SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lawrence* [2001] QCA 441
PARTIES:	**R** **v** **LAWRENCE, Mark Richard** (appellant)
FILE NO/S:	CA No 104 of 2001 DC No 3421 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 October 2001
DELIVERED AT:	Brisbane
HEARING DATE:	10 September 2001
JUDGES:	McPherson and Thomas JJA, White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Appeal allowed. Conviction set aside and a new trial ordered of the counts in the indictment.**
CATCHWORDS:	APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OF COURT BELOW – PARTICULAR CASES – CONTROL OVER PROCEEDINGS – ADMISSION OF EVIDENCE – whether Trial Judge should have allowed the admission of evidence to establish that the complainant had previously threatened to wrongly accuse a fellow inmate of propositioning him for sex CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – OTHER OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – RAPE AND SEXUAL ASSAULT – PROOF AND EVIDENCE – whether evidence of earlier threats admissible as evidence of a propensity or disposition on the part of the complainant to make false complaints of a sexual nature CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – GENERALLY

Criminal Code (Qld), s 668E(1), s 668E(1A)
Criminal Law (Sexual Offences) Act 1978 (Qld)
Evidence Act 1977 (Qld), s 101

Attorney-General v Hitchcock (1847) 1 Ex 91; 154 ER 38, considered
Chandu Nagrecha [1997] 2 Cr App R 401,
Knight v Jones; ex p Jones [1981] Qd R 98, applied
Natta v Canham (1991) 32 FCR 282, considered
Palmer v The Queen (1998) 193 CLR 1, considered
Piddington v Bennett and Wood Pty Ltd (1940) 63 CLR 533, considered
R v Busby (1982) 75 Cr App R 79, considered
R v Funderburk [1990] 1 WLR 587, considered
R v Kochnieff (1987) 33 A Crim R 1, considered
R v Lowrie & Ross [2000] QCA 405; CA Nos 95 and 92 of 2000, 3 October 2000, considered
R v LSS [1998] QCA 303, CA No 128 of 1998, 2 October 1998, considered
R v Phillips (1936) 26 Cr App R 17, considered
Smith v The Queen (1993) 9 WAR 99, distinguished
Urban Transport Authority of NSW v Nweiser (1992) 28 NSWLR 471, considered

COUNSEL: A J Rafter for the appellant
N Weston for the respondent

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

[1] **McPHERSON JA**: In 1999 the appellant and the complainant were prisoners in the Moreton Bay Correctional Centre, where the complainant was being held on remand. According to his evidence, on 14 October 1999, the appellant came into the prison dormitory where he was sleeping and had anal intercourse with him without his consent. At the trial in the District Court in 2001, the appellant was found guilty of one count of raping the complainant and a second count of sexual assault with a circumstance of aggravation. This is his appeal against those convictions. It is now confined to ground 5, which complains that the trial judge wrongly excluded evidence from one Ian Galley whom the defence wished to call as a witness.

[2] At the trial, the complainant gave evidence of what he said had taken place on the occasion in question. In the way in which the complainant said it had happened, the incident was denied by the appellant in his evidence at the trial. Earlier, in the course of cross-examining the complainant, counsel for the defence asked him a series of questions about conversations with other prisoners at the Centre. One of them was Tony Corrigan. The complainant denied he had asked Corrigan whether he believed that, if someone was raped in gaol, it would help his chances of getting bail. At the trial, Corrigan gave evidence for the defence that, about four to six weeks before 14 October 1999, the complainant had asked him that question, to which he had responded "I'm sure it would". The complainant was also cross-examined about a

prisoner named John Martin. He denied he had made a false complaint about him; but he did admit that he had made a false representation to police about Martin causing an investigation to be commenced, in respect of which the complainant was later convicted of an offence.

[3] In cross-examination, defence counsel also put to the complainant a series of questions about Ian Galley, who was another inmate at the Centre. Having agreed that he knew Galley, the complainant was questioned as follows:

> "You had, in fact, told Mr Galley, hadn't you, that you were going to set Mr Galley up by telling officers that you had propositioned - that he propositioned you for sex? --- I didn't say that.
>
> You told that to Mr Galley, I suggest? --- No, I didn't say in those words.
>
> You told him in words to that effect though, didn't you ---? --- No.
>
> --- that you were going to set him up by telling the prison officers that he had propositioned you for sex? --- No, that's not true.
>
> The reason why he - you didn't like him at that time was that you had taken advantage of another prisoner by the name of McConaghy, hadn't you? --- That's not true."

Counsel then went on to suggest that the complainant had "swindled" McConaghy, who was a prisoner who suffered from a disability, and that Galley had intervened and told him to give the money back to him. The complainant denied it was after this incident that he had threatened to make the complaint against Galley.

[4] When it came to the defence case at trial, counsel raised with the judge his intention of calling Corrigan and Galley to give evidence about the conversations with the complainant which had been put to him in cross-examination. His Honour ruled that the evidence proposed to be led from Corrigan was admissible as having a direct relevance not merely to the complainant's credibility but also to whether the subject rape had actually taken place. His ruling relied in part upon the authority of *Smith v The Queen* (1993) 9 WAR 99, and in part upon a passage in *Cross on Evidence* (4th Australian ed, 1991) para 17580. He decided that Corrigan's evidence was admissible because it was relevant as showing a motive for making a false allegation, and in that way, possible bias on the part of the complainant. However, as regards the evidence proposed to be led from Galley, his Honour ruled it inadmissible. He said:

> "So far as the evidence of Galley is concerned, I would consider that to fall within a different category to that of Corrigan. At its highest that evidence shows little more than a propensity to make false allegations. It was a matter that might properly be put in cross-examination, as it was put, but in my view it is plainly collateral and evidence of that nature from Galley would not be admissible; see, for example, *The Queen and Kochnieff* 33 Australian Criminal Reports at page 1. In my view, that evidence is not admissible."

