IN THE COURT OF APPEAL [1998] QCA 303

SUPREME COURT OF QUEENSLAND

C.A. No. 128 of 1998

Brisbane

[R v. LSS]

THE QUEEN

v.

LSS

(Applicant) Appellant

Pincus JA

Thomas JA

Ambrose J

Judgment delivered 2 October 1998

Separate reasons for judgment of each member of the Court; each concurring as to the orders made.

APPEAL AGAINST CONVICTION ALLOWED. CONVICTIONS ON COUNTS 1 - 11 INCLUSIVE QUASHED. JUDGMENT AND VERDICT OF ACQUITTAL ON COUNTS 3, 4 AND 5 ENTERED. NEW TRIAL ORDERED ON COUNTS 1, 2, 6 - 11 INCLUSIVE. APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE REFUSED.

CATCHWORDS: EVIDENCE - Sexual offences - recent complaint - requirement of recency of complaint - need for judicial direction on limited use of fresh complaint evidence.

Whether evidence of "coaching" of complainant admissible - finality and collateral evidence rule - exception in favour of evidence of bias or partiality in a witness.

Evidence of uncharged acts - warning necessary where evidence of uncharged acts (not properly receivable as propensity or similar fact evidence) presents risk that jury may identify a propensity to commit a charged offence.

BRS v The Queen (1997) 71 ALJR 1512
Gipp v R (1998) 155 ALR 15
R v K (CA 64 of 1998, 23 June 1998)
Pfennig v The Queen (1995) 182 CLR 461
Suresh v The Queen (1998) 72 ALJR 769
Jones v The Queen (1997) 71 ALJR 538
Kilby v The Queen (1973) 129 CLR 460
R v Umanski [1961] VR 242.

Counsel:	Mr P. Callaghan for the appellant
	Mr B. Campbell for the respondent
Solicitors:	Legal Aid Queensland for the appellant
	Director of Public Prosecutions (Queensland) for the respondent

Hearing Date: 1 September 1998

REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 2 October 1998

1 I have read and, subject to the observations which follow, agree with the reasons of Thomas J.A. His Honour refers to the decision of the High Court in Jones (1997) 71 A.L.J.R. 538, which appears to me to throw doubt upon the proposition that evidence of recent complaint may buttress the credit of the complainant, where the charge is one of a sexual offence: Kilby (1973) 129 C.L.R. 460 at 472. In Jones, in discussing whether the absence of a proper direction as to the use of evidence of recent complaint necessitated an order for a new trial, the Court remarked:

> "Unless explained, the evidence might well have played an important part in the jury's assessment of credibility".

Since it is clear that such evidence cannot be used in proof of the Crown case, the only possible basis for its admission is credit. The sentence I have quoted from Jones should not, in my respectful opinion, be treated as authority that evidence of recent

complaint may not be used in assessing credit.

2 Under the heading "Evidence of Uncharged Acts", Thomas J.A. refers to the decision in Gipp (1998) 194 C.L.R. 106. As is mentioned by Thomas J.A., I discussed that case in K (C.A. No. 64 of 1998, 23 June 1998). To what I said there, I would add only that I think juries should ordinarily be told, by way of direction, where evidence of uncharged instances of sexual contact between the complainant and the accused is let in, that its relevance is to show the existence of a sexual passion or relationship. I have thought it desirable to add this because the variety of suggestions as to the basis of admission to be found in Gipp may, with respect, create some practical difficulty for judges who have the task of directing juries on the point.

3 With respect to the decision in K [1997] 1 Qd.R. 383, mentioned by Thomas J.A., I do not accept that such tendentious directions as were held appropriate to the facts of that case should necessarily be given in s. 229B prosecutions. Whether or not one agrees with the view that the enactment of s. 229B was a desirable reform, it does

not appear to me to be any part of a trial judge's function so to frame directions on the facts as routinely to discourage juries from returning a verdict of guilty in such cases.

4 I agree with the orders proposed by Thomas J.A.

REASONS FOR JUDGMENT - THOMAS JA

Judgment delivered 2 October 1998

1 The appellant was indicted and convicted in the District Court on eleven charges of a sexual nature involving his daughter between 31 December 1986 and 7 February 1995. The first count, indecent dealing, was said to have occurred when the complainant was six years old; the other offences are said to have occurred between 7 June 1993 and 7 February 1995, when she was aged between 12 and 14 years.

