SUPREME COURT OF QUEENSLAND

CITATION:	*R v R* [2003] QCA 71
PARTIES:	**R** **v** **R** (appellant)
FILE NO/S:	CA No 203 of 2002 DC No 108 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	28 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	3 February 2003
JUDGES:	McPherson and Jerrard JJA and Mullins J Separate reasons for judgment of each member of the Court; each concurring as to the orders made
ORDER:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – OTHER CASES – where contradictions existed between complainant's evidence in chief and her statements to investigating police officers – where appellant submits that the absence of motile spermatozoa in vaginal swabs taken from the complainant left open the possibility that consensual intercourse occurred between the complainant and the appellant – whether verdict unsafe and unsatisfactory CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – EVIDENCE UNFAIR TO ADMIT OR IMPROPERLY OBTAINED – PARTICULAR CASES – where DNA samples taken from appellant when charged with rape several years prior to this offence – where appellant later acquitted of that offence – where governing legislation did not provide for the disposal or destruction of DNA samples in circumstances of acquittal – where appellant submits that analysis of the

earlier sample for the purposes of the current offence was unlawful or unauthorised – whether learned trial judge ought to have excluded the DNA evidence

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where appellant convicted of rape several years prior in similar circumstances to current offence – where appellant showed complete lack of remorse – whether sentence manifestly excessive

Bunning v Cross (1978) 141 CLR 54, applied
M v The Queen (1994) 181 CLR 487, applied
R v Mallie [2000] QCA 188; CA No 49 of 2000, 17 May 2000, distinguished
R v Soper [1994] QCA 254; CA No 119 of 1994, 15 June 1994, considered
R v Swaffield (1998) 192 CLR 159, considered

Criminal Code (Qld), s 259, s 668E
Police Powers and Responsibilities Act 2000 (Qld), s 315, s 316, s 317

COUNSEL: A J Rafter for the appellant
M J Copley for the respondent

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

[1] **McPHERSON JA:** I agree with the reasons of Jerrard JA for dismissing the appeal against conviction. I also agree, for the reasons his Honour has given, that the application for leave to appeal against sentence should be dismissed.

[2] As to the question of retention of DNA samples, I would only add, perhaps unnecessarily, that there is a public interest not only in securing by that means, conviction of those guilty of crime, but also the acquittal of those who are innocent. DNA samples are capable of serving not only one but both of these important purposes.

[3] **JERRARD JA:** At 10.00 p.m. on 30 March 1999 LT left the Boundary Hotel in West End Brisbane where she had been drinking beer since about 6.00 or 7.00 p.m., and after sitting for some time at a bus stop she asked a passing motorist for a lift to her then residence at Normanby Terrace. The motorist did not take her there, but instead drove her to an area somewhere around Wacol on the Brisbane City outskirts, and there assaulted and raped her. Following her fresh complaint made after her release from his control at a railway station, vaginal and vulval swabs were taken from her in a medical examination at 9.25 a.m. on 31 March 1999 ("the 1999 samples"). On 30 October 2000, a comparison was made of the results of DNA analysis of those samples with the DNA result of analysis of bodily samples taken from the appellant on 17 February 1992 ("the 1992 samples"); and the result

relevantly identified him as a male person who had had sexual intercourse with the complainant LT. On 29 March 2001 he was interviewed, and while he admitted giving a lift to a woman of LT's aboriginal cultural identity "about a month before" 30 March 1999, and from the same location outside a "chicken place" in West End as LT had described, he denied having had intercourse with that woman, or with any Aboriginal woman in calendar year 1999. He was arrested that same day 29 March 2001, and charged with the rape, assault, and deprivation of liberty of LT two years earlier. On 20 June 2001 a further DNA sample was obtained from him as a consequence of that arrest; and he was convicted by a jury on 6 June 2002 after a trial in which the unchallenged expert evidence of a comparison of the DNA results of the vaginal swabs and vulval swabs with the June 2001 sample was that it was about 200 billion times more likely that the cellular mixture on the low vaginal and vulval swabs from the 1999 samples had come from LT and the appellant, rather than from LT and a male person chosen at random from the community. The appellant, who had been previously convicted in November 1988 of a rape committed in November 1987 and sentenced to five years imprisonment for that rape, was sentenced on 7 June 2002 to 11 years imprisonment. He appeals against all three convictions and applies for leave to appeal against that sentence.

[4] The appellant argued two grounds of appeal. The first was that his conviction was "unsafe and unsatisfactory", which should be understood as a submission made pursuant to s 668E of the Criminal Code that the verdict of the jury was unreasonable or cannot be supported having regard to the evidence[1]. On this ground the appellant relies upon a number of contradictions between LT's evidence in chief and statements made by her to the investigating police officers. His counsel submitted both at trial and on the appeal that those contradictions, coupled with the absence or non detection of motile spermatozoa in the vaginal and vulval swabs, left open and unrebutted the possibility that an act of consensual sexual intercourse occurred between LT and the appellant not at the time she alleged, but perhaps in the period beginning 48 hours and ending about 16 hours before the time at which those swabs were taken.

[5] Additionally, the appellant argues that the use for analysis in October 2000 of body samples taken from him in February 1992 was either unlawful or unauthorised, and that the sample taken in June 2001 was tainted by its collection being derived directly from the knowledge acquired from that earlier unauthorised comparison; and accordingly the learned trial judge ought to have acceded to a request made to her to exclude, in her discretion, evidence of the comparison of the DNA analysis of 1999 sample with the result of the DNA analysis of the June 2001 sample. The results of that comparison were essential for the conviction of the appellant. The evidence did not in any way otherwise identify him as the man who raped LT.

[6] **Contradictions in the Complainant's Evidence.**

Her account of the critical events, to which she adhered in cross examination, was that she had been seated at a bus stop next to "the chicken shop" when she saw a white Ford car drive past her two or three times, and she waved the male driver down. She asked for a lift for Normanby Terrace, he agreed, but drove her first to the Hamilton Wharf. When she asked what they were doing there, the man said he had to check something out and, flicking a badge out, said he was with the FBI. He

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1 See *Gipp v R* (1998) 194 CLR 106 at 147-150, and *MFA v R* (2002) 193 ALR 184 at [38] and [46].

then said he had to go to Wacol to check something out, and she fell asleep in the car. She woke up at Wacol Train Station and asked the man to drop her off there, but received no answer. The man kept driving out to a bush area at the back of Wacol, and on the drive to that spot she asked a couple of times to be let out of the vehicle. Each time the response was to increase the speed of the vehicle. When the vehicle stopped she got out of the car, intending to run to a house, but was grabbed by the hair, dragged back to the car, and pushed into the back seat. She was punched twice in the jaw and during a struggle which ensued the man ripped her pants off. He then had sexual intercourse without her consent.

[7] When that act was completed they both got up, she was pulled again into the car (the front seat) by her hair, driven to what she said was the Wacol Train Station, and pushed out of the door by the man. She then rang the police.

[8] The evidence at the trial was that Detective Elizabeth Hutchinson, the primary investigating officer, understood that uniform police officers had actually collected LT from the Riverview Railway Station, rather than the Wacol Railway Station. Riverview is four stations from Wacol. LT's evidence in cross examination was that she had been drinking alcohol on 30 March 1999 in the afternoon at Musgrave Park before going to the Boundary Hotel. When she left the hotel she was carrying an open carton of a white wine, described as a fruity lexia. She agreed that by the time she was giving her complaint to Detective Hutchinson at the Ipswich CIB (sometime after 2.00 a.m. on 31 March 1999) she was falling asleep, drunk, and tired.

[9] The evidence established she had supplied an incorrect date of birth when first making her complaint by telephone at 1.32 a.m. that day, and did so because "they had a warrant on me". The complaint then recorded was of rape by a man named "Mark", who had been driving a white Holden vehicle; but when interviewed on tape later that morning by Detective Hutchinson, LT said she could not recall if the vehicle was a Holden or a Ford. She told Detective Hutchinson then that the man had gotten out of the car and approached her, started talking with her, and at that stage had pulled out an FBI badge. She also told Detective Hutchinson that whilst she had said in her original telephone complaint words to the effect of "Mark selling me for $20.00", she had not in fact seen Mark earlier that night. The evidence was that she did know a man by the name of "Indian Mark", but was unable to recall at the trial whether she had or had not seen Indian Mark at that hotel earlier that night.

[10] Cross examination established that she had told Detective Hutchinson in the taped interview that the man who raped her had said he needed to see someone at Wacol jail, and that LT said then she had said to him "I'll come for a ride with you". LT had denied in her own cross examination that she had agreed to go with him to Wacol.

[11] LT's evidence in cross examination was that she had seen the man who raped her before, he being a regular drinker at the Boundary Hotel. She described him as having a big nose resembling a broken nose, and recalled having told Detective Hutchinson that the man "looks" like a "wog". Although LT denied it in cross examination, Detective Hutchinson's evidence was that LT said the man "speaks" like a "wog". LT had also told Detective Hutchinson that she did not know the man, and had never seen him before.

[12] Other inconsistencies established were that although LT could not recall so saying, she did tell Detective Hutchinson that the man was 38 or 39 years of age, and had hit her once in the assault upon her. She had also told Detective Hutchinson that man had "grabbed her out of the car and chucked her into the back seat" and had raped her there; and that thereafter she had remained throughout in that back seat. In contrast, her evidence in chief and in cross examination had been that after being raped in the back seat of the car, she had gotten into the front seat, from which she had been forcibly evicted by the rapist at the railway station where she was left.

[13] Detective Hutchinson's evidence was that LT appeared very tired and fairly intoxicated when first interviewed at about 2.20 a.m. on 31 March 1999. Detective Hutchinson described the first oral account she got from LT about the events, obtained before conducting a tape recorded interview. That short account repeated by Detective Hutchinson was quite consistent with the evidence in chief of LT, but of course differed (on the points on which LT was cross examined) from what LT said later that morning (around 5.30 a.m.) when a video and tape recorded interview was conducted with her.

[14] LT did not purport at all to identify the appellant as the man who raped her. Nor did she say he was not that man. She swore she could not now recall what apparent age her attacker had been, and the appeal record does not demonstrate that the appellant had any particular or noticeable accent or manner of speech consistent with LT's description in March 1999 of a man who spoke "like a wog". Her evidence was that a "wog" was a "Greek fella".

Results of the Forensic Examination

[15] The medical examination of LT relevantly showed that she had some slight swelling over the right lower jaw and cheek, and bruises underneath the finger nails of the left ring and middle fingers. The injury to her face was consistent with blunt trauma such as being hit by a fist; and she had described that her hand had been closed in a car door (when that had happened was not established). No spermatozoa were detected on the high vaginal swab, one sperm head was detected at the time of DNA extraction on the low vaginal smear, and eight non intact spermatozoa "with no tails on the end of the sperm head" were detected on the vulval swab. The evidence of the forensic biologist Peter Clausen accepted the general proposition that, from the non discovery of intact spermatozoa, the act of intercourse which deposited those spermatozoa might have occurred as much as 48 hours prior to the time of collection of the swab samples; but he did not accept the further proposition that that act must have occurred at least 16 hours before those swab samples were collected. Mr Clausen contended it was not unusual to find tails falling off spermatozoa heads before 16 hours had passed after ejaculation; and he also stressed that the fact that only a small number of spermatozoa were detected, all of which were not intact, did not exclude the possibility that there were actually some intact spermatozoa then present. Mr Clausen did accept as a general proposition that a rule of thumb had been used in the laboratory in which he worked, which held that if there were no intact spermatozoa, this was suggestive that coitus may have taken place a good number of hours prior to the medical examination. However, there was definitive time.