It may be added that the decision in *Kochnieff* (1987) 33 A Crim R 1 was concerned primarily with whether the defence at a criminal trial was entitled to insist on a

confession being admitted in evidence even when, after editing, it contained nothing but self-serving statements by the accused.

[5] Ground 5 in the notice of appeal raises for consideration the current status, scope and operation of the rule that a witness's answers in cross-examination to questions, which are merely collateral as going only to credit and not directly to the issues at trial, are final and may not be contradicted by affirmative evidence from the other side. As can be seen from the decision of the Federal Court in *Natta v Canham* (1991) 32 FCR 282, 297, the rule is one of considerable antiquity. It originally evolved at least partly in the interests of the witness being cross-examined in order to protect him or her from being asked or having to answer disparaging questions tending to degrade the witness as "infamous" or "disgraceful": see *Starkie on Evidence* (3rd ed 1842) at 192-195. It began to assume its modern form in *Harris v Tippett* (1811) 2 Camp 637; 170 ER 1277, where Lawrence J refused to allow evidence to be adduced to contradict the denial of a defence witness that he had attempted to dissuade a witness for the plaintiff from attending the trial. Lawrence J ruled that questions put to a witness as to improper conduct would be allowed:

> "… for the purpose of trying his credit; but when these questions are irrelevant to the issue on the record, you cannot call other witnesses to contradict his answer. No witness can be prepared to support his character as to particular facts, and such collateral inquiries would lead to endless confusion."

[6] Reported as a note to that case is another ruling of the same judge on the same circuit in a matter of *R v Yewin* (1811) 2 Camp 638; 170 ER 1278. On an indictment for stealing wheat, defence counsel asked the principal witness for the crown whether he had not been charged with robbing the accused (who was his employer) and had afterwards said that he "would be revenged on him, and would soon fix him in Monmouth gaol". Lawrence J's ruling treated the answer to the first question as final; but "as the words were material to the guilt or innocence of the prisoner evidence might be adduced that they were spoken by the prisoner". By that, Lawrence J appears to have been referring specifically to the threat to take revenge against the accused. Understood in that sense, the ruling in *Yewin* was, in the leading case of *Attorney-General v Hitchcock* (1847) 1 Ex 91; 154 ER 38, later treated as forming a special exception to the finality rule. Pollock CB (1 Ex 91, at 100), spoke of "those matters which affect the motives, temper, and character of a witness, not with respect to his credit, but with reference to his feelings towards one party or the other". In reference to *Yewin*, the learned Chief Baron said that a witness might be asked whether he had not used expressions importing he would be revenged on someone, and, if he denied it:

> "… you may give evidence as to what was said, not with a view of having a direct effect on the issue, but to show what is the state of mind of the witness, in order that the jury may exercise their opinion as to how far he is to be believed".

The reason why in *Attorney-General v Hitchcock* contradictory evidence was held to have been rightly rejected was that the question put in cross-examination was whether the witness Spooner had been *offered* a bribe, which, in the words of Rolfe B (1 Ex 91, 106), "would not have the smallest bearing on … the credibility of his testimony". It would have been different if it had been put to him that he had *received* the bribe, in

which event, it "might have had a bearing on the bias of his mind" (ibid; and see Pollock CB, at 101, and Alderson B, in argument, at 98).

[7] The statement of Pollock CB in *Attorney-General v Hitchcock* was applied in *Smith v The Queen* (1993) 9 WAR 99 in circumstances superficially not altogether dissimilar to those in the present case. The complainant accused her foster father of raping her and said in her evidence that that was why she had left her foster home. The West Australian Court of Criminal Appeal held that the trial judge had wrongly rejected evidence proposed to be led from a Mr Starcevich that she had told him she had left home on account of her use of drugs; that she had declined an invitation from her foster parents to return; but "don't worry. They will pay for it". The court held (9 WAR 99, 105) that the evidence to be given by Mr Starcevich "came squarely within the long standing exception of bias and was directly relevant to the credit of the complainant which was critical to the proper determination of the verdict in this particular trial, her evidence being the sole evidence for the prosecution". Evidence that the complainant had testified from "a corrupt or other motive" was admissible at the trial, and the trial judge had erred in refusing to admit it.

[8] It may be noticed that in both *Smith v The Queen* and *Yewin* the evidence tendered was designed to show animosity on the part of the witness against the accused. Here, however, the evidence of Galley that was rejected did not suggest any such animosity or motive for revenge on the complainant's part against the appellant himself. If what was said to Galley disclosed a vengeful attitude on the part of the complainant, it was directed against Galley for having intervened in the complainant's alleged swindling of McConaghy. In stating the exception in *Attorney-General v Hitchcock*, Pollock CB spoke of "the motives, temper, and character of the witness … with reference to his feelings towards one *party* or another", and Galley was not in any sense a party to the proceedings at the trial of the appellant. In *Attorney-General v Hitchcock*, the barons in Exchequer accepted that it would have been open to the defendant to prove (if it had been the fact) that the witness Spooner had said he had accepted a bribe from the revenue officers; but that was because it would have revealed that, in giving his evidence against the defendant, the witness was actuated by an improper motive. The fact that the complainant was actuated by ill will against Galley did not disclose a motive for his complaint against the appellant. The question put to the complainant about the exchange with Galley therefore went only to the complainant's credit.

