SUPREME COURT OF QUEENSLAND

CITATION:	*R v SCA* [2001] QCA 199
PARTIES:	**R** **v** **SCA** (appellant/applicant)
FILE NO/S:	CA No 366 of 2000 DC No 3519 of 2000 DC No 3520 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	1 June 2001
DELIVERED AT:	Brisbane
HEARING DATE:	3 May 2001
JUDGES:	McPherson and Thomas JJA, Chesterman J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. Conviction and verdict set aside.** **3. Direct that verdict and judgment of acquittal be entered on counts 2, 3 and 4 of the indictment.** **4. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF THE COURT BELOW – IN GENERAL – WRONG PRINCIPLES – where the trial judge allowed cross-examination of the accused as to previous convictions – whether the trial judge should have taken into account the delay in complaint – whether the prejudicial effect on the defence outweighed the potential damage to the prosecution's case CRIMINAL LAW – PARTICULAR OFFENCES – OTHER OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – RAPE AND SEXUAL ASSAULT – where the complainant was under the age of fourteen at the time of the facts relevant to the complaint *Child Protection Act* 1999 (Qld) *Criminal Code* (Qld), s 695A *Criminal Law Sexual Offences Act* 1978 (Qld), s 6

Criminal Offence Victims Act 1995 (Qld), s 13
Evidence Act 1977 (Qld), s 15, s 21A
Juvenile Justice Act 1992 (Qld), s 62

Amoe v Director of Public Prosecutions (1991) 66 ALJR 29, cited
Jones (1997) 191 CLR 439, cited
Longman v The Queen (1989) 168 CLR 79, cited
M v The Queen (1994) 181 CLR 487, cited
Phillips v The Queen (1985) 159 CLR 45, followed
R v G [1997] 1 Qd R 584, cited
R v Jenkins (1945) 31 Cr App R 1, cited

COUNSEL: Mr A Rafter for the appellant/applicant
Mr C Heaton for the respondent

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

[1] **McPHERSON JA:** I have read and agree with the reasons of Chesterman J for allowing this appeal against conviction. The appeal should be allowed. The convictions and verdicts are set aside. Verdict and judgment of acquittal are entered on counts 2, 3 and 4 of the indictment.

[2] **THOMAS JA:** This appeal raises an important question concerning the proper exercise of a trial judge's discretion to permit cross-examination of an accused person on his criminal convictions. A discretion to do so is conferred by s 15 of the *Evidence Act* 1977. The nature of the discretion has been the subject of authoritative judicial discussion.[1]

[3] Whilst any reconsideration of the relevant principles is inappropriate, it is timely to examine the application of these principles to present day criminal trials for sexual offences, particularly when the complaint is stale. The present case is one in which the alleged acts of sexual misconduct are said to have occurred between 14 and 22 years ago.

[4] The principles are not in doubt, but their application to particular cases is by no means easy. For convenience, whilst not purporting to present a comprehensive summary, I shall commence by identifying the main criteria that emerge in *Phillips* as relevant to the exercise of the discretion. Although identifying the discretion as an entirely unfettered one, the judgment of Mason, Wilson, Brennan and Dawson JJ identifies the first four of the following considerations as a "valuable guide"[2], and the fifth as a consideration "to be weighed in the scales when considering the exercise of the discretion".[3]

1. The legislation is not intended to make the introduction of an accused's previous convictions other than exceptional;
2. The prejudicial effect on the defence of questions relating to the accused's criminal record needs to be weighed against such damage

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1 *Phillips v The Queen* (1985) 159 CLR 45.
2 Ibid at p 53.
3 Ibid at p 57.

as the trial judge might think had been done to the Crown case by the imputations;

3. On the issue of credibility it might be unfair to the Crown to leave the Crown witnesses under an imputation while preventing the Crown from bringing out the accused's record;
4. The actual prejudicial effect of the cross-examination, if allowed, might far exceed its legitimate evidentiary effect upon credit;
5. The fact that an accused, in making imputations against the prosecution witnesses, is not doing anything more than presenting his defence, should tend against allowing cross-examination as to previous convictions. But if the accused makes quite gratuitous imputations that are not necessarily involved in the proper conduct of the defence, the court will be more ready to exercise its discretion in favour of the Crown.

[5] Extrapolations of each of those particular considerations can be found in other parts of the judgment. On a more general level the judgment also includes the following statement:

> "It is right to stress the exceptional character of a case in which the credibility of an accused person is open to be attacked by reference to his bad character or previous convictions and it is undoubtedly right that the discretion of a trial judge to permit such an attack be sparingly and cautiously exercised."[4]

[6] The court also emphasised that "the essential thing is a fair trial".[5]

[7] I therefore propose to describe some contemporary features of trials of the present kind where there is a stale sexual complaint, with a view to better understanding how the exercise of this particular discretion may be exercised consistently with the holding of a fair trial.

[8] In recent years extensive changes, many of them statutory, have been introduced into criminal procedure in sexual charges, designed to alleviate the discomfort of complainants and of witnesses of various kinds.[6] Sensitivity towards the feelings of "victims" has been a feature of these changes. I have placed "victims" in inverted commas because the use of that term is in most instances a barbarism in a criminal trial which is, of course, convened in order to decide whether an accused is guilty or not guilty. When the truth of the complainant's version is in issue the term is a direct negation of the presumption of innocence. Our society is now aware that sexual predation within families is far more prevalent than had once been believed. When a complaint of that kind is now made there is a not inconsiderable risk that a jury or some of its members may start with the premise that it is probably true. However correct or appropriate that assumption may or may not be, the difficulty faced by an accused person adequately defending himself against stale allegations

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4 Ibid at p 57.

5 Ibid at pp 52-55.

6 These include *Evidence Act* 1977 s 21A (first inserted in 1989) – special procedures and protections for "special witnesses"; *Criminal Law (Sexual Offences) Act* 1978 – protection of complainants from cross-examination concerning their sexual history; *Criminal Offence Victims Act* 1995 s 13; and various privacy protections including *Criminal Law (Sexual Offences) Act* 1978 s 6, *Criminal Offence Victims Act* 1995, *Criminal Code* s 695A, *Juvenile Justice Act* 1992 s 62, *Child Protection Act* 1999 part 6.

of sexual misconduct is now well recognised by courts in cases such as *Longman*.[7] Notwithstanding this awareness, a robust defence may now be a dangerous commodity.

[9] Other cases have thrown up the difficulty of ensuring a fair trial following a belated complaint.

> "It must be acknowledged that in cases of this kind where complaints are made by mature people many years after the alleged time of an impropriety a close examination is necessary of the circumstances and motivation of the complainant. Sometimes an active imagination can provide a solution to social problems that may be threatening to overwhelm a disturbed person. The courts need to be particularly vigilant when the community is conditioned to believe in a high level of child molestation and when there exists a prospect of sympathetic support to persons who make such complaints. The concern of the court is with the truth of such complaints."[8]

[10] Many cases pass through this court in which the evidence comes down in the end to a contest between word of the complainant and word of the accused, with little or no objective criteria to assist the court in telling which account is more likely or acceptable, and where the opportunity of the accused to gather evidence and test the complainant's allegations has been lost because of the delay. In such cases, leaving aside possible error in the trial process, this court examines the evidence and if it thinks that upon the whole of the evidence it was "open" to the jury to be satisfied beyond reasonable doubt that the accused was guilty,[9] that is the end of the matter. Moreover, in considering these appeals we must remember that the jury is the body entrusted with the primary responsibility of deciding the result.

[11] In such cases not only the jury but also the judge must remain alive to the possibility of a false complaint. It hardly seems necessary to say that all trials should be regulated so that accused persons have a fair trial with a reasonable opportunity to defend themselves, including trials where the defence is "false complaint".

[12] Sometimes, as here, the accused will have a criminal record of offences of dishonesty. Such information may have a devastating and decisive impact if revealed to the jury. At the very least it has a high likelihood of tipping the scales in an otherwise finely balanced case. If there is a substantial risk that choosing to give evidence will lead to an accused's convictions being exposed to the jury, it is unlikely that he will elect to do so and his account will not be given at all. This is not in my view a desirable end.

[13] The exercise of the discretion in cases of stale sexual complaints should take account of the fact that an accused person is already under some disadvantage in effectively defending himself, and that the introduction into evidence of his criminal convictions will be likely to tip the scales against him, if not to have a devastating and decisive effect. Because of this, factor No 4 above (excess prejudicial effect far exceeding legitimate evidentiary effect upon accused's credit) will often tend to operate strongly against the grant of leave in trials of this nature.

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7 *Longman v The Queen* (1989) 168 CLR 79, 91.
8 *R v G* [1997] 1 Qd R 584 at 588 per Fitzgerald P and Thomas J.
9 *M v The Queen* (1994) 181 CLR 487, 493; *Jones* (1997) 191 CLR 439.

