SUPREME COURT OF QUEENSLAND

CITATION:	*R v S* [2002] QCA 167
PARTIES:	**R** **v** **S** (appellant)
FILE NO/S:	CA No 307 of 2001 DC No 300 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against conviction
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	14 May 2002
DELIVERED AT:	Brisbane
HEARING DATE:	22 March 2002
JUDGES:	McPherson JA, Byrne and Philippides JJ
ORDER:	**Appeal allowed. Verdicts and convictions set aside. Judgment and verdict of acquittal on each of counts 1, 3, 4, 5 and 6 in the indictment**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – COMPLAINTS – FIRST REASONABLE OPPORTUNITY – whether complaint must be fresh – whether three to five years too long a delay CRIMINAL LAW – EVIDENCE – COMPLAINTS – ADMISSIBILITY OF DETAILS AND FACT OF COMPLAINT – complainant stated pregnancy result of rape – whether contrary statement admissible – whether complaints of similar uncharged acts can amount to recent complaint CRIMINAL LAW – EVIDENCE – GENERALLY – failure to object to inadmissible evidence of similar uncharged acts – failure to make this evidence subject of jury direction - whether any forensic advantage gained by admission of prejudicial evidence justifies admission CRIMINAL LAW – EVIDENCE – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS – CORROBORATION – WHAT CONSTITUTES CORROBORATION – whether evidence of act of which accused was acquitted capable at the trial of corroborating testimony of another offence charged

CRIMINAL LAW – JURISDICTION, PRACTICE, AND PROCEDURE SUMMING UP – Judge failed to give *R v Markuleski* direction – whether without direction differing verdicts are fatally inconsistent

Evidence Act 1977, s 18

Graham v The Queen (1998) 195 CLR 606, discussed
R v M [2000] QCA 20, applied
R v M [2001] QCA 458, applied
R v Markuleski [2001] NSWCA 290, applied
R v Noble [2000] QCA 523, distinguished
R v Schneider (1998) CA 128 of 1998, applied
R v W [1996] 1 Qd R 573, considered
Suresh v The Queen (1998) 72 ALJR 769, applied

COUNSEL: Mr N V Weston for the appellant
Mr B G Campbell for the respondent

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

[1] **McPHERSON JA**: In October 2001 the appellant was brought to trial in the District Court at Cairns on four counts of rape and three of indecent dealing alleged to have been committed in Brisbane some 25 to 30 years previously between 1972 and 1976. He was the complainant's former brother in law who at that time was married to the complainant's older sister Sandra. They separated in about 1980. Each of the seven offences charged was alleged in the indictment to have been committed between certain specified dates ranging in their outer limits from 1 January 1972 at the earliest to 31 December 1976 at latest. In giving evidence at the trial, the complainant, who was born on 29 March 1963, fixed her age at the time of each of the alleged offences by reference to her grade in school when she said the offence had occurred. In this way, she was able to say that she was 9 going 10 years of age at the time of the offences in count 1 (indecent dealing) and count 2 (rape), and 10 going 11 years of age in the case of all of the remaining offences, which were counts 3 (rape), 4 (rape), 5 (indecent dealing), and 6 (indecent dealing), other than count 7 (rape), when she was 13 years old. She claimed that as a consequence of this last offence, she had become pregnant to the appellant, and in September 1976, as her sister confirmed, had travelled to Sydney, where her pregnancy was terminated. After that date, there was no further sexual contact with the appellant.

[2] The jury found the appellant not guilty of count 2 (rape) and not guilty of count 7 (rape), but returned verdicts of guilty on each of the other counts in the indictment. The two acquittals presented difficulties for the Crown on appeal in meeting ground E in the amended notice of appeal, which argued that the verdicts are inconsistent. With one exception, the prosecution case depended entirely on the uncorroborated testimony of the complainant at the trial, in response to which the appellant gave evidence himself denying each of the alleged offences. The exception was the rape alleged in count 2, where the complainant's account of it was supported by her older brother Dean, who claimed to have seen the act of sexual intercourse taking place.