[9] It may well have been this difference with *Smith v The Queen* that led Mr Rafter for the appellant to rely principally on the majority decision of Lucas ACJ and Sheahan J (Macrossan J dissenting) in the Court of Criminal Appeal in *Knight v Jones*, *ex p Jones* [1981] Qd R 98. He used that decision to support a submission that the evidence of Galley tended to establish a propensity or disposition on the part of the complainant to make false complaints of a sexual nature; and that evidence of that kind was relevant and probative of an issue in the appellant's case, which was that the complaint against him was fabricated. Some of the statements on that subject in *Knight v Jones* are very broad and are the subject of some criticism in *Cross on Evidence* (Aust ed), vol 1, ¶19065. Curiously, the reasons for the decision in that case give little or no attention at all to the finality rule. In commenting on it in *R v Livingstone* [1987] 1 Qd R 38, 43-44, Connolly J (with whom Williams and Ambrose JJ agreed) said that occasion for the admission of similar fact evidence showing a disposition or propensity for a prosecution witness to act in a certain way "will be

rare"; but the decision was followed by the Court of Appeal in New Zealand in *R v Katipa* [1986] 2 NZLR 121.

[10] There is, however, another line of authority, beginning with *R v Funderburk* [1990] 1 WLR 587, that suggests what may be a slightly different basis for admitting the evidence of Galley in this instance. Of the decisions in question, the most favourable to the appellant is *Chandu Nagrecha* [1997] 2 Cr App R 401, in which the Court of Appeal in England set aside the conviction of a man charged with indecently assaulting a female employee. At the trial the judge refused to admit defence evidence from a Mr Lee, who was a former employer of the complainant, that she had made similar complaints against him some two or three years earlier, which under cross-examination she denied having made. The court held that Mr Lee's evidence that the complaint had been made by her should have been admitted at the trial, giving as their reason ([1997] 2 Cr App R 401, 410), that the evidence:

> "went not merely to credit, but to the heart of the case, in that it bore on the crucial issue as to whether or not there had been any indecent assault. As to that matter only the complainant and the appellant were able to give evidence."

[11] The decision in *Chandu Nagrecha* is part of a discernible recent tendency in courts in England and Australia to relax the strictness of the finality rule. In *Natta v Canham* (1991) 32 FCR 282, the Full Federal Court upheld the admission, at the trial of a personal injury claim in a motor vehicle collision case, of defence evidence contradicting the plaintiff's denial in cross-examination that she had told a friend that an easy way of making money was to buy an old car and then stage an accident. In considering *Attorney-General v Hitchcock* and other authorities concerning the finality rule, which the court characterised as having "a case management rationale", their Honours said it was based "primarily upon the need to confine the trial process" and to avoid distracting a jury with issues not central to determination of the case; and that creditworthiness of a witness "was always indirectly relevant to facts in issue and may be decisive of those facts". The fact if true that the plaintiff in *Natta v Canham* had been prepared to propose the pursuit of fictitious claims (32 FCR 282, 300) "could properly be taken into account without embroiling the court in a multiplicity of peripheral issues". In that instance, the evidence:

> "demonstrated if true an approach to the litigation and claim process that called into serious question the extent to which she could be believed in what she told the court and her doctors in important areas concerning the extent and location of her pain which to a significant degree could not be independently verified."

The decision in *Natta v Canham* was followed in somewhat similar circumstances by the Court of Appeal in New South Wales in *Urban Transport Authority of NSW v Nweiser* (1992) 28 NSWLR 471.

[12] A noteworthy feature of all of the cases in which the finality rule has been relaxed is the emphasis that has been placed upon the fact that the matter of credibility was inextricably linked with the principal issue in the case, and that the court was confronted with testimony about that issue which was incapable of being verified or tested except by evidence from other sources that went to credit rather than directly to the issue. That consideration was treated as material in *Natta v Canham*, as can be seen from the passage referred to above, and also in *Urban Transport Authority v Nweiser*, where the evidence sought to be called was that the plaintiff had previously

attempted to recruit fellow workers into supporting a false claim by him for workers compensation for injury to his back.

[13] In charges of sexual misconduct, where the central issue of guilt often depends entirely on resolving a conflict in testimony between the complainant and the accused, courts in England have recently been prepared to relax the finality rule in the interests of justice. In both *R v Funderburk* [1990] 1 WLR 587, 597-598, and *Chandu Nagrecha* [1997] 2 Cr App R 401, 406, the Court of Appeal in England referred with approval to the following passage from *Cross on Evidence*:

> "It has also been remarked 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 the difference between questions going to credit and questions going to the issue to vanishing point. If the only issue is consent and the only witness is the complainant, the conclusion that the complainant is not worthy of credit must be decisive of the issue."

That passage, and the two decisions in which it has been approved, have been criticised by Mr Seabrooke in [1999] Crim L R 387; but the Australian authorities which have been mentioned support the approach adopted in the passage in question. See also *R v C* [1995] 2 NZLR 330, 335-336.

[14] The matter has recently been the subject of extensive consideration and analysis by McHugh J in *Palmer v The Queen* (1998) 193 CLR 1, 22-25, in the course of which his Honour (at 23) said, citing *Natta v Canham* (1991) 32 FCR 282, 298, that evidentiary rules based on the distinction between issues of credit and facts in issue "should not be regarded as hard and fast rules but should instead be seen 'as a well established guide to the exercise of judicial regulation of the litigation process'". His Honour went on to say (193 CLR 1, 23-24):

> "For reasons of convenience, it is necessary to maintain the rule that independent evidence rebutting the witness's denials on matters going to credibility is not ordinarily admissible … If evidence going to credibility has real probative value with respect to the facts-in-issue, however, it ought not to be excluded unless the time, convenience and cost of litigating the issue that it raises is disproportionate to the light that it throws on the facts-in issue."