[14] Further, the essence of a contest of this kind is a complainant saying that the accused did certain things to him or her, and the accused saying that he did not. The contest is not solvable by suggesting that the complainant is mistaken, as it might be in matters of mistaken identification, as the parties are usually well known to one another. The very nature of the defence is not that the complainant is mistaken but that for some reason known or unknown the allegations are false. Courts should not be too precious in condemning counsel's perceived errors of taste or choice of words in putting their client's position to the witness. I do not regard "lie" as a taboo word which counsel may not use; or that counsel's use of it should subject the client either to exposure of his criminal record or abandonment of his right to go into the witness box. On the contrary, it may be an accurate formulation of the only real defence. The defence of "false complaint" is not inherently outrageous; it may be true. It may be very difficult to dress it up as something else. The making of suggestions to the complainant of something less than fantasy or fabrication may be an abnegation of counsel's duty.

[15] I do not suggest that trial judges should do otherwise than consider the principles of *Phillips* in ruling from case to case upon such applications. However, I am prepared to say that in cases of stale sexual complaints, because of the factors to which I have adverted, such a discretion should be particularly "sparingly and cautiously exercised".[10]

[16] I turn to the relevant factors in the present matter which may be set out in summary form.

1. Defence counsel did not make "quite gratuitous implications" or exceed the bounds of propriety in cross-examining the complainant;
2. His attack upon her credit was an essential part of the defence he was instructed to present, and which the accused was entitled to have put on his behalf;
3. The damage done to the Crown case by the accusations of untruthfulness was probably little more than the foreshadowing of the defence;
4. The prejudicial effect on the defence of the introduction of his criminal record was likely to be considerable;
5. The actual prejudicial effect of the cross-examination of the accused, which in the event was enthusiastically pursued by the Crown prosecutor, is likely to have considerably exceeded its legitimate evidentiary effect upon the accused's credit.

[17] With these factors in mind, I conclude that the learned judge's exercise of discretion, which was not exposed by any reasons other than that "the cross-examination of the complainant has amounted to the casting of imputations on the character of the complainant", miscarried. The trial was thereby rendered unfair and the convictions should be set aside.

Retrial

[18] There remains the question whether a retrial should be ordered. We were informed that there have already been two trials. Apparently, the appellant was first tried on a number of counts. The jury acquitted him on some of them, but could not agree in relation to the remaining counts. He was then tried on five counts in December 2000 in the course of which a nolle prosequi was entered on one count, the jury

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10 *Phillips* above at p 57.

found him not guilty on one of the remaining counts and convicted him of the other three. However, those convictions must now be set aside. The question now arises whether a further trial may be regarded as unduly oppressive. There are troubling weaknesses in the Crown case which are apparent from a reading of paras [21] to [40] of Chesterman J's reasons. While I do not hold quite the same views of the complainant's evidence as those expressed in para [51] of his Honour's reasons, the oddities in the evidence she has given suggest that the case at its best is weak, and the truncation of the complainant's story through elimination of various counts probably weakens it still further. In the circumstances, I conclude that it would be unduly oppressive to subject the appellant to a third trial on the remaining counts, and that the interests of justice will best be served by declining to order a retrial.

Sentence

[19] There is also an application for leave to appeal against sentences imposed on the sexual offences that have been mentioned, and upon a further ex officio count which was preferred against him at the time of sentence. In consequence, the present application also relates to a sentence of six months' imprisonment imposed in respect of a separate offence of stealing. No argument was addressed by counsel for the appellant suggesting that that particular sentence was excessive, and on its face it does not appear to be so. I would therefore refuse the application for leave to appeal against sentence.

Orders

I agree with the orders proposed by Chesterman J with a direction that verdicts of acquittal be entered.

CHESTERMAN J:

[20] After a three day trial the appellant was convicted on 15 December 2000 of:

- Raping FM, a girl under the age of 14 years between 1 August 1978 and 30 September 1981.
- Raping the same girl between 1 January 1985 and 31 December 1985.
- Indecently dealing with the girl, who was then under the age of 14, between 1 February 1986 and 30 April 1986.

The appellant was also charged with indecently dealing with the girl between 1 August 1978 and 30 September 1981 but was acquitted. A further charge of indecent dealing between 7 May 1984 and 12 May 1986 was withdrawn. The appellant was sentenced to nine years imprisonment on the counts of rape and two years imprisonment on the count of indecent dealing, to be served concurrently.

[21] The complainant was born on 8 May 1973. She was aged between five and eight at the time alleged in the indictment for the first count of rape, 12 at the time of the second count of rape and 13 at the time alleged for the count of indecent dealing. The appellant was born on 30 November 1960. He is thus 13 years older than the complainant. At the times relevant to the counts he was respectively between 17 and 20, and 24 or 25 at the times alleged in respect of the two counts of rape and the count of indecent dealing. The appellant is the half-brother of the complainant’s father, in effect the complainant’s uncle. At the relevant times he lived with his mother

in Toowoomba. His half-brother and his family also lived in Toowoomba. He was a frequent visitor to the complainant's home, often staying overnight, especially on weekends.

[22] The complainant first made her allegations against the appellant some time in 1998 when she was a married woman with children. It appears from her Victim Impact Statement that her complaints came as a result of her experiencing tensions in her marriage which she attributed to "abuse done by SCA over the years" and in the hope that her revelations would improve her relationship with her husband.

The appellant first had notice of the complaints against him at least 17 years and perhaps as much as 20 years after the earliest occasion on which he was alleged to have raped the complainant. He was 40 when tried. He is also married with children.

[23] The appellant gave evidence. He denied the charges against him. The sole ground of appeal is that the trial judge wrongly exercised the discretion to allow the appellant to be cross-examined about his previous convictions for offences of dishonesty. In March 1992 at the Magistrates Court in Toowoomba the appellant was convicted on five charges of stealing, two charges of attempted false pretences and four charges of false pretences. He was ordered to perform 60 hours of community service on each charge, required to serve 12 months' probation and had to make restitution of just under $600. Three months later, in June 1992 in the same court he was charged with four counts of stealing, three charges of false pretences and two charges of attempted false pretences. He was ordered to serve 12 months' probation and directed to make restitution of $765. Lastly, in August 1996, he was charged with one count of false pretences and sentenced to a term of six months' imprisonment wholly suspended. It will be noted that all but the last charge occurred more than eight years before the appellant gave evidence. The last charge was four years earlier.

[24] Section 15 of the *Evidence Act* 1977 provides:

> "(2) Where in a criminal proceeding a person charged gives evidence, the person shall not be asked, and if asked shall not be required to answer, any question tending to show that (he) has committed or been convicted of . . . any offence . . . unless –
>
> (a) . . .
>
> (b) . . .
>
> (c) . . . the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of any witness for the prosecution . . .
>
> (3) A question of a kind mentioned in subsection (2) . . (c) may be asked only with the court's permission."

Once the statutory pre-condition is satisfied the trial judge has a wide, indeed an unfettered, discretion to allow an accused to be cross-examined about his previous convictions (See *Phillips v. The Queen* (1985) 159 C.L.R. 45). However the primary exclusionary rule, against adducing evidence of prior convictions, is a factor relevant to the discretion which is to be exercised "sparingly and cautiously" (*Phillips* at 57). The sole criterion governing the exercise of the discretion "is what fairness requires in the circumstances of the particular case" (*Phillips* at 58).

To accuse a complainant of lying, and thereby of giving dishonest evidence against an accused, necessarily makes imputations on the character of the complainant (See *Amoe v. Director of Public Prosecutions* (1991) 66 A.L.J.R. 29 at 33).

[25] The first count on which the appellant was convicted, that of rape between 1 August 1978 and 30 September 1981, was said by the complainant to have occurred in her house after she had attended a birthday party for her cousin. She could not remember how old she was. The dates in the indictment were chosen by reference to other evidence which fixed the time when her grandmother lived in the house which the complainant remembered was the venue for the party.

The complainant over ate at the party. Having gone to bed on her return home she woke in the night to vomit. The appellant was in the house as were her parents, brother and sister. According to the complainant the appellant tended her when she was sick. He held her hair to avoid its contact with vomitus and washed her face when she finished retching. He then took her into her bedroom which she shared with her sister. It was fitted with two bunks the upper one being occupied by the complainant. She said:

> "I jumped up . . . into my bed . . . laid on my back because I . . . was still sick . . . (The appellant) then jumped into bed with me . . . He started touching and I kept on saying 'no, I'm sick'. (He) started touching me on the inside of my legs, touching my vagina, tried to kiss me . . . (He) had pulled his pants off . . . laid next to me still and . . . still rubbing on my legs, touching my vagina . . . (My pyjamas) were pulled down (by the appellant) (who) jumped on top to have sex . . . I was still on my back . . . then I went up and got to the toilet."

The complainant explained that the appellant inserted his penis "not that far" into her vagina and the episode did not last for "very long". It ended when the complainant returned to the bathroom to be sick.

[26] In cross-examination it emerged that the complainant had told police that she was 10 or 11 years of age when this incident occurred. However her grandmother had left the house where she remembered the party was held in September 1981 when she was only eight.