[3] In respect of that count, the jury nevertheless returned a verdict of acquittal, as they also did in respect of the rape in count 7. In attempting to meet the appellant's challenge to the other verdicts on grounds of inconsistency, Mr Campbell of counsel, who appeared for the Crown on the appeal, submitted that the two verdicts of acquittal were attributable to the fact that the jury, who had copies of the indictment before them, had been overly concerned about the limits of time specified in those two counts in the indictment. The acquittals were said to be due to no more than the fact that in each case the evidence had taken the incident outside the limits of time averred. Mr Campbell suggested that in that respect the appellant might have been rather fortunate because "time is rarely an element of the offence unless there is something that particularly depends on time".

[4] In the present case, however, where the offences were charged as having taken place some 25 to 30 years before the trial, it was of the utmost importance to the appellant that the times and occasions of the alleged offences be specified as precisely as possible. Without some particulars of that kind, it is, as has been recognised in decisions of the High Court, often quite impossible for the accused in prosecutions for sexual offences to prepare or present an effective defence to charges against him that depend for their proof simply upon the word of one person against another. The learned trial judge was therefore correct in directing the jury that, before they could convict on any count, they would have to be satisfied that the particular offence occurred within the "time frame" that was alleged in the relevant count in the indictment. If the facts as they emerged at the trial failed to accord with those limits, the appropriate course was for the prosecution to apply at the trial for leave to amend them, and not to ask the jury to return a verdict contrary to the particulars averred in the count in the indictment. Whether such leave could or would, whether with or without an adjournment, have been granted at trial after evidence had been received would have been a matter for the exercise of judicial discretion taking into account the requirements of justice to both the appellant and the prosecution: *S v The Queen* (1989) 168 CLR 226, 274-275.

[5] As a result of this not having been done, it is now not easy to be sure whether, as the Crown claims on appeal, the two acquittals were the result of the jury deciding that the prosecution case had not been proved within the limits of time alleged in counts 1 and 7, or on some other and broader basis, such as shortcomings in the evidence presented in support of them. As to that, the prosecution case was not without grave weaknesses. In giving evidence on count 2, the complainant's testimony was that she was 9 years old in 1972 and living with her parents and two other children at the family home at Blackwood Road, Woodridge. On the occasion in question, the appellant, arrived at her home on a Saturday morning, went into her bedroom, pushed her on the bed and had forcible sexual intercourse with her. This was the first offence of its kind. Her parents were out at the time, but at least two other children were at home. The bedroom had internal windows fitted with "rippled" glass through which she believed she saw, although not distinctly, the figure of her brother. She said the rape did not hurt, and she did not scream or call out for help because she was afraid, the appellant having told her "on many occasions" that, if she did, no one would like her. For his part, her brother Dean said he had been able to see though the glass and had witnessed the appellant having sexual intercourse with his sister, a fact which he did not disclose to her until 1993, at about the time when or after she first reported the appellant's conduct to the police.

[6] In this, what was especially damaging to the prosecution case as alleged in count 2 of the indictment was that the complainant's sister Sandra, the former wife of the appellant, and her mother, as well as the appellant himself, gave evidence that the family had not yet moved into the house at Blackwood Road in 1973 when the incident was said to have occurred. According to her mother, they were still living in a house at Ellen Street, which was owned by the appellant and his wife, and did not move to Blackwood Road until after the Australia Day floods in Brisbane in 1974. The complainant's brother Dean conceded that he could not say for certain that they were living at Blackwood Road at the time he claimed to have seen the act of intercourse, although both he and the complainant gave their evidence by reference to particular features of that house and the bedroom in which the rape was said to have occurred.

