SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kemp* [2008] QCA 355
PARTIES:	**R** **v** **KEMP, Michael Shane** (appellant)
FILE NO/S:	CA No 90 of 2008 DC No 185 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Rockhampton
DELIVERED ON:	14 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	1 October 2008
JUDGES:	Fraser JA, Jones and Daubney JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISCARRIAGE OF JUSTICE – Conduct of legal practitioners - Misdirection and non-direction – where the Crown Prosecutor made assertions that the accused withheld the name of a witness from police because it would have been adverse to the defence – where the Crown Prosecutor asserted the accused did not cross-examine a witness because it would have been adverse to the defence – whether the Crown Prosecutor's remarks had the effect of misleading the jury into believing the accused had an onus to prove his innocence – whether the trial Judge made sufficient comments to the jury to ensure they were not wrongly influenced – where no miscarriage of justice occurred *Criminal Code* 1899 (Qld), s 668F *R v Allouche* [1998] QCA 216, cited *R v DDR* [1998] 3 VR 580, cited *R v Hay and Lindsay* [1968] Qd R 459, cited *R v M* (1994) 181 CLR 487, applied *R v Pernich & Anor* [1991] 55 ACrimR 464, cited *R v Rigney* [2005] SASC 264, cited

COUNSEL: K A Mellifont for the appellant
B W Farr SC for the respondent

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

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Jones J. I agree with the order proposed by his Honour, and with his reasons for the order.

[2] **JONES J:** The appellant was convicted by a jury of two counts of rape and one count of doing an indecent act in a public place. He was acquitted of a charge of attempted rape. He appeals against the convictions on the grounds –

1. The prosecutor's address in this case disclosed serious irregularities which when taken separately or together produced a real risk of wrongly influencing the verdict:

Nature of Irregularities

(a) Making an assertion that defence counsel did not cross-examine the complainant about a matter (in respect of which the complainant did not give evidence) because the answer would have been adverse to the defence;

(b) Making an assertion that the accused person withheld the name of a potential witness from the police during interview because he would want to first check with the potential witness to see if he would lie for him and implying to the jury that the accused should have provided the name to police and/or call the witness; and

(c) Making an assertion to the jury that the offence was a "classic rape…the textbook rape…no independent witnesses"; thus potentially wrongly distracting the jury from their role of looking at the evidence in favour of seeing the case as a type; and referring to what the defence counsel Mr Lo Monaco sometimes says to juries and referring to same as "a very old chestnut…that's been traipsed up by defence barristers for a very long time".

2. The trial was, thus, unfair, thereby occasioning a miscarriage of justice.

3. The inadvertent use of the screen while a number of witnesses gave their evidence rendered the trial unfair.

[3] The prosecution case was that the complainant and the appellant met for the first time on the evening of 20 October 2002 at the Swan Hotel, Rockhampton. The complainant was then 16 years old and was in the company of two older female cousins. Whilst standing outside the hotel the complainant and her companions engaged in a conversation with a group of males which included the complainant's uncle. The appellant was part of that group. After talking for about 10 minutes the males left. The complainant and her cousins went to a nearby park where they met with other friends and began to drink the alcohol they had purchased at the hotel.

[4] A short time later the appellant and a male companion arrived at the park in a green car. After some conversation a group drove to a place near the gas works on the

banks of the Fitzroy River and then to a caravan park at Parkhurst. Notwithstanding the presence of the complainant's uncle during the course of these travels the appellant made advances of a sexual nature to the complainant which she resisted. The appellant then offered to take the complainant back to the city and to allow her to drive the car. They left Parkhurst with the appellant driving. In the course of this journey the appellant drove down a side road beside the highway and stopped near a bridge, ostensibly to allow the complainant to take over the driving. At that point the appellant again asked her to have sexual intercourse which she refused.

[5] The appellant then got out of the car, went to the passenger's side where the complainant was seated and asked her to kiss him. She refused. He then undid her seatbelt, forced her out of the car and pulled her to the ground. He then took a mattress from the car and told her lie on it. He pulled down his pants exposing his penis and initially tried to put his penis in the complainant's mouth but desisted when she protested. This was the circumstances of the attempted rape upon which the appellant was acquitted.

[6] The appellant then lay on top of the complainant, pinning her hands above her head. He removed her pants to one side and had sexual intercourse with her in the missionary position but he did not ejaculate. When the appellant got off the complainant she commenced to put things back in the car. The appellant stood beside the car and commenced to masturbate himself. This was the substance of the indecent act offence.

[7] The appellant then said to the complainant, "Come on we'll do it doggie style". He pushed her onto the ground and penetrated her vagina with his penis from behind and on this occasion achieved ejaculation.

[8] Before leaving the scene the appellant said to the complainant, "You're lucky, you cunt", which she interpreted to mean that it would have been worse for her if she had not complied.

[9] The appellant then drove the complainant back to the city area to look for her cousins and ultimately delivered her to her residence. The complainant had a shower following which she cut off her hair, she said to change her appearance because she feared further action from the appellant. She told her male flatmate what had happened and he observed her to be distressed. She made a telephone call to her mother who was living in Mount Isa. Her mother called the police who then contacted the complainant.

[10] The statement to her flatmate followed his complaint to her about the length of time she had taken to shower. While she was cutting her hair she said to him, "I don't feel right. I've just been raped". The complainant's mother recalls that in her conversation, the complainant said that she had been raped by Michael Kemp and that Michael Kemp had threatened her in terms that, "He'd get his brothers to rape her as well". This was why she had not reported the matter to the police. In giving her evidence before the jury the complainant made no reference to any such threat but the evidence of that conversation was led from the complainant's mother pursuant to s 4A of the *Criminal Law (Sexual Offences) Act* 1978.

[11] The appellant neither gave nor called evidence but he conducted the case on the basis that the two acts of sexual intercourse were consensual and that the threat inherent in the "you're lucky" conversation was never said. His version of events

was set out in a lengthy taped record of interview, ex 7. The appellant fought the case on the basis that the complainant lacked credibility, that there were no overt signs of her being raped and that the appellant's version was reliable or should at least raise a doubt.

[12] The issue for the jurors then, was whether they could be satisfied beyond reasonable doubt that the complainant gave a truthful account of the circumstances in which the sexual intercourse occurred. By its verdict, the jury was so satisfied. However, the appellant contends that he did not receive a fair trial because of two matters –

1. the conduct of the Crown Prosecutor in three specific respects stated above; and.
2. the inadvertent use of a witness screen for a number of witnesses other than the complainant.

Conduct of the prosecutor

[13] In the course of his address to the jury the prosecutor made three statements which the appellant argues prejudiced his fair trial. The first of the statements with the most potential for harm related to the evidence of the threats and the disparity between what the complainant said in evidence and what she said to her mother. The prosecutor said:-

> "Now she didn't actually give any evidence of the threats either. What she's – what the evidence that you've heard is, at the time she told other people about the threats. Bear with me for a minute. Now, an interesting thing about this is, in cross-examination that was left alone. It didn't come up in evidence in chief, I couldn't get her to it and Mr Lo Monaco never suggested to her in cross-examination, "Look, he didn't threaten afterwards." The danger of that, of course, is that she would say, "Actually, that's right, yeah, he did".[1]

[14] At this point counsel for the appellant objected and the jury was asked to retire. The obvious thrust of the prosecutor's remarks was to suggest that defence counsel did not cross-examine the complainant about threats because he knew there would be an adverse response to his question with the suggestion that the complainant could have given evidence of the threat which it was alleged the appellant had made to her mother about getting his brothers to rape her. In circumstances where the complainant herself did not give evidence of that particular threat it was quite improper of the prosecutor to suggest that he, "couldn't get her to it" and to imply that had he been able to she would have given evidence to confirm what she said to her mother as the preliminary complaint witness. The defence counsel properly objected to the statement thereby interrupting the prosecutor's address.

[15] The prosecutor acknowledged that the objection was properly taken and agreed to correct his comment. On the jury's return he said:-

> "Mr Lo Monaco's concern that I have spoken to you about threats. Now, the threats – we've all been hearing about from Pearl, we've been hearing about from well, Pearl, essentially. These threats never came from the complainant. Evidence of these threats never came from the complainant at any point. The threats that she says she heard, were – and this gets into evidence and my friend has quite

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1 Record book p 228/58

> properly put this to her. The threats that she said occurred, was when he said, "You're lucky, you cunt, you know what I could have done to you". She says, "Yes, I know I'm lucky." That's a different thing from her threats about having the brothers come around and rape her.
>
> Now, I am grateful to my friend for pointing that out to me, because I don't want you to be misled by anything I say."[2]

[16] The defence counsel at trial had the opportunity to draw attention to the inconsistency between the complainant's evidence about the terms of the threat and what she had told her mother. In his address, he did so in a general way as follows:-

> "She's told her mother some lies on the phone, including, it seems, if you accept the mother's evidence – I certainly didn't challenge her on this – the mother says that she remembered her daughter saying to her something like, "I've cut my hair to disguise myself because – because he would get his brothers to rape her as well".
>
> Well, that's – I mean that's a pretty serious threat. …but I'm suggesting, ladies and gentlemen, that having told these lies to her mother, and you'll remember on the evidence that it's then the mother who contacts the police.
>
> Once she's spoken to her mother and accused this man of raping her…police have gone around to her place and by this stage, it's simply all too late for her. She's made a very, very serious allegation against [the appellant] for reasons only known to her and the police have become involved. She's really, I suppose, what position does she find herself in if she's lying?"[3]

[17] He referred to the inconsistency again later in his address by commenting on the complainant's statement to her mother about the threat, he said:-

> "She [the complainant] just simply – doesn't appear in her statement. It's never put to him [the appellant] that she said that in her statement. She doesn't give it in her evidence. She's forgotten that she told that lie to her mother. That's what happens when people make things up. They often can't be consistent because they've made things up."[4]

[18] But the matter did not end there. Defence counsel at trial raised the matter again during a break in his Honour's summing up and he sought a strong direction on this and the other matters which are the subject of complaint about the prosecutor's conduct. But he did not seek that the jury be discharged.[5]

[19] The learned primary judge in his summing up dealt with the use to be made of preliminary complaints to the effect that inconsistency between such a complaint and the evidence given by the complainant was relevant to the question of the complainant's credibility. He said:-

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2 Record book p 231/42
3 Record book p 260/30-261/10
4 Record book p 300/30
5 Record book p 333/10-40

> "Any inconsistencies between any preliminary complaint or disclosure which you find was made and [the complainant's] evidence before you, or, indeed, any inconsistencies you may find between the accounts given to Mr Hill and her mother, may cause you to have doubts about the credibility or reliability of [the complainant's] evidence. Whether consistencies or inconsistencies impact upon the reliability of [the complainant] is a matter for you."[6]

[20] Against that background the appellant now contends that the attempts to remedy the harm occasioned by the prosecutor's erroneous comment were insufficient. The respondent does not contest the fact that it was quite improper for the prosecutor to criticise the defence for not examining the complainant on a matter about which she had not given evidence and worse still to suggest that the reason for not doing so was fear of an adverse answer. The duty of a prosecutor to act fairly, impartially, honestly and temperately has been canvassed in many cases. *R v Hay and Lindsay*[7]*; R v Pernich and Maxwell*[8]; *R v Allouche*[9]. There has been a clear breach of that duty here. But the question is whether that breach has resulted in a miscarriage of justice.

[21] The appellant contends that the prosecutor's erroneous comment should have been corrected by the learned primary judge by way of a "quick short and emphatic refutation", adopting the words of Ormiston JA in *R v DDR*[10]. Whether the intervention of the trial judge is called for depends on the circumstances and is often a matter of balance. In this case there was, as a consequence of the objection, an immediate correction though perhaps not in terms as specific as the appellant might have wished. The likely impact of the erroneous comment was certainly reduced thereby. If anything, the discussion served to highlight the inconsistency between the complainant's evidence and her statements to her mother about the nature of the appellant's alleged threats. The defence counsel had time to weigh the competing adverse impact against the forensic benefits which he in fact exploited. He chose not to ask for the jury to be discharged, even though he was aware that such an application was open to him.[11] Whilst the choice made by defence counsel at trial does not determine this Court's consideration of whether the appellant received a fair trial, it does indicate how the principal actors thought the problem should be remedied in the prevailing circumstances. The learned primary judge did not refer to the controversy between counsel but confined himself to referring to the impact of the inconsistencies on the creditworthiness of the complainant. He reminded the jurors of the inconsistency between the evidence of the complainant and that of her mother[12]. The fact that his Honour chose to highlight the inconsistency without any personal rebuke of the prosecutor does not result in any shortcoming in the conduct of the trial. Having regard to the early intervention to correct the erroneous and improper comment and to the fact that the defence counsel had the opportunity to, and did in fact, exploit the complainant's inconsistencies I am of the view that the adverse impact of the prosecutor's transgression was quite minor in this instance.

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6 Record book p 381/1
7 [1968] Qd R 459 at 476
8 (1991) 55 A Crim R 464
9 [1998] QCA 216
10 [1998] 3 VR 580 at 594
11 Record book p 333
12 Record book p 376/45

That of course has to be weighed together with the other matters of complaint to the second of which I now turn.

[22] In the course of his address, the prosecutor made the following comment:-

> "I want to talk a bit more about [the accused's] credibility. I want you to understand this, and his Honour will tell you this and my friend will tell you this. There's no issue about this at all. It is always – the onus is always, at any point during the trial, with the Crown to prove guilt. The onus never shifts to that man there, ever. Okay. So he doesn't have to prove his innocence in any way. He's not obliged to call this mysterious man who drives the green Laser, who can tell us that she consented down by the river. He's not obliged to do that.
>
> But you might think – any one of you men sitting here, just imagine, you're sitting in a police station, and someone in a police station says to you, "Look, we're investigating a rape. This girl says that you raped her." Now, you know that you had consensual sex and you've got a bloke standing right there when you put it on her and she says, "yes", **aren't you going to say the name to the police. Wouldn't you knock yourself out to make sure that the police get a statement from this fellow,** who can give evidence that she consented. **Five and a half years later, there's still no name.**
>
> He doesn't have to give evidence. Like I said, the onus never shifts. I'm not talking about now at the trial. I'm not talking about – Mr Kemp has to call this guy. I'm talking about back then in the record of interview. He's given the opportunity to give the name of the man who could clear him. He's given that opportunity.
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> Now, you would all appreciate this, surely. That if you're being questioned by the police, and at this point in time… here in the interview, he's already been arrested. You're being questioned by the police about something as serious as this, you're going to give up that name straight away. Straight away. The first chance you get.
>
> Now, it's open to you, ladies and gentlemen. You might think that what he's doing is **he's not going to say the name until he's had a chance to gee it up with his mate, and see if his mate will lie for him.**
>
> It goes to his credibility, when he tells you all these wonderful things happened and this young girl, she's just agreed to all this."[13]

[23] For a prosecutor to make such remarks is quite improper. They carried the suggestion that the appellant bore an onus to prove his innocence, that he had an obligation to answer police questions when no such obligation exists and worse still that the jury should infer that he was a person who would corrupt a witness.

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13 Appeal record 239/55-240/38

[24] Strictly speaking, the appellant's credibility was not in issue. He did not give evidence. The question for the jury was what weight should be given to the contents of the record of interview which the appellant gave freely to the police. This assessment had to be made in the context of whether they were satisfied beyond reasonable doubt as to the complainant's allegations.

[25] No objection was taken by defence counsel at trial to these comments but they did give rise to a concern in the mind of the learned primary judge. However, his Honour only made his concern known after the conclusion of addresses. He invited counsel to make submissions about how he should deal with those concerns. The argument was pursued after an overnight adjournment. Defence counsel at trial dealt with the topic only briefly in his address[14]. After hearing the concerns raised by the learned primary judge he did not seek any discharge of the jury but left to his Honour the task of correcting the inappropriate comment from the prosecutor. His Honour did this by saying:-

> "Now, in his record of interview with the police, the defendant told the police that another person was present … But he declined to name that person. The defendant was under no obligation to name that person, and he certainly has no obligation to call that person to give evidence in his defence, and you must not draw any inference adverse to him because he has not called that person to give evidence.
>
> Mr Loudon submitted that in relation to the record of interview between the defendant and the police and the defendant's refusal to give to the police the name of the man who, he says, was present… that you would think that the defendant would have given the name of that person to the police so that they could take a statement from him. Mr Loudon did, in fact, remind you at that point of his address that the onus of proof did not shift to the defence and that the defendant had no obligation to give evidence, but he argued that the defendant's refusal to supply the man's name to the police was something that went to the defendant's credibility. He suggested that you might think that what the defendant was doing was that he was not prepared to give the man's name to the police until he had had a chance to see if his mate would lie for him. **Well, there is no evidence that that was the reason that the defendant refused to give the man's name to the police and it would be pure speculation for you to think that. You are not entitled to speculate.**
>
> You will recall that near the start of the interview the police, as they were required to do by law, gave the defendant certain warnings. Included in that, he was told that he was not obliged to answer questions. He was asked several times whether he was prepared to give this man's name to the police. On each occasion the defendant asked the police officer if he had to give the name, and on each occasion he was clearly told by the police officer that he did not have to, but on one occasion he was also told that if he did it might assist him.

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[14] Record book 275/50

> In refusing to give the man's name to the police, the defendant **was merely exercising his right to remain silent. It would, in those circumstances, be quite wrong for you to reason that because the defendant was refusing to answer this question, he must have something to hide or be guilty of some offence. You cannot use against the defendant the fact that he took notice of the police caution** and accepted their advice that he did not have to answer these questions. **You must not draw against the defendant any adverse inference** because he exercised his right to refuse to answer those questions and supply the man's name to the police. He was not obliged to do so in any event.
>
> In any event, **there could be a number of reasons, consistent** with the defendant's innocence, for which he might not have wanted to supply the man's name. For example, he might have wished to preserve this man as his witness. Bear in mind that he had already been arrested by the police. He might have been aware of some reason why this man would not want to speak to the police. There could be many other reasons why he would not want to give the name.
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> Indeed, **it would not be correct to assume**, as Mr Loudon suggested, that if he had given the man's name to the police this would necessarily have cleared him. The man, for example, might not have had any recollection of the conversation or might not have had a clear recollection of it, or he might have remembered only part of it. In any event, he might not have been willing to speak to the police at all."[15]

[26] The appellant argues that these remarks did not go far enough. There was no correction of the comment about the appellant corrupting a witness, there was no direct rebuke of the prosecutor for making the comments and the correction in any event came too late. The appellant relied particularly on the remarks of Ormiston JA in *DDR* (supra).

[27] In fact, the summing up commenced on the day following the prosecutor's remarks but the relevant passage set out above was not delivered until the second day of the summing up. Importantly, it was one of the last points made to the jury before they retired to consider the verdicts. By its terms the correction delivered by his Honour was quite emphatic, as illustrated by the highlighted words as set out above and it was comprehensive. In my view the correction given in such emphatic terms and at the time it was delivered was sufficient to overcome any adverse impact arising from the prosecutor's remarks.

[28] The remaining complaint about the prosecutor's conduct relates to his description of the offence in this instance as "the classic rape…the textbook rape…". The prosecutor commenced his address by commenting that this would be the last time he spoke to them and that he had to anticipate what defence counsel at trial might say. He then continued:-

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15 Record book 385/40; 397/35-399/50

> "The thing about that is, like I said, I've got to anticipate what's likely to be said. What you sometimes hear, and **having done a few of these with Mr Lo Monaco in the past, I know that what he sometimes says to juries is this, he says something like this, and I suspect if I don't address it he'll say it**…[he then gave a scenario of where there is an allegation of assault the police will want to see the bruises and bumps and then he continued]…
>
> But essentially, **this is a very old chestnut. This is an argument that's been traipsed up by defence barