SUPREME COURT OF QUEENSLAND

CITATION:	*R v S* [2002] QCA 57
PARTIES:	**R** v **S** (appellant)
FILE NO/S:	CA 242 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against conviction
ORIGINATING COURT:	District Court at Mount Isa
DELIVERED ON:	8 March 2002
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2002
JUDGES:	McMurdo P, Thomas JA, Ambrose J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Appeal allowed, convictions on counts 1, 3, 4, 5, and 6 set aside. Direct retrial upon counts 1, 3 (indecent dealing only), 4, 5 (indecent dealing only) and 6.**
CATCHWORDS:	APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OF COURT BELOW – PARTICULAR CASES – DISCHARGE OF JURY – appeal against conviction – where appellant convicted of sexual offences against girl under 12 years – where Crown entered *nolle prosequi* against count 7 at end of Crown case – whether evidence given in support of count 7 created prejudice which could not be undone by a direction from the trial judge – whether mistrial should have been granted by trial judge APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – IN GENERAL – MISCARRIAGE OF JUSTICE – CIRCUMSTANCES INVOLVING MISCARRIAGE OF JUSTICE – UNSATISFACTORY NATURE OF TRIAL APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – IN GENERAL – MISDIRECTION OR NON-DIRECTION – DIRECTIONS AS TO PARTICULAR MATTERS – OTHER MATTERS – where section 93A statement – where judge gave redirection to jury regarding statement – where

defence counsel requested judge to point out evidence from cross examination which was inconsistent with statement – where judge gave general direction to take into account all of the evidence – whether judge should have pointed out inconsistency to the jury

CRIMINAL LAW – EVIDENCE – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS – CHILDREN – where child complainant – where no fresh complaint – where confusing witness statement – where confusion regarding incidents and occasions the subject of the charges – whether appellant entitled to clear indication of particulars and occasions of charges

Evidence Act (Qld) 1977, s 92A, s 93A

R v C [2000] 2 QdR 54, distinguished
R v H [1999] 2 QdR 283, considered

COUNSEL: B G Devereaux for the appellant
C W Heaton for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:**I have read the reasons for judgment of Ambrose J in which the relevant issues are set out.

[2] I agree generally with his reasons for concluding that there is a real possibility that the evidence led on count 7, which was abandoned by the prosecution at the end of its case, improperly influenced the jury's verdicts, despite the warning given by the trial judge. The appeal must be allowed and a retrial ordered.

[3] I agree with Thomas JA's additional reasons and with his proposed order.

[4] **THOMAS JA:** The reasons of Ambrose J sufficiently state the issues and the evidence. I generally agree with those reasons, and will comment on only two matters.

Effect of evidence of count 7

[5] This was the only count on which the complainant's sisters were called. They gave evidence of a sexual incident inside the appellant's caravan in which they saw him masturbating. It is now common ground that the evidence failed to show that the appellant invited them to watch or that he knowingly involved the girls in that particular incident. In short the evidence was incapable of showing that the exposure was wilful. However the effect of the reception of this evidence is likely to have been significant. The Crown had the advantage of corroborating the occurrence of a sexual incident in which the appellant was seen to do something disgusting. It was the only occasion in the trial in which there was some corroboration of the allegations of the complainant.

[6] I am inclined to think that the application for mistrial should have been granted, and that in the circumstances it would have been almost impossible for the learned trial judge to have undone the prejudice from the calling of evidence which, in hindsight, ought not to have been called at all. This is quite unlike the situation where a Crown witness does not come up to proof, and a particular part of the Crown case simply falls on its face. In such cases, the prejudice, if any, is slight and the trial can proceed without disadvantage to the accused. But here there was real prejudice which it would have been very difficult to cure. This is in my view sufficient to require the setting aside of the convictions, and prima facie to require a retrial.

Shifting particulars

[7] Throughout the trial, and even now, it is difficult to discern particulars and the occasion to which each count relates. The appellant has been acquitted of those alternative parts of counts 3 and 5 which alleged rape. The counts upon which he was convicted, and upon which he might be retried are:

Count 1	Indecent dealing
Count 3	Indecent dealing (but not rape)
Count 4	Procuring an indecent act (ie that he induced her to touch his penis)
Count 5	Indecent dealing (but not rape)
Count 6	Indecent dealing

[8] Leaving aside the incident in the caravan it is said that there were three occasions on which sexual incidents occurred. It is further said that counts 1 and 3 happened on the second of these occasions and that counts 4, 5 and 6 happened on the third of these occasions.