[7] The evidence in support of count 7 suffered a similar process of attrition at the trial. The charge of rape it contained was alleged to have taken place between 1 January 1973 and 31 December 1976, at a time when the complainant said she was 13 years old. She said it happened in what was described as the appellant's new workshop in Moss Street, where he carried on his business as an auto-electrician. Her evidence was that, in the course of driving to his home, the appellant had stopped off at the workshop and raped her (count 7). In this instance, he was able to show by reference to newspaper advertisements (exs 7 and 8) relating to the business that he had not moved into the workshop at Moss Street until November 1977, so that the rape could not have occurred at the time or place asserted by the complainant in her evidence at the trial.

[8] This was, moreover, not an instance that could be explained as resulting simply from a mistake in fixing the date or the place. When coupled with the further claim that the complainant had become pregnant as a consequence of the act of intercourse in count 7, her evidence falls little short of being absurd. She said she had first become aware that she was four months pregnant in about June or July 1976, which was when her mother took her to the clinic because she was being sick. On that footing, she must have conceived in about February or March 1976. To accommodate her evidence that the rape took place in the new workshop (a matter about which the complainant said she was "certain"), it would have been necessary to move that incident of rape forward to a date as late as November 1977, which was more than a year after the pregnancy had been terminated. On the other hand, to account for the pregnancy in mid-1976 the alleged rape had to have taken place back in February or March 1976, at a time when the complainant was not quite 13, but still 12 years old. On that matter, the appellant, in evidence that was not challenged by the Crown, said that in mid-February 1976, he had been admitted to hospital suffering from double pneumonia and pleurisy, from which he was discharged still in a weakened state. Only two weeks later, on about 11 March, he left with his wife and children for a holiday in England, where he remained for at least eight weeks. He was able to confirm his return date in early May by reference to entries in his passport. None of this evidence was challenged by the Crown in cross-examination. Obviously it would not have been physiologically possible for the appellant to have been the father of the unborn child unless one assumes that, despite his illness and before he went overseas in March that year, he had taken advantage of the brief opportunity available to him to rape the complainant following his discharge from hospital. This in turn was altogether inconsistent with her claim that the rape had taken place at the Moss Street workshop resulting in her pregnancy in 1976. On the complainant's evidence in support of count 7, the jury

may very well have had a reasonable doubt about the veracity or reliability of the complainant's testimony. Looking at the matter objectively, it would have been difficult for them not to have done so. That doubt ought then to have been taken into account in assessing her credibility or reliability on the other counts with which the appellant was charged. See *R v Markuleski* [2001] NSWCA 290, §35; and *R v M* [2001] QCA 458.

[9] The appellant said he first learned of the complainant's pregnancy from his wife after they had returned from England in May 1976. At some unspecified time after the complainant became aware she was pregnant, one or possibly more than one family conference was held in order to work out what was to be done about her pregnancy. Present were the complainant, her father and mother as well as the appellant and his wife. Her brother Dean may also have been there. When questioned about it, the complainant declined to say who was the father of the child she was carrying. Her refusal to do so may have been due to fear of reprisal from the appellant, although she had also declined to tell her mother when she asked about it privately on the occasion of the visit to the clinic.

[10] Ground B of the notice of appeal is that the evidence about the conference proved nothing against the appellant, and ought not to have been tendered at trial. That unsurprising proposition is supported by *Smith v The Queen* (2001) 75 ALJR 398. It was suggested by the Crown on appeal that the prosecuting counsel may have been expecting some further and relevant evidence to be given by one or more of those present, but that, in the end, none of the witnesses came up to proof. There is no indication in the record that this is what happened and, it is something that, without more, cannot be assumed. Sandra said that she and the appellant assisted by paying the expense of the complainant's travel to Sydney for the abortion because her parents, who had had eleven children of their own, were poor and had no funds. The appellant had a successful business as an auto-electrician and they were not without financial resources. They owned the house in Ellen Street where her parents and the remaining three children lived until it was sold at some time between 1973 and 1975. It was submitted by the Crown on appeal that the evidence led nowhere and could therefore not have prejudiced the appellant in his defence But that is not necessarily so. The jury might conceivably have viewed the appellant's financial assistance for the complainant's abortion as implying some kind of admission by him of his paternity. They should have been, but were not, instructed to ignore the evidence about the family conference as being completely irrelevant, although it is fair to say that the learned trial judge was not asked to give any direction to that effect.

[11] The matters referred to so far were not the only evidence bearing on the paternity of the unborn child. As has been noticed, it was not until 1993 that the complainant reported the appellant's actions to the police. At the trial, however, evidence was tendered by the prosecution of a much earlier complaint or complaints made by the complainant about the appellant's sexual misconduct towards her. The evidence consisted of (1) testimony by the complainant herself; and (2) testimony from Laurie Jeff O'Mera, who had been the complainant's boyfriend for some years from the time when she was aged about 14 in 1973. According to her account of it, there was an incident in 1976, when she was 16. She was upstairs busy tidying her bedroom as, she said, "all teenage girls should be", in the family home, which was by then in Diamond Street, while Jeff O'Mera and everyone else was downstairs. The appellant suddenly came into the room and asked her if she wanted to do "the

things he used to do". She said No, and that he was to leave her alone or she would tell somebody, upon which he left the room.

[12] She went downstairs and told O'Mera that the appellant had just asked her to do the things that he used to do to her, "and that I had been abused and that I had to have an abortion". In cross-examining her about this statement, defence counsel elicited that she discovered she was pregnant in May, June or July 1976, when she was 13 years old; that her pregnancy was the result of a rape that took place at Moss Street (count 7); and that the appellant, and "definitely not" a person named Morgan Turriff, was the father of that child. Counsel then put to her that she had told O'Mera that the appellant was not the father but that Turriff was. She denied this and agreed that, if she had told said that to O'Mera, she had been lying to him.

[13] O'Mera was later called as a witness in the Crown case. He recalled that the complainant was 14 when he started going out with her, and about 17 or 18 when she made this or a further complaint to him. According to his recollection, she told him of an incident in which she and her brother had been at a Christmas party. Her father had wished to stay on at the party but she and her brother wanted to go home, so the appellant brought them home. On arrival, she said, the appellant took her into a bedroom, threw her on to a bed and had sexual intercourse with her. In relating this incident to O'Mera, she was, he said, "very distressed". She said that the incident had taken place, when she was 12 or 13, at a house in Blackwood Street, Woodridge, where she and her family were then living. It in some ways resembles her evidence in support of count 2, which we have seen, did not correspond with the particulars of the count as charged or the house in which she was in fact living at the time. It appears to have described an entirely different, and uncharged, incident of rape.

[14] O'Mera said that the complainant also told him of another incident, which happened when she had been baby sitting for her sister and the appellant. He had driven her to his workshop, this time on the way home, where he had raped her. O'Mera said his recollection of being told this was "very clear". Again, she was crying and distressed. He advised her to tell the police or her parents about these matters. Prosecuting counsel then asked him:

> "Mr O'Mera, how certain are you that she told you what you say? That there had been incidents of rape and the like?"

His answer was, "She definitely told me". None of this evidence was objected to by counsel for the defence. It resembled her evidence about the incident in count 7, on which the appellant was acquitted, except that she said that on that occasion she was on the way home.

[15] Counsel for the defence began his cross-examination of O'Mera by suggesting to him that these were "fairly dramatic allegations" and that it was not every day that someone told him she had been raped by her brother-in-law, with which the witness agreed. Counsel then sought and received confirmation of some of the details of the uncharged rape at her home on the occasion of the Christmas party, and also that the complainant had refused to do anything about telling the police or her parents. After that, he asked O'Mera about the complainant having said she had had an abortion, and who she said the father was:

> "Who did she tell you the father was ? --- A person named Morgan, Turriff.

