Stuart v The Queen [2010] NTCCA 16

PARTIES:	JOHN RICHARD STUART
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 19 of 2010 (20904813)
DELIVERED:	19 November 2010
HEARING DATES:	27-29 OCTOBER 2010
JUDGMENT OF:	MILDREN, KELLY & BARR JJ
APPEAL FROM:	BLOKLAND J AND A JURY OF 12

CATCHWORDS:

CRIMINAL LAW – appeal against conviction and sentence – sexual offences – admissibility – whether requirement that evidence of complaint be early – whether evidence of later memory of events admissible – "the Bolster Rule" - whether risk that complainant's recollection inaccurate – appeal against conviction dismissed – whether sentence manifestly excessive - appeal against sentence allowed

Criminal Code, s 14(2), 411(1)
Criminal Law and Consolidation Act and Ordinance, s 66
Evidence Act, s 21B(2)(b)(i)
Sentencing Act, s 43
Sexual Offences (Evidence and Procedure) Act, s 4(5)(b)

M v The Queen (1994) 181 CLR 487; applied

R v Minor (1992) 2 NTLR 183; considered

Bellemore v State of Tasmania (2006) 207 FLR 20; *GPR v R* [2007] NTCCA 12; *HML v The Queen* (2008) 235 CLR 334; *MK v R* [2005] NTCCA 13; followed

Cheung v The Queen (2001) 209 CLR 1; *Fleming v The Queen* (1998) 197 CLR 250; *Gipp v The Queen* (1998) 194 CLR 106; *Graham v The Queen* (1998) 195 CLR 606; *MFA v The Queen* (2002) 213 CLR 606; *S* (2002) 129 A Crim R 339; *Suresh* (1998) 102 A Crim R 18; referred to

REPRESENTATION:

Counsel:

Appellant:	P Elliott
Respondent:	S Robson

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Mil 10478
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Stuart v The Queen [2010] NTCCA 16
No CA 19 of 2010 (20904813)

BETWEEN:

JOHN RICHARD STUART
Appellant

AND:

THE QUEEN
Respondent

CORAM: MILDREN, KELLY & BARR JJ

REASONS FOR JUDGMENT

(Delivered 19 November 2010)

THE COURT:

[1] This is an appeal against conviction and sentence.

[2] The appellant was charged with three counts of indecently assaulting one TL between 29 March 1980 and 7 November 1983 at Alice Springs in the Northern Territory, contrary to s 66 of the *Criminal Law and Consolidation Act and Ordinance*. At the completion of the trial, the jury returned verdicts of guilty on each count. The learned trial Judge convicted the appellant on each count and imposed a sentence of 20 months imprisonment on each count to be served concurrently, backdated to take into account time already spent in custody and fixed a non-parole period of 14 months.

[3] The day following the hearing of this appeal the Court made the following orders:

1. The appeal against conviction is dismissed.

2. The appeal against sentence is allowed and the sentences imposed quashed.

3. In lieu thereof, the appellant is convicted and sentenced to imprisonment for 16 months on each count, to be served concurrently, backdated to commence from 18 February 2010.

4. That the sentences imposed be suspended forthwith.

5. That there be an operative period of 12 months for the purposes of s 43 of the *Sentencing Act* to run from the date of these orders.

[4] We said that we would publish our reasons at a later time. These are our reasons.

The Crown case

[5] The complainant TL was born on 6 November 1976 in Alice Springs. Her parents were KL and LL. When she was about 4 years of age her parents moved to live in a house in Hibiscus Street, Alice Springs where they remained until she was 8 years of age. At the time of the alleged offending TL had an older brother JL and a younger brother DL.

[6] The appellant is a cousin of the complainant's father KL.

[7] In about 1982, when the complainant was about 6 years of age, the appellant and his partner and two young children came to stay with the complainant's family. According to the complainant's father KL, the appellant and his family originally stayed in a garden shed out the back of the property but when the weather got cold the appellant and his family moved into the house. The evidence was that at the time of the alleged assaults the appellant and his family slept on the lounge room floor. Leading from the lounge room were three bedrooms. The first bedroom as one proceeded down the passageway was the complainant's. Next to her was the bedroom of her brothers. The parents slept in the bedroom at the end of the passageway.

[8] It was unclear on the evidence for precisely how long the appellant and his family were staying at the complainant's parents' home. The complainant thought it may have been for a week or maybe two. The complainant's mother was unable to recollect in her evidence in chief but in cross-examination she conceded that it was for a sufficiently long enough period for a change in seasons because she recalled it getting colder. According to her evidence, they were invited into the lounge room because there was a heater there. Nevertheless, the evidence was consistent that this was the only occasion when the appellant and his family stayed with the complainant and her family.

[9] According to the complainant the appellant was very close to her parents, she loved him as an uncle and got along with him very well before the assaults occurred.

[10] At a time when the complainant's mother was away, the complainant said that she was asleep in her bedroom and woke up with the appellant at the end of her bed. Her underwear had been pulled down to her ankles. Her knees were bent and to the side so that her legs were open. When she woke up the appellant was licking her vagina and rubbing and touching her on the vagina. When she woke up, she pulled her underwear up and moved back to her pillow. The appellant then left the room. The complainant's evidence was that her bedroom was lit up by a streetlight just outside of her bedroom window. It was her normal practice to sleep with the door to her room leading into the hallway open. She noticed that when the appellant was in her bedroom the door was closed. She described the appellant as wearing a black top and a pair of jeans. She said that she did not say anything to him whilst he was in the room and nor did he say anything to her.

[11] On the second occasion, which she said occurred during the next evening, she was again woken up from her sleep to find the appellant licking her vagina. She described her underwear as being down to her ankles and her knees bent and her legs open. On this occasion, she said that the appellant was beside the bed and she was up on her pillow. She said that she pulled her underwear back up and rolled to the other side of the bed against the wall. She also indicated that the appellant had touched her vagina with his

fingers. After she woke up, she said that the appellant left the room. She said that he was wearing a black shirt and blue jeans and nothing was said by either of them on that occasion.

[12] In relation to the third occasion which occurred on the following night, once again she woke up to find the appellant licking her vagina and using his fingers. She described her underwear as being down around her knees. She was up on her pillow, her legs were open and the appellant was beside the bed. She said that she pulled her underwear up, straightened up her nighty and that the appellant climbed over the bed and lay next to her on the bed. After that, she started whinging. She said that the appellant hopped off the bed and said, “No, no” and patted the bed with his hand saying, “It’s ok, it’s ok”. She said, “No, no” again and he got up and said, “It’s ok, it’s ok” and then left the room. On this occasion, she said that the door was also closed and as he left the room, she remembered seeing a light which looked like it came from the dinning area shining through the open door. She said that he was still wearing the black shirt and blue jeans.

[13] Her evidence was that at that time in her life she had no knowledge of sexual matters at all, her parents had not spoken to her about what was right or wrong with respect to adults touching children and that she did not understand what the appellant had been doing. No complaint was made by the victim to either of her parents until many years later.

[14] The complainant gave evidence that she did not think about these events until she was 13 years of age. She was at a party with a few friends having her first taste of alcohol. She said that she had drunk about three drinks of blue Curacao. The party was held at a block of units in Nicker Crescent, Alice Springs. She said that she was sitting out the front of the property waiting for a friend to come so that she could leave and all of a sudden, "I just had all the visions of what [the appellant] had done to me". She said that this really made her feel upset and distraught but she did not really know what to think of it and so she left her friends and walked home on her own. At that time, she did not speak to anyone else about these matters.

[15] The complainant gave evidence that when she was 16 she and her family had gone to the corner shop at the North Side Shops when she saw the appellant standing out in front of one of the shops. When her parents got out of the car, she hid in the car behind the front seat so that the appellant could not see her and come over and speak to her. She said that she hid out of fear because of what the appellant had done to her and she did not know how to handle it.