2 It is desirable to set out the counts seriatim. It will be noted that the final count is one of maintaining a sexual relationship with a child under s.229B of the Code, the particulars of which included the details of the preceding counts 2 to 10.

Count 1	31.12.86 - 01.04.87	Indecent dealing with girl less than 14 years
Count 2	07.06.93 - 18.06.93	Indecent dealing with child less than 16 years with a circumstance of aggravation
Count 3	07.06.93 - 18.06.93	Incest
Count 4	07.06.93 - 18.06.93	Indecent dealing with a child less than 16 years with a circumstance of aggravation
Count 5	07.06.93 - 18.06.98	Incest
Count 6	07.06.93 - 18.06.93	Indecent dealing with a child less than 16 years with a circumstance of aggravation
Count 7	07.06.93 - 18.06.93	Indecent dealing with a child less than 16 years with a circumstance of aggravation
Count 8	30.04.94 - 01.06.94	Incest
Count 9	23.06.94 - 27.06.94	Incest
Count 10	06.02.95	Incest
Count 11	07.06.93 - 07.02.95	Maintaining a sexual relationship with a child less than 16 years (with a circumstance of aggravation i.e. incest in the course of the relationship)

3 The appellant was 40 years of age at the time of trial. He was convicted by the jury on all the above counts notwithstanding that, pursuant to a direction of the learned trial Judge, a verdict of not guilty on count 5 had already been given before the defence called evidence. In the result the endorsement on the indictment with respect to count 5 contains verdicts of both guilty and not guilty. It is common ground that the record needs to be corrected by an appropriate direction of acquittal on that count by this Court.

4 The incidents were described by the complainant as happening on various occasions when her mother was absent from the household or when she was alone with her father. Count 1 was described as happening at about the time of the birth of her twin brothers; counts 2 to 7 as occurring during her mother's holiday visit to Vanuatu; count 8 as occurring when her mother went to the Gold Coast for a holiday; count 9 as occurring in a hotel in Brisbane after a trip with her father from Warwick; and count 10 as occurring in the house in which the family lived when the other members of the household were asleep. At all material times relating to counts 2 to 11 the family lived in a house in Nanango.

5 The Crown case depended largely but not entirely on the evidence of the complainant. There was some evidence which tended to confirm that the appellant had the opportunity to commit the offences. There was also evidence of a medical examination in February 1995 describing the complainant's hymen as "consistent with the story of repeated penetration having occurred". There were also statements made by the appellant when he was taxed by various persons with the allegations and in a letter that he wrote to the complainant. His replies fall short of admissions, but are somewhat equivocal. They included comments such as "I must have done something for her to say something like that".

6 A letter which the complainant handed to a friend after attending a Jehovah Witness meeting on 7 February 1995 was also received into evidence as evidence of recent complaint. The complaint was in these terms:

> "Dear K,
>
> You are the first person I have told this. Please I beg you. Don't tell anyone. After I have told you I am going to tell Unty Edie (Jamie's mum) at Easter time.

Please don't tell anyone.

My father has been sexually abusing me since I lived in Ipswich up until now. I am scared to tell someone because I don't won't S to hurt me.

Please don't tell anyone.

I am trusting you.

K.

Please".

7 The appellant gave evidence denying any wrongdoing on his part towards his daughter. The learned trial Judge refused to permit the defence to call evidence from his son R, who was prepared to say, inter alia, that he had seen the complainant being coached by her mother in relation to the evidence she would give, an allegation which had been denied by the complainant under cross-examination. R was also in a position to give evidence of a statement made by his sister (the complainant) admitting that she had in 1994 had sexual relations with a nineteen year old youth. That of course was relevant to inferences that could be drawn from

the medical evidence. That factor seems to have featured prominently in the trial, including in the summing up of the Judge. In cross-examination of the complainant she had admitted making such a statement to a man named Clark, but not to her brother. She did not admit that she had said it happened in 1994 (i.e. before the medical examination); and she said that she made the statement to Clark "because I didn't want to tell him that I was abused by my father", and that it was in any event an untrue statement.

8 It will be convenient to deal with the particular grounds relied on by the appellant for submitting that the trial was flawed and that the verdicts cannot stand.

Recent Complaint: Admissibility, and Absence of Directions

9 It was first submitted that the letter of 7 February 1994 itself should not have been received into evidence. However that was the form in which the complaint was actually made. It would seem to be the best evidence on this point, and not objectionable on that account.

10 It was next submitted that whilst the contents of the letter might be admissible as evidence of recent complaint in relation to count 10 (and arguably count 11) it could not consistently with authority be regarded as evidence of recent complaint in relation to any of the other counts (counts 1 to 9). This would seem to be correct.[1] However there is little point in lingering on the admissibility question, as the evidence was plainly admissible in relation to count 10, and, subject to what is said below, count 11. In that situation it was incumbent upon the trial Judge to give appropriate directions concerning the extent to which it might legitimately be used. When evidence is properly receivable on one basis, and there is a clear risk that it may be illegitimately used on another basis, there is a need for appropriate directions as to how it may and how it may not be used.[2]

---

1 *Suresh v The Queen* (1998) 72 ALJR 769, paras 4, 17, 51-52.

2 *BRS v The Queen* (1997) 71 ALJR 1512.

11 In my view it would assist any jury in a case involving a sexual complaint to know how and when any complaint about the conduct of the accused person first

emerged. Evidence of this kind is pivotal to explaining how the complainant comes to be in the witness box and the accused in the dock. An assessment of the truth of the complaint can hardly be attempted without some knowledge of how it first saw the light of day. It is my view that evidence of first complaint should always be receivable in cases involving sexual misconduct, as evidence which permits a better understanding of the story, irrespective of when it was made. To say that an early complaint is merely a bolster, or a late complaint a drawback to the complainant's credibility is an oversimplification. The circumstances of first emergence of the complaint may enable the story to be seen in a different light. To take just one of the factors involved in relation to such a complaint, the identity of the person chosen by the complainant may give an insight into the complainant's motivation. For example if it is made to a member of a peer group or a person from whom a complainant arguably might try to gain attention, some circumspection might be called for. This if added to other features might in the circumstances of a particular case raise reasonable doubt that the complaint may have been an irresponsible one

and that the complainant became locked into it, or unwilling to withdraw it when further steps were taken in consequence of it. Conversely, in a family with a dominant father or step-father, and an apparently selfish or weak mother who is dependent upon the financial support of the male in the household, it might be easy to accept that a molested child sees no point in sharing her misery with her mother. Such factors in my view are often far more telling than the single circumstance of recency or lateness.

12 Unfortunately I do not think that the authorities on this question permit it to be said that the above views currently represent the law. The rules concerning evidence of recent complaint are still fairly rigidly tied to their historical origins and the requirement of recency has recently been affirmed by the High Court as a criterion of the admissibility of such evidence.[3] Of course once such evidence is received, counsel for the respective parties, in the light of community perception at the time concerning such matters, might urge upon the jury that the circumstances

---

[3] *Suresh v The Queen*, above.

bolster or cast doubt upon the credibility of the complainant. But the initial hurdle is admissibility.

13 The admission of a "recent complaint" with respect to the offence of maintaining a sexual relationship (which in the present case spanned twenty months) poses its own problems. In one sense it may fairly be called recent if it is made while the relationship is still continuing; while in another sense it may be called late if it is made a long time after the relationship commenced. This is perhaps another illustration that recency is not a satisfactory test for the admission of such evidence. For the purposes of the present case it is enough to say that the evidence was capable of being received in relation to count 11.

14 As I see it, the evidence was properly before the jury. The prosecution was entitled to suggest that it bolstered her credibility on counts 10 and 11; and the defence was entitled to submit that it was surprising that if her story of preceding events was true, she had not seen fit to tell anybody about it at an earlier time. And of course both counsel could make submissions of the kind earlier discussed

that might help persuade the jury whether the circumstances of emergence of the complaint better support it as a true or untrue story.

15 The main problem on this aspect of the case is that the learned trial Judge gave no directions at all on how the jury could use the evidence of the complaint. There is no doubt that is was an important factor in the trial, because it had led directly to a report to the police followed by investigation and prosecution of the appellant. The limited basis upon which such evidence may be received and used has been well established in Australia since *Kilby*[4], and probably much earlier. Its effect is confined to showing consistency of statement or conduct, the evidence having itself no probative value or capacity to prove the truth of what is said (or written). The familiar direction given in summings up is that such evidence constitutes a buttress to the credit of the complainant but that it does not independently prove anything[5].