> Right. Did she ever make any suggestion to you that Mr S had made her pregnant? ---- She didn't, no.
>
> No. It was Morgan Turriff she said that was the father? ---- That's what she told me."

[16] Ground C of the notice of appeal is that this evidence of the complainant and O'Mera was not admissible as recent complaint. There can be no doubt that it was not recent. There has been criticism of this condition for the admissibility of complaints, and some judicial attempts have been made to re-interpret it: see *R v W* [1996] 1 Qd R 573, 576. However, the decision of the High Court in *Suresh v The Queen* (1998) 72 ALJR 769, 770, at [47], 772, at [17], 778-779, at [51-52], has confirmed the requirement of recency. In that case, McHugh J doubted if a delay of six months was not too lengthy to be recent. In *Graham v The Queen* (1998) 195 CLR 606, their Honours considered that a complaint made some six years after the event could not be considered to be "fresh" in the memory of the complainant. In both decisions, the judgments stressed the expectation or assumption that the victim of sexual offences "will complain at the first opportunity" (*Graham v The Queen* (1998) 195 CLR 606, 640). Not without some reluctance, it has been accepted in Queensland since the decision in *Suresh* (1998) 72 ALJR 769, that the complaint must be "recent". See *R v Schneider* (1998) CA 128 of 1998, at [12]; *R v M* [2000] QCA 20, at [20], [24]; *R v Noble* [2000] QCA 523, at [26]. In *Robinson* (1998) 102 A Crim R 89, it was accepted by this Court that a delay of three years was too long to admit of the complaint being recent.

[17] In the present case the complainant's delay was somewhere between three years and four or five years, from age 13 to 16 (or 17 or 18). It can scarcely be characterised as the first reasonable opportunity to complain, although the complainant said in evidence that O'Mera was the first person she felt "comfortable with" in making his complaint. On appeal, it was conceded by the Crown that the evidence of complaint to O'Mera could not amount to a fresh complaint; but its reception was not objected to at the trial, and counsel for both appellant and respondent acknowledged that there was, or arguably was, a forensic purpose in defence counsel's failure to object to it.

[18] Several comments are apposite. In the first place, the evidence of O'Mera about the paternity of the unborn child was plainly admissible as going to the credit of the complainant. The complainant said her pregnancy was the result of a rape with which the appellant was charged. When it was put to her that Turriff was the father, she did not "distinctly admit" that fact to be so; it was therefore open to defence counsel to cross-examine O'Mera to establish that she had previously told him in 1976 or thereabouts that Turriff was the father: *Evidence Act 1977*, s 18. O'Mera's evidence to that effect went not only to her credit (or discredit) but in Queensland it was under s 101(a) of that Act also admissible evidence of the fact that Turriff was, and the appellant was not, the father. The jury may have assumed that to be so, but they were not in fact instructed about either of those matters in the summing up.

[19] The second point to be made about O'Mera's evidence was that one of the two specific incidents that he said was recounted to him by the complainant was the Christmas party incident. It was not the subject of any of the counts in the

indictment, but simply an uncharged act amounting to a similar offence. As such, there ought to have been a specific direction to the jury about the limited use that might be made of it. No such direction was sought or given; but, in any event, not being an act charged against the appellant, it was not something about which recent complaint evidence from O'Mera would have been admissible. This aspect of the matter apparently escaped everyone's attention at the trial. Counsel for the defence did not object to the evidence about it given by O'Mera.

[20] It would, as McHugh J said in *Suresh v The Queen* (1998) 73 ALJR 769, 774:

> "… undermine the system of adversarial criminal justice if the admission of technically inadmissible evidence, not objected to for rational forensic reasons, could result in the quashing of a conviction because the forensic tactics had failed to bring about the accused's acquittal."