[16] At that time she had a boyfriend whose first name was Barry. She gave evidence that when she returned home she telephoned him and told him that her uncle had molested her when she was little. After giving him some further information Barry called her a "fucking dirty bitch" and hung up the phone. She then decided that she would go and speak to her aunty HL to whom she was very close. HL's daughter happened to be at the

complainant's home at the time and together they walked down to her aunty's boyfriend's house which was just around the corner. As they arrived, her aunt was just leaving so they got into her aunt's car. The complainant said that by then, "I was crying, extremely emotional". When they arrived back at her aunt's house, she told her aunt that the appellant had molested her when she was 6 or 7 at a time when he had been staying at her home. She said that she did not mention any details. After that happened her aunt contacted her mother who came around and they both consoled her for a while. She said that when her mother came around she could not speak to her at that time because she was so distraught she could not speak at all, so her aunt explained everything to her.

[17] The complainant said that in 2007 she moved to Port Augusta and sometime thereafter she saw the appellant in a car park. Thereafter she went to the police in Port Augusta and made a report about the events to them.

[18] The only other witnesses called to give evidence were the complainant's mother, father and aunt. No record of interview was tendered and the appellant did not give evidence.

Ground (e) – the learned trial Judge erred in admitting evidence of the complainant as to her recall at the age of 13 of what the appellant allegedly did to her

[19] It is necessary first to observe that the complainant's evidence was given at the trial before Blokland J by playing a pre-recording made at a special

sitting before Riley J on 9 November 2009 at Alice Springs, in accordance with s 21B(2)(b)(i) of the *Evidence Act*.

[20] Mr Elliott, who was also counsel for the appellant at his trial and during the taking of the pre-recording of the complainant's evidence, took objection to this evidence at the time of the pre-recording before Riley J. His Honour admitted the evidence and the special hearing to record the complainant's evidence continued on the basis that the evidence was admitted.

[21] Subsequently, the trial commenced before Blokland J, but at a time before the evidence was heard by the jury, Mr Elliott submitted that this evidence should be excised from the pre-recording. Her Honour ruled that the evidence was admissible on two bases. First, it was relevant to rebut a suggestion that her memory of these events some 27 years later was not a conscious recollection. Given that the cross-examination of the complainant suggested that possibility, it would have been relevant in re-examination to rebut that suggestion and therefore, as a practical matter, although the evidence should not have been led by the Crown in the first instance in accordance with the Bolster Rule, it would be artificial to excise it from the pre-recording when the evidence was admissible in re-examination.

[22] The second basis for admitting the evidence was that it was relevant to explain why it was that the complainant had not complained up until the time that she was 13 years of age.

[23] Mr Elliott submitted that the evidence was inadmissible because there was no evidentiary basis for it to be admitted. It was not evidence of a prior consistent statement; nor was it evidence of recent complaint. It was not relevant to rebutting the suggestion that she may have dreamt it up during the period after she was 6 years of age.

[24] We are of the view that the evidence would not have been relevant or admissible in re-examination as going to the complainant's credit on the question of whether or not she had a true recollection of the events which occurred all those years ago.

[25] Evidence of a late complaint or the reasons for not making an early complaint is not admissible in evidence in chief led by the Crown.[1] The reasons why it is not admissible in evidence in chief were explained in great detail by Heydon J in *HML v The Queen*.[2] Essentially, evidence of recent complaint is only admissible as going to the credit of the witness. Evidence of no complaint or a late complaint is led in order to explain the delay in making a complaint and it is therefore relevant only to credit. The Crown cannot lead evidence in chief going to the credit of a witness because of the well-known Bolster Rule. This is so, as Heydon J points out, even if the defence have foreshadowed before the witness has been called, that the defence intends to attack the witness's credit on the basis of making either no complaint or a late complaint. As Heydon J points out, the Bolster Rule

[1] *Bellemore v State of Tasmania* (2006) 207 FLR 20 at para 45 per Crawford J at para 181 per Blow J.
[2] (2008) 235 CLR 334 at paras 290 to 313 per Heydon J.

is intended to avoid false issues. Counsel for the accused may decide not to cross-examine a witness as to the non-making of the complaint or the reasons for not making a complaint at an earlier time. If however the matter is raised by counsel in cross-examination, then that matter may fairly be dealt with in re-examination.