---

4 *Kilby v The Queen* (1973) 129 CLR 460.

5 Cf. *Kilby v The Queen* above at 472.

16 In *Jones*[6] the High Court considered that a specific direction is necessary as to the use which may be made of such evidence.[7] The Court also considered that the proviso could not be used to save a conviction obtained in such circumstances, at least in a case where the credibility of the complainant was seriously in question. Where that is the position, as it certainly was in the present case, "unless the trial Judge made clear to the jury the limited use they might make of the evidence of the complainant of her complaints and the evidence of those to whom she complained, there was every likelihood the jury might treat that evidence as confirmatory proof of the facts which the Crown alleged".[8]

---

6 *Jones v The Queen* (1997) 71 ALJR 538.

7 Ibid at 539.

8 Ibid at 539.

17 Counsel for the Crown submitted that the Crown Prosecutor had early in the trial (during his opening) told the jury how such evidence might be used. That is however a far cry from a judicial direction in its proper place when the evidence has been heard. Counsel for the Crown further submitted that the jury would have

understood that it was only a complaint and that it did not prove the relevant facts. However in the absence of appropriate directions there is no way of telling how it may have been used. It may also be noted that during the summing up His Honour made the point that where much depends on the acceptance of a particular witness, it is natural and proper for the jury to look to see whether that witness is supported by evidence from another source. The jury was also instructed "all evidence placed before you may be acted upon. The weight which you give to any piece of evidence which has been placed before you is entirely a matter for you".

18 In the context of the present case, an error plainly occurred through failure to give any directions on the use to which evidence of recent complaint might be put; and it is impossible to say that no miscarriage of justice could have resulted from that failure. It follows that the convictions will have to be set aside.

19 In the usual course it would be unnecessary at this point to deal with other issues raised on the appeal, and the Court would simply set aside the convictions and order a retrial. However the necessary retrial will almost certainly re-agitate

some of the points which have been argued on this appeal, and it is desirable that some guidance be given on them if this is possible. Further, there is a submission by counsel for the appellant that on at least some of the counts upon which the appellant was tried the evidence could not support a conviction, and that he is entitled to be acquitted on those counts here and now. Accordingly I shall proceed to consider the following further points.

Exclusion of Evidence Concerning "Coaching" of Complainant Before the opening of the defence case, the Crown Prosecutor objected to the foreshadowed intention of the defence to adduce evidence from R, the complainant's brother. Initially the Crown prosecution took objection to evidence that this witness proposed to give about statements made to him by the complainant in which she admitted sexual relations with a man (other than the appellant) prior to the medical examination. There was also evidence foreshadowed of a "kissing incident at Maroochydore" and other suggestions of minor sexual activity on the complainant's part observed by this witness. This latter evidence does not seem to have been pressed, and in any event would have had difficulty in surmounting the hurdle of the *Criminal Law (Sexual Offences) Act* 1978. That Act makes evidence of this kind unable to be received unless the Court grants leave, after being satisfied that the evidence has substantial relevance to the facts in issue or is a proper matter for cross-examination

as to credit.[9] However the earlier conversation with Mr Clark in the presence of the brother would seem to be a matter which might well justify leave for such evidence being given, especially when one considers the prominence that was given to the medical examination. In relation to that evidence His Honour seems simply to have upheld the Crown Prosecutor's submission that it should be excluded as "evidence on collateral issues". That term seems to have been inappropriately used as synonymous with evidence on matters of credit. In any event, His Honour appears not to have addressed, or have been invited to address, the proper questions in relation to reception of that evidence.

---

[9] *Criminal Law (Sexual Offences) Act* 1978 s.4 r.3.

20 More importantly for the purposes of the present appeal, R could give evidence that he had witnessed his mother coaching his sister in relation to the evidence that she would give in this case. His statement also suggests that some hostility and, arguably, bias existed on the part of his mother (a Crown witness) against the appellant. He claims that she was "always trying to talk to me about L's

statement and trying to get me to say that 'yes Dad did all these horrible things', but because I did not ever do that she would always get angry...". His statement mentions that his mother was always present when his sister was being interviewed by the female police officer who apparently took her statement, observing that his mother always had a lot to say during those interviews. He continues that on many occasions, almost every night, "my mother made my sister take her statement to her room and study and learn it there. My mother would question my sister on the statement and if my sister gave non-specific answers, she would then ask what would happen on that date and get my sister to explain it more and evolve the answer, and would also encourage my sister to get emotional when giving her statement". He also claims that in 1995, after his mother had evicted his father from the house, "she said on many occasions that she was going to wreck my dad's life."