[16] The evidence of Dr Hoskins is relevant here. This was that a number of factors affect sperm motility. These include the frequency of ejaculation, the presence in

some women of anti-bodies to male sperm, illness in the sperm donor, and ingestion by that donor of any of a number of drugs which have the capacity to influence normality of sperm and sperm count. The appellant was born on 3 December 1947 and when interviewed on 29 March 2001 was on an invalid pension; and he described himself then as having been suffering for about four years from the post polio syndrome for which he received the pension. He also described having been placed on medication "at that particular time" (apparently around March 1999), which medication he said had a side effect which was that "it could make you impotent until your body adjusted to it", and to "knock around the potency side of the thing to the body and that" (I am quoting from the transcript of the record of interview supplied during the course of the appeal).

[17] The appellant's counsel argued that, putting all this together, there was sufficient doubt raised by reason of LT's heavy consumption of alcohol, and poor recollection of events, to make it possible that consensual intercourse had occurred between herself and the appellant on some prior occasion and not on the night of 30 March 1999. That argument has a number of weaknesses. One is that there was no suggestion put to LT in cross examination that she had ever had consensual sexual intercourse with the appellant at any time. The general tenor of her evidence, not challenged in any way on this point, was that she had actually had no dealings herself at all with the appellant other than on the night of 30 March 1999, assuming the other evidence identified the appellant as the man who raped her. A further difficulty is that the appellant himself denied when interviewed having had sexual intercourse with any Aboriginal woman in 1999, including the woman who had entered his car outside the "chicken store" on the occasion he described in that interview, apparently in late February or early March 1999.

[18] The appellant's account to the police of that event was that he had seen that woman engaged in an apparent scuffle with two men, and that she had hit on the window of his car "screaming to give her a lift out of the area". This was at around 7.00 p.m.-7.30 p.m., and accordingly he did give the woman a lift over the Grey Street Bridge and into the City. She had then started asking him for $50, which he declined to give her and he let her out of the car.

The Appellant's Alibi

[19] LT's evidence included an account of what she had done in the 16 hours prior to the medical examination, and she was not cross examined at all about what she had been doing in the 32 hours before she went to Musgrave Park. The appellant, who did not give evidence on his trial, gave an account when interviewed in March 2001 of having spent his time from the evening of Monday 29 March 1999 until the early hours of Wednesday 31 March 1999 largely at his daughter's home, playing either chess or cards. This had been a requirement imposed on him by his ex wife, who wanted him to spend some time with the "family". It was not suggested that LT had been a visitor at either the appellant's home, or the appellant's daughter's home, (apparently then situated very close to the appellant's), and accordingly the appellant's own answers in interview would exclude the possibility of any sexual dealing between himself and LT for at least 40 of that 48-16 hour period prior to the collection of those vaginal and vulval swabs.

[20] The appellant had contacted Detective Hutchinson in early March 2001, advising her that police from the Gold Coast said he was wanted in relation to a rape, and

wanting to know from Detective Hutchinson what it was about. She had explained that complaint to him by telephone, and had given him the date and time of the alleged offence. An appointment was made for him to be interviewed and that interview eventually occurred on 29 March 2001. Accordingly, he knew then the critical date, and his account then, which if true provided a complete alibi, was that he had spent the latter part of the night of 30 March 1999 and the early hours of 31 March 1999 teaching his daughter and a friend of hers to play Canasta. They played until about 2.00 a.m.

[21] The prosecution called his daughter at the trial and her evidence in chief supported that alibi. That evidence was that she was heavily pregnant at the time with a daughter born one week prematurely on 7 April 1999, and that her father had taken her to the Ipswich Hospital on the day of 30 March 1999 because she had been suffering pains throughout the course of the day. They had remained there until about 10.00 p.m. and then her father had driven her home. At her home they played cards, and he taught her and her friend to play Canasta until about 12.30 a.m. on 31 March 1999. Her father then left for his adjacent home.