See also *R v Noble* [2000] QCA 523, at [28], [29]. It is, however, not altogether easy here to identify any rational forensic purpose by which the interests of the defence would have been served by letting in the complaint evidence at the trial. It was not needed for the purpose of establishing inconsistency and so of discrediting the complainant in the matter of paternity of the unborn child. That could have been and was achieved by cross-examining the plaintiff and O'Mera pursuant to s 18 of the *Evidence Act* about her conflicting statements on the issue of paternity. It was quite separate from her more general complaints about having been raped or indecently dealt with by the appellant, including her reporting of the incidents covered by the reference to "doing the things he used to do". The issue of paternity could readily have been isolated from her other complaints without allowing the other, and inadmissible, evidence of her complaints to O'Mera to be received. Counsel's addresses to the jury are not reproduced in the appeal record, and one can therefore only guess that the forensic advantage, if any, perceived by defence counsel in failing to object to this highly prejudicial self-serving evidence from the complainant, as well as the completely hearsay statement from O'Mera, might have been designed to stress the complainant's delay in making her complaints as something that would adversely affect the jury's assessment of her credibility. That this may have been his forensic purpose is suggested by something that he said to the trial judge in the course of his submissions on the appropriate directions to be given to the jury.

[21] The advantage, if any, was certainly purchased at a high price in risk to the appellant's prospects of acquittal. The general tendency of evidence of complaints to enhance credibility has been recognised in several decisions, notably for example, *Suresh v The Queen* (1998) 72 ALJR 769, 771, at [6], and 776-777, at [42], as precluding the application of the proviso on appeal. See also *R v Aston-Brier* [2000] QCA 211, at [6]. While, however, it may be possible on this basis to account for the failure to object to inadmissible evidence of a complaint that relates, or is capable of being related, to an incident that is charged as an offence in the indictment, I am not able to see what was to be gained from not objecting to evidence from O'Mera concerning an incident that was not charged against the appellant at all. The evidence of that statement was pure hearsay, which should not have been led at all, or, if it was led, should have been objected to. Not having been objected to, it should have been the subject of a specific direction to the jury about the limited use that could be made of it. Failure to seek such a direction with respect to this hearsay evidence of another but uncharged act of rape by the appellant can only have been

prejudicial to his defence at the trial, and may help to explain why the jury found him guilty of five of the offences charged while acquitting him of counts 7 and 2.

[22] As a result of all this, the learned judge was left in the quandary that there was inadmissible evidence of complaint that called for some direction to be given to the jury. Her Honour instructed them that it could be used either as evidence of consistency or of inconsistency of conduct on the part of the complainant. Mr Weston for the appellant submitted that the direction should have been limited to inconsistency of conduct. It could not be evidence of consistency on her part because the complaint was not "recent"; and, not having been made at the first reasonable opportunity, it was, on the contrary, some evidence of the falsity of the complaint: see *Suresh v The Queen* (1998) 72 ALJR 769, 770, at [4]. On this footing there had been a misdirection of the jury, and, because credibility was so much in issue at this trial, one that could not be cured on appeal by applying the proviso in s 668E(1A) of the Code: *Suresh v The Queen* (1998) 72 ALJR 769, 771 at [6]; 776-777 at [42].

[23] That the credibility of the complainant was in issue at the trial is beyond question. Of the five charges on which the appellant was found guilty, count 1, like count 2 on which he was acquitted, was said by the complainant to have been committed in 1973 at a time when she was 9 years old; those in counts 3, 4, 5 and 6 in 1973 or 1974 when she was still 10. The latter were all said to have taken place when she was being driven by the appellant to the home of the appellant and his wife, or, in one instance of indecent dealing (count 6), when she was staying there overnight. In each instance the purpose was to enable the complainant to baby sit their children at night. With respect to the convictions on those counts, ground D of the appeal is that the verdicts should be set aside as unsafe and unsatisfactory.