[9] There are parts of the rather confusing s 93A statement which tend to suggest that there was only one touching of her private part by the appellant's penis. If that is so, then I do not think that the appellant could properly be retried on both of counts 3 and 5, and the Crown would have to elect on which to proceed and to give particulars of it. However on a close reading of the exhibit there are other parts which suggest that there may have been more than one incident in which he simulated intercourse or used his penis. With some hesitation I think that there is sufficient evidence to justify the appellant being retried on counts 1, 3, 4, 5 and 6, noting of course that counts 3 and 5 do not now contain an alternative charge of rape. I would emphasise however that it will be a matter for the Crown as to whether it proceeds on all of such matters and that the appellant will be entitled to particulars of the acts relied on in relation to each count and the occasion on which those acts are said to have occurred. A clear indication of such details at the outset of any retrial may assist in avoiding some of the misunderstandings and shifting particulars which afflicted the first trial.

Orders

[10] The appeal should be allowed and the convictions on counts 1, 3, 4, 5 and 6 set aside. Direct retrial upon count 1, count 3 (indecent dealing only), count 4, count 5 (indecent dealing only) and count 6.

[11] **AMBROSE J:** The appellant appeals against his conviction on 7 August 2001 upon four counts of indecently treating a child under 12 years of age and upon one count of procuring that child to commit an indecent act upon him.

[12] He was arraigned upon and pleaded not guilty in the District Court at Mount Isa, to 7 offences each alleged to have been committed on a date unknown between 1 January 1996 and 31 July 1998 at Mount Isa. Those counts were enumerated as follows –

Count 1	Indecent dealing with a child under the age of 16 years, that child being under 12 years of age.
Count 2	Unlawfully procuring a child under the age of 16 years to commit an indecent act, that child then being under 12 years of age.
Count 3	The rape of that child or alternatively an unlawful and indecent dealing with that child under the age of 16 years, that child being under 12 years of age.
Count 4	Unlawfully procuring that child under the age of 16 years to commit an indecent act, that child being under 12 years of age.
Count 5	The rape of that child or alternatively an unlawful and indecent dealing with that child under the age of 16 years, that child being under 12 years of age.
Count 6	An unlawful and indecent dealing with that child under the age of 16 years, that child being under 12 years of age.
Count 7	Wilful and unlawful exposure of the child who was complainant in the first 6 counts and of her sister both being children under 16 years of age to an indecent act by him both children being under the age of 12 years at the time.

[13] At the close of the Crown case, counts 2 and 7 were taken from the jury.

[14] The appellant was acquitted on each of the counts of rape (3 and 5) but was convicted on the alternative counts of unlawful and indecent dealing with the circumstance of aggravation.

[15] There are three grounds of appeal –

(a) The failure of the trial judge to discharge the jury when count 7 was taken from it at the close of the Crown case;

(b) The failure of the trial judge to redirect the jury on aspects of evidence of the complainant child contained in her cross-examination, having redirected the jury at its request in some detail on the content of a video recorded tape tended by the Crown pursuant to s 93A of the *Evidence Act* 1977.

(c) The verdicts are unsafe and unsatisfactory taking into account -

(i) The lack of corroboration of the child's evidence;

(ii) The lack of evidence of recent complaint;

(iii) The unclear nature of the evidence of the complainant;

(iv) The delay between the time of the alleged offences (a date unknown between 1 January 1996 and 31 July 1998) and the making of the recorded interview between a police officer and the child on 5 May 2000, which was tendered pursuant to s 93A of the Evidence Act 1977;

(v) The lack of particularity as to the dates of the offences charged;

(vi) The age of the complainant – 9 years when she gave evidence; between 4 years and 6 ½ years at the time of the alleged offences; and 7 years and 3 months when she gave her statement tendered pursuant to s 92A of the *Evidence Act*.

(vii) The evidence given by the child that the appellant had touched her only once with his penis.

[16] Briefly summarised, the evidence was to the effect that the complainant child and her sister resided in Brisbane with their mother, who had separated from their father prior to the period during which it was alleged the appellant committed the offences with respect to the complainant in counts 1 to 6 and with respect to the complainant and her sister in count 7.