Although the other members of the High Court had no need to consider that question in their judgments in *Palmer v The Queen*, I respectfully regard his Honour's remarks on this subject as correctly reflecting the state of the law as it now is in Australia. To that extent, the observations in *R v Tribe* [2001] QCA 206 ¶32, may need to be read in the light of what was said by McHugh J in *Palmer*.

[15] With these authorities in mind, it is possible to return to the question in this appeal. It is whether the trial judge ought to have admitted evidence from Galley which tended to show that the complainant was lying when he denied he had threatened to report Galley for importuning the complainant to have sex with him. That evidence would have gone to the complainant's credibility. It would have gone only indirectly to the issue whether or not the appellant had raped the complainant; but that was an event which, as it was alleged to have happened, had taken place in private

and on which there was no means of independently verifying the conflicting accounts of either of the witnesses. It was therefore evidence which, because the complainant's credibility was central to proof of the charge, was closely linked with the primary issue of whether the rape had taken place.

[16] It is plainly undesirable that, in trials of rape and other sexual offences which present those features, the attention of juries should be diverted from the main issue of whether the charge is proved. As is demonstrated by the judgments in *Attorney-General v Hitchcock*, there is a well founded need to ensure that trials do not degenerate into endless inquiries about acts and events on other occasions and involving other individuals that have little or nothing to do with the facts of the offence with which the accused is charged. To a large extent the trial process in the case of sexual offences is already protected from such abuse by safeguards against cross-examination of complainants about their sexual activities with others and by restrictions on evidence about those activities. The accused, in turn, is protected from being cross-examined without leave about his criminal sexual activities on other occasions. Questioning is, however, permitted of the complainant in cross-examination about complaints of a similar kind made against the same or other persons in the past. If those complaints are denied, it would ordinarily not occasion a marked degree of inconvenience or occupy much time or expense to permit such a denial to be contradicted by evidence led in the defence case. Whether the disadvantages are disproportionate to the probative value of evidence contradicting the denial is something that can be determined in each instance only by reference to the nature of the statement itself and its potential bearing on, or remoteness from, the facts in issue at the trial. In the light of the authorities referred to, however, it would be wrong to proceed on the footing that the finality rule automatically excludes the adduction of evidence to contradict the complainant's denial.

[17] In this context, it is relevant to notice that, while in *Chandu Nagrecha* the Court of Appeal recognised that evidence of the making of an earlier complaint against the complainant's former employer Mr Lee ought to have been admitted at the trial, the learned lords justices were not prepared to say that evidence that it was false would also have been admissible. In giving the reasons of the Court, Rose LJ ([1997] 2 Cr App R 401, 409) distinguished two other English decisions in which evidence had been excluded. He did so on the ground that the complainants in each instance had admitted making complaints against others, so that, if the evidence tendered there had been admitted:

> "… there would necessarily have been an exploration at some length of irrelevant and peripheral issues as to the falsity or otherwise of complaints which had been made, [whereas] in the present case … there would have been no such broad investigation."

It is ordinarily not the process of proving that an earlier complaint against someone else was in fact made by the complainant, but rather the investigation of the truth or falsity of the complaint that is liable to take up time and divert attention from the issue at the trial.

[18] In any event, it is not necessary here to decide whether or not evidence would have been admissible, or ought to have been admitted, to show that the threat to report Galley was "true" in the sense that it was justified by something Galley had said to the complainant. No doubt it was to some extent implicit in the circumstances of the statement put to but denied by him in cross-examination that the report he was

threatening to make to the prison authorities would be false. However, I do not understand Mr Rafter's submission for the appellant to be more than the defence ought to have been permitted to adduce Galley's statement to contradict the complainant's denial, and not that further evidence should be permitted to show that the threat to report Galley for sexually importuning him was without foundation and, in that sense, "false". The distinction is not without difference. In cases of this kind it is only when evidence is led to prove the truth or falsity of the statement in question, as distinct from the fact that it was made, that there is a real risk of diverting the jury from the primary issue they are appointed to determine. That risk may perhaps be heightened in Queensland, where s 101 of the *Evidence Act* 1977 has the potential to convert evidence of a prior contradictory statement into evidence of the facts stated in it.

[19] In my view, therefore, the defence at the appellant's trial ought not to have been prevented from leading evidence from Galley that the complainant, in contradiction of his denial in cross-examination, had in fact threatened to report him for sexually importuning him. Such evidence, even if going only to credit, became admissible once the complainant denied having made that statement or threat. It is true that in the course of cross-examination the complainant had himself gone far to admitting he had a propensity for making complaints. He was asked:

> "You had no compunction or no problem with going to prison officers and complaining about other prisoners at all?"

His answer was:

> "Well, we all did. That's how they worked over there. They just dobbed people for the smallest things."

That response immediately followed an answer in which he said he had "never made a false complaint. We just dobbed each other". It was made in the context of cross-examination involving the incident concerning John Martin, as to which the complainant conceded he had made a false representation to the police. On one view, therefore, he had already acknowledged his propensity for making false statements.

[20] To that extent, the evidence excluded might not have added greatly to the attempt to impeach the complainant's credibility. But I do not think the appeal is capable of being disposed of on that limited basis. The case is one in which the evidence of Galley, related as it was to the complainant's threat to report him for a sexual approach of a kind which at trial he complained had been forced upon him by the appellant, might have carried some real probative value in the minds of a jury who had little else to go on except competing accounts of the two protagonists. The exclusion of Galley's evidence involved a wrong decision of law within the meaning of s 668E(1) of the *Criminal Code*. On behalf of the Crown, Mr Weston on appeal conceded that it would not be open to him to invoke what is still being called the proviso to s 668E(1A) in order to sustain the conviction.

[21] In my opinion, the appeal should be allowed, the conviction set aside, and a new trial ordered of the counts in the indictment.

[22] **THOMAS JA:** The appellant was convicted of two sexual offences (including rape) committed upon a fellow prisoner. This appeal concerns the admissibility of evidence that the appellant wished to call in his defence.

[23] The appellant admitted sexual acts with the complainant but claimed that they were consensual. There were two witnesses whom he desired to call. The evidence of the first such witness, Corrigan, was admitted. It was to the effect that some weeks before the time of the alleged offences the complainant had asked him whether, if someone was raped in gaol, it would help his chances of getting bail. Corrigan had replied "I'm sure it would". I agree, with respect, that such evidence was rightly received. It was capable of showing a motive for making a false allegation and as such was capable of bearing upon the subject whether the rape had actually occurred. It might also be regarded as going to the collateral issue of bias of a witness[1], as to which independent evidence may be called.

[24] However the learned trial judge refused to permit the defence to call evidence from another witness, Galley, of another alleged conversation between Galley and the complainant. That conversation had been put to the complainant in cross-examination but he had denied it. The evidence that Galley could give has been set out in para [3] of the reasons of McPherson JA and need not be repeated. That evidence could be interpreted as tending to prove that the complainant was, at a time very close to the time when the present complaint was made, willing to "set up" or falsely accuse another prisoner of propositioning him for sex, if to do so would be to his advantage. It is true that the evidence does not suggest a specific bias against the appellant, but if received it could support the view that he was a person with a disposition to make false sexual complaints.

[25] His Honour considered that this evidence fell within the "finality rule"[2] as the evidence only went to the credit of the complainant and held that it could not be contradicted by affirmative evidence.

[26] The question then is whether such evidence should have been received.

Exceptions to the finality rule

[27] Bias of a witness and corruption of a witness are recognised exceptions to the finality rule[3]. In discussing the "corruption" exception, Wigmore[4] comments:

> "The theoretical place of this sort of impeachment is not easy to determine. It is related in one aspect to interest, in another to bias, in still another to character (ie involving a lack of moral integrity). It suffices to point out that the essential discrediting element is a willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony".

The learned author recognises bias, corruption and interest as aspects of the quality of partiality, evidence of which may be adduced to impeach the credit of a witness. An offer to testify corruptly is a good and clear example of the "corruption" exception. There is no doubt that a legitimate collateral issue is raised in such a case, and that evidence to support such an allegation may be independently called.

---

1 See *Smith v The Queen* (1993) 9 WAR 99.

2 See *Palmer v The Queen* (1998) 193 CLR 1, 21, 24; *Natta v Canham* (1991) 32 FCR 282, 297; D Byrne and J D Heydon, *Cross on Evidence* (Australian ed. Butterworths) paras [17580] et seq.

3 See *Cross on Evidence* paras [19030], [19035].

4 J H Wigmore, *Wigmore On Evidence* (Chadbourn Revision, vol 3A, 1970) para [956] at 802-803.

[28] In para [963] Wigmore appends a variety of decisions dealing inter alia with "habitual false charges" by witnesses. Those decisions reveal inconsistent rulings, some admitting such evidence and others excluding it. Wigmore left little doubt of his conviction that such evidence ought to be received, stating:

> "It is time that the courts took warning here, and became more liberal. They know, and all know, that the court-room has its quota of false claimants and pretended victims of wrongs; some are children, some eccentrics, some hysterics, some insane, some nymphomaniacs, some conscious blackmailers. It is hard enough, at least, to detect and expose them. To hamper this exposure with the shibboleth 'res inter alios acta' is unpractical. And the injustice of the situation is often intensified by this maddening prohibition of the very evidence to which a common-sense tribunal would most quickly resort".

Wigmore's concern was in relation to those cases which insisted that although evidence of conduct indicating a specific corrupt intention in respect of the case in hand was admissible, evidence of conduct indicating in general corrupt moral character was not. He saw no good reason for the continued exclusion of evidence of the latter kind.

[29] The difference of opinion noted by Wigmore in relation to the latter cases seems to have been progressively resolved, at least in the United States, largely toward the more liberal view which he favoured[5]. Over the same period something of a similar trend, although it is less pronounced, can be seen in other common law countries including Australia. I do not think that evidence of this kind is still limited to that described by Pollock CB in 1847, namely "those matters which affect the motives, temper, and character of a witness, not with respect to his credit, but with reference to his feelings towards one party or the other"[6].

[30] Some of the decisions to which I am about to refer suggest, at least in relation to complaints of sexual offences, that evidence showing a disposition on the part of a prosecution witness to make or support false complaints may be called. The issue to which such evidence ultimately goes is whether or not the offence was committed. The decisions which incline me to this view include *Phillips*[7], *Busby*[8], *Knight v Jones ex parte Jones*[9] and *Nagrecha*[10]. Other cases such as *LSS*[11] and *Lowrie and Ross*[12] have identified a tendency to broaden the scope of cases in which "bias" may be identified as a legitimate collateral issue. In *Lowrie and Ross*[13], following the giving of a number of examples where collateral facts are recognised as being properly in issue, all members of the court agreed with the following statement:

---

5 *Covington v State*, 703 P.2d 436 (Alaska. App. 1985); *People v Wall*, 95 Cal.App.3d 978, 157 Cal.Rptr.587 (1979); *People v Randle*, 130 Cal.App.3d 286, 181 Cal.Rptr. 745 (1982); *People v Adams*, 198 Cal.App.3d 10, 243 Cal.Rptr. 580 (1988); *Little v State*, 413 N.E.2d 639 (Ind. Court. App. 1980); *State v Chambers*, 370 N.W.2d 600 (Iowa App. 1985); *Commonwealth v Bohannon,* 376 Mass. 90, 378 N.E.2d 987 (1978); *People v Mandel*, 61 A.D.2d 563, 403 N.Y.S.2d 63 (1978); *State v Boiter*, 396 S.E.2d 364 (S.C.1990).

6 *Attorney-General v Hitchcock* (1847) 1 Ex.91, 154 ER 38, per Pollock CB at 42.

7 (1936) 26 Cr.App R 17.

8 (1982) 75 Cr.App R 79.

9 [1981] Qd R 98.

10 [1997] 2 Cr.App R 401.

11 [2000] 1 Qd.R. 546.

12 [2000] QCA 405; CA Nos 95 and 92 of 2000, 3 October 2000.

13 Ibid at para 43.

> "Some of the above examples may be explained under the 'bias' exception; others may be difficult to explain on any other basis than practice and the obvious injustice of excluding them. The "bias" exception is probably wider than the literal meaning of that word suggests. However I do not think it desirable to generalise in an area where so many factors may come into play according to the circumstances of the particular case. The rule against finality of answers on credit and the exceptions to it are not in doubt. Individual situations will no doubt be identified from case to case where it would be unjust to deprive an accused person of the right to lead evidence destructive of the credibility of another witness when the circumstances do not tidily fit within the recognised exceptions".

[31] There is considerable force in the following statement, quoted with approval in *Nagrecha*[14]:

> "If the only issue is consent and the only witness is the complainant, the conclusion that the complainant is not worthy of credit must be decisive of the issue".

Statements in appellate courts that "the credibility of the complainant's account was the critical issue"[15] are now commonplace. It seems to me that when such a case comes down to the word of the complainant against the word of the accused, there are some circumstances in which collateral conduct of the complainant may properly be regarded as going to the central issue of guilt or innocence. The real difficulty is in drawing the line between matters that merely have a serious effect upon credit and those which should be identified as manifesting corruption, bias or some other recognised exception to the finality rule.

[32] In a criminal trial the defence may call evidence showing that a prosecuting policeman has been prepared to go to improper lengths to secure a conviction. Such evidence is not always limited to improper conduct in the course of the subject prosecution, at least if the improper conduct is indicative of a method or propensity[16]. The Queensland decision of *Knight v Jones; ex Parte Jones*[17] is in my view supportable on this basis, although the stated basis of the decision is that evidence of the improper activity of the arresting policeman on other occasions should be received as "similar fact evidence". The court, in reliance upon *Lowery v The Queen*[18], acknowledged that while the Crown would not have been permitted to call such habit or propensity evidence (because a jury might place too much weight on it), it was a different matter if the accused were to adduce such evidence because the policy behind the rule no longer applied. The decision has been criticised as "marginal"[19]. Its result is in my view more readily justifiable on the footing that the evidence revealed a corrupt or tainted prosecution. The propriety of receiving evidence that can impugn the reliability of the investigation or "taint the investigation" has been recognised in *Wakeley v The Queen*[20], even when the precise basis upon which it is said to be tainted

---

14 *Nagrecha* at 406.
15 *R v Tribe* [2001] QCA 206; CA No 349 of 2000, 1 June 2001 at para 37.
16 *Knight v Jones; ex parte Jones*; *Harmer v R* (1985) 28 A Crim R 35.
17 *Knight v Jones; ex parte Jones*
18 [1974] AC 85, 102.
19 *Cross on Evidence* at para [19065].
20 (1990) 64 ALJR 321, 324, 325.

may be difficult to define. *Wakeley* was concerned with the adduction of such evidence by cross-examination, but evidence of that kind was treated by the court as a legitimate issue in the trial going to matters over and above the credit of particular witnesses.

[33] In *Nagrecha*[21], the exclusion of evidence that the complainant had made allegations of sexual impropriety against men other than the accused was regarded as an error justifying a retrial. The court seems to have treated the allegations as false complaints. This approach is consistent with that taken in the American decisions referred to in note 5 above. A similar result may be seen in *Phillips*, *Busby*, *Marsh*[22], *Funderburk*[23] and *LSS*[24] although in each of those cases the false complaint or improper conduct was directed towards the accused. However I do not think that that latter factor should now be regarded as a pre-requisite to admissibility.

[34] McHugh J observed in *Palmer v The Queen*[25] that "evidence concerning the motive or lack of motive in the complainant for falsifying her complaint is admissible not only in relation to her credit but also in relation to the facts-in-issue in the case". His Honour further agreed that the distinction between evidence as to credibility of witnesses and evidence as to facts in issue is productive of absurdity, but recognised the need for preventing trials becoming burdened with side issues, and the need for "case management" rules such as the finality rule. His Honour suggested that the distinction between issues of credit and facts in issue should not be regarded as hard and fast rules of law, and that the finality rule should be seen as "a rule of convenience and not of principle"[26].

[35] In my view there is not a great deal of difference between evidence that shows the motive for making a false sexual complaint and evidence which shows that a complainant from time to time has made false complaints. Evidence of each kind can serve to explain what might otherwise be inexplicable. Evidence of each kind may give the jury at least some insight into an unusual mind, and a possible understanding of why the complaint might not be true.

[36] I do not think it matters whether the present question is approached, as McHugh J suggests, by the "adoption of a more flexible view as to when matters going to the credibility of a witness should be admitted as evidence probative of the facts in issue"[27], or whether it should simply be recognised that evidence of previous false charges may properly be regarded as falling into the "corruption" exception to the finality rule. For my part I prefer the latter course as it preserves a recognised structural approach and it may assist in leading to greater predictability in rulings than recourse to perceptions of justice from case to case.