[24] On each of those counts, an essential element in the prosecution case at trial was that it was the complainant's baby sitting activities that explained how she came to be alone with the appellant and so provided him with the opportunity of committing the offences. Apart from the baby sitting, there was little or no occasion for their seeing each other. The appellant and his wife lived at some distance from the complainant's home, which was described as being three suburbs away. They had two young children and, on occasions when they went out at night, the complainant sometimes baby sat for them. For that purpose, the appellant picked the complainant up after work and drove her from her home to theirs. On at least two separate occasions the complainant said that, in the course of the journey, they stopped at his workshop, which was then in Kingston Road, where he raped her. Those incidents were the subjects of counts 3 and 4. Count 5, which was a charge of indecent dealing, was said to have taken place at the same place and occasion as count 4 and immediately after it. Count 6 charged an incident in 1974, when she was staying at the appellant's home overnight in the course of performing baby sitting services. She said she woke to find the appellant touching her breasts and her genitals.

[25] The outer limits of the period during which these offences were committed were alleged as between 29 March 1973 and 29 March 1975, or, in other words, between her 10th and 12th birthdays. The problem is that, according to her evidence, the complainant was at the time of the alleged offences only 9, or at most 10, years old. One of the children she was supposed to be looking after was a boy Sean who was born in 1969, and so was 3 or 4 years old, or at most 5, at the time the baby

sitting was taking place. He suffered from a severe asthmatic condition and Sandra agreed that it would have been irresponsible to have allowed a 9 or 10 year old girl to baby sit at night for such a young child who was in that condition. Sandra said in evidence that the complainant did not begin baby sitting until after she had had the abortion in September 1976, at a time when she was 13 or 14, and that it was impossible that the complainant had begun to do so at a much younger age. Sandra conceded that there may have been an occasion when she had done so at an earlier age under the supervision of a neighbour, but only once. The recollection of the complainant's mother, with whom the complainant was living at the time, was fading; but she said that the complainant was about 13 or 14 when she started baby sitting for the appellant. The appellant said the complainant baby sat for them only a few times, and that she began to do so when she was 14 or 16.

[26] On appeal Mr Campbell pointed to Sandra's acknowledgement in evidence that the complainant might have been at their home on other occasions; but the Crown case at the trial was specifically related to the complainant's baby sitting activities as affording the opportunity for the appellant to be alone with the complainant, as enabling him to commit the offences or to do so in secret. Considered objectively, the strong probability is that Sandra would not have engaged her to baby sit at night for a child as young as 4 or 5 years old with his asthmatic condition at a time when she was herself only 9 or 10 years. Her evidence to the contrary effect was contradicted not only by that of the appellant but also by that of her sister and her mother. It seems improbable that they were all mistaken about her age when she started baby sitting, and that she, rather than they, was correct about it. It is only if they were mistaken and she was not that the jury could have been satisfied beyond reasonable doubt that the appellant was guilty of counts 1, 3, 4, 5 and 6.

[27] There were other matters of detail on which the evidence of the complainant was contradicted not only by the appellant but by Sandra. One was the condition of the back of the van in which the rapes were alleged to have taken place at the workshop. It was only a small area occupied in the middle by a large toolbox fixed to the floor and by the clutter of tools and equipment that commonly accompany the activities of busy tradesmen. Another was the contour of the back of the front seats between which the complainant said she had to climb. In print the appellant's evidence reads well, and is supported in a number of respects by the evidence of his former wife. Against this, Mr Campbell submitted that Dean's evidence of having observed sexual intercourse taking place (count 2) was capable of affording corroboration of the complainant's evidence about the offences charged in counts 3, 4, 5 and 6. For this he relied on *R v Sakail* [1993] 1 Qd R 312 and *R v Massey* [1997] 1 Qd R 404, where independent evidence of uncharged similar acts was held to be capable of corroborating the complainant's testimony with respect to offences charged in the indictment. But count 2 was a charge of an offence on which the appellant was acquitted; and it would be a considerable and, in my opinion, unwarranted extension of the principle of those two decisions to hold that evidence of an act of which the accused has been found not guilty is nevertheless capable of being used at the same trial as capable of confirming testimony that he committed another offence or offences with which he is charged. Dean's evidence on count 2 was therefore not capable of corroborating the complainant in relation to the other counts in the indictment, and the trial judge did not direct the jury that it was.

