SUPREME COURT OF QUEENSLAND

CITATION:	*R v GS* [2005] QCA 376
PARTIES:	**R** **v** **GS** (appellant)
FILE NO/S:	CA No 90 of 2005 DC No 2621 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	7 October 2005
DELIVERED AT:	Brisbane
HEARING DATE:	24 August 2005
JUDGES:	McMurdo P, McPherson JA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – Appeal and new trial and inquiry after conviction – Miscarriage of justice – Non-direction – Corroboration – Child complainant of sexual offence – Whether trial judge erred in failing to give *Robinson* direction CRIMINAL LAW – Appeal and new trial and inquiry after conviction – Particular grounds – Unreasonable or insupportable verdict – Where appeal dismissed – Whether trial judge erred in failing to direct on the use to be made of evidence of distress CRIMINAL LAW – Jurisdiction, practice and procedure – Verdict – Alternative verdicts – Particular cases – Sexual offences – Rape – Whether trial judge erred in failing to leave alternative verdicts of indecent treatment to the jury *Criminal Code Act* 1899 (Qld) s 578, s 632(2) *M v The Queen* (1994) 181 CLR 487, cited *R v H* [1999] 2 Qd R 283, referred to *R v RH* [2004] QCA 225; [2005] 1 Qd R 180, referred to *R v Roisetter* [1984] 1 Qd R 477, referred to *R v Rutherford* [2004] QCA 481; CA No 295 of 2004, 17 December 2004, discussed

Robinson v The Queen (1999) 197 CLR 162, referred to

COUNSEL: P E Smith for the appellant
M J Copley for the respondent

SOLICITORS: Ken Owens Solicitors for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with Fryberg J that the appeal should be dismissed and generally with his reasons in which the relevant facts and issues are set out.

[2] The primary grounds of appeal pursued in oral argument at the hearing were that no reasonable jury properly instructed could have convicted the appellant of rape and that the alternative verdicts of indecent dealing should have been left to the jury on each count of rape.

[3] The prosecution case was that the appellant twice raped his partner's eight year old daughter by penetrating her vagina with his finger. Section 349(2) *Criminal Code* relevantly provides that:

> "A person rapes another person if -
> …
> (b) the person penetrates the vulva, vagina … of the other person to any extent with a … part of the person's body that is not a penis without the other person's consent; …".

[4] That section distinguishes between the vulva (the external female genitalia, specifically the two pairs of labia and the cleft between them)[1] and the vagina (the passage leading from the uterus to the vulva in a female)[2] but provides that penetration of either vulva or vagina with another's finger without consent is rape.

[5] The prosecution case, both counsels' addresses to the jury and the judge's summing up were solely concerned with whether the appellant on two occasions penetrated the complainant's vagina with his finger. The appellant was ultimately sentenced on this basis. It was never the prosecution case that the appellant only penetrated the complainant's vulva with his finger. The judge carefully explained to the jury that they could only convict the appellant if they were satisfied beyond reasonable doubt that the complainant was truthful when she told police that on each occasion the appellant put his finger in her vagina. The complainant was not cross-examined as to whether the appellant may have penetrated her vulva, rather than her vagina, with his finger or whether he may have touched her on the outside of her genitalia without penetration of either vulva or vagina. Whilst the medical evidence did not confirm the complainant's evidence that the appellant twice put his finger in her vagina, it was not inconsistent with that evidence. The complainant said she told her mother, when her mother returned home after the second offence, that the appellant put his finger in her vagina. Her mother gave evidence that the complainant said that the appellant touched her vagina with his finger and that this had happened on two occasions but without stating his finger penetrated her vagina. The evidence of the complaint to the mother was admissible under s 4A *Criminal Law Sexual Offences Act* 1978 (Qld). It was not evidence of the truth of the

---

1 Macquarie Dictionary Federation Edition, Macquarie Library, 2001.
2 Above.

statement of complaint but was evidence only as to the complainant's credibility: *R v RH*.[3] Neither that evidence of the complaint, the medical evidence, nor the evidence given by the complainant in cross-examination compelled the jury to reject her earlier statements to police that on two occasions the appellant had put his finger in her vagina. It was well open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt of the guilt of the accused on each count: *M v The Queen*.[4]

[6] In the circumstances of this case, where the only issues for the jury were whether they were satisfied beyond reasonable doubt of the truth of the complainant's statement to police that the appellant had twice put his finger in her vagina and the appellant instructed his counsel that he did not wish the alternative verdicts of indecent dealing to be left for the jury's consideration, there has been no miscarriage of justice in not leaving these alternative verdicts for the jury.

[7] I would dismiss the appeal.

[8] **McPHERSON JA:** Having read the reasons of Fryberg J, with which I agree, I am satisfied that the appeal against conviction in this matter should be dismissed.