[26] However, in this particular case, although the evidence was inadmissible we would not allow the appeal on that ground alone. The evidence was virtually worthless and to the extent that it favoured either party, it favoured the appellant. Mr Elliott conceded quite properly that the appeal could not succeed if that was the only ground which he made out.

[27] We might at this point also mention that evidence was elicited from both the complainant's mother and aunt during their evidence in chief concerning the question of complaints made when the complainant was 16. Likewise this evidence was inadmissible in evidence in chief and should not have been led, because in order to be admissible as evidence of complaint, it must be "recent", and on no view could it be said that a complaint 10 years after the alleged acts was "recent".[3] However, Mr Elliott frankly conceded that he took no objection to it for tactical reasons. No complaint is now made that that evidence was wrongly lead by the Crown[4] and we say no more about it.

[3] *Suresh* (1998) 102 A Crim R 18 (High Court); *Graham v The Queen* (1998) 195 CLR 606; *S* (2002) 129 A Crim R 339 (Court of Appeal Qld).
[4] Nor could it have been: *Suresh* (1998) 102 A Crim R 18.

Ground (c) – the verdict of the jury was unsafe and unsatisfactory having regard to the evidence as a whole

[28] This ground was pleaded in this way because when the appellant sought leave to appeal, four grounds of appeal were to be relied upon as set out in the affidavit in support as follows:

> (a) The verdict of the jury is unreasonable and cannot be supported having regard to the evidence;
>
> (b) the verdict of the jury should be quashed because the jury should have entertained a reasonable doubt of the applicant's guilt;
>
> (c) the verdict of the jury was unsafe and unsatisfactory having regard to the evidence as a whole; and
>
> (d) the verdict of the jury lead to a miscarriage of justice.

[29] Leave was granted by a single Judge only on ground (c).

[30] Section 411(1) of the *Criminal Code*, which provides the statutory formula for the determination of an appeal in ordinary cases is expressed in the following terms:

> The Court on any such appeal against the finding of guilt shall allow the appeal if it is of the opinion the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court of trial should be set aside on the ground of the wrong decision on any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal.

[31] The provisions of s 411(1) of the *Criminal Code* follow a statutory formula which is common in all jurisdictions in Australia.

[32] The expression "unsafe or unsatisfactory", although it had been used on a number of occasions including cases in which the expression was accepted in the High Court does not appear in the statutory formula.

[33] As was later pointed out in *Gipp v The Queen*[5] and in *Fleming v The Queen*,[6] it is safer to return to the words of the statutory formulation in the place of attempted synonyms so that the requirement to test disputed verdicts against the actual language of the criminal appeal legislation is restored.

[34] As was said in *MFA v The Queen:*[7]

> In recent years, in many contexts, this Court has insisted upon close attention to the language of the applicable legislation in preference to other formulations derived from pre-statutory expositions, post-statutory explanations and (in this case) the language of foreign legislation.

[35] Notwithstanding that criticism, the learned Judge gave leave to appeal on a ground criticised by the High Court and refused leave on grounds that would have fallen within the statutory formula.

[36] Notwithstanding this error, it is plain that the appellant wished to argue that the verdict of the jury should be set aside on the ground that it was unreasonable or cannot be supported having regard to the evidence. Although nothing turns on this in this case, we draw attention to the need to stick closely to the statutory formula and to avoid using the expression "unsafe and unsatisfactory".

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[5] (1998) 194 CLR 106 at 147 to 150 [120-127].
[6] (1998) 197 CLR 250 at 255 to 256 [11].
[7] (2002) 213 CLR 606 at 620 [46] per McHugh, Gummow and Kirby JJ.

[37] The test to be applied in considering this ground is well known and not in doubt. In *M v The Queen*,[8] the majority of the Court[9] said:

> In most cases a doubt experienced by an appellate court will be a 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 in 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 that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court 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.

[38] The main thrust of the argument of Mr Elliott was that this Court should entertain a reasonable doubt because the evidence contained "discrepancies, displays inadequacies, is tainted and otherwise lacks probative force".

[39] In this particular case, the complainant gave evidence of events which occurred approximately 27 years ago when she was a child of 6 or 7. There was no evidence of recent complaint and no corroboration. The entire Crown case stood or fell solely on her evidence. We note that a *Longman* direction was given by the learned trial Judge, as indeed it should have been, and that no objection was taken to her Honour's summing up. So far as

[8] (1994) 181 CLR at 494 to 495.
[9] Mason CJ, Deane J, Dawson J and Toohey J.

discrepancies in the account given by the complainant are concerned we consider these to be very minor. Counsel for the appellant pointed out that the complainant told the police in her statement that at the time when the first instance occurred the appellant was at the side of her bed and not at the end whereas in her evidence in chief she said that the first incident occurred when the appellant was at the end of the bed and the second incident occurred whilst the appellant was at the side of the bed. The second discrepancy alleged was that the complainant told the police in relation to the second incident that she was unable to see what the appellant was wearing. The cross examination on this point is as follows:

> Q: Did you tell the police you couldn't see what he was wearing?
>
> A: Yes.
>
> Q: You think he would have been wearing a particular clothing – t-shirt and jeans - because that's what he always wore?
>
> A: I think I was referring to the actual black top and the blue jeans.
>
> Q: Well, in any event, what I am getting at and what I am asking you is do you agree that you told the police you couldn't see what he was wearing but you think he would have been wearing a certain type of clothing because that's what he usually wore?
>
> A: Yes.
>
> Q: When you came to the third incident, and I'm just trying to find the relevant passage, you said in relation to the third incident you're pretty sure he was in the same type of clothes, a t-shirt and jeans?

A: Yes.

Q: When you use the words “the same type of clothes” is it fair to say you meant the same type of clothes that you saw him wearing around the house by day?

A: Yes.

Q: Not the same type of clothes that you observed when you say the earlier two incidences occurred?

A: I don’t recall him having any other clothes with him.

Q: Yes, what I’m getting at is, if I could put it in a nutshell, you – is it fair to say you didn’t see – or when you told the police what had happened, you didn’t have a recollection of what clothing, you didn’t actually see and recall and retain in your memory the clothing he had on at the time of the first and second incident?

A: Yes.

Q: Is that fair to say?

A: That’s fair to say.

Q: … but you told us in your evidence he had on a black top and blue jeans?

A: That’s what I remember seeing him in.

Q: On the first occasion, you have a recollection of seeing him with that on, do you?

A: It was on the third.

Q: Yes, but do you agree that you told us that on the first occasion, he had on a black top and blue jeans and you told us on the second occasion he had on a black top and blue jeans?

A: He had a shirt and jeans on. I can't be absolutely certain it was a black top.

Q: You say he had a shirt and jeans on on all three occasions and you saw that on all three occasions?

A: Yes.

Q: Then why did you tell police specifically in relation to the second occasion "I couldn't see what John was wearing"?

A: Well, I know he had clothes on, he was - he had clothes on.

[40] The complainant's mother gave evidence that the appellant used to dress a lot in jeans and often a coloured shirt, a cowboy styled shirt.

[41] Of course, that does not necessarily mean that he was not wearing a black top in the middle of the night. He may have been wearing a black singlet under his shirt during the day and taken off his shirt when he slept. We do not consider this as a major discrepancy in the complainant's evidence.

[42] The third discrepancy was that the appellant told the police that each incident was separated by a night or a couple of nights later, whereas in her evidence in chief she maintained that each incident occurred on consecutive nights. She might well have been mistaken in her recollection about whether the events occurred on consecutive nights or not. We do not think that that is a significant matter.

[43] Counsel for the appellant submitted that there were some discrepancies in the evidence between the complainant and her aunt relating to the time

when, at 16 years of age, she told her aunt what had happened to her. In our view, it is not surprising there would be some inconsistencies between the recollection of the witnesses of precisely what occurred some 16 or 17 years earlier. The aunt was cross-examined about whether the complainant was upset when she first got into the car:

> Q: When she came to your place in the car she was perfectly alright, wasn't she?
>
> A: Well, I wasn't looking at [the complainant], I was concentrating on where I was going because I'd only just – was going home.
>
> Q: She didn't appear to you to be hysterical, distraught, deeply upset, anything like that?
>
> A: She certainly wasn't hysterical, no.
>
> Q: And not distraught that you were able to notice in the time that - even when you arrived home and went to the bedroom with her and started talking?
>
> A: Not really, no. I didn't notice that, no.
>
> Q: When you say "not really" do you mean you had absolutely nothing to indicate she was distraught or upset?
>
> A: No, we were serious, I mean I was going to have a serious conversation with her, so she was serious as well.

