(2) Any adult who maintains a relationship of a sexual nature with a child under the age of 16 years is guilty of a crime and is liable to imprisonment for 7 years.

(3) A person shall not be convicted of the crime defined by this section unless it is shown that the offender, as an adult, has, during the period in which it is alleged that he maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child on 3 or more occasions, and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions.

(4) If in the course of the relationship of a sexual nature the offender committed an offence of a sexual nature for which the offender is liable to imprisonment for at least 7 years but not more than 20 years, other than an offence against section 192(8) or 192B, the offender is liable in respect of maintaining the relationship to imprisonment for 20 years.

(5) If in the course of the relationship of a sexual nature the offender committed:

(a) an offence against section 192(8) or 192B; or

(b) an offence of a sexual nature for which the offender is liable to imprisonment for more than 20 years,

the offender is liable in respect of maintaining the relationship to imprisonment for life.

(6) It is a defence to a charge of a crime defined by this section to prove:

(a) the child was of or above the age of 14 years; and

(b) the accused person believed on reasonable grounds that the child was of or above the age of 16 years.

> (7) A person may be charged in one indictment with an offence defined by this section and with any other offence of a sexual nature alleged to have been committed by him in the course of the relationship in issue in the first-mentioned offence and he may be convicted of and punished for any or all of the offences so charged.
>
> (8) Where the offender is sentenced to a term of imprisonment for the offence defined by this section and a term of imprisonment for an offence of a sexual nature, an order shall not be made directing that one of those sentences take effect from the expiration of deprivation of liberty for the other offence.
>
> (9) An indictment for an offence against this section shall be signed by the Director of Public Prosecutions.
>
> (10) Section 12 does not apply to the child with respect to whom an offence against this section is committed.

[9] In the absence of authority I would have regarded s 131A(2) of the *Criminal Code* as creating an offence of maintaining a relationship of a sexual nature with a child under the age of 16 years. Section 131A(3) provides that a person "shall not be convicted" of the crime of maintaining a sexual relationship with a child under 16 "unless it is shown" that he has “done an act defined to constitute an offence of a sexual nature in relation to the child on three or more occasions”. The evidence regarding such acts "shall be admissible and probative of the maintenance of the relationship". I would have considered that for a conviction to be recorded under the section there is required, in addition to the three relevant acts stipulated by s 131A(3), the maintenance of an unlawful sexual relationship with the child. However, there is authority to the contrary.

[10] In *KBT v The Queen*[1] the High Court discussed the Queensland provision, which is in pari materia to the Northern Territory section. In their joint judgment the majority (Brennan CJ, Toohey, Gaudron and Gummow JJ at 422) concluded "that the actus reus of (the) offence is the doing, as an adult, of an act which constitutes an offence of a sexual nature in relation to the child concerned on three or more occasions". The actus reus of the offence is as specified in that requirement "rather than maintaining an unlawful sexual relationship". The offence is made out if the jury is agreed as to the commission of the same three or more acts constituting offences of a sexual nature.

[11] In *KRM v The Queen*[2] the High Court considered a similar, although differently worded, provision from Victoria. In that case the relevant section provided that "a person who maintains a sexual relationship with a child under the age of 16 to whom he or she is not married and who is under his or her care, supervision or authority is guilty of an indictable offence". The section then went on to provide:

> (2) To prove an offence under subsection (1) it is necessary to prove -
>
> (a) that the accused during a particular period (while the child was under the age of 16 and under his or her care, supervision or authority) did an act in relation to the child which would constitute an offence under a particular provision of this Subdivision or Subdivision (8A) or (8B); and

[1] (1997) 191 CLR 417.
[2] (2001) 206 CLR 221.

(b) that such an act also took place between the accused and the child on at least two other occasions during that period.