[9] **FRYBERG J:** On 16 March this year the appellant was convicted by Samios DCJ on the verdicts of a jury on two counts of what is now deemed to be rape by virtue of digital penetration of the victim's vagina. The first offence was alleged to have been committed on an unknown date between 7 May and 27 October 2003. The second was alleged to have occurred on 27 October 2003. He now appeals against those convictions.

The trial

Four witnesses were called in the Crown case. They were the alleged victim, E, her mother, Ms C, a police officer, Ms Wallace, who identified a videotape recording of an interview which she had with E less than two days after the second alleged assault, and a medical practitioner, Dr M Crawford, who had examined E about four days after that event. E's unsworn evidence was pre-recorded on videotape. The trial commenced at 10.00 am on 15 March. Ms C was the first witness. Then Senior Constable Wallace was called. The recorded interview was tendered under s 93A of the *Evidence Act 1977* and played to the jury in closed court. Then Dr Crawford gave her evidence by telephone. The court adjourned at 12.35 pm and resumed with the jury at 2.35 pm, when the tape of E's evidence was played. That was the Crown case. The appellant neither called nor gave evidence. The Crown prosecutor addressed the jury from 2.37 pm until 2.54 pm and counsel for the appellant from 2.54 pm to 3.10 pm. The judge then summed up until 3.34 pm, when the trial was adjourned until the following day. Before he resumed his summing up at 9.30 am, the judge received a note from the jury asking to view the interview tape and read the transcript of it (although they had not been given the transcript). He finished his summing up and the videotape was then played. The jury retired at 10.08 am; neither videotape was given to them on retirement. There were no requests for redirections. The jury returned with verdicts at 11.17 am.

---

3 [2004] QCA 225; [2005] 1 Qd R 180.

4 (1994) 181 CLR 487, 493 - 495.

The evidence

[10] In October 2003 E was 8½ years old. She lived with her mother and her older brother A and, from sometime between February and April 2003, the appellant. On the evening of 27 October, Ms C left her and the appellant at home when she went to pick up A from Scouts. E said in the police interview that while her mother was out, she was in bed reading. She was wearing pyjamas. She said that the appellant entered her room and started to tickle her, "then he pulled my pants down and put his finger in my vagina". A little later in the interview she described the incident again:

> "HW Okay, so you're in bed reading, was your door open or closed?
> [E] It was closed, it wasn't locked.
> HW Okay, so what happened, you were in bed reading?
> [E] Yes, put the blanket over and he come and he tickled me, opens the sheet and pulls down my pants.
> HW Uh huh, and what did he do?
> [E] Put his finger in my vagina.
> HW Okay, and then what?
> [E] It was quick and mum came back and when, and [A] shuts the doors really badly so he heard the door closing, so he pulled my pants back up, put the cover over me and he went outside and had a cigarette.
> HW Uh huh, did [GS] say anything at all?
> [E] 'Don't tell mum'.
> HW Uh huh, what did you say?
> [E] I told mum.
> HW Okay, did you say anything to *him then*?
> [E] I said, 'Stop it, don't bloody *do* that'.
> HW Okay so this was how many *nights* ago?
> [E] Two."[5]

A little later she was asked by the police officer how it felt when GS touched her "on" her vagina and she responded, "I said, 'Stop', but he said, 'You'd like it.' I said no I didn't then I started screaming." She also said that the appellant was in her bedroom for about five minutes; and that when her mother returned, she told her "that [GS] pulled down my pants and put his finger in my vagina".

[11] Ms C testified that when she arrived home the appellant was on the sundeck smoking a cigarette. She heard E crying and went in to see her. E then accused GS of touching her vagina. Ms C went and spoke to the appellant, who denied the accusation. She returned to her daughter and in five or 10 minutes E went to sleep. They had a further conversation next morning when she repeated the allegation. She also said that it had happened on a previous occasion when she was putting her shoes on. In cross-examination she agreed that that on neither occasion had E said anything about penetration.

[12] During the interview Constable Wallace asked E had anything like this happened before with the appellant. She said that on an earlier occasion when she wouldn't put her shoes on, he started tickling her then pulled up her dress and pulled down her undies and did "the same thing", which she identified as "finger in vagina". On

---

5 Words in italics are correct, although they are incorrectly transcribed in the appeal record.

that occasion her mother was at university. She stated that she said to him, "Would you please stop that", but he did not then do so. He subsequently stopped when he heard her brother approaching. It is unnecessary to elaborate on other detail which she gave.