[44] The aunt's evidence concerning the reason for the conversation so far as she was concerned was that she was aware that the complainant had a boyfriend and she thought it was time to have a chat with her about the "birds and the bees" and she said to her "don't do anything that you don't want to do with

this young fellow" and that "it's best to stay a young girl as long as you can". According to the aunt, it was at that stage that the complainant broke down and told her that she had been molested by the appellant when she was a little girl. The complainant on the other hand denied that on that day her aunt was having a talk to her about "the birds and the bees" or about "sex education" although she did agree that prior to that time her aunt had spoken to her about that matter.

[45] The alleged inconsistency is about the occasion when this occurred. It is an inconsistency between the complainant's evidence and the aunt's evidence but it is really a minor matter.

[46] Cross-examination was directed towards why the complainant had made no complaint to anyone after she remembered the incident at the time when she was 13 and, in particular, why she was unable to tell her mother about it until many years later. Having regard to the relationship between the complainant's mother and the appellant, it is hardly surprising that the complainant chose to tell her aunt with whom she was very close rather than her mother.

[47] The complainant said that she first started to tell her mother about it when she was about 21 years of age although her mother seemed to have no recollection of this until about two years before the trial. We think the jury was entitled to take the view that the mother was an unsatisfactory witness and to prefer the evidence of the complainant on that issue having regard to

the fact that both the complainant and her aunt gave evidence that after she had told her aunt about what had happened to her, the mother was summoned to her aunt's house because her aunt believed that her mother should know what occurred. However as events transpired, the complainant said that when her mother arrived she was too distressed to tell her anything. The aunt said that although she was in the room and she saw her mother comforting the complainant she deliberately "tuned off and did not listen into any conversation between them". All she could remember was her mother saying words to the effect, "It's ok, it's ok, it's all over now". The mother had no recollection of this incident at all.

[48] Another difference between the evidence of the mother and the evidence of the complainant and her aunt related to a matter which Mr Elliott submitted suggested that the complainant's evidence was tainted.

[49] In cross-examination of the mother the following occurred:

> Q: Have you talked about this with your daughter in the last week or two before you came along to give your evidence?
>
> A: Yes, we have talked about it, but she still has not totally opened up to me as to what had happened.
>
> Q: Did she tell you anything about what happened when she was in court?
>
> A: No.
>
> Q: Are you sure?

A: Yes.

Q: Nothing at all?

A: No.

Q: … you certainly did not have a conversation with [the complainant] when she was 16 years old in the presence of her aunt, did you?

A: I was told that we did, but I can't remember it.

Q: Who told you that?

A: [HL] and [the complainant].

Q: When did they tell you that?

A: A few days ago.

Q: Yes, you were being told about what's happened in this court case, haven't you so far?

A: No, just that.

Q: You've been told what other people have said, haven't you?

A: Only that that was the only comment.

Q: What, you were sitting around having a cup of tea and all of a sudden out of the blue did someone say, "By the way I gave evidence to say that there was a conversation when [the complainant] was 16 about there being a conversation with [HL] and you" and then that was the end of it and you didn't talk about it any more?

A: We were only talking about what we can – what – our memories and it wasn't about this case only. It was about memories in

general and trying to remember things of 28 years ago is – is quite hard – and then of course it came up in conversation from there.

[50] However, the aunt denied that there was such a conversation. In cross-examination she said:

> Q: … have you had a conversation with either mum or [the complainant] or both in the last week about that conversation and whether it occurred and what was said in it?
>
> A: No.
>
> Q: Are you absolutely sure?
>
> A: Yes.