[17] On a number of occasions during this period the children had travelled from Brisbane to Mount Isa during school vacation periods (presumably to accommodate the schooling requirements at least with respect to the complainant's sister who was 4 years older than the complainant child), to spend a couple of weeks with their father in Mount Isa. Upon one or more of those visits the children stayed in the residence of their father. The appellant was a friend of the children's father and from time to time was in the father's house at a time when the complainant child was sleeping during her father's absence at work.

[18] All the offences with the exception of count 7 were said to have been committed by the appellant on the child in her father's bedroom where she had been put to rest by her father while he was absent working during afternoon hours.

[19] Count 7 alleged an offence committed with respect to both the complainant child and her sister in a caravan or cabin at a caravan park which the two children attended with their father and eldest sister and other people for a short holiday.

[20] The essence of the evidence called on this count was that the complainant child's elder sister (specified in count 7) opened the door of a caravan occupied by the appellant and observed him to be masturbating himself. She quickly closed the door and informed the complainant child of what she had observed. Both children then informed their eldest sister who also opened the door and observed the appellant to be masturbating. The children's father was then informed what his two elder daughters had observed and this led to him taking steps to prevent any further contact between the appellant and the children.

[21] The child related the events relevant to count 7 in the video recorded statement tendered pursuant to s 93A. There are about 9 foolscap pages all told of the transcript of that tape devoted entirely to count 7. During that interview she drew a plan of the caravan indicating where the appellant had been lying in the caravan when observed by her sister. It seems clear enough from her statement recorded and viewed by the jury, that in fact she did not personally see any activity of the appellant to support count 7. It seems that her elder sister told her that she observed something along the lines of what the complainant child recounted to the police officer who was interviewing her, and that part of the child's statement tendered pursuant to s 92A was essentially hearsay evidence.

[22] Unsurprisingly in the light of that, her sister was called to give evidence. At the time she gave evidence she was 13 years of age. She said that she accompanied the complainant child to Mount Isa in the school holidays in June or July 1998. She travelled to a caravan park with the complainant child and an older sister and her father and another boy.

[23] She said that she was walking around the caravan park with one of her sisters when she looked in to see the appellant lying on the bed in the caravan masturbating. At the time she observed this her older sister was standing beside her. She was could not remember whether the complainant child was with them. She and her older sister immediately went and informed their father what they had observed. Her father then went to the caravan in which the appellant had been seen. She agreed that she had not knocked on the door of the caravan occupied by the appellant before she opened it to observe his activity and she said that she could not remember whether or not she had even seen his penis when she looked into the caravan. She was unable to recall whether or not the complainant child was with her and her elder sister and indeed suggested that her younger sister was somewhere else in the caravan park.

[24] The eldest of the three children had lived in Mount Isa with her father after his separation from her mother when the two younger daughters had gone to Brisbane to live.

[25] By the time the eldest daughter was called to give evidence there had been a reconciliation between father and mother who were living with all three daughters in Mount Isa.

[26] She gave evidence that in the June/July school vacation in 1998 she and her two sisters travelled with their father up to a caravan park. At that caravan park the father and his three daughters occupied a flat. She said that the two older girls occupied one room, the complainant child shared a room with her father and the appellant and another male friend of the family shared a third room. She said that they stayed at the caravan park for only one night. She said the holiday came to an end when "us three girls caught [the appellant] …masturbating in someone else's cabin". She said that she learned of this event when one of her two younger sisters – she wasn't sure which one – told her what she had observed; she said she then went over to "another cabin" opened the door and caught the appellant masturbating. She said she then slammed the door shut.

[27] She gave detailed evidence as to the activities of the appellant she had observed in this cabin on a bed. She said when she observed the appellant's activity in the cabin, she slammed the door, returned to the flat which she was occupying, informed the family friend who told her father, who then left the flat and spoke with the appellant.

[28] She said that after the separation of her parents the appellant had shared the house which she and her father lived in at Mount Isa from about the beginning of 1996. At that time the appellant and her father were working together. Eventually they broke up that business arrangement and each apparently worked with somebody else.

[29] She said that when she observed the appellant through the caravan door after she opened it, she could not remember whether he was looking in her direction as he was masturbating; she said that as soon as she observed his activity she slammed the door quickly and did not continue to watch what she had first observed. She said she had not said anything to him.

[30] At the close of the Crown case counsel for the appellant argued that counts 2 and 7 were insupportable on the evidence and asked that they be taken from the jury. After counsel had addressed argument on the appellant's application towards the end of Friday afternoon, the learned trial judge adjourned the case until the following Monday.

[31] On the Monday morning when the trial resumed the learned trial judge referred to a concession by the Crown that there was insufficient evidence to support count 2, he then ruled that the evidence called to support the Crown case on count 7 – that the appellant had invited two of the girls into his caravan or cabin and then proceeded to masturbate – was not made out on the evidence. He ruled that the evidence could not support an inference that the appellant had invited any of the girls into the caravan for the purpose of their witnessing his activity and indeed that the preponderance of evidence was that they entered the van without warning when he was engaging in that activity in the privacy of the cabin or caravan with its door closed. He ruled that there was no case to go to the jury in relation to count 7.

[32] Upon that intimation from the trial judge the Crown prosecutor entered a *nolle prosequi* with respect to both counts 2 and 7 and the accused was discharged in respect of those counts.

[33] After the *nolle prosequi* with respect to count 7 had been entered counsel for the appellant made the following submission –

> "… as a matter of fairness, I suppose I should raise at this point whether that gives rise to an issue of prejudice that can't be cured by any direction. I accept that your Honour certainly can give directions to the jury to disregard it, but it is, obviously, a highly prejudicial matter. Although, if the jury do accept the evidence as it has come out, perhaps they may accept there is no wrongdoing in it, but there is that prejudicial element."

[34] His Honour replied –

> "I understand what you say, but I think the trial should proceed."

[35] Before addresses commenced the learned trial judge informed the jury *inter alia* –

> "As a result of certain rulings that I have made, rulings of law, the Crown have indicated that they do not intend to proceed further with counts 2 and 7 on the indictment before you.
>
> Now, that means you now have two less charges to consider. You still have counts 1, 3, 4, 5 and 6 for your consideration, and those are the matters to which you will need direct yourself to in due course."

[36] After this instruction to the jury, counsel for the appellant indicated that he would neither give nor call evidence upon his trial and counsel then addressed.

[37] The Crown prosecutor addressed the jury for approximately 26 minutes and counsel for the appellant then addressed it for approximately 50 minutes.

[38] Before the commencement of the summing up there was a discussion concerning the content of counsel's addresses. Unfortunately there was no transcript of those addresses provided to this court. It is unclear whether they were transcribed. If they were neither the appellant nor the Crown sought to have them transcribed.

[39] Interestingly counsel for the appellant complained of reference in the address of the Crown prosecutor "to creamy stuff and that we all know what that is and that sort of thing"; he pointed out that the only evidence that the child gave about creamy stuff related to count 7 "which was no longer before them".

[40] In the course of his initial summing up the learned trial judge said –

> "Now, I should also say something to you about what was formerly count 7 on the indictment, members of the jury; the incident that is alleged to have occurred at the caravan park. The Crown has not proceeded with that charge. The evidence establishes no more than one or more of the girls went into the caravan at a time when the accused was committing an act of masturbation. The evidence does

> not go so far as to establish that the accused invited the girls to the caravan for that purpose.
>
> And you should remember that this is not a Court of morals. I tell you expressly that you should not and can't use evidence of that incident as a basis for providing an inference or an indication of guilt in relation to the other charges that are before you. You cannot use the evidence of that incident in that way. So I give you that direction, members of the jury."

[41] The jury sought a redirection with respect to whether they should consider only the evidence of the interview recorded on the video tape tendered by the Crown pursuant to s 93A of the *Evidence Act* 1977, or whether they could also consider evidence given by the child in cross-examination. His Honour observed –

> "Well the answer to your question is simply this, ladies and gentlemen: that you have regard to the whole of the evidence, whether of any particular witness, and to the whole of the evidence generally. Of course it's a matter for you to decide what parts of the evidence you accept or reject…But in making those decisions you have regard to the whole of the evidence that you heard, whether from any particular witness or from the witnesses generally."