[13] E's oral evidence was given 14 months after the events to which it related, when she was about nine and three quarters years old. She was not asked directly to recall those events in her evidence in chief. Rather she was asked if she had recently watched the videotape of her interview with Constable Wallace. It emerged that she had done so two days earlier. She was then asked if everything that she said in the videotape was the truth, to which she responded, "Yes". The cross examination was brief and can be quoted in full:

> "MR SMITH: E, can you see me there? – Yes.
> And can you hear me? – Yes.
> Okay. Now, E, I want to ask you a few questions. Do you understand that? – Yes.
> Okay. Now, the first thing I wanted to ask you was you don't really remember what you said to the police, do you? – No.
> And you don't remember [GS] doing anything rude to you, do you? – How do you mean?
> Well, you don't remember [GS] doing anything rude? – I don't know.
> All right. E, is there a photograph – a photo album at home? – Yes.
> Okay. And the photo album, are there pictures of your Daddy in that? – Yes.
> And do you look at the photo album sometimes? – Yes.
> And do you miss your Daddy? – Yes.
> And sometimes you'd like Daddy to come home and live with Mummy? – Yes.
> Now, [GS] lived at your home last year, didn't he? – Yes.
> And you thought Mummy and [GS] might get married? – Yes.
> All right. Now, do you remember sometimes [GS] would tickle you? – Yes.
> And sometimes – that would hurt sometimes, wouldn't it? – Yes.
> And sometimes you'd laugh until you'd cry? – Yes.
> That's all I have, thank you, your Honour.
> HIS HONOUR: I didn't want you to feel under any pressure, Mr Smith.
> MR SMITH: No, I'm not, your Honour.
> HIS HONOUR: If you're happy with that. Yes, Mr Nardone?
> MR NARDONE: Your Honour, I have no re-examination.

[14] Dr Crawford testified that her examination of E found a girl of normal growth and condition with no evidence of trauma in the genital area. Her hymen was normal and appropriate for a girl of her age. She said that those findings did not preclude the girl having been touched or fondled in that area. In cross-examination she explained that the sort of touching or fondling of which she was speaking consisted of somebody inserting a finger through the labia up against the hymen or even part way into the hymen orifice. Specifically, had there been penetration of the labia up against the hymen or part way into the hymen she would not expect there to have been any bleeding.

The summing up

[15] In the course of the summing up the trial judge identified for the jury what was evidence. He told them that the evidence included the videotape interview. Of that interview he said:

> "Now the purpose behind that video allows for the exceptional use of a videotaped interview of a child to be tendered as evidence in Court, namely to overcome the difficulty for the child that at the time of complaint till the time trial can be many months and is a long time in the life and memory of a child. However, before you can find the defendant guilty of any offence you must be satisfied beyond reasonable doubt that the complainant was both truthful and accurate about the events described by her in that interview with the police officer, Detective Wallace."

[16] He also told the jury that the critical issue for them was "the truth and accuracy of the complainant's evidence". He said that they could not regard what E said to her mother in out of court statements (in other words, her complaints) as proof of what actually happened. He explained the concept of deemed rape, referring in particular to penetration to any extent of E's vagina by the finger. He said the prosecution case was that they should be satisfied beyond reasonable doubt that there was such a penetration without her consent on each occasion. He described the defence case:

> "Members of the jury, the defence says that this is the case where you have inconsistency and it is such an inconsistency where you have the complainant complaining to her mother of being touched rather than her vagina being the subject of a penetration by the defendant, and that difference would lead you to have doubts and therefore you could not be satisfied beyond reasonable doubt. … that this is a case where there might have been some playing between the defendant and the complainant, that the complainant has elevated it to something it was not, and if you carefully scrutinise her evidence bearing in mind the inconsistency between touching and penetration that arises on the evidence and also the medical evidence here, you would find the defendant not guilty of both charges."

The amended grounds of appeal

[17] The grounds of appeal as amended are:

> "1. No reasonable jury could have convicted in light of the following:
>
> a. The complainant gave evidence at the trial she did not recall speaking to the police.
>
> b. The complainant did not know whether the accused had been rude to her.
>
> c. <u>The complainant did not complain of penetration to the mother.</u>
>
> d. <u>The medical evidence did not support the complainant.</u>
>
> 2. <u>A direction that it would be dangerous to convict the accused on the uncorroborated evidence of the complainant should have been given because of the following:</u>

a. There were real doubts about penetration.
b. The age of the complainant.
c. There was no corroboration.
d. The medical evidence.
e. The failure to recall matters or make disclosures in the evidence – how could the jury rely on the complainant's evidence when there was no oral evidence about the matter the proper subject of evidence in chief and cross examination.

3. The trial judge erred in failing to direct as to the use to be made of the evidence of distress.

4. The trial judge erred in failing to give any warning to the jury as to the use to be made of the Section 93A tape when it was played on a second occasion particularly he had earlier bolstered its reliability (R40/25).

5. The trial judge erred in failing to have the pre-recorded evidence of the complainant re-played to the jury.

6. The trial judge erred in failing to leave alternative verdicts of indecent treatment."

Ground 1 – unreasonable verdict

[18] The appellant submitted first that the complainant in evidence could not say that what she told the police was the truth. The foundation for that submission is unclear. As I read the transcript, she said exactly the opposite. He next submitted that her evidence was that she did not know whether GS had been "rude to her". Again, as I read the transcript, that is not what she said. Moreover it seems clear that she did not understand the question. That will often be the consequence when a question is phrased as a statement in the negative for comment, particularly with a witness who is a child or whose first language is not English.