[51] The complainant was not cross-examined about that issue because she had already given her evidence and no application was made to recall her.

[52] Some other discrepancies were pointed out in relation to the evidence of the aunt and the mother in relation to what they had told the police in their prior statements. The mother was cross-examined along the lines that she had told the police that at one stage she had asked the complainant whether the incident involved penetration and at the time she was "pretty sure" that the complainant had said "yes". When giving her evidence the mother was unable to recall that and said that she may have misunderstood her daughter as she has a hearing problem.

[53] The aunt was cross-examined about what she said to police in her statement when she alleged that the complainant had told her that the appellant "used to come into her room through the window". The aunt resiled from that in cross-examination.

[54] The evidence of the mother and the aunt was clearly admissible as an inconsistent out of court statement which reflected on the credit of those witnesses, but unless those witnesses affirmed as true that the complainant had told them that she had been penetrated and that the appellant had entered her bedroom through the window the evidence was not evidence which could be used to attack the credit of the complainant.

[55] Mr Elliott's main argument was that the explanation given by the complainant as to how she recalled the events at the age of 13 for the first time and the detail that she was able to give of the events during her evidence was such that no reasonable jury could believe that evidence particularly as, at the age of 6 or 7, the complainant claimed to have had no knowledge of sexual matters at all. During the trial, the complainant was cross-examined about whether she had had nightmares or dreams of this kind, which the complainant denied. There was nothing to suggest in the evidence that there was ever any hostility between the complainant and the appellant. Indeed, apart from the two occasions when the complainant saw the appellant after the events were alleged to have occurred, the complainant had had nothing to do with

the appellant since then. There is nothing to suggest in the evidence that the complainant had a motive to lie. We think it is unlikely that a young girl, whether at 13 or even some earlier age, would have dreamt of these matters if they had not occurred. The explanation for the sudden recall of the events at age 13 is not such as to cause us to have a reasonable doubt about the complainant's evidence. It is a matter of human experience that events of many years ago, even about childhood events, can be recalled for the first time many years later, often without any particular reason that a person is able to remember as to why it was that those events were recalled. That we think was a matter for the jury who was able to see and hear the complainant giving her evidence.

[56] As noted earlier, the appellant did not give evidence and therefore it cannot be said, as was said in *M v The Queen*,[10] that the appellant had done everything that he could have done to answer the charges against him. Whilst, of course, no adverse inference can be drawn against the appellant for exercising his right of silence, the case as it was left to the jury stood or fell on the complainant's evidence alone.

[57] So far as lack of recent complaint is concerned as Gaudron J pointed out in *M v The Queen*:[11]

> There is one class of case which cannot be approached on the basis of an assumption of the kind discussed in Hawkins' *Pleas of the Crown*, namely, cases of sexual assault on a child by a person who

[10] (1994) 181 CLR 487.
[11] (1994) 181 CLR 487 at 515.

> has the child's trust and confidence. In cases of that kind, the victim may be reluctant to resist the offender or to protest and, on that account, reluctant also to complain. As well, a child in that situation may be reluctant to complain from fear that he or she would not be believed, from fear of punishment or, even, fear of rejection by the offender.

[58] Since that time the *Sexual Offences (Evidence and Procedure) Act* s 4(5)(b) has required trial judges to warn a jury that delay in complaining does not necessarily indicate that the allegations are false and to inform the jury that there may be good reasons why the victim of a sexual offence may hesitate in complaining about it.

[59] In the circumstances of this case, we do not think that lack of recent complaint evidence is of any significance.

[60] Taking into account all of the matters referred to by counsel for the appellant, we do not consider that the appellant has established that this Court should entertain a reasonable doubt about the appellant's guilt or that the verdict of the jury was unreasonable or cannot be supported having regard to the evidence and we would dismiss this ground of appeal.

[61] The result is that the appeal against conviction must be dismissed.

Appeal against Sentence

[62] At the time of the offending, the maximum penalty for the offences for which the appellant was charged was imprisonment for two years. The maximum penalties since then have been significantly increased. Section 14(2) of the *Criminal Code* provides that the appellant cannot be punished to

any greater extent than was authorised by the law in force at the time the offence was committed.