[27] When cross-examined the complainant said that her father was awake and was watching television in the lounge when she went to the bathroom and returned to her bedroom. He spoke to her and told her she would be "alright". When the appellant joined her in bed he took off his jeans and dropped them onto the wooden floor. She reiterated that the appellant "started kissing, started touching me. I didn't want him to because I was sick and . . . he . . . jumped on top, went inside me a few times and I jumped off and went back to the toilet". On her way she spoke to her father but did not mention to him what the appellant had just done. When she returned to her bedroom she got into her sister's bed so as to avoid further attention from the appellant.

[28] The complainant had, with the assistance of a police officer, prepared a detailed statement. It was, she said, compiled with great care. According to it when the complainant returned from the bathroom she climbed into her own bed, to join the man who had just raped her. The statement read:

> "I went back to my room and (the appellant) was still in my bed. I got back into the position I was before and said 'No more. I feel real sick now'. He said 'It's alright now' and let me go to sleep".

[29] When confronted with the inconsistency the complainant said:

> ". . . What you do remember . . . is . . . avoiding him . . . by going . . . into your sister's bed? - Yes.
>
> You remember that well? - Yes because I didn't want to go back to bed when I was sick.
>
> That would be the last thing you would want to do . . . get back up with him? - Well I did jump up and told him 'no'. Because I was sick and . . . he said 'that's okay'.
>
> . . . Did you go back to bed with him or back to bed with your sister? - Originally it was back to bed with my sister – sorry (the appellant).
>
> You're not telling the truth, are you? - Yes, I am.
>
> You know very well that you're mucked up about this important part, don't you? - I know what he did to me . . ."

[30] In relation to the second count of rape the complainant's evidence-in-chief was that she was in Grade 7. She was to sing at a school concert. The appellant came to her bed very early that morning and began to kiss her. She remembered the appellant "pulling (her) pants down and . . . having sex with (her)."

When asked for more details she said:

> "(The appellant) . . . jumped on me, laid on me, stuck his penis inside of me, had sex, I then got up, went to the toilet and sat up and watched TV because I just didn't want to go back to the bedroom."

She confirmed that the appellant was "on top of" her when intercourse took place. She recalled the incident because she caught a cold from sitting in the lounge and could not sing.

[31] In cross-examination the complainant admitted that she had given a different account when giving evidence against the appellant on a previous occasion. Then she said that the appellant jumped into her bed and:

> " . . . started rubbing . . . me . . . on the vagina . . . with his hand, then (he) had sex with me . . . (Her) back was . . . laying next to the wall . . . When he had intercourse . . . (her back was) against the wall . . . He was sideways."

[32] The complainant's evidence on the third count on which the appellant was convicted, that of indecently dealing with the complainant, was said to have occurred when Halley's Comet was visible in the night sky. It was admitted that this must have been between February and April 1986. Her account was that she and the appellant were sitting on her father's car parked outside the front of the house. They had a blanket wrapped around them to keep warm. The appellant put his arms around the complainant and put his hands inside her pants and started to play with her vagina. She remembered because:

> ". . . My dad was sitting playing on the computer and I was wetting myself because all dad had to do was just look out the window and see that something was going on."

[33] Although the indictment was limited to two counts of rape and three counts of indecently dealing with the complainant, her evidence was that over a number of years he regularly had intercourse with her while he was a guest in her parents' house. The occasions were usually early in the morning on the weekend. She gave evidence that she first had a period on her thirteenth birthday, 8 May 1986. After that onset of puberty she had a discussion with the appellant because she "was scared in case (she) fell pregnant". On the Saturday following her birthday the complainant had a party at home. The appellant was present. Early next morning there was an incident which was the subject of count 5 which ultimately did not go to the jury. The complainant said that she was wearing a one piece pink pants suit which the appellant asked her to take off and "to put something else on" because he "couldn't get into" the suit. She obliged and "jumped into the sofa where (the appellant) was". On this occasion which was "the same as always" something different happened. She said:

> "I remember (the appellant) was rubbing his penis up and down my vagina. I remember feeling different, nice, but I didn't know why it was feeling nice. I remember myself breathing heavy and all that stuff . . ."

She said this was the last occasion in which they had intercourse because of the complainant's fear of falling pregnant. She managed to avoid the appellant by sleeping with her sister in her sister's bed.

[34] In cross-examination the complainant's attention was directed to the "first time . . . and the last time" she and the appellant had intercourse. She agreed that she had said that until then she had "regularly (been) having full vaginal sex . . . a couple of times a week". There are some aspects of this statement which might be thought surprising. One is that the complainant said that the last occasion on which she had intercourse with the appellant was the only one on which she bled. Another is that such a relationship with one so young would not have come to the attention of the complainant's parents. Another, perhaps, in that there were only two occasions in this relationship on which intercourse was not consensual.

[35] Despite her evidence-in-chief the complainant said that the last occasion was not the one the subject of count 5 when she had been asked to change from her pink pants suit, and intercourse "felt nice". Counsel for the appellant sought to explore the inconsistency. She confirmed that the occasion she described when she felt "different" was not the last occasion she engaged in that activity with the appellant. That, she repeated, was a different time which she remembered because she bled. The complainant defended her confusion on the ground that she had remembered the last episode after she had given her statement to the police. This is quite wrong. She prepared her own written account of it which she took to the police. It read (in part):

> " . . . It was a cold morning during the week. (The appellant) was asleep on the floor. I had jumped in because it was cold. . . . He woke up . . . looked at me and jumped on me . . . He pulled my legs apart and put his legs in between mine. He put his penis on my vagina. I asked him what he was doing. He said 'don't worry, it won't hurt'. He started to kiss me . . . I remember my face getting hot . . . I told him to stop because it hurt. He said 'relax and it won't hurt'. (The appellant) was trying to stick it in further. I started crying because it was really hurting. He looked at me and saw me crying and jumped off and said 'sorry'. I got up and went to the toilet. I wiped myself and found blood. I ran . . . scared because I

> didn't know why I was bleeding. I told him I was bleeding. He said it was alright. I ran into my room crying and stayed in there until dad got up. I was still bleeding so I ran into mum's room and got a pad and put it there. I was really angry because he said it wouldn't hurt and it did. For days after it still hurt and stang when I went to the toilet."

[36] If this was the last occasion of many on which they had had "full vaginal intercourse" it is curious that the complainant should have reacted as she describes. One would have expected her to understand quite fully what was happening and what to expect. It is also a little odd that she had not bled on any prior occasion despite intercourse having first occurred when she was between five and eight years of age.

[37] The complainant had said in her statement that she could clearly remember the last occasion she had intercourse with the appellant because it was the only time he performed that act after she had experienced a period. This would make it the event described in para. [33]. In cross-examination she was clear that the last occasion was the one just described, when she bled. When confronted with the obvious discrepancy the complainant appeared to take refuge in obfuscation. She said the statement, most of which is quoted above, referred to two separate incidents, though a reading of it does not suggest any such thing. The cross-examination proceeded:

> "Are you saying that this is a description of more than one incident? - . . . Yes . . . When I first wrote this out, we concentrated on the other ones that I did. We didn't go into this one here and this was just stuff that I was writing out.
>
> Where does the second incident start? - The second incident is basically the same as the first. It happened at home.
>
> No, you said the document describes two incidents? - Yes, it does.
>
> I want to know where the second one starts? - The second one like when it . . .
>
> Take your time? - . . . The first one was when I was crying and all that stuff, getting hot, and the second bit starts like, the last time was, don't tell your father because that happened as well . . .
>
> You are simply not telling the truth, are you? - Yes, I am.
>
> You are not telling the truth, are you? - (The appellant) did this to me. He did all this to me and I cried on both occasions . . .
>
> That was the description of the last time you say he had intercourse with you, wasn't it? - The last time this – the end bit, yes, that was the last time. The first one, like, at the beginning, that was the first time.
>
> . . . . . .
>
> Is that a description of the last time he had . . . intercourse with you? - Yes, some of it, yeah.
>
> You said to me . . . yesterday that, 'Look, I didn't put in my statement about the last time . . . because I remembered it after I'd finished my statement'. That is what you said to me? - Yes.

> That was a lie, wasn't it because it is in the document . . .? - But I haven't done a full thing of the last time we had sex."

[38] There was some evidence which the trial judge directed could provide corroboration for the complainant's evidence. Her brother recalled an occasion when he was young. He saw the appellant and the complainant in the loungeroom of their house covered by a blanket. When he asked what they were doing he saw the appellant pull his hand from where it had rested on the complainant and he heard the sound of "clicking" as though elastic on underpants had snapped back into place. He had not remembered this last item when giving evidence on the earlier occasion. As well, in 1998 when he became aware of the complainant's allegations he was present in the appellant's sister's house. The sister asked the appellant "if he had had sex" with the complainant and he replied that he "tried it once and it didn't fit". The woman with whom that witness lived claimed to have been present and to have heard the admission in different terms: she believed the appellant said that he "felt her up".

[39] The appellant denied any sexual impropriety with the complainant. He also denied admitting misconduct in either of the versions laid against him. He called his sister to confirm that he had not made any admission and that the brother's companion had not been present in the house on the occasion she claimed to have heard the admission.