[19] It was further submitted that a reasonable doubt was raised as to whether penetration of the vagina had occurred because:

a. Constable Wallace did not question E in the interview in sufficient detail to determine whether penetration of the vagina, as distinct from the labia, occurred;
b. the prosecutor did not question E on whether penetration had occurred;
c. E did not tell her mother that penetration had occurred;
d. E testified that she did not really remember what she said to the police and did not know whether she remembered GS did anything rude to her;
e. there was no medical evidence of any trauma or injury and no evidence that an insertion into the vagina would not leave signs of injury.

[20] It is true that no one questioned E's evidence that the appellant put his finger in her vagina as distinct from her labia. That is hardly surprising. There was no issue at trial as to whether the finger was in the vagina or between the labia. To raise such

an issue would have been pointless, because the appellant would have been equally guilty even if his finger had been inserted between the labia. They are part of the vulva, and penetration of the vulva is also deemed to be rape.[6]

[21] Whether E complained of penetration to her mother was a question of fact for the jury. She said that she did; Ms C said that she did not. The tone of the latter's evidence is such that the jury may have thought her account to be superficial or incomplete. The judge specifically drew the jury's attention to the inconsistency and the weight which the defence placed upon it. Even if they were satisfied that what E told her mother was that GS touched her vagina, rather than that he touched her in her vagina, the jury were entitled to regard E's omission as insignificant in the circumstances.

[22] E's inability to remember what she said to the police 14 months earlier is hardly surprising. What would be more surprising would be if she had remembered what she had said. Otherwise, point d is dealt with above.

[23] It is true also that it would be reasonable to imply from the medical evidence that any substantial penetration of the vagina would have left signs of injury; but it was also clear from that evidence that some slight penetration might not have done so. It is true that the medical findings did not preclude the possibility that E had been touched or fondled in her genital area without penetration. However that is not what she said happened. She said the appellant put his finger "in" her vagina, not "on" it. That assertion was not challenged in cross-examination.

[24] Considering all of these factors together, I am satisfied that a reasonable jury could properly have convicted. I find the evidence convincing; it satisfies me beyond reasonable doubt.

[25] Reliance was placed on the decision in *R v Cumner*[7]. The facts of that case are so obviously different from the present that it is unnecessary to distinguish it here.

Ground 2 - Robinson *direction*

[26] Ground 2 in the amended Notice of Appeal is that a direction should have been given that it would be dangerous to convict the accused on the uncorroborated evidence of the complainant. That direction is substantially in accordance with the one traditionally given in Queensland pursuant to a rule of practice applied to the evidence of complainants in sexual cases.[8] The requirement to follow that rule of practice was abolished in 1997 by the enactment of s 632(2) of the *Criminal Code*. Counsel for the appellant did not explicitly seek to revive it, but instead relied upon the decision of the High Court in *Robinson v The Queen*. There, the High Court reaffirmed the general requirement of the law that "a warning be given 'whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case'."[9] Describing the terms of the warning, the court said:

---

6 *Criminal Code*, s 349(2)(b) at the relevant time.
7 [1994] QCA 270; CA No 108 of 1994, 28 July 1994.
8 *R v Cook* [1927] St R Qd 348; *R v May* [1962] Qd R 456.
9 (1999) 197 CLR 162 at p 168.

> "Taken together with the absence of corroboration, these matters created a perceptible risk of a miscarriage of justice which required a warning of a kind which brought home to the jury the need to scrutinise with great care the evidence of the complainant before arriving at a conclusion of guilt. That warning should have referred to the circumstances set out above, and should have been expressed in terms which made clear the caution to be exercised in the light of those circumstances."[10]

That is a substantially different warning from the one proposed in the amended Notice of Appeal. Moreover, even that warning is not required to be given, nor is there anything in *Robinson* to suggest that it is usually necessary, in every case where a child's complaint of sexual abuse is uncorroborated.[11]

[27] The circumstances relied on by the appellant to support the need for a warning were listed in the amended Notice of Appeal. Two other matters were raised in oral argument: the fact that E's evidence was pre-recorded and the inconsistency between her evidence and that of her mother regarding the terms of her complaint.

[28] Some of the circumstances relied upon may be disposed of summarily. Grounds 2a and 2e assume a foundation of fact which does not exist. They have been dealt with above. Ground 2c also makes an incorrect assumption. There was evidence capable of providing corroboration (in the sense of confirmation) of E's evidence. It was to be found in her mother's evidence of the girl's distressed condition when she returned home. It was for the jury to decide whether that distress might have resulted from an innocent activity such as tickling which, she agreed in cross-examination, sometimes hurt her and made her cry. They could have taken into account the fact that it was not suggested to her that any tickling had occurred on the night in question. The fact that E's evidence was pre-recorded could constitute a ground for concern as to its reliability only in the mind of a recalcitrant Luddite. There was no flaw in his Honour's direction in relation to it. These matters do not constitute circumstances which could strengthen the argument in support of a direction.