[63] In both *MK v R*[12] and *GPR v R*,[13] this Court held that a sentencer dealing with historical offences should apply the sentencing standards at the time of the offending. Neither counsel was able to provide the Court with accurate information as to what exactly the sentencing standards were for this kind of offence in the early 1980s, but we have had access to the Court's records to ascertain this for ourselves. During the period from 1979 to 1985, the median range imposed by Judges of this Court for indecent assault upon a child was in the order of 10 to 12 months following a plea of guilty. In most cases, the sentences were either wholly or partly suspended.

[64] In the present case, we think the head sentences imposed are excessive and do not reflect the sentencing standards of the time. Allowing for a discount in the order of 25 per cent for a plea of guilty, we consider a median range for offending of this kind where there was no penetration and where the matter proceeded to trial, would have been in the order of 16 months.

[65] The learned sentencing Judge imposed a non-parole period notwithstanding that the appellant had no previous convictions for sexual offences and had no convictions at all since 1993. There was nothing to suggest, in the material placed before the learned sentencing Judge, that the appellant was not a proper candidate for a partially suspended sentence.

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[12] [2005] NTCCA 13.
[13] [2007] NTCCA 12.

[66] In *R v Minor*,[14] this Court considered the circumstances upon which it would be appropriate for a sentencing judge to impose a partially suspended sentence rather than a non-parole period. It was pointed out that an offender who has a fixed release date does not have the same incentive to be of good behaviour whilst in prison so as to earn early release on parole. Also a prisoner who needs to be given the opportunity of proving himself capable of resuming a responsible attitude to life is best given that opportunity by the imposition of a non-parole period. Another consideration is that the Parole Board is often in a better position to determine whether it is appropriate that a prisoner be released than a sentencing judge would have been at the time the original sentence was imposed.

[67] In this case, the appellant has had no convictions since 1993 and there is nothing to suggest to us that he is unlikely to be a satisfactory prisoner or that he needs time to prove himself capable of resuming a responsible attitude to life. In those circumstances, we consider that it is appropriate that a partially suspended sentence be imposed now rather than a non-parole period.

[68] Having regard to the fact that the appellant has now spent eight months in custody we think that he has already spent long enough and that the proper order is that the sentences be backdated to take into account time in custody and that he be released forthwith with the balance of the sentences to be

[14] (1992) 2 NTLR 183.

suspended, with an operative period of 12 months for the purposes of s 43 of the *Sentencing Act*, to operate from the date of our order.

[69] Before leaving this aspect of the appeal, we should deal with one other matter which was raised by counsel for the appellant. In her sentencing remarks the learned sentencing Judge said that she was satisfied beyond reasonable doubt that the guilty verdicts reflected the full facts of the description of the indecencies described by the complainant in her evidence and that she intended to sentence in accordance with those facts. Her Honour said that if the jury had any doubt about a part of the testimony concerning her direct evidence of the actual assaults, the jury would not have convicted.

[70] It was submitted that the learned sentencing Judge erred in this approach on the basis that some jurors may have accepted that the appellant touched her on the vagina whilst other jurors may have accepted that she was also licked.

[71] The general rule is that, in cases of this kind, it is the function of the sentencing judge to find the facts.

[72] This matter was discussed at some length in *Cheung v The Queen*[15] in the joint judgment of Gleeson CJ, Gummow and Hayne JJ.[16]

[15] (2001) 209 CLR 1 at para 7 to 14.
[16] see also Callaghan J at para 170.

[73] In the circumstances of this case, we agree with the learned sentencing Judge that the jury could not have been satisfied beyond reasonable doubt that the appellant was guilty if there was a doubt in their minds as to whether licking occurred. By necessary implication, the jury must have accepted the complainant's evidence on that issue. Even if it were a matter for the learned sentencing Judge to decide for herself, there was simply no reason not to accept the complainant's evidence on that question. It was never suggested in cross-examination that the complainant was mistaken and that all that happened was that the appellant touched her with his fingers. The case was run on an all or nothing basis. We do not think there was any force to this submission.