[22] Following an application made by the Crown Prosecutor, the learned trial Judge made a declaration that Ms R was a hostile witness, and allowed limited cross examination by the Crown Prosecutor. That cross examination confirmed that as at 30 March 1999 Ms R was 38 weeks pregnant, and had been at that hospital from about 3.00 a.m. until 10.00 p.m. on 30 March 1999. However, on 29 March 2001 when interviewed over the telephone by Detective Hutchinson, Ms R, whilst supporting her father's description of his teaching her to play cards on a particular night, unequivocally described that night as being when she, Ms R, was either five or six months pregnant, which she also agreed was in either January or early February of 1999; and she had entirely omitted from the account she gave then to Detective Hutchinson any reference to visits to the hospital during the preceding day and evening (Detective Hutchinson had not supplied Ms R with a specific date about which she was being questioned).

[23] The appellant's description to the police of that same evening when he taught Canasta to his daughter also entirely omitted any reference to his having earlier taken her to the Ipswich Hospital for a 19 hour stay because of her advanced state of pregnancy at that time, or that she was pregnant. Given that significant omission by the appellant and the considerable difference between what his daughter swore to on oath and what she told the police, the jury was entitled to conclude that the alibi had simply fallen entirely to pieces during the trial. Since there was no suggestion made at the trial or on the appeal that the forensic evidence was in the slightest way unreliable, and since it demonstrates the unanswerable proposition that the appellant did have sexual intercourse with LT in late March 1999, then on the independent assessment of the evidence mandated by the decision of the High Court in *M v The Queen* (1994) 181 CLR 487 at 492, upon the whole the evidence it was open to the jury to be satisfied beyond reasonable doubt that the appellant raped LT by that act of intercourse, and on the occasion she described in evidence. It was likewise open to the jury to be satisfied that he assaulted her with intent to rape her and that he had unlawfully deprived her of her personal liberty, at least after she had awoken in the car at Wacol and asked to be released. Accordingly, unless the appellant can succeed on his second ground of appeal all three convictions must be upheld.

[24] **The DNA Evidence**

It was common ground that on 17 February 1992 the appellant was then lawfully in custody on a charge of rape, of which alleged offence he was later acquitted. While in custody what was described in submissions as "bodily samples" were taken from him pursuant to the provisions of s 259 of the Criminal Code, now repealed but then in force and regulating the taking of samples of a person's blood, saliva, or hair.

[25] Section 259(3) relevantly provided:

> "When a person is in lawful custody upon a charge of committing an offence –
>
> (a) a legally qualified medical practitioner acting in good faith and at the request of a police officer…may do such of the following as may afford evidence as to the commission of **the** offence –
>
> (i) examine the person of the person in custody including the orifices of the person's body
>
> (ii) take samples of the person's blood, saliva, or hair…"
>
> (Emphasis mine)

Section 259(3A) provided that a "prescribed act" meant any act referred to in subsection 3(a), and s 259(4) provided that a person should not do a prescribed act unless either the person in custody consented in writing to the doing of the act, or a Stipendiary Magistrate had upon application made to the Magistrate given approval to the doing of the act.

[26] Section 259(6) relevantly provided that:

> "A Stipendiary Magistrate shall not approve the doing of a prescribed act unless the Magistrate is satisfied:-
>
> (a) that the person to whom the act is to be done is in lawful custody upon a charge of committing an offence; and
>
> (b) that there are reasonable grounds for believing that the doing of the act may afford evidence as to the commission of **that** offence; and
>
> (c) that the person in custody has been informed of the person's right to have present while the act is being done 2 persons of the person's choice." (Emphasis mine).

[27] Nothing in s 259 described or in any way limited the tests which might be performed upon samples of blood, saliva, or hair, lawfully taken from the person in custody; or provided for the destruction of those samples, or of records of the result of whatever analysis or examinations were performed on those samples, in the event of an acquittal or on any other happening. However, the authority to take samples was limited to those as to which there were reasonable grounds for believing they might afford evidence of the commission of the offence of rape with which he was then charged. Mr M Copley, appearing for the respondent Director on the appeal, himself very fairly suggested that the provisions of s 259(6) and (3) left open the argument that any sample taken pursuant to such authority, or the results of DNA analysis of it, could only be used in relation to the offence for which the person had been held in lawful custody. As Mr Copley submitted, it would not be the continued possession of an "old" sample that might be claimed to be unlawful or unauthorised conduct on the part of any law enforcement or other authority or body, but rather the use of the sample for a purpose or investigation other than that allowed for or envisaged by the approval given under s 259(6)(b).