[29] The remaining circumstances are: E was approaching 10 when she gave her evidence; there was a minor inconsistency between her evidence and that of her mother; and the medical evidence was inconclusive. In none of these matters would a judge have the "special knowledge, experience and awareness" which constitutes the basis for giving a warning.[12] No such direction was sought at the trial. In my judgment the circumstances of the present case did not require any such warning to be given.

Ground 3 – non-direction as to the use to be made of evidence of distress

[30] Samios DCJ gave no direction regarding the use which could be made of the evidence relating to E's distressed condition. In fact he did not refer to that evidence in his summing up at all. Counsel for the appellant submitted that his Honour should have directed the jury as to the use which could be made of that evidence and should have referred to other possible reasons for the child's distress.

---

10 *Ibid* at p 171.

11 *R v TN* [2005] QCA 160 at para [56].

12 *Ibid* at para [69].

He informed the court that on his instructions the Crown prosecutor raised E's distress in his address to the jury. He seemed also to suggest that the evidence should not have been left to the jury without a warning as to its reliability. No such direction was sought at the trial.

[31] Counsels' addresses were not included in the appeal record, but I have obtained a transcript of them from the State Reporting Bureau. The Crown prosecutor made no mention of E's distress or crying. Counsel for the appellant did refer to it, but only to support his submission that if E had indeed been interfered with, she would hardly have calmed down and gone to sleep with the appellant still in the house. Neither counsel nor the judge referred to the use of the evidence as confirmatory of E's story. Nonetheless, counsel submitted to us that the jury might have so used it, that it would have been dangerous to so use it and that a direction to that effect should have been given. That comes perilously close to an attempt to revive the direction given pursuant to the practice described above[13]. For reasons already given the submission should be rejected.

[32] Counsel did not identify the other directions which should have been given, but simply relied upon the decision of this court in *R v Rutherford*.[14] That is a somewhat problematic decision. The question in issue[15] was "whether the absence of any direction on the subject may have led the jury to assume uncritically that [the complainant's distress] was consistent with what she said had happened, without considering other possibilities." One might have thought that ordinarily no particular warning is required to a jury to alert them to the need to consider all rational possibilities. Isolating the ratio decidendi of the case is complicated by the reference in the leading judgment to the decision of McPherson J (as he then was) in *R v Roissetter*[16]. That case was decided when the rule of practice referred to above held sway. By the time *Rutherford* was decided, that rule had been abolished. Importantly, McPherson J did not suggest that any particular direction was required:

> "To require even that, unless the circumstances are 'special', there be a specific warning in particular terms against relying upon evidence of distress as a possible form of corroboration has the effect of elevating to the status of a rule of law a matter which in the end, is necessarily and entirely one of fact or inference or simply credibility. If the circumstances are such that the causal connection or apparent relationship between the distressed condition and the alleged assault is tenuous or remote, then the duty of the trial judge is to withdraw it from the jury as a circumstance capable of being considered corroborative: see *R v Flannery* (1969) VR 586; *R v Berrill* [1982] Qd R 508, 527. But, given that it is, in the particular circumstances, fairly capable of affording corroboration, the matter of the inferences if any to be drawn from, and the weight if any to be allowed to, a state of distress in a complainant is pre-eminently one for the jury. No fixed verbal formula is capable of being laid down for determining what direction should be given by judge to jury, or

---

13 Para [26].
14 [2004] QCA 481.
15 *Ibid* at para [30].
16 [1984] 1 Qd R 477.

> whether any specific direction as to the weight or lack of it is necessary or desirable in a particular case."[17]

In *Rutherford*, reference was made to "analysing whether the verdict on count 3 may have been affected by the lack of a direction of the kind referred to in *Roissetter*."[18] In the light of the passage just quoted, it is not clear what was meant by "a direction of the kind referred to in *Roissetter*."

[33] In my judgment *Rutherford* should be regarded as a particular application of the general rule laid down in *Robinson*. The need identified in *Rutherford* to draw the jury's attention to the possibility that distress may be explained by emotions or circumstances other than the conduct alleged against the accused arose from the particular circumstances of the case. *Rutherford* should not be regarded as authority requiring such a direction in most cases. Trial judges should decide in the exercise of their discretion whether a *Robinson* direction should be given, having regard to all of the circumstances of the case and adapting the direction to meet those circumstances. As a general proposition it is unnecessary to tell the jury (to use a colloquialism) the bleeding obvious, and to do so is to denigrate their intelligence. That is undesirable.