[40] The prosecutor asked for, and was given, permission to cross-examine the appellant about his criminal past. The imputation which it was said had been made against the complainant was that she had lied when giving evidence. The imputation was made by the questions which appear towards the end of the passages set out in paras. [29] and [37] of these reasons. Three times it was put to her that she was not telling the truth; once it was put that what she had said was a lie; and once it was put to her that she had "mucked up" an important part of her evidence. The trial judge gave his ruling very briefly. His Honour said:

> "In my opinion, the cross-examination of the complainant has amounted to the casting of imputations on the character of the complainant. In the circumstances I consider it is appropriate to give leave to the prosecution to cross-examine the accused on the offences of dishonesty from which he's been convicted and that shall be set out by the Crown prosecutor."

[41] The prosecutor made effective use of the permission. The cross-examination was vigorous:

> "Are you being honest with us? - Yes, I am.
> Are you accustomed to telling the truth? - Yes.
> You always tell the truth? - Not always.
> You wouldn't tell lies in this court? - No.
> Would you tell lies if it suited you? - No.
> You've told lies because it suited you in the past, haven't you? - Yes.
> See, you are a liar, a convicted liar, aren't you? - You can put it that way.
> You are a convicted thief as well? - Yes.
> You appeared in court . . . and you were convicted of five charges of stealing . . . two charges of attempted false pretences . . . and four charges of false pretences? - Yes
> . . . . . .

> What did you do? Did you steal some property and then try to sell it to someone? - Yes.
> And then you appeared three months later in court . . . didn't you? - Yes.
> And you were convicted of a further four charges of stealing? - Yes.
> . . . three charges of false pretences? - Yes.
> And two of attempted false pretences? - Yes.
> . . . You were involved in . . . a bit of a spree of dishonesty between . . . July 1991 and . . . February 1992; is that fair? - Yes.
> All up involving something like $1,365 worth of property? - Yes.
> . . . You committed a further offence of false pretences in November of 1995? - Yes.
> . . . the . . . charge involved you telling lies . . .? - Yes.
> So as to get some sort of financial advantage? - Yes.
> You told lies because it suited you to tell lies? - Yes.
> . . . This period in your life was one where you . . . behaved in a thoroughly dishonest manner; is that so? - Yes.
> You told lies to the total of twelve different people? - Yes.
> . . . But you say that you're telling the truth today? - Yes."

[42] The "guiding star" for the exercise of the discretion given by s. 15 is fairness. The appellant was faced with the usual difficulties confronting a man accused of sexual offences against a young girl decades earlier. The opportunity which would have been provided by a prompt complaint to recall circumstances which would controvert or throw doubt upon the allegations, or to summon evidence, perhaps of alibi, in support of innocence is lost. A complainant is able to put forward circumstantial detail which may be thought to add veracity to her evidence. The detail is likely to be affected by the distortions a long lapse of time plays on memory, or even by imagination acting upon a sense of grievance. An accused in such a case can do little to answer the detail other than to offer a general, and perhaps for that reason unconvincing, denial of wrongdoing. A trial taking place many years after the events alleged can, for that reason, tend to be unfair. This is a factor which, in my opinion, should be in contemplation when a trial judge is asked to exercise the discretion found in s. 15.

[43] The appellant categorically denied raping the complainant and indecently dealing with her. It was necessarily implicit in his defence that her allegations were false, and that her evidence was the result of imagination, or invention, and was not honest recollection. The jury must have understood that. The explicit suggestion that she was not telling the truth, put with respect to the particular points where the questions were in that form, took the defence no further. In their context the imputations of dissimulation implicit in the questions were not extravagant. They followed a demonstrated departure by the complainant from earlier testimony on matters of some importance. There are only occasions in a lengthy cross-examination in which the assertion is made that the complainant has not told the truth.

[44] The fact that a defence necessarily involves imputations against a complainant does not result in the discretion, as a matter of course, being exercised against the cross-examination of the accused but "it remains . . . a valid consideration to be weighed in the scales . . ." (*Phillips* at 57).

[45] In *R. v. Jenkins* (1945) 31 Cr. App. R. 1 at 15 Singleton J. said (in a passage approved by the High Court in *Phillips* at 52):

> " . . . The judge . . . may feel that even though the position is established in law, still the putting of such questions as to the character of the accused . . . may be fraught with results which immeasurably outweigh the result of questions put by the defence and which make a fair trial of the accused person almost impossible."

The joint judgment of Mason, Wilson, Brennan and Dawson J.J. in *Phillips* concludes (p. 59):

> ". . . a critical consideration . . . was the weighing of the prejudicial effect on the defence of the admission of the evidence of prior convictions against the potential damage to the prosecution case of the imputations . . ."