[28] The argument as to the implied limit placed on the use of samples by the provisions of s 259, and derived from the limited purpose for which approval could be given for a sample to be taken, applies equally whether a conviction occurred for that offence then charged, or an acquittal, or any other result. Whether a conviction occurred or an acquittal, if the sample was retained or records of the results of whatever analysis was made were kept, the argument is just as much open that subsequent use of that sample or those results, to identify or exclude the commission of another or other offences by Mr R, was beyond or outside the purpose for which the approval was originally given and samples obtained.

[29] The argument can be conceded to be accurate, but all that it leads to is further argument that any other use of the sample is a breach of privacy, rather than that it is unlawful. Nothing in s 259 actually prohibited the use of samples lawfully obtained when prosecuting one offence from being used for comparison with samples obtained when investigating other offences. What s 259 did, and all that it did, was impose strict conditions on when a sample could be taken. There remains the question of whether anything in the *Police Powers and Responsibilities Act* 2000 (Qld) ("the *Powers Act*"), which came into force on 1 July 2000, rendered it unlawful to conduct an analysis and comparison of samples collected before that Act came into force, and collected after an approval under s 259 was given.

[30] Part 4 of the *Powers Act* introduced into Queensland law statutory provisions controlling taking of samples for DNA analysis, and the use of those samples and results of DNA analyses. Section 296 provides that the primary purposes of Part 4 include authorising the establishment of a DNA data base and authorising the recording in the data base of the information obtained by performing a DNA analysis of a DNA sample taken under Part 4. Those purposes also include authorising the use of information in the data base for investigation by declared law enforcement agencies.

[31] Section 317 of that Act provides that the Commissioner (of the Police Service) **must** ensure information obtained by a DNA analysis of a DNA sample taken under Part 4 is recorded in a DNA data base, and s 317(3) provides that the Commissioner **may** arrange for information obtained by a DNA analysis of either of the following held by the Commissioner to included the data base:

(a) a sample including blood taken before or after the commencement (of s 317);

(b) a senior police officer reasonably suspected evidence of the commission of an offence.

It follows that there is a legislative intent that the data base can include information obtained by a DNA analysis of samples taken perhaps years before, including both samples taken by consent (from complainants, suspects and other persons), and samples taken from persons charged by use of the force impliedly authorised in s 259 of the code. Section 317(3) contains no implication that the information obtained from samples taken before 1 July 2002 is limited to information from samples obtained in respect of charges, let alone charges resulting in a conviction rather than an acquittal. Accordingly, the information obtained by DNA analysis of each of the 1992 and the 1999 samples could legitimately be included the data base.

[32] Section 315(2) provides that it is lawful:

> "(a) for a police officer to keep the results of any DNA analysis of a DNA sample taken under (Part 4) and;
> (b) for a police officer to use the results of **any** DNA analysis for any investigation being conducted by a police officer for the Police Service or a declared law enforcement agency." (Emphasis mine)

While the authorisation granted by s 315(2)(a) to keep the results of DNA analysis is specifically limited to that of DNA samples taken under Part 4, the same limitation does not appear in s 315(2)(b) in its approval of the use of the result of "any DNA analysis". This drafting could scarcely be an oversight, and as s 315(2)(b) authorises the use of the results of DNA analysis of samples collected perhaps years earlier in any later investigation, then just as with s 317(3), it is not possible to discern any intent that the "results of any DNA analysis" in s 315(2)(b) should be limited to the analysis of samples where legal proceedings in respect of which they were collected resulted in convictions. Accordingly, this section makes it lawful for a police officer to use the results of DNA analysis of the 1992 sample for any other investigation.

[33] Section 316(1) **does** provide for the destruction of DNA samples where either the arrest or the legal proceedings for the indictable offence to which the sample relates are discontinued, or where the person is found not guilty of that indictable offence. The obligation to destroy the samples is to do so "within a reasonable time", which requirement suggests that s 316(1) may be limited in its application to samples collected pursuant to Part 4. However, s 316(1) is not so expressed, and the *Powers Act* in Part 4 generally distinguishes in its provisions between samples collected under Part 4 and other samples. Putting that aside, s 316 (2) expressly provides that that requirement for destruction does not apply if, inter alia:

> "(b) the person has been found guilty of another indictable offence whether before or after the commencement of this section."

[34] Applied to this matter, Mr R's conviction for rape incurred on 29 November 1988 means s 316(2) would justify the retention for DNA analysis of the sample taken in February 1992, if s 316(1) has a retrospective effect. If it does not, nothing else the *Powers Act* requires destruction of, or prohibits the use of, the 1992 sample; and there is a clear legislative determination in s 316(2) that samples susceptible to DNA analysis taken any time, from persons who have been found guilty of an indictable offence at any other time, will remain available for use in the investigation of crime.

[35] The provisions in s 317(3) authorising the Commissioner to include in the data base information obtained by DNA analysis of samples other than ones taken pursuant to the *Powers Act,* the provisions in s 315(e) authorising the comparison of the results of DNA analysis of samples taken under the Act with other samples obtained other than under the Act, the provisions in s 315(2)(b) authorising police officers to use the results of any DNA analysis, and the provisions in s 316(2), all lead to the conclusion that the limitation arguably imposed by s 259 of the Code, on the purposes for which the 1992 sample could be used, has necessarily been abrogated by those provisions of the *Powers Act*.

[36] It follows that the 1992 sample was lawfully taken, that information obtained by DNA analysis of it was lawfully available for inclusion in the DNA data base established and maintained by the *Powers Act,* and that nothing in the *Powers Act* made it unlawful for an analyst to have recourse to that sample for comparison with

the 1999 samples. The police were specifically authorised by s 315(2)(b) to use the results of that comparison; and all that is missing is an express authorisation for an analyst to make the comparison which produced that result. Since there was no prohibition on that being done, and since it was a necessary step to take to get the information lawfully available for inclusion in the data base, and since the samples were not required to be destroyed, the analyst who conducted that comparison of the 1992 and 1999 samples was acting lawfully.

[37] The only matter therefore which was arguably capable of invoking the exercise of the Judge's discretionary power to exclude the DNA evidence is the use in October 2000, without his knowledge, of the sample taken eight years earlier from Mr R for another purpose. One can assume he would not have consented in 2000 if asked.

[38] The discretion to exclude admissible evidence as a matter of public policy, identified and recognised by the High Court in its decision in *Bunning v Cross* (1978) 141 CLR 54 and further considered and discussed by that court in *R v Swaffield* (1998) 192 CLR 159, would not justify the exclusion of the admissible evidence (the DNA analysis of the June 2001 sample) which had been obtained in the knowledge of the results of the October 2000 comparison. That October 2000 comparison was itself admissible evidence but not led, and this was done to keep knowledge of the 1992 charge from the jury. That October 2000 analysis and comparison was lawfully conducted, and broader questions of high public policy overwhelmingly favour carrying out such analyses, despite their intrusion into the privacy of the donors of the samples analysed and compared. This is because the accuracy of results of DNA analysis mean that those committing offences, or properly suspected of doing so, are identified; and that likewise Mr R may well have been excluded as a possible suspect for other offences by DNA analysis comparisons which used his 1992 sample.

[39] As declared by Lord Steyn in *Attorney General Reference* (No. 3 of 1999) [2001] 2 AC 91 at 118) "….it is in the interest of every one that serious crime should be effectively investigated and prosecuted". Adopting and further adapting a portion of his Lordship's reasoning in that part of his judgment, absurd consequences would follow from courts holding it appropriate to exclude otherwise admissible evidence of the results of DNA analysis obtained by police actions and investigation, which were themselves conducted on the basis of knowledge derived from the use of other and earlier DNA analysis of samples collected for other purposes, and which might (or even ought to) have been destroyed. For example, if the police received information as a result of such other and earlier analysis that a particular person was responsible for a number of serial murders, the police would be unable to take any action; and equally unable to rely on other admissible evidence derived from that knowledge, such as a consequential confession from the person identified as responsible when approached by the police, or the discovery of the murder weapon in that person's house. As His Lordship observed, it must be borne in mind that respect for the privacy of defendants (and the donors of samples generally) is not the only value at stake, and "the purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property". His Lordship might have added that acquittals, just like convictions, may be obtained at too high a price.

[40] It follows that the learned judge was correct in declining to exercise her discretion to exclude the results of the comparison of the June 2001 sample with the vulval

and low vaginal swabs. The learned judge identified the relevant principles by reference to the decisions in *Bunning v Cross* and *R v Swaffield,* and made a careful analysis of the provisions of the *Police Powers Act.* Her Honour applied the appropriate test, and in any event I consider her conclusion was correct.

Application for Leave to Appeal Against Sentence

[41] It was submitted, correctly, that the sentence of 11 years imposed upon Mr R was a very heavy one. The difficulty facing him in his application for leave to appeal against that sentence is the fact of his earlier conviction for rape. That offence was also committed in circumstances in which the applicant seized an opportunity for rape presented to him, when a female who was a stranger to him got a lift in his car at night. The complainant in 1987 was aged only 16, and Mr R obtained her consent to sexual intercourse by threatening to strangle her if she did not stop screaming.

[42] The respondent Director particularly relies on a sentence of 11 years imprisonment imposed in the matter of *Soper,* CA No. 119 of 1994, which was not disturbed on appeal to this court. In that matter, that applicant had raped a 17 year old school girl in a shower block in a Caravan Park, and the assault committed upon that complainant appears to have been more brutal than the assault committed upon LT. Soper also threatened to kill that complainant. Like Mr R, he endeavoured to establish a false alibi in his own defence and showed no remorse. He had an extensive criminal history which included seven offences of breaking and entering, six of stealing, and one in 1986 for carnal knowledge against the order of nature committed on a younger boy who had resisted Soper's advances.

[43] Soper's more extensive criminal history, more extensive violence, and his threat to kill, all make his offending behaviour appear more serious than that of Mr R in the instant matter. McPherson JA, who gave the judgment of the court in *Soper,* remarked that the 11 years imposed there was at high end of the range but not so severe as to attract the intervention of this court. I would have considered the present sentence excessive were it not for two matters. The first is the concession made during submissions by counsel for the applicant, that sentences for rape have probably become more severe than they were at the time of Mr R's first conviction for rape; and that had he been a first offender he might have been sentenced to about seven years imprisonment. Counsel appeared to concede that accordingly there were difficulties in demonstrating that what was in reality an extra four years, imposed by reason of the applicant being a recidivist rapist, was manifestly excessive. Aggravating his recidivism was his complete lack of any apparent remorse.

[44] The second matter was the sentence imposed in the matter of *Mallie,* CA No. 49 of 2000, judgment delivered 17 May 2000. That applicant, who pleaded guilty to an ex officio indictment, was sentenced to 10 years imprisonment for the rape of a 37 year old complainant in her house in the middle of the night. Mallie was far more brutal in his assault on that complainant than was Mr R, and like Mr R, Mallie was apprehended nearly two years later after being identified by DNA analysis. Mallie had a solid work history, with some previous convictions including for assault occasioning bodily harm, and for wilful damage. He had no prior conviction for rape, although his conduct had the aggravating circumstance of the burglary of the dwelling in which the complainant was raped. The 10 year sentence in that case,

not changed on appeal to this court, means that on a comparison of overall criminality Mr R fails to show that the sentence imposed upon him for his second conviction for rape was manifestly excessive.

[45] I would order that both the appeals against conviction and the application for leave to appeal against the sentence for rape be dismissed.

[46] **MULLINS J:** I agree with the reasons for judgment of Jerrard JA and the orders proposed.