[34] In the present case there was no suggestion that the distress was fabricated. The only possible alternative cause of it in evidence was tickling and even that was not put squarely to E. The distress was reasonably contemporaneous with the alleged events and was consistent with them. I see no reason why the judge should have given any of the directions suggested or hinted at by counsel for the appellant. Indeed, there was every chance that had the judge drawn particular attention to the evidence it would have been disadvantageous to the defence. I would not uphold this ground of appeal.

Grounds 4 and 5 - the interview tape and the evidence tape

[35] Counsel for the appellant submitted that the judge gave the interview tape undue weight by his explanation of the purpose for it, viz "to overcome the difficulty for the child that the time of complaint until the time of trial, it can be many months and is a long time in the life and memory of a child." He submitted that the effect of that statement was the greater because it was replayed at the request of the jury after the summing up without the recorded evidence being replayed. He did not submit that the judge should have refused the jury's request to see the tape again, but submitted that the jury should have been warned not to give it disproportionate weight. These submissions were based on the decision of this court in *R v H*, where the President wrote:

> "If the jury request to hear the evidence of the complainant child a trial judge must deal with each situation on the facts as they arise. … The judge should … warn the jury that because they are hearing the evidence in chief of the complainant repeated a second time and well after all the other evidence, they should guard against the risk of giving it disproportionate weight simply for that reason and should bear well in mind the other evidence in the case. It is not in our *[sic]* view necessary in every case after replaying the videotape to remind the jury of the cross examination and re-examination of the

---

17 [1984] 1 Qd R 477 at p 482.

18 [2004] QCA 481 at para [34].

> complainant from the judge's notes or transcript, where this is not requested by the jury. *In many cases this may be wise but every case will depend on its own facts. The overriding consideration for the trial judge must be fairness and balance*, something which can be difficult to achieve in emotive sexual cases which are particularly likely to arouse feelings of prejudice in the jury."[19]

The President, although not the other members of the court, applied that dictum in *R v DAJ*.[20]

[36] In assessing the course taken below, two facts should be borne in mind. First, Samios DCJ was well aware of *R v H* and referred to it in discussion with counsel before the tape was shown. Second, defence counsel raised no objection to the playing of the tape, nor did he suggest that any particular warning should be given or that the tape of the cross examination should be played.

[37] The question is whether the course followed by the trial judge achieved fairness and balance. In making that assessment some unusual features of the case are relevant. First, virtually all E's evidence was contained in the interview tape. Second, none of that evidence was challenged by the defence in cross-examination. Third, little of the remaining evidence impacted on what E said in the interview tape. Those considerations are important because, as is quite clear from the authorities cited in *R v H*, the purpose of the steps described is to ensure that the jury are not left with an incomplete picture of the evidence.[21] The same principle applies if the jury ask for any large portion of the transcript to be read to them. The judge must ensure that fairness and balance are maintained. In my judgment the replaying of the interview tape without the replaying of the tape of the evidence and without the warning regarding disproportionate weight did not upset the necessary fairness and balance. Indeed had the evidence been replayed, the frailty of the appellant's position may well have been dramatised. It is significant that defence counsel, who was immersed in the atmosphere of the trial, suggested no other course and raised no objection.

[38] Nor did the explanation of the purpose of the interview tape give undue weight to the child's evidence. It provided a reasonable explanation for the admission of evidence given much earlier. There is no reason why a jury should be left in a state of puzzlement about procedural steps taken during a trial.

Ground 6 - alternative verdict

[39] Counsel addressed the jury immediately upon the close of the evidence. No discussion between counsel and the judge took place at that time. That was not in accordance with best practice. It is usually desirable for the judge to discuss with counsel, in the absence of the jury, what directions are intended on matters of law, what verdicts are open and any other matters which in the particular circumstances could give rise to divergence between counsels' addresses and the summing up. Of course what should be said and when is entirely within the discretion reposed in the trial judge as part of his or her duty to conduct the trial fairly. The omission of such

---

19 [1999] 2 Qd R 283 at p 291 (emphasis added and citations omitted). Shepherdson J wrote to somewhat similar effect at p 295. Jones J agreed with both.

20 [2005] QCA 40.

21 See particularly [1999] 2 Qd R 283 at p 289.

a discussion in the present case is understandable: the evidence had taken less than a day.

[40] The Crown prosecutor did not refer to the question of an alternative verdict in his 17 minute address. Counsel for the accused was one minute shorter, but in the course of his address he said:

> "Now, of course, if you're not satisfied of penetration having occurred, you might find that you'd take that doubt into consideration as to whether there might be some other touching. You see, because the charge is one of rape, one of the alternative verdicts, an alternative verdict with respect to each count is one of indecent dealing. Indecent dealing is just a touching, but does not extend to penetration. These are matters of law and anything I say to you I stand to be corrected by his Honour, the learned trial Judge. If you are not satisfied as to the aspect of penetration, then you might not be satisfied as to the aspect that there was touching as she originally said to her mother. These are all matters for you."