[28] It follows from all that has been said in these reasons that I regard the verdicts of guilty returned by the jury at this trial as unsafe and unsatisfactory. In particular,

I consider that the jury ought, on all the evidence before them, to have entertained a reasonable doubt about the reliability of the complainant's evidence of the baby sitting hypothesis on which the prosecution case on counts 1, 3, 4, 5 and 6 at the trial was based. In addition, I am bound to say that in my opinion the complainant's evidence on count 7 raised serious doubts about her veracity. Her claim that the appellant was the father of the unborn child as a result of the rape alleged to have been committed in the Moss Street workshop was plainly unreliable, the more so when considered in the light of her conflicting statement to O'Mera on the same matter. It is, of course, possible that by the time of the trial, she mistakenly believed that the appellant was the father; but, at the very best for her, in making that allegation at the trial her evidence, if not dishonest, was certainly reckless. Once that became apparent to the jury, as it ought to have been, it clearly had the logical effect of damaging her reliability on all other issues at a trial in which credibility was likely to be decisive.

[29] In her summing up to the jury, the learned trial judge gave the conventional direction that it was open to them to accept and act upon the whole, or only some parts, of the evidence of a witness. In *R v Markuleski* [2001] NSWCA 290 a majority of the Court decided that as a general rule a trial judge should direct the jury that a reasonable doubt with respect to the complainant's evidence on any count ought to be taken into account in assessing the complainant's evidence generally. In *R v M* [2001] QCA 458, at [22], and with the concurrence of Jones J, I said that in some, perhaps many, cases of this kind, it is desirable that a qualifying direction of that kind should be given. Although it would not have been possible for her Honour to predict that the jury would return the disparate verdicts which they did, the quality of the complainant's evidence on count 7 made it a real possibility that they would acquit the appellant at least in respect of that charge. For that reason, the qualifying direction ought to have been given to the jury in this case. The record here shows references were made to the decision in *R v Markuleski* early in the trial. Without such a direction, it is not possible to be confident that there is any rational explanation for the differing verdicts against the appellant other than that the complainant's evidence on that count, and perhaps also on count 2, arose from doubt about her credibility. On that basis the verdicts were inconsistent and fatally so.

[30] The result is that the appeal should be allowed and the verdicts and convictions set aside. Whether a new trial should be ordered is not in this case a question to which the answer is immediately apparent. The discretion under s 668E(2) of the Code to order a new trial is not one that ought to be exercised automatically or mechanically, but only after first considering whether the admissible evidence given at the original trial was sufficient to justify a conviction, "for it is wrong by making an order for a new trial to give the prosecution an opportunity to supplement a defective case". Here the admissible evidence would hardly satisfy that test, and would certainly not do so without some fundamental restructuring of the time limits in the counts in the indictment, and to some extent also of the evidence and the nature of the prosecution case against the appellant. That is not a purpose which the power to order a re-trial is designed to serve, especially in a matter in which the events alleged took place some 25 or more years ago, rendering recollections unreliable and documentary evidence difficult to obtain.

[31] In allowing the appeal, I would therefore enter judgment and verdict of acquittal on each of counts 1, 3, 4, 5 and 6 in the indictment.

[32] **BYRNE J:** McPherson JA mentions the circumstances germane to this appeal. They, and his Honour's analysis of them, show that the reliability of the complainant's testimony was so effectively called into question that the jury should have entertained a reasonable doubt about guilt on all charges, not just in respect of those for which verdicts of acquittal were rendered.

[33] Accordingly, I agree in the orders McPherson JA proposes.

[34] **PHILIPPIDES J:** I agree with the judgment of McPherson JA and with the orders proposed.