21 Counsel for the Crown submitted that although this reveals coaching, it does not on its face show an attempt to persuade the complainant to give evidence of anything other than the truth.

22 It is of course possible to suggest that any hostility on the mother's part was based upon her belief in the truth of her daughter's complaint. But there is some circularity in reasoning in this way when the ultimate issue is the truth of the complaint. On any view the evidence foreshadowed from the brother could cast doubt upon the reliability of the complainant's evidence given the rather extended coaching that is said to have occurred, including encouraging the complainant to "get emotional". When there is a total contradiction between complainant and accused on the vital question of sexual activity, subject of course to the need for the jury ultimately to be satisfied on the evidence as a whole of the guilt of the accused, the resolution of credit between those persons becomes the central point of the trial. 23

Should evidence of this kind have been received? The importance of the general rule that treats the answers of a witness who is cross-examined on matters of credit as final and which prevents such answers being contradicted by evidence from other witnesses, is undeniable. There are only a few recognised exceptions to

the rule, and one of these concerns matters of bias or partiality in a witness.[10] There is a good deal of authority indicating that evidence which shows that a witness in a criminal trial holds spite against the accused will be received "to shew that the mind of the witness was not in a state of impartiality or equality towards the prisoner".[11] Even more relevantly for present purposes is the case of *Phillips*[12]. Phillips appealed against his conviction for incest with his twelve year old daughter. The main Crown evidence was that of the girl and her younger sister. The defence was that the allegations were pure invention and that the children had been "schooled" by their mother who was ill-disposed towards the appellant. The children denied under cross-examination that they had been schooled or that they had told another person that the evidence they had given against their father in other

---

10 *Attorney-General v Hitchcock* (1847) 1 Exch 91; 11 Jur 478; *R v Shaw* 1888 16 Cox CC 503; *The King v Finnessey* 1906 11 Ontario LR 338; The cases are usefully collected in Phillips J's article "Impeachment for Bias of Evidence by Witnesses as to Collateral Matters" 1998 62 ALJ 288.

11 *Ex parte Yewin* 1812 2 Camp 638 per Alderson B.

12 *R v Phillips* 1936 26 Crim App Reps 17.

proceedings was untrue. The trial Judge refused to permit defence counsel to call witnesses to whom such admissions had been made by the children. The Judgment of the Court (Hewart CJ, Talbot and Singleton JJ) considered that such a matter could not be dismissed as something put to the children for the purpose of testing their credit:

> "the substantive part of his defence was that the children, upon whose evidence alone the case for the prosecution rested, were not speaking for themselves, but for the designer and controller of the whole matter, their mother. Whatever the merits of that defence might have been proved to be, it was, at any rate, a defence which the appellant was entitled to raise. The questions were directed not to the credibility of the two witnesses, but to the very foundation of the appellant's answer to the charge".[13]

Variations in circumstance may produce different results. For example in *Umanski*[14] in a case alleging incest with a step-daughter, in which the accused's wife was an important witness for the prosecution, the Victorian Full Court considered whether the defence could call evidence that the accused's wife had threatened to give her

---

[13] Ibid at p.21.

[14] *R v Umanski* [1961] VR 242.

husband up to the police unless he gave her her share of the property. The Court "not without hesitation" held that such evidence fell short of tending to establish bias or partiality that might lead her to give false evidence. Accordingly it upheld the ruling that independent proof of the alleged statement of the wife could not be led.

24 Whilst the present case is not on all fours with *Phillips* it is obvious that exclusion of this evidence would deprive the jury of evidence of considerable potential importance in demonstrating the real defence of an accused man. Of course as an accused person he is not obliged to prove anything, but his defence is a negative proposition, namely "nothing sexual happened" and it is inextricably bound up with the proposition "my daughter's complaint (and the evidence she will have heard here) is not true". In the nature of things, evidence is hardly ever likely to be able to be brought forward that can do much more than tend to suggest it is not true, or to raise a doubt about it.

25 In my view evidence demonstrating the coaching of a witness, when there is a clear opportunity for a person apparently hostile to the accused to influence the

witness, ought to be able to be called by an accused person. The evidence of the brother certainly satisfies this test. The reasons for the law permitting such evidence to be given are at least as strong as those which permit the prosecution to bolster the credit of the complainant by evidence of the recency of a complaint that he or she has made.

26 It has been suggested[15] that:

> "Sexual intercourse, whether or not consensual, most often takes place in private, and leaves few visible traces of having occurred. Evidence is often effectively limited to that of the parties, and much is likely to depend upon the balance of credibility between them. This has important effects for the law of evidence, since it is capable of reducing to vanishing point the difference between questions going to credit and questions going to the issue".

However to use this as a basis for departing from the general rule of finality would leave too wide a gap in that important rule. I would not wish to weaken the general rule of the finality of a witness' answers in cross-examination on matters of credit,

---

15 Cross on Evidence (Australian edition) Byrne and Haydon Vol 1 p.19,038.

but am prepared to identify evidence of the present kind as fairly falling within the well-recognised exception in favour of evidence of bias or partiality in a witness.

27 The error of excluding this evidence was compounded by His Honour's repetition of a prosecution submission that "there is no evidence at all of her having been coached, prompted or otherwise induced. She denied such suggestions and no other evidence is available to you which would contradict that".

28 In my view the trial also miscarried by the incorrect exclusion of the above evidence.

Evidence of Uncharged Acts

29 Some of the complainant's evidence described details with reasonable particularity and fixed the events within reasonable limits of time and place. However on some occasions evidence was given of sexual misconduct which cannot clearly be seen to relate to a particular count. For example she said that "a lot of things happened on numerous occasions" and "it was basically the same thing that happens other times" and "they were all the same". Counsel for the appellant quite fairly recognised that a complainant cannot realistically be expected to be able to give evidence of multiple acts with precision and in any event accepted that evidence of that nature could in any event be admissible in relation to count 11 which is the charge brought under s.229B(2) of the Code. His submission was that in the circumstances of this case it was necessary for a careful direction to be given to the jury as to the manner in which such evidence could be used. He conceded, correctly in my view, that such a direction might not need to be given in every case where evidence of this kind is given.[16]

---

[16] *R v K* (CA 64 of 1998, 23 June 1998); *R v W* (CA 476 of 1997, 12 May 1998).

30 The recent decisions in *BRS*[17] and *Gipp*[18] create difficulty in deciding upon the directions that should be given in relation to such evidence. Such a difficulty will almost certainly re-emerge upon retrial of the present charges. Obviously different views are held as to how such evidence ought to be characterised, whether as "background" "propensity" "relationship" "similar fact" "tendency" or "guilty passion". The main point which emerges with substantial support in both *BRS* and *Gipp* is that in cases where such evidence presents a risk that the jury may identify a propensity to commit a charged offence, the jury should be warned against using it as establishing a predilection to commit the offences charged or as proof that the accused committed them. That of course does not apply when the evidence is properly receivable as propensity (or similar fact) evidence under the rules stated in *Pfennig*[19], in which case appropriate directions of the kind mentioned in *Pfennig* must be given. But with due deference to the views of Callinan J in *Gipp*, low quality

---

17 *BRS v The Queen* (1997) 71 ALJR 1512.

18 See note 15 above.

19 *Pfennig v The Queen* (1995) 182 CLR 461.

evidence of this kind which merely fills up the gaps or alleges without any independent particularity that the same sort of things happened on other occasions as well, will rarely if ever satisfy the tests of *Pfennig*, and if not, it cannot be called propensity evidence. To return to the question of appropriate directions in relation to evidence of this kind, although McHugh and Hayne JJ were in the minority in *Gipp*[20] the other judgments do not in my view render inappropriate their Honours' statement of at least one well-recognised positive use that might be made of such evidence by a jury.[21] They considered it:

> "...admissible to show the relationship which existed between the parties and to explain why the complainant so readily complied with the various demands of the appellant. Without evidence of the background and the continuing nature of the conduct of the appellant, the evidence of the complainant may have seemed 'unreal and unintelligible'. Without knowing the course of the relationship, the jury may have had great difficulty in accepting that the incidents could have occurred in the way that the complainant described".[22]

---

[20] Ibid at (72).

[21] I.e. the non-propensity relevance of it.

[22] Ibid at 72.

I also agree with the following statement of Pincus J.A. in *K*[23]

---

[23] Above at note 15 .

> "It appears to me that the High Court's decision in *Gipp* does not alter what was previously understood to be the law, that evidence of uncharged instances of sexual abuse may be let in as showing evidence of a sexual passion or relationship. In the present case the evidence of the uncharged incidents was, in the main, vague and unspecific and it appears to me unlikely that its admission could have had any great impact on the jury's deliberations; but it might have been thought by them to have some relevance as indicating persistent sexual interest in the complainant, on the part of the appellant".

I would add that general unparticularised evidence of continuity of a relationship or of general repetition of particular allegations (as in the present case), although theoretically suggestive of propensity, lacks the genuine danger of specific propensity evidence. The real danger to an accused lies in the evidence of specific acts, and if a jury does not accept a complainant's evidence about the specific acts it is very difficult to think that they are going to accept the allegation that "he kept doing the same sort of thing". It therefore seems to me that there will be many cases where

the suggested warning about the evils of propensity evidence would be at best confusing, and at worst counterproductive.

31 What needs to be kept in mind are the situations where genuine damaging propensity evidence creeps in under another flag. In those cases it is absolutely essential that it be identified and disarmed. But I am reluctant to interpret *BRS* and *Gipp* as requiring warnings by rote against the dangers of propensity evidence.

32 In the present case the submission of counsel for the appellant was focussed primarily upon the lack of specificity of the complainant's evidence and the need to warn that her evidence in these respects did not support the occurrence of the specific events charged in the indictment. Such a direction ought to be given if the evidence emerges as it did at this trial. Evidence of this kind may also possibly call for directions along some of the lines suggested by Fitzgerald P in *R v K* [1997] 1 Qd R 383 at 397.

Sufficiency of Evidence in Relation to Particular Counts

33 Some submissions were addressed to this Court concerning possible confusion in the particulars supplied by the Crown during the opening and the difficulty that arises in relating the complainant's evidence to these. At this point it will be sufficient for this Court to examine whether the evidence with respect to any particular count was insufficient to sustain a conviction.

34 As conceded below and here by the Crown, the evidence was insufficient to justify a conviction on count 5, and an acquittal should be entered on that count.

35 The only evidence given to support count 3, a charge of incest, was insufficient to prove beyond reasonable doubt that penetration occurred. The following was the evidence:

> "I think he just pulled his penis out of his undies and he put it near my vagina and was pushing it in and out...while he was doing it he was touching my breasts with his hands and he had his hands all over me and then - and I'm not sure whether his penis went into my vagina or not".

She was then asked if anything else happened in that incident and she replied “No”. As carnal knowledge is an element of incest a conviction based on that evidence is unsafe. The conviction on that count should be quashed.

36 Count 4 (indecent dealing when the complainant’s mother was in Vanuatu) was opened by the Crown as an incident following an unsuccessful attempt to penetrate with the penis. The allegation was that she then felt the appellant apply something like cream externally and that she then felt his finger enter her vagina. The complainant gave evidence of an incident which may well have been intended to make out this particular count, but it was not related to the time when the complainant’s mother was in Vanuatu, and indeed it was not placed within any time frame at all. Furthermore, although she described an incident where he applied some cream her evidence does not include any statement of digital penetration. Quite clearly the evidence fails to make out the incident which the Crown had particularised as establishing count 4.

37 In relation to the balance of the counts, there is in my view sufficient evidence to justify a retrial on each matter. However for the above reasons in relation to counts 3, 4 and 5, it can be seen that the appellant stood trial and the Crown failed to make out its case. Even though the complainant might well recall further details to make up the deficiencies if there were to be a retrial on such counts it is not appropriate that the appellant be placed in jeopardy on these matters again. He is entitled to an acquittal on counts 3, 4 and 5.

Orders

38 The appeal should be allowed and all eleven convictions quashed. Judgment and verdict of acquittal on counts 3, 4 and 5 should be directed to be entered. A retrial should be directed on all other counts.

REASONS FOR JUDGMENT - AMBROSE J.

Judgment delivered 2 October 1998

1 I agree with the reasons of Thomas J.A. and the orders proposed by His Honour and

I also agree with the observations of Pincus J.A..