[41] The judge then commenced his summing up, but he did not complete it that day. He dealt with the defence case in these terms:

> "Members of the jury, the defence says that this is a case where you have inconsistency, and it is such an inconsistency where you have the complainant complaining to her mother of being touched rather than her vagina being the subject of a penetration by the defendant, and that difference would lead you to have doubts and therefore you could not be satisfied beyond reasonable doubt. Further, that the medical evidence here does not assist the prosecution at all, that in this instance there is no evidence of trauma or injury, and further that this is a case where the prosecution having the – bearing the onus of proof must satisfy the onus beyond reasonable doubt and that they have not done so, that this is a case where there might have been some playing between the defendant and the complainant, that the complainant has elevated it to something it was not, and if you carefully scrutinise her evidence bearing in mind the inconsistency between touching and penetration that arises on the evidence and also the medical evidence here, you would find the defendant not guilty of both charges."

[42] The next morning, before the summing up continued, the following exchange took place in the absence of the jury:

> "HIS HONOUR: The second thing is, Mr Mumford, you talked about alternative verdicts yesterday?
> MR MUMFORD: Yes.
> HIS HONOUR: Well, do you want me to put alternative verdicts?
> MR MUMFORD: Well, on one view of the evidence, if they accept what she said to her mother, that it is just a touching, the complaint to the police officer is one of penetration. 578 of the Code makes it clear that an alternative verdict exists. From this side of the Bar table we would be much more content with them just being left with rape or nothing but if your Honour were to leave them alternatives I

wanted to say something about it and it was only for that reason that I mentioned it.
HIS HONOUR: Well, I'd only leave them the alternatives if you insisted on it.
MR MUMFORD: In those circumstances, your Honour, my instructions are to not leave with or ask that your Honour not leave them the alternative of indecent dealing.
HIS HONOUR: Well, then I think in the circumstances it's best if I say nothing about it.
MR MUMFORD: Yes.
HIS HONOUR: As I have directed them they have to be satisfied beyond reasonable doubt about penetration.
MR MUMFORD: Yes. Thank you, your Honour.
HIS HONOUR: All right. Thank you.
MR GOODWIN: Thank you, your Honour."

Three points should be noted from that exchange. First, this was not a case where counsel simply failed to object to the omission of directions on the alternative verdict; it was a case where counsel positively requested the judge not to direct on the alternative verdict. Second, this was done for tactical reasons. The defence case stood or fell on whether the jury were satisfied beyond reasonable doubt that penetration had occurred. One of the few points in the evidence helpful to the defence was the inconsistency between E and her mother as to whether an allegation of penetration had been made to the latter. Third, the request was made upon instructions.

[43] The *Criminal Code* provides:

> 578 **Charge of offence of a sexual nature**
> (1) Upon an indictment charging a person with the crime of rape, the person may be convicted of any offence, if established by the evidence, defined in section 208, 209, 210(1), 215, 216, 217(1), 218, 222 or 352."

In this court, counsel for the appellant submitted that at worst for his client there might have been convictions for indecent treatment. That was a reference to the heading above s 210 of the Code. Only sub-s (1) of that section is listed in s 578:

> **"(1)** Any person who—
> (a) unlawfully and indecently deals with a child under the age of 16 years;
> …
> is guilty of an indictable offence."

In the circumstances of the case, the maximum penalty under that section would have been imprisonment for 20 years. Counsel submitted that it was open to the jury to convict the appellant of this offence on the evidence and that even though the point was abandoned on instructions at the trial, the appellant was entitled to raise it on appeal if there was a miscarriage of justice. For that submission reliance was placed upon *Pemble v The Queen*,[22] *R v Rehavi*[23] and a dictum of McHugh J in *Fingleton v The Queen*.[24] In his oral submissions counsel seemed to abandon the

---

22 (1971) 124 CLR 107.
23 [1999] 2 Qd R 640.
24 (2005) 79 ALJR 1250.

condition that there be a miscarriage of justice by submitting that the trial judge was obliged to leave the alternative where it was open. Those submissions were designed to demonstrate that the alternative was open on the evidence.

[44] Counsel for the Crown submitted in his outline:

> "The failure of defence counsel to seek an alternative verdict on tactical grounds does not prohibit the appellant from taking the point that a miscarriage of justice occurred. (*Chan* (2000) 114 A Crim R 276 at [7]; [56]). However, there must be an evidentiary basis for the alternative verdict to be open on before a failure to leave such a verdict can result in a miscarriage of justice. (*R v Willersdorf* [2001] QCA 183 at [20]; *R v Phan* (2001) 123 A Crim R 30 at [39].) As Thomas JA pointed out in *Willersdorf* at [19], the appellant's analogy with manslaughter is to be rejected. There was no basis open on the evidence for an alternative of indecent treatment. The only evidence admissible in proof of the offence was that the appellant had put his finger in the vagina."

In his oral submissions he conceded that if the alternative charge was open on the evidence, defence counsel's request to the trial judge that it not be put did not absolve the judge from the duty to put it. He submitted that the alternative charge was not open on the evidence.

[45] It has long been held in this State that the alternative offences specified in s 578 of the Code should not be left to the jury unless there is evidence upon which it would be open to the jury to convict of those offences: *R v Redgard*,[25] *R v Coureas*.[26] That seems to follow from the terms of the section. Under it the jury can convict of a specified offence only if that offence is established by the evidence. If the state of the evidence is such that it would not be open to the jury to convict, it would be pointless to leave the alternative offence. Logically, the first question therefore is whether it was open to the jury to convict the appellant of the alternative offence. In the circumstances of the case, it could have done so only if satisfied beyond reasonable doubt that the appellant touched E on her genitalia without penetrating them.

[46] There was no direct evidence that he did so. E made no such assertion and the appellant did not give evidence. No support for such a finding can be found in the medical evidence. Constable Wallace used the expression "on the vagina" in questions, but that was not evidence. Ms C testified that E "accused [the appellant] of touching her vagina". There is a degree of ambiguity in that statement, but even if it be understood as negating penetration while asserting a touching of the genitalia, the evidence was not admissible to prove the truth of the statement. It was admitted as a complaint and went only to credit.[27] On the other hand it might be argued that the jury were entitled to accept all of E's evidence except for her assertion of penetration, and to have a reasonable doubt on that point. I find that an unattractive argument. Credibility findings must be based on reason and no reason for such a finding is apparent in the evidence. This is particularly so when it is remembered that E's evidence was not challenged in cross-examination. The matter

---

25 [1956] St R Qd 1.

26 [1967] QWN 5.

27 *Kilby v R* (1973) 129 CLR 460 at p 466; *R v W* [1996] 1 Qd R 573 at p 575.

may be tested by supposing the alternative had been left to the jury and had founded a conviction. It seems to me that the appellant could successfully argue on appeal from such a conviction that there was no evidence of a touching (or "dealing") upon which the conviction could safely be based.

[47] Even if that conclusion is wrong, what follows? I would reject the submission that an alternative verdict must be left to the jury whenever there is some evidence to support it, regardless of the interests of justice. Counsel cited no authority for that proposition, which is not surprising. I very much doubt whether any exists and there is a decision of this Court which arguably is to the contrary.[28] Unfortunately, neither side in the present appeal favoured the court with argument regarding the proper test, or even with an identification of relevant circumstances. Few of the relevant authorities were referred to. Counsel for the appellant did not attempt to amplify his submission regarding a miscarriage of justice, nor to identify the circumstances of the case said to give rise to such a miscarriage. Counsel for the respondent did not advance any argument to support the verdict in the event that his primary submission was not accepted.[29] I protest this lack of assistance. The authorities which counsel did cite, particularly *Rehavi* and *Willersdorf*, raise a number of very complex issues. Those issues can be the more clearly discerned in a number of decisions not cited to us: *R v Elfar*,[30] *R v Le Doan*,[31] *R v Kane*[32] and *R v King*.[33] Those cases show the sharp division of opinion which the principal case relied upon by the appellant, *Rehavi*, has aroused in other States and within those States. They discuss the issues, in some cases at considerable length. They provide an essential context for understanding the implications of *Rehavi* and *Willersdorf*.

[48] In my judgment it would be inappropriate, in the absence of argument, to attempt to formulate a statement of the relevant law. It is sufficient to dispose of the present case to say that, even if I were persuaded that the alternative verdict was open on the evidence, a number of factors persuade me that it would have been inappropriate for the judge to have left it to the jury. Those factors are that counsel for the appellant positively requested the judge not to leave the alternative verdict; that he did so for tactical reasons; and that he did so on instructions. There is no suggestion of incompetence or negligence in his conduct of this aspect of the case. This was not a case where there was a danger that "faced with a false choice between conviction or acquittal of the main offence and nothing else [the jury] would … convict the accused of the more serious offence rather than let him get off scot-free for what was, on any view, serious misconduct."[34] I reject this ground of appeal.

Conclusion

[49] The appeal should be dismissed.

---

28 *R v Chan* [2000] QCA 347 at para [7].

29 He did hint at a floodgates argument by submitting that if it were necessary to direct on an alternative verdict under s 578 it would also be necessary to direct on attempt as an alternative under s 583. However if the evidence were insufficient to persuade the jury of rape, it could not support attempted rape.

30 (2000) 115 A Crim R 64.

31 (2000) 3 VR 349.

32 (2001) 3 VR 542.

33 (2004) 59 NSWLR 515.

34 *R v Kane* at p 585.