[37] Whichever view is taken, it seems to me that Galley's evidence ought to have been received. It is true that no particular reason emerges why the complainant would make a false complaint against this appellant, but in the light of its combination with

---

21 Above.
22 (1986) 83 Cr App R 165, 169.
23 [1990] 1 WLR 587; [1990] 2 All ER 482.
24 Above
25 Above at 22.
26 Ibid at 23.
27 Ibid at 24.

Corrigan's evidence, it could support a submission that the complainant had both reason and disposition for making such a false complaint. It is appropriate that the evidence of both Galley and Corrigan be considered in tandem as aspects of a circumstantial case that the defence wished to present.

Summary

[38] The making of false sexual complaints on other occasions may properly be the subject of an exception to the finality rule, provided that it has a clear tendency to support the view that the subject complaint is false. Such evidence is not limited to complaints or conduct directed against the accused. Of course matters such as remoteness in time and significant factual dissimilarity might well justify a decision in the trial court to exclude such evidence as not probative. In this context it may be noted that in the U.S. decision of *State v Boiter*[28] the bare accusation of an eight year old child made nine years earlier was regarded as "too remote to be of sufficient probative value". It is however unwise to attempt to lay down in advance the criteria that will make such evidence admissible in particular cases. The reception of such evidence will in some cases be overlaid with issues arising under the *Criminal Law (Sexual Offences) Act* 1978. I have considered possible answers to these problems, but, again, it is preferable to postpone further consideration of such matters until they actually arise. The present case should be identified as one where there was sufficient evidence to raise for the consideration of the jury the question of a lack of moral integrity on the part of the complainant such as to raise the reasonable possibility of a false complaint.

[39] The appeal should be allowed. I agree with the orders proposed by McPherson JA.

[40] **WHITE J:** I have read the reasons for judgment of McPherson JA and Thomas JA where the relevant facts are set out.

[41] It is a rule of long standing that evidence cannot be adduced to contradict the denial of a witness in cross-examination on matters affecting only credit save for certain well-recognised exceptions. The rationale for the rule has been variously expressed but it is, in essence, to avoid potential endless exploration of issues which may obliquely throw some light on the issues in question, *Toohey v Metropolitan Police Commissioner* [1965] AC 595 at 607. So far as jury trials are concerned, it serves to preserve the trier of fact from being distracted by irrelevant, or only marginally relevant, issues, *Attorney-General v Hitchcock* (1847) 1 Ex 91; 154 ER 38 and see the discussion in *Cross on Evidence* at [17580].

[42] The rule has properly been characterised, at least since its modern enunciation in *Hitchcock*, as a rule of convenience, *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 per Starke J at 551, but has tended, nonetheless, subject to the exceptions, to be strictly applied. More recently, it has been observed that its rigid application has on occasion led to the exclusion of evidence of considerable potential probative value. It has been criticised by the Australian Law Reform Commission as "an artificial and inflexible limitation which may result in the court being misled", Report No. 26, *Evidence (Interim)* (1985) Vol 1, p 226, quoted by McHugh J in *Palmer v The Queen* (1998) 193 CLR 1 at 23.

---

28 See note 5 above.

[43] The exceptions to the rule which permit evidence to be received in rebuttal include bias, corruption, a reputation for untruthfulness and medical or physical disability, see *Cross* [17595]. The alleged bias or corruption have traditionally been directed towards "one party or another", *Hitchcock* per Pollock CB at 100 and 42. Here Galley was not a party to the proceedings and there was nothing to connect any ill-will which the complainant might have borne Galley to the appellant and the evidence was excluded on that ground.

[44] It is important not to elevate the finality rule and its exceptions to the status of a statutory pronouncement. As the Full Court of the Federal Court said in *Natta v Canham* (1991) 32 FCR 282 at 300:

> "… the court is not bound to the view that the exclusionary rule is absolute or that the categories of exceptions to it are closed. It is a rule of practice related to the proper management of litigation. A trial judge should not be precluded from determining in an appropriate case that the matter on which the witness' credit is tested is sufficiently relevant to that credit as it bears upon issues in the case that such evidence may be admitted."

[45] Similarly in *Palmer*, McHugh J at 23 considered that evidentiary rules based on the distinction between issues of credit and facts in issue should not be regarded as hard and fast rules of law but should instead be seen "as a well-established guide to the exercise of judicial regulation of the litigation process" quoting *Natta v Canham* at 298. This does not mean that settled authority can be disregarded. For reasons of convenience which lie at the heart of the rule, independent evidence rebutting a witness's denial on matters going to credit only will not ordinarily be admitted. McHugh J said of this proposition in *Palmer* at 23-24:

> "In this, as in other areas of the law of evidence, a distinction exists between what is relevant and what is admissible. In general, evidence of a relevant fact is excluded only when it infringes some policy of the law, one of which (even in civil cases) is that evidence of a relevant fact is not admissible if the probative value of that fact is so low that it cannot justify the time, convenience and cost of litigating its proof. If evidence going to credibility has real probative value with respect to the facts-in-issue, however, it ought not be excluded unless the time, convenience and cost of litigating the issue that it raises is disproportionate to the light that it throws on the facts-in-issue."

[46] But, as *Piddington* demonstrates, the distinction between evidence going solely to credit and evidence which is probative of the facts in issue may be productive of disagreement, see Latham CJ at 546-547 and Starke J at 551 in favour of admitting evidence to rebut a witness's evidence of how he came to be present at the scene of the accident, while Dixon J at 554, Evatt J at 557-558 and McTiernan J at 567 thought that the evidence could throw no light on the question whether the witness had seen the accident.

[47] There are recent cases which support an extension of the categories of evidence which may be admitted in rebuttal of matters of credit. In *Urban Transport Authority v Nweiser* (1992) 28 NSWLR 471 evidence was sought to be led that a worker, prior to the alleged subject injury at work, sought to enlist fellow-workers to support a false claim which had been denied in cross-examination. Clarke JA at 478, with whom

Mahoney and Meagher JJA agreed, said that the evidence was admissible on what he described as "the better view", as relevant to the issue whether the subject accident occurred. In this the court followed the approach of the Full Federal Court in *Natta v Canham*, which was a claim for damages arising out of a motor vehicle accident where evidence was permitted to be called after the plaintiff had denied in cross-examination that she had proposed staging rear-end collisions in the past to claim damages. The court said at 300:

> "Ms Natta's credit in the present case was of vital importance not only to the treatment to be given to her testimony concerning the circumstances and sequelae of the accident, but also to the faith that could be reposed in medical opinion based upon history supplied by her. The fact, if it were the fact, that she had been prepared in 1984 and 1987 to propose the pursuit of a fictitious claim for damages arising out of a staged accident was a matter the trial judge could properly take into account without embroiling the court in a multiplicity of peripheral issues. It demonstrated, if true, an approach to the litigation and claim process that called into serious question the extent to which she could be believed in what she told the court and her doctors in important areas concerning the extent and location of her pain which to a significant degree could not be independently verified. The matter of which Giakoumelos gave evidence was an important one which the trial judge was entitled to enquire into in the interests of justice, whether or not it came within any of the traditional exceptions of the rule against evidence on collateral issues."

[48] Cases alleging sexual misconduct are in a particular category where the essential fact in issue is often the credit-worthiness of the complainant because there is rarely other evidence to bear upon the resolution of the central question whether the offence was committed.

[49] In *R v Funderburk* [1990] 1 WLR 587 an aspect of the child complainant's evidence at the trial of the appellant charged with counts of sexual intercourse with her was that she was a virgin at the time of the first act of intercourse with him. The defence was not permitted to call evidence of previous inconsistent statements by her that she had engaged previously in sexual intercourse with two other men. The court characterised the evidence as going to the very heart of the complainant's evidence that she had intercourse with the accused.

> "Unchallenged, the descriptive details could give the account the stamp of truth: detail often adds versimilitude, and it seems to us that it certainly would have here. But if a detail of such significance is successfully challenged it can destroy both the account and the credit of the witness who gave it." At 597.

The court added:

> "We are disposed to agree with the editors of *Cross on Evidence*, 6th ed (1985), p 295 that where the disputed issue is a sexual one between two persons in private the difference between questions going to credit and questions going to the issue is reduced to vanishing point."

[50] A recent Court of Appeal decision in England upon which Mr Rafter placed considerable reliance is *Chandu Nagrecha* [1997] 2 Cr App R 401. At the trial of the

appellant for indecently assaulting the complainant who was his employee, in respect of which there were no witnesses, the judge refused to admit evidence from a former employer of the complainant that she had made similar complaints against him two to three years earlier which, under cross-examination, she had denied having made. The court referred to *Funderburk* and approved the passage in *Cross and Tapper on Evidence* (8th ed, 1995) p 341 that:

> "It has also been remarked 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 the difference between questions going to credit and questions going to the issue to vanishing point. If the only issue is consent and the only witness is the complainant, the conclusion that the complainant is not worthy of credit must be decisive of the issue" at 406.

Rose LJ at 410 noted that the evidence:

> " … went not merely to credit, but to the heart of the case, in that it bore on the crucial issue as to whether or not there had been any indecent assault. As to that matter, only the complainant and the appellant were able to give evidence. In our judgment, that being so, the learned judge ought to have permitted the evidence to be called because it might well have led the jury to take a different view of the complainant's evidence."

In that case there was no risk of embarking on an investigation of the truth or falsity of the earlier incident. The evidence went only to the complainant's denial that she had ever made a previous complaint of a similar kind.

[51] Here the complainant denied in cross-examination the substance of the conversation with Galley which, if accepted as occurring as Galley would say, tended to show that the complainant was a person who was prepared to make false complaints about sexual matters. That was the very fact in issue at the trial. The appellant had denied that the acts were non-consensual.

[52] The complainant in cross-examination had admitted to making complaints to the authorities about other prisoners which he described as merely "dobbing" and not as false complaints although he did eventually concede that he had made a false complaint to police about another person for which he had been convicted. These admissions showed the complainant to be a person of doubtful character and the evidence of the conversation with Corrigan, set out by McPherson JA, which the complainant had denied in cross-examination exposed his credit in relation to sexual complaints. Even so, it could not be concluded that the further evidence of Galley which was of considerable probative value in respect of the central issue, namely, whether or not the appellant had forced the sexual encounter on the complainant, would have had no relevant influence on the jury's verdict.

[53] Thomas JA has proposed that such evidence can more appropriately be regarded as falling with the "corruption" exception to the rule and in this way a more structured approach to exceptions to the finality rule can be preserved. But to so describe it may

unduly proscribe the admission of such evidence. Ultimately the test is much as was posed by Pollock CB in *Hitchcock* at 99 and 42, that is, "whether the fact it is sought to prove in rebuttal could have been revealed in evidence for any purpose independently of contradiction", JH Wigmore *Evidence* (1970), [1003] quoted with approval by the court in *Natta v Canham* at 299.

[54] Where the proposed evidence is so closely connected with the facts in issue that its admission will fairly influence the conclusion of the trier of fact as to those facts then it ought to be admitted, *Piddington* per Latham CJ at 546. As recent decisions have indicated, the finality rule is a case management rule and it ought to be left to the trial judge to determine the sufficiency of the relevance of the evidence proposed to be adduced to test the witness's credit. In making that determination the judge will be assisted by reference to other cases where, in the fashion of the common law, the law has been developed incrementally.

[55] I agree with the orders proposed by McPherson JA.