[12] In *KRM v The Queen*[3] McHugh J, likewise, observed that the Victorian offence requires the proof of three acts constituting offences and it is proof of those acts and not the maintaining of a relationship that constitutes the actus reus of the offence. Similar observations were made by Gummow and Callinan JJ[4] and by Hayne J.[5]

[13] Whilst it is possible to distinguish the provision in the Victorian legislation from s 131A of the *Criminal Code (NT)* that is not the case in relation to the Queensland provision discussed in *KBT v The Queen*.[6] For present purposes there is no material difference between the wording of the Queensland provision and the wording of the Northern Territory provision. In the circumstances it is appropriate for the offence created by s 131A(2) of the *Criminal Code* to be subject to the same interpretation. It follows that the actus reus of the offence created by s 131A(2) of the *Criminal Code* is the doing, as an adult, of an act defined to constitute an offence of a sexual nature in relation to a child on three or more occasions. It is not the maintaining of an unlawful sexual relationship with the child.

[14] Accepting that the actus reus of the offence is the doing on at least three occasions of "an act defined to constitute an offence of a sexual nature" in

[3] (2001) 206 CLR 221 at 236.
[4] (2001) 206 CLR 221 at 245.
[5] (2001) 206 CLR 221 at 265.
[6] (1997) 191 CLR 417.

relation to a child, the question then arises as to what is meant by that expression. The "act" must "constitute an offence of a sexual nature". An offence of a sexual nature is defined by reference to the various sections set out in s 131A of the *Criminal Code*. A relevant "act" must be an "offence" of a sexual nature as identified in that section rather than an act per se.

[15] To obtain a conviction for an offence under s 131A(2) of the *Criminal Code* the prosecution must establish the presence of the actus reus and that the accused had the necessary intention. Section 131A of the Code is not a Schedule 1 offence or a declared offence for the purposes of Part IIAA of the Code and the provisions of that Part relating to physical elements and fault elements do not have application. Section 31 of the Code has application and provides that a person will be excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.

[16] The actus reus of the offence created by s 131A(2) of the *Criminal Code* is, as the High Court has determined, the doing, as an adult, of an act which constitutes an offence of a sexual nature in relation to the child concerned on three or more occasions. The offence comprises the presence of the actus reus as identified together with the presence of the necessary intention. In order to obtain a conviction it is necessary for the prosecution to establish that the appellant had the necessary intention, or had the applicable foresight, in relation to the actus reus. It is apparent that it is not necessary

for the prosecution to show any intention on the part of the accused to maintain an unlawful sexual relationship with the child.

[17] The circumstances in which the legislation was introduced and the second reading speech of the Attorney-General[7] make it clear that the introduction of s 131A(2) was not intended by the legislature to create a new offence because of any concern of the legislature that proof of substantive sexual offences against a child provided an inadequate reflection of criminal conduct where the offences were indicative of an offender establishing a sexual relationship with the child. The purpose of the new provision was to create an offence which could be established in circumstances where the prosecution evidence was incapable of proving substantive offences by reason of lack of particularity sufficient to comply with the requirements identified in *S v The Queen*.[8]

The meaning of "three or more occasions"

[18] The first issue for determination is what is meant by the requirement that the offender has "done an act defined to constitute an offence of a sexual nature in relation to the child on three or more occasions". The respondent contends that the prosecution must establish three identical crimes before the provision can take effect. On the other hand the applicant contends that it is not necessary for the Crown to prove the accused committed three similar or like offences to succeed in a prosecution under the section.

[7] (see par [30] below).
[8] (1989) 168 CLR 266.

[19] Re-ordering the words of the section reveals that what must have occurred on "three or more occasions" was "an act defined to constitute an offence of a sexual nature". There is nothing in the wording of the section to require that it must be the same or a similar act on each occasion. In my view, there is no basis for importing those qualifying words into the section. To do so would create a significant impediment to the prosecution of offenders who over time commit different types of sexual assault against children. It would tend to defeat the purpose of s 131A.

[20] Contrary to the submission of the respondent, the observations in the majority judgment of the High Court in *KBT v The Queen*[9] do not suggest otherwise. There the Court resolved that in order for a person to be convicted under the equivalent Queensland provision, the jury must be "agreed as to the commission of the same three or more illegal acts". That does not suggest that the "three or more illegal acts" must be the same act on each occasion only that the jury must be agreed as to the individual acts that make up the number necessary for a conviction.

Autrefois convict

[21] Absent any legislative provision to the contrary it would be arguable that a person convicted of an offence under s 131A(2) of the *Criminal Code* would be able to change his plea of not guilty and plead autrefois convict in relation to charges on the same indictment that constituted one of the three

[9] (1997) 191 CLR 417 at 422.

or more offences of a sexual nature amounting to the actus reus of the offence under s 131A(2).[10] However, s 131A(7) specifically addresses the issue and permits both the conviction and punishment of the person for any or all of the offences of a sexual nature charged in the indictment.

Double punishment

[22] The effect of s131A(7) is to permit what would otherwise be impermissible because of duplicity. However, the subsection does not exclude the power of the court to consider an application to quash the indictment or stay the proceedings pursuant to s 339 of the *Criminal Code* and to consider whether, for the matter to proceed in all of the circumstances, including the terms of the subsection, would amount to an abuse of process.

[23] An effort is made to ameliorate one aspect of the apparent unfairness of the provision by providing in subsection (8) of the section that:

> (8) Where the offender is sentenced to a term of imprisonment for the offence defined by this section and a term of imprisonment for an offence of a sexual nature, an order shall not be made directing that one of those sentences take effect from the expiration of deprivation of liberty for the other offence.

[24] Notwithstanding the ameliorating effect of s 131A(8) of the *Criminal Code* unfairness may arise and, depending upon the circumstances of the individual case, the offender may be liable to double punishment for the same act.

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[10] *R v Kent-Newbold* (1939) 62 CLR 398 at 409-410; *R v Stone* (2005) 64 NSWLR 413 at 419; *Connelly v DPP* [1964] AC 1255 at 1331 and 1341; *Maxwell v The Queen* (1996) 184 CLR 501 at 520.

[25] Section 131A(7) provides that a person "may be convicted" of any or all offences in the indictment. In a case such as the present, where the offences contained in the indictment are all "sexual offences" as defined in the *Sentencing Act*, the mandatory provisions of that Act have application. Section 78BB(1) of the *Sentencing Act* is in the following terms:

> (1) Where a court finds an offender guilty of a sexual offence, the court must record a conviction and must order that the offender serve:
>
> (a) a term of actual imprisonment; or
>
> (b) a term of imprisonment that is suspended by it partly but not wholly.

[26] Where a court finds an offender guilty of a sexual offence the section requires the court to impose a conviction and sentence the offender to a term of actual imprisonment notwithstanding the fact that the person will be subject to double punishment as discussed in *Pearce v The Queen*.[11] It is apparent that in many cases of this kind the elements of the individual offences charged will overlap to a significant extent, and in some cases wholly, with the elements of an offence charged against s 131A(2) of the *Criminal Code*. The matter under consideration is one such case.

[27] In *Pearce v The Queen*,[12] in a joint judgment, McHugh, Hayne and Callinan JJ made the following observation:

> To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish

[11] (1998) 194 CLR 610.
[12] (1998) 194 CLR 610 at [40].

> that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts.

[28] Their Honours went on to observe that making sentences wholly concurrent did not necessarily resolve the problem. Double punishment may remain for what is, in truth, a single act. However, as their Honours noted, the general principle against double punishment must yield to a contrary legislative intention.

Addressing the unfairness

[29] Legislation to similar effect has been passed in other jurisdictions. In relation to the equivalent legislation in Victoria Winneke P observed in *GJB*[13] that the legislation was introduced to overcome perceived deficiencies in criminal pleading exposed in the decision of the High Court in *S v The Queen.*[14] His Honour went on to remark:

> However, as this Court noted in *Macfie* the provisions of section 47A have a tendency to "cut across time-honoured concepts of procedural fairness" in the administration of the criminal law which have long established that a person accused of a serious criminal offence is entitled to know with particularity the offence he is said to have committed and the occasion upon which and the circumstances in which he is said to have committed it. It is no doubt these facets of the offence which have caused it and its counterparts in other States, to become the subject of close scrutiny.

[13] (2002) 129 A Crim R 479 at [5].
[14] (1989) 168 CLR 266.

[30] In the second reading speech of the Attorney-General of the Northern Territory it was made clear that the purpose of s 131A(2) of the *Criminal Code* was to overcome the perceived deficiencies in criminal pleading exposed in the decision of the High Court in *S v The Queen*.[15] The deficiencies were identified by the Attorney-General as follows:

> The decision in *S v The Queen* has made it very difficult to prosecute successfully a sexual assault case under the existing law where the victim is very young at the commencement of the period of the violations, those violations have occurred regularly over an extended period, there is no distinction between the separate violations, and no complaint has been made for some time after the commencement of the series of events.

[31] As was observed by Winneke P in *GJB*[16] in relation to the Victorian legislation the provisions of the section have a tendency to cut across time-honoured concepts of procedural fairness. It seems the Northern Territory section, when read with the *Sentencing Act* (NT), has the additional effect of requiring double punishment in some circumstances.

[32] Whilst some of the particular unfair consequences that have emerged may not have been anticipated by the legislature it is apparent from the second reading speech of the Attorney-General that the potential for injustice to the accused was recognized. The Attorney-General observed that "without sufficient particularity as to time, place or occasion to identify any particular act relied upon to constitute the offence charged it is extremely difficult for an accused to mount a proper defence". He went on to say:

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[15] (1989) 168 CLR 266.
[16] (2002) 129 A Crim R 479.

> To safeguard against abuse of this provision, an indictment charging the offence must be signed by the Director of Public Prosecutions.

[33] The prospect that unfairness would occur as a result of the passing of the section was recognized and addressed in two ways. The first safeguard was provided in the requirement that the indictment be signed by the Director of Public Prosecutions. The second safeguard is found in the ameliorating effect of s 131A(8). In addition, and importantly for present purposes, the operation of s 339 of the *Criminal Code* and the inherent jurisdiction of the court to avoid an abuse of process remain intact.

[34] In my opinion where, notwithstanding the presence of the identified safeguards, proceedings under s 131A(2) would amount to an abuse of process, the court may intervene to prevent the abuse. The court may do so in the exercise of the power contained in s 339 of the *Criminal Code* or in the exercise of its inherent power. A superior court has an inherent jurisdiction to stay proceedings which are an abuse of process. The jurisdiction to grant a stay of a criminal prosecution has the dual purpose of preventing an abuse of process or the prosecution of a criminal proceeding which will result in a trial which is unfair.[17] The exercise of the inherent power in such circumstances as are found in the present matter would be consistent with the apparent concern of the legislature to avoid abuse arising

[17] *Williams v Spautz* (1992) 174 CLR 509 at 518.

from the special measures adopted to meet the "deficiencies" identified in *S v The Queen*.[18]

[35] The categories of abuse of process are not closed. There will be an abuse where the conduct amounts to vexation, oppression and unfairness to the accused and where tolerance of it will bring the administration of justice into disrepute.[19]

[36] In a case such as the present where the offence under s 131A(2) of the *Criminal Code* consists of three identified acts, each of which has been the subject of a finding of guilt, and where the mandatory sentencing provisions of the *Sentencing Act* require the recording of a conviction and the imposition of a sentence of actual imprisonment leading to double punishment, relevant abuse is apparent. In the event of the Director of Public Prosecutions choosing to proceed with both the charge under s 131A(2) of the *Criminal Code* and with the three or more individual sexual offences identified as comprising the charge, it would be open to the court to grant a stay. Whether a stay would be granted must depend upon all of the circumstances of the particular case.

Question 1: Leaving the charge to the jury

[37] The learned trial Judge asked whether he was correct in allowing the charge against s 131A(2) to be left to the jury in the circumstances. By reference to s 131A(7) of the *Criminal Code* it is apparent that:

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[18] (1989) 168 CLR 266.
[19] *Rogers v The Queen* (1994) 181 CLR 251 at 256.

(a) An indictment may charge an offence of maintaining a relationship of a sexual nature with a child under 16 years (s 131A(2));

(b) the same indictment may also charge "any other offence of a sexual nature" alleged to have been committed in the course of the relationship;

(c) the accused person may be convicted of any or all offences so charged in the one indictment; and

(d) the person may be punished for any or all of the offences upon a finding of guilt.

[38] In my opinion, and contrary to the submission of the accused, the reference to "an offence defined by this section" in s 131A(7) is a reference to the offence of maintaining a relationship of a sexual nature with a child as defined in s 131A. What is meant by "any other offence of a sexual nature" is found in s131A(1) where such offences are identified by reference to relevant sections of the *Criminal Code*. Provided the offence identified in s 131A is alleged to have occurred in the course of the relationship in issue, such an offence may be charged in the one indictment together with an offence contrary to s 131A and, further, an offender may be convicted of, and punished for, any such offence so charged.

[39] In the present case the exposure of the accused to double punishment provided a basis for a stay application on behalf of the accused. Reliance upon s 131A(2) was not necessary for the presentation of the case against the accused. It amounted to prosecutorial oppression and harassment. All

of the individual offences relied upon to provide the elements of the offence under s 131(A)(2) were the subject of direct evidence from the complainant as to specific identifiable events. This was not a case where the complainant could not specify the circumstances of the particular acts. It was not a case where it was necessary to rely upon the provision to overcome the perceived deficiencies in criminal pleading exposed in the case of *S v The Queen*.[20] The direct evidence satisfied the pleading requirements identified in *S v The Queen.*

[40] The accused has been found guilty of the offences of gross indecency (count 2), sexual intercourse without consent (count 4) and indecent dealing (count 5). The combination of the findings of guilt in relation to those offences, and nothing more, constitutes the offence of maintaining an unlawful sexual relationship with the child (count 6). The imposition of an appropriate penalty for the individual counts (2), (4) and (5) would lead to a sentence proportionate to the offending of the accused. To then impose a further penalty in relation to the offence under s 131A(2) of the *Criminal Code* would be to again sentence the accused in relation to the identical conduct.

[41] The situation may have been different had the elements of the offence under s 131A(2) of the *Criminal Code* included the requirement for proof of the maintenance of a relationship of a sexual nature with the child. However, that is not the case.

[20] (1989) 168 CLR 266.

[42] In my view the learned Judge should not have allowed both the charge against the accused under s 131A(2) and the other offences alleged in the remaining counts to be left to the jury. This was because:

(a) the acts constituting the offence under s 131A(2) relied upon by the prosecution were all pleaded as counts in the indictment;

(b) no evidence was led of an act constituting an offence of the kind referred to in section 131A(1) which was not the subject of a charge in the indictment;

(c) there were none of the problems of proof of the kind referred to in *S v The Queen*.[21]

[43] In my opinion, in the circumstances of this matter, the learned trial Judge should have intervened at the commencement of the proceedings. That not having occurred, at the close of the case for the prosecution his Honour should have required the prosecutor, who had the responsibility for presenting the case, to elect between proceeding in relation to the offence under s 131A(2) or the individual offences in counts 1 to 5. Finally, if earlier intervention did not occur, upon a verdict of guilty in relation to the offence under s 131A(2) or, alternatively, to the three or more of the individual offences in counts 1 to 5, his Honour should have granted a stay in relation to the balance of the indictment. To take a verdict or verdicts on

[21] (1989) 168 CLR 266.

the balance of the indictment would lead to double punishment. In the circumstances double punishment was not justified by the need to meet the perceived deficiencies in criminal pleading identified in *S v The Queen*[22] and, therefore, was an abuse of process.

Question 2(a): Is the prosecution required to elect?

[44] In relation to the first of the remaining two questions posed in the reference to the Full Court it is my view that the question need not be answered in light of the answer to question 1.

[45] Should the power to grant a stay not be available either generally or in the circumstances of a particular case then, in light of that conclusion and upon a finding of guilt having been made, there is no basis upon which the learned trial Judge could call upon the prosecution to elect before recording a conviction. The learned trial Judge must act in accordance with s 78BB of the *Sentencing Act*.

Question 2(b): The recording of a conviction

[46] This question need not be answered in light of the response to question 1. Should the power to grant a stay not be available either generally or in a particular case then I would answer this question as follows.

[47] The finding of guilt having been made, sentencing is governed by the relevant provisions of s 78BB of the *Sentencing Act* and by s 131A(8) of the *Criminal Code*. The provisions of the *Sentencing Act* require the sentencing

[22] (1989) 168 CLR 266.

Judge to record a conviction and impose a mandatory sentence of imprisonment in relation to each of the "sexual offences". The only legislative prospect for amelioration of those requirements is to be found in the part of the section which provides that the Judge is precluded from directing that one of the sentences take effect from the expiration of the deprivation of liberty for the other offence. The power to order concurrency provides some scope for ameliorating the prospect of double punishment.

The Appeal

[48] At the time of hearing argument in relation to the reference the appellant pursued various grounds of appeal. The third ground of appeal was not pressed. The first ground of appeal was that the verdict was unreasonable or could not be supported having regard to the evidence. I will first address the remaining grounds of appeal.

Ground 2: The exclusion of evidence as to complainant's credibility

Ground 5: The directions as to the evidence regarding the credibility of the complainant

[49] It is convenient to consider these grounds of appeal together.

[50] The second ground of appeal was that the trial Judge erred in excluding evidence sought to be called from a witness, SW, impeaching the complainant's credibility and in particular disallowing a question whether, in the opinion of the witness, the complainant was to be believed upon her oath.

[51] SW is the mother of the complainant. She was called to give evidence by the prosecution and she was cross-examined by counsel for the accused. In the course of cross examination she was asked:

> Would you believe what (the complainant) says under oath in this court?

The question was the subject of an objection and without providing reasons the learned Judge ruled that the question should be disallowed.

[52] On the hearing of the appeal reference was made to the decision of the Victorian Court of Appeal in *R v BDX*[23] a decision delivered on 12 March 2009 by a bench consisting of five Justices of Appeal. In that case Vincent and Weinberg JJA [24]reviewed the relevant authorities on this issue and stated that the modern formulation of the applicable rule is to be found in Archbold, Criminal Pleading, Evidence and Practice 2009 in the following passages:

> Whether a witness has or has not been convicted, witnesses may be called to speak as to his general character, although not as to any particular offence of which he may be guilty .... In order to impeach the credit of a witness for veracity, witnesses may be called by the other side to prove that his general reputation is such that they would not believe him upon his oath ... In practice the question usually put is "from your knowledge of the witness would you believe him on his oath"?
>
> ....
>
> The impeaching witness may not, in examination in chief, give his reasons for his belief, but he may be asked for his reasons in cross-

[23] [2009] VSCA 28.
[24] (at paragraphs 27 to 49)

examination, and his answers in cross-examination cannot be contradicted. (References omitted).

[53] Their Honours went on to refer to the judgment of the Court of Criminal Appeal in *R v Richardson; R v Longman*[25] where Edmund Davies LJ (with whom Widgery and Lyell JJ agreed) summarised the position as follows:

> 1. A witness may be asked whether he has knowledge of the impugned witness's general reputation for veracity and whether (from such knowledge) he would believe the impugned witness's sworn testimony.
>
> 2. The witness called to impeach the credibility of a previous witness may also express his individual opinion (based upon his personal knowledge) as to whether the latter is to be believed upon his oath and is not confined to giving evidence merely of general reputation.
>
> 3. But whether his opinion as to the impugned witness's credibility be based simply upon the latter's general reputation for veracity or upon his personal knowledge, the witness cannot be permitted to indicate during his examination in chief the particular facts, circumstances or incidents which formed the basis of his opinion, although he may be cross-examined as to them.
>
> This method of attacking a witness's veracity, though ancient, is used with exceeding rarity. Nevertheless it was sought to be made use of in the present case... .

[54] It was observed that the rule as stated had been applied by other courts for example the Full Court of the Federal Court in *Bell v The Queen*[26] and in *R v Hanrahan.*[27]

[55] These authorities were not drawn to the attention of the learned trial Judge.

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[25] [1969] 1 QB 299 at 304 - 305.
[26] (1985) 7 FCR 555.
[27] [1967] 2 NSWR 717.

[56] The respondent to the appeal accepted that the position as formulated above was applicable in this jurisdiction, although it was argued that the exclusion of the question occurred in circumstances where the opinion of the witness that the complainant was not to be believed, was in any event before the jury. Reference to the transcript of the evidence of the mother confirms that to be so. At the time of the trial, and when the mother was not on speaking terms with her daughter, she told the jury that her daughter would "lie... about things" and went on to identify some of the claimed lies. The adult friend HM also gave evidence that she initially did not believe the complainant and was then unsure of her veracity at the time of trial. The appellant in his evidence identified the complainant as a person who told lies. Counsel for the accused said in his address to the jury:

> It is fairly obvious that (the mother) doesn't believe her. It is fairly obvious that the -- that the witness (the mother) has formed a view that she is certainly capable of telling a lie.

[57] Although the learned trial Judge prevented counsel for the accused from asking the identified question the information sought to be elicited in that question was in any event effectively before the jury. Had the matter rested there, whilst accepting that the learned trial Judge erred in failing to allow the question, I would have been inclined to dismiss the ground of appeal.

[58] However, in ground 5, the accused also complained that the learned trial Judge erred in his directions to the jury in relation to the evidence regarding

the veracity of the complainant. In the course of his address the learned trial Judge said:

> Now, you have also heard evidence from HM (an adult friend) that she thought that she was lying at the time and now she is not sure whether she is telling the truth or not. (HM's) opinion on that subject is not evidence and you should ignore it. What (HM) thought about the child is neither here nor there. It is your duty to find out whether what she told (HM) is the truth. It is your duty to find out whether what she told you is the truth. Other people's opinions about her are not evidence. That goes to whether she is a liar or whether she is not a liar.

[59] Later in the address the learned trial Judge said:

> Mr Maley pointed out that it is fairly obvious that (the mother and HM) did not believe (the complainant). That may be so, but as I have told you, it is irrelevant whether they believe her or not. It is your task to decide whether she is to be believed.

[60] To the contrary the evidence was admissible and therefore was available to be considered by the jury as part of their deliberations. The direction that the opinions were irrelevant and to be ignored was in error. It is to be assumed that the jury obeyed the direction to ignore the evidence. The evidence may have been important in this case where the credibility of the complainant was of critical importance.

[61] Further, the evidence of HM was capable of being of assistance to the jury in another way. Her evidence went to the demeanour of the complainant at the time of her discussion with HM. HM asked the complainant questions and said of the complainant that she was "not really responsive" and "sat there doing her blank stare that she normally does". Such a response may

have induced the jury to conclude that the complainant was acting in a manner consistent with the serious allegations she was then making. However, subsequent evidence from HM may have provided another explanation for her demeanour. HM suggested that the demeanour of the complainant was not different from how she often appeared on other less serious occasions. The direction of the learned trial Judge to ignore her evidence may have led the jury not to consider this available explanation for the demeanour of the complainant at the time of her discussions with HM.

[62] I would allow the appeal on these grounds.

Ground 4: The prejudicial evidence of the complainant

[63] During the cross-examination of the complainant it was put to her that the appellant had never behaved inappropriately towards her. The complainant gave the following non responsive answer which, the parties acknowledge, was audible to the jury:

> He has. And he has done it to my friends, too, the arsehole.

[64] The cross examination continued without interruption. Counsel for the appellant did not apply for a discharge or a direction to the jury. There was no further mention of the answer before the jury by counsel or the Judge.

[65] The evidence was prejudicial. Taken in context it asserted that the accused had committed sexual offences against other children. The information was not relevant to the facts in issue in the proceedings and it was likely to have

had a detrimental impact upon the assessment by the jury of the character and credit of the accused. Further, the information was unchallenged before the jury and was open to be accepted by them. In the absence of a direction from the trial Judge, the evidence may have led to impermissible reasoning by members of the jury that the accused is the sort of person who would commit the offence with which he is charged.

[66] No objection was taken at the trial to the omission of the learned trial Judge to direct the jury in relation to this evidence. By operation of r 86.08 of the *Supreme Court Rules* it is necessary for the accused to obtain leave to appeal on this ground. In my opinion leave to appeal on this ground should be granted and the appeal allowed.

Ground 1: The verdict was unreasonable or could not be supported having regard to the evidence

[67] Having reviewed the whole of the evidence, I am of the view that it could not be said that the verdict was unreasonable or could not be supported having regard to the evidence.

[68] It was submitted on behalf of the appellant that there was no real difference in the nature and detail of the evidence of the complainant in respect of each and every count on the indictment. It followed, so it was submitted, that the verdict of the jury of guilty in relation to counts 2, 4, 5 and 6, whilst finding the appellant not guilty in relation to count 1 and being unable to reach a

verdict in relation to count 3, suggested that the verdict was unsafe and unsatisfactory.

[69] A review of the evidence reveals a clear basis upon which the jury may have distinguished between both count 1 and count 3 and the remaining counts.

[70] Count 1 related to an allegation by the complainant that the appellant touched her with his penis whilst they were in a “swag” in the lounge room of their home in Alice Springs. Evidence of complaint by the complainant to HM was led and in the course of that evidence HM was asked whether the complainant referred to the appellant touching her with his "penis or doodle". HM said she specifically asked the complainant that question and the complainant respondent "no, only fingers". The evidence of the complainant before the jury, whilst identifying the incident in terms of place and circumstance, was otherwise vague and uncertain. She could not recall how she came to be naked and she could not recall how she came to be in the swag. There was a basis upon which the jury may have concluded that they could not be satisfied beyond reasonable doubt of the guilt of the appellant in relation to this particular complaint.

[71] Reference was also made to count 3 where the jury was unable to reach a unanimous verdict and was discharged in relation to that count. The allegation was that the appellant had committed cunnilingus on the complainant. A real issue may have arisen as to whether the evidence established that cunnilingus occurred. The description of the incident

provided by the complainant was firstly “that he raped me” and when asked for detail she said that the appellant "licked me ... on my vagina ... it was just a lick". No further information as to the alleged offending was provided and there was a basis upon which the jurors may have disagreed.

[72] The verdict in relation to count 1 and the failure to reach a verdict in relation to count 3 do not, in my view, reflect an inconsistency when compared with the verdicts of guilty in relation to counts 2, 4, 5 and 6 considered in light of the evidence available to the jury.

Conclusion

[73] For the reasons expressed above, the appeal should be allowed.

[74] In my opinion, there was evidence which could sustain a verdict of guilt in relation to the matters where the jury returned a verdict of guilty. Upon the whole of the evidence it was, in my view, open to the jury to be satisfied beyond reasonable doubt that the accused was guilty in relation to those matters.

[75] I would order a retrial.

SOUTHWOOD J:

[76] I too agree with the answers proposed by Riley J and with his Honour’s reasons. For the reasons given by Riley J, the appeal should be allowed and a retrial ordered.