[42] In my view, the intimation from counsel for the appellant after the Crown entered a *nolle prosequi* with respect to count 7, that the likely prejudice engendered against the accused by all the evidence given by the complainant child and her sisters could not be cured by any direction which the trial judge could give, amounted in essence to an application for discharge of the jury. The intimation by the learned trial judge that in spite of the entering of the *nolle prosequi* on count 7 the trial should proceed, should be treated as a refusal of an application to discharge the jury.

[43] In my view some of the evidence led from the child's elder sister may well have suggested to the jury that the appellant may indeed have attempted to target the older girl for some sort of sexually improper purpose. She gave evidence that she was asked about the "incident involving a caravan with [the appellant] …in it"; she was asked how she came to be at that caravan park with the appellant and she said "well we were walking around the caravan park"; she said that the appellant came to a caravan and walked in. She said it was not his caravan but he said to her, come in, and she said, she would not. She said that at some stage she had observed the appellant laying on the bed of the caravan masturbating, although she conceded that she could not remember whether she was able to see his penis. She said that she then called the eldest of the girls over towards her and told her to look in the caravan which she did.

[44] Upon appeal the Crown did not attempt to argue that the evidence led on count 7 was even arguably admissible on the other counts. It did not argue that the evidence was not highly prejudicial having regard to the nature of the activities alleged by the Crown against the appellant in the 5 counts considered by the jury.

[45] For my part, having considered carefully both the complainant child's video recorded statement tendered under s 93A of the *Evidence Act* and the evidence given by the three sisters on this count in court and the detailed observation

evidence given on this non-issue as far as any of the 5 counts considered by the jury were concerned, there was substantial prejudice occasioned to the appellant by the admission of this evidence. In my view, a very careful direction on this point even had it been given, would be unlikely to have placed the appellant in the same position as would have been the case had it not been placed before the jury.

[46] In my view, however, the directions actually given to the jury both initially and upon the redirection they sought, to both of which I have referred, were not nearly sufficient as to overcome such prejudice. Relating to the credibility or reliability of the child it seems that the Crown prosecutor, in the course of his address to the jury on the only counts remaining before them, did refer to her evidence about "creamy stuff" used by the appellant. This reference of course, could only relate to the evidence relevant to count 7 which was no longer in issue. She referred to "cream stuff and he kept on going that with it" in her s 93A statement. She was examined in detail on "this cream stuff" upon the appellant's trial. Upon the whole of the evidence it seems she did not observe what she described; it seems probable she relied upon what she had been informed by one or both of her elder sisters, both of whom gave evidence that they had observed the appellant's activity – though neither gave evidence that they had seen "cream stuff" in the course of their observation.

[47] The learned trial judge's observation in the course of his summing up that the Crown did not proceed with that charge and that the jury "should remember that this is not a Court of morals" and the "express" direction that "evidence of that incident" of masturbation could not be used "for providing an inference or an indication of guilt" in relation to the other charges and that they could not use "the evidence of that incident in that way", in my view, could not overcome the obvious prejudice which would be engendered by the jury giving any consideration whatever to it – they were of course encouraged in the first redirection to have regard "to the whole of the evidence".

[48] It was not part of the case that that evidence or any other evidence could properly be used as propensity evidence against the appellant. It could not in my view ever have been used for that purpose. The direction given by the learned trial judge, which I have set out in full, that it could not be used as "an indication of guilt" in relation to the other 5 counts remaining did not involve a warning that whatever use might be made of the evidence called on count 7, it could not be used to indicate that the appellant in engaging in those activities was doing something that a "Court of morals" might consider reprehensible and that he was therefore the "sort of person" who might do the things about which the child gave evidence in support of the remaining counts.

[49] The case argued on behalf of the appellant in this court on the unsafe and unsatisfactory ground should not, in my view, be considered in isolation from the prejudice occasioned to the appellant by the reception of the evidence from the child and her two sisters relating only to count 7.

[50] In my view it is necessary to consider also the failure of the trial judge in his redirections to draw attention to the fact that in the course of cross-examination of the child on counts 3 and 5 (rape and in the alternative indecent dealing) she said that the appellant had only ever touched her once with his penis in the vicinity of her vagina.

[51] When re-examined by the Crown she confirmed that the appellant had touched her on her vagina on only one occasion with his penis. On one view of the complainant child's rather confusing 93A statement played before the jury, it may perhaps be construed in such a way that the child was complaining of contact between the appellant's penis and her vaginal area on two occasions.