Deane J. said (p. 63)

> ". . . cross-examination of an accused to credit should only be permitted in a case where, from the viewpoint of the interests of the administration of justice including the need to ensure that the particular trial is a fair one, any risk of unfair prejudice to the accused is outweighed, in the overall circumstances of the case, by other relevant considerations . . . Those other considerations will ordinarily include the extent and the nature of any damage done to the Crown case by the imputations and the circumstances in which any relevant imputations on the character of the prosecutor . . . came to be made."

[46] This point, in my opinion, is the critical one in this appeal. The damage done to the appellant's denials of sexual misconduct by the cross-examination as to his earlier dishonesty was far greater than any harm caused to the complainant's evidence by the suggestions put to her. The circumstances in which the imputations were made do not appear capable of damaging the prosecution case beyond that which was done by the appellant's general challenge to her testimony. That challenge demonstrated a number of serious discrepancies and inconsistencies in her evidence. There were as well a number of odd features in her account. The jury may well have been deflected from paying attention to those inconsistencies and improbabilities by the cross-examination as to credit. It is hard to believe that the force of the appellant's denials was not greatly diminished by the attack on his credit. By contrast the imputations put against the complainant were not such as to have diminished what force her evidence had. The case was one in which the complainant's evidence required careful assessment to determine whether it satisfied the jury beyond reasonable doubt of the appellant's guilt. The jury may well have thought it was safe to accept the complainant, without subjecting her evidence to proper scrutiny, because of the appellant's past. The appellant gained little advantage from expressing disbelief in the complainant's evidence and suffered, in return, a serious detriment.

[47] The reasons given by the trial judge do not reveal that his Honour expressly adverted to the need to ensure that the cross-examination would not cause disproportionate damage to the appellant's defence, compared to the potential damage to the prosecution of the accusations put to the complainant. The trial judge should have expected that the cross-examination would substantially damage the appellant's credibility and the force of his denials. Given the demonstrated discrepancies in her evidence, and the context in which the imputations were made, the damage to the appellant's case far outweighed any detriment to the complainant.

That imbalance should have been expected. To allow it in the circumstances of this case was, in my opinion, to make the trial unfair.

[48] I have had the advantage of reading the draft judgment prepared by Thomas J.A. The point I have endeavoured to explain is made by his Honour with great force and felicity. I agree with what his Honour has written and, indeed, support the views put forward.

[49] It follows that the appeal should be allowed and the convictions set aside. Whether the court should order a third trial is more difficult. Ordinarily such an order would follow the quashing of convictions on the ground made out in this appeal but the High Court in *Director of Public Prosecutions (Nauru) v. Fowler* (1984) 154 C.L.R. 627 at 630 pointed out that the power to grant a new trial is discretionary and in deciding whether to make such an order the court must decide whether the interests of justice require a further trial. In so deciding the court should first consider whether the evidence is sufficiently cogent to justify a conviction and, if it is, whether there are any other circumstances which might render it unjust to the accused to put him again on trial.

[50] We were not given any details about the appellant's first trial but it is apparent that he was charged with a number of offences arising out of his relationship with the complainant. He was acquitted on all but five of the charges on which he was retried with the results described. He was acquitted on one further charge and convicted on three after he had been wrongly cross-examined as to his past.

[51] Of the three remaining charges I would regard the evidence in relation to the first count of rape as quite unsatisfactory. The complainant's first version of the incident was, in my view, implausible. She (it can only have been deliberately) altered her account to remove the implausibility and to increase the prospect of conviction. The evidence in respect of that offence is not "cogent".

The remaining two counts do not suffer the same defect although there is with respect to the second count of rape a significant inconsistency though not one that may be regarded as vital. However the complainant's general credibility was severely compromised by her evidence in relation to the count that was withdrawn. There is a demonstrated unreliability about what she has said such that it would be unjust to place the appellant on trial for a third time. I come to the conclusion with some hesitation because the discretion whether or not to prosecute is one entrusted to the Director of Public Prosecutions who has in her possession more information than the court. Nevertheless what has been revealed in the appeal record indicates, to my satisfaction, that the evidence against the appellant on the remaining charges is inconsistent or unreliable.

The appellant also applied for leave to appeal against sentence. There is no need to consider that application but because it remains on the file an order should be made with respect to it.

[52] The orders I propose are:

1. Appeal allowed;

2. Conviction and verdict set aside;

3. Direct that verdict and judgment of acquittal be entered on counts 2, 3 and 4 of the indictment.

4. The application for leave to appeal against sentence is refused.