[52] I agree with the observations made by the learned trial judge that the s 93A tape "was not a very satisfactory interview. That is one of the difficulties in this case".

[53] Counsel for the appellant analysed the s 93A statement of the complainant child in detail and addressed arguments which I found persuasive that upon its proper evaluation in effect it recorded only one penile contact with the child's vagina and not two. The confused way in which the statement reads, to no small degree results from a number of attempts by the interviewing police officer to have her encapsulate the various sexual activities between her and the appellant which she related into discrete "times" or "occasions" or "incidents". Ultimately the interviewing officer had the child agree that there were three different "times" or occasions when the appellant had engaged in the sexual activities which comprised the five counts upon which he was ultimately convicted.

[54] However, I must say I find quite confusing the account extracted from the complainant child by the interviewing police officer. Clearly the learned trial judge and counsel also found it confusing as did the members of the jury.

[55] The jury on their application for a second redirection observed that they were "confused about the sequence of the events". They indicated that they would like to see the s 93A video recording again "in an attempt to reconcile the counts with actual occurrences".

[56] In a discussion between the trial judge and counsel concerning a redirection as requested, the learned trial judge observed –

> "…the Crown alleges of the three occasions, as I understand it, count 6 is alleged to have occurred on the first occasion, count 3 on the second, and counts 1, 4 and 5 on the third occasion."

[57] At this stage counsel for the Crown indicated that he thought "there was nothing on the first occasion". Counsel for the appellant submitted that count 6 occurred on the third occasion.

[58] Eventually the learned trial judge directed the jury in these terms –

> "… that the complainant spoke of three occasions. The second occasion is the occasion in which it is alleged count 3 occurred, and the other events, the other charges, counts 1, 4, 5 and 6 are alleged have occurred on the third of those occasions."

[59] At this stage the Crown prosecutor interrupted to observe –

> "… the prosecution case is that on the first occasion there are no counts."

[60] He continued –

> "On the second occasion it is counts 1 and 3 … And on the third occasion it is 4, 5, 6."

[61] There was then a further discussion as to whether the Crown prosecutor was correct.

[62] One of the jurors interrupted the discussion to inform the court –

> "Basically, your Honour, we need to get set in our minds which count occurs on which occasion."

[63] His Honour then embarked upon an evaluation of the s 93A statement observing in the course of so doing that –

> "… the officer asked her about what she could remember about the first time, the first incident that he wanted her to touch his penis…
>
> Then she was asked about the second time, what can she remember about that. She said, "Umm he told me to have S-E-X with him."

[64] He pointed out that she had refused and then he asked her to deal with him sexually.

[65] His Honour went on to observe –

> "… still dealing with this second incident; this is where count 3 is alleged to have occurred."

[66] He then read parts of her statement which included her assertion that on this second occasion or incident "he touched my private, my fanny". He then read parts of the statement indicating that the part of the appellant's body that had touched her vaginal area was "his dick". His Honour then informed the jury that that was "all part of count 3, the second occasion".

[67] It would be unhelpful in my view to set out in full the redirection given when the jury asked to view once more the s 93A video statement; the trial judge analysed the s 93A statement at some length dealing with what had happened at the various times or incidents and what he understood the Crown to contend in which of those incidents the various counts occurred.

[68] After discussion with counsel, the learned trial judge decided to again redirect the jury and observed –

> "I brought you back in, ladies and gentlemen, because although I had endeavoured to summarise for you what the complainant said about these matters, it may be that I inadvertedly misled you in one respect. The complainant, as I understand it, speaks of three occasions. The Crown case is that nothing occurred on the first occasion, that counts 1 and 3 were committed on the second occasion, and that the remainder of the counts, that is 4, 5 and 6 were committed on the third occasion. That's the allegation."

[69] Prior to that final direction counsel for the appellant requested that the trial judge draw to the jury's attention the fact that the complainant had admitted in cross-examination that her vaginal area had been touched by the appellant's penis on only one occasion. The learned trial judge however said that he was reluctant "to present any précis" but in the circumstances of this case he would simply remind the jury that they should keep in mind all of the evidence including cross-examination.

[70] With respect to the other particulars upon which the appellant relies to support the ground that the claim the verdicts were unsafe and unsatisfactory, it is clear on the material that the evidence of the complainant child remained uncorroborated. It is clear that the manner in which the section 93A statement was taken from the child was confusing not merely to the trial judge and counsel involved in the trial, but also to members of the jury. Moreover, even if it could be so construed as to arguably at least assert a penile contact with the child's vagina in two separate incidents it is clear beyond doubt that the evidence actually given by the child upon trial was that there was penile contact with her vagina in only one incident of sexual activity between them.

[71] The delay referred to in particular (iv) as supporting the contention that the verdict was unsafe and unsatisfactory emerges clearly enough from the evidence. It is clear that the only particularity with respect to any of the counts emerged from the evidence of the elder sisters of the child with respect to count 7 – that is, that offence occurred in a school holiday period in June or July 1998 – towards the very end of the 18 month period specified between January 1996 and 31 July 1998 as the period during which all alleged offences were committed. While undoubtedly in a case of this kind the inability of a child of tender years to be more particular with respect to the dates of different occasions of sexual molestation other than to indicate that they occurred during school holiday periods on some unknown dates over a period of 2 ½ years is understandable, nevertheless, in my view it is a matter to be kept in mind when determining whether in the whole of the circumstances, the verdicts were unsafe and unsatisfactory.

[72] In *R v H* [1999] 2 QdR 283 members of this Court indicated that should a section 93A tape be played before a jury the Court has a discretion as to whether that tape should be replayed after the jury has embarked upon consideration of its verdict. It is unnecessary to deal with circumstances in which Courts may exercise a discretion to decline to have it replayed. However, it was stated clearly that should the tape be replayed then care should be taken after the tape has been replayed to remind the jury of the complainant's cross examination and re examination by reading from the transcript containing that evidence given in court. I refer to the judgment of the President at 290 – 291 and to the judgment of Shepherdson J at 293 – 294.

[73] In the circumstances considered in *R v C* [2000] 2 QdR 54 this Court held that a refusal by a trial judge to read from the transcript of cross-examination of the complainant to balance the evidence contained in a tape tendered under section 93A of the *Evidence Act* 1997 where the trial judge redirected the jury highlighting internal inconsistencies in the complainant's evidence and other evidence in preference to reading "many pages of transcript" and advised them that any passage in the transcript of evidence in which they were interested could be read to them, sufficiently balanced the possibility of over emphasis being given to the taped evidence from the child against other evidence in the case.

[74] The circumstances of that case, however, differ significantly from those in the present case. In that case, it seems from the report that the trial judge did in fact highlight internal inconsistencies in the evidence of the child. In this case, while his Honour did not replay the videotape of the child's statement to the police officer made so long after the events, he did make a précis of it or at least a précis of his interpretation of the content of that rather long and confusing and "unsatisfactory" statement.

[75] In my view, to balance the effect of that précis of the video recorded statement, his Honour ought to have acceded to the request of counsel for the appellant to at least point out to the jury that in the oral evidence she gave before them she had asserted both in cross-examination and re-examination that in fact there had only been contact between the appellant's penis and her vagina in the course of one incident of sexual activity and not in the course of two separate incidents as suggested from the interpretation advanced by the Crown and outlined by the trial judge.

[76] At the end of the day I am persuaded that the learned trial judge ought in the circumstances to have ruled a mistrial in view of the highly prejudicial evidence led with respect to count 7 in respect of which the Crown entered a *nolle prosequi*. I am also of the view that the learned trial judge, after analysing the rather confusing and ambiguous terms of the child's statement tendered under section 93A to leave open a construction that it contained an assertion that on each of two quite separate occasions the appellant had penile contact with her vagina, he ought to have acceded to the request by counsel for the appellant to point out to the jury that in her oral evidence she had clearly sworn that in fact there had only ever been such penile contact on one occasion.

[77] These to my mind are the principal matters of concern with respect to the appellant's conviction. Viewed in the light of the other particulars relied upon to support the contention that the verdict was unsafe and unsatisfactory, it is my view that the verdicts cannot stand. I would set aside the convictions on the grounds that:

(a) the learned trial judge ought to have ruled a mistrial upon the applicant's application at the close of the Crown case; and

(b) the verdicts against the appellant cannot stand because they are unsafe and unsatisfactory.

[78] In the circumstances I would order a re-trial on Counts 1, 4 and 6 and upon the alternative counts 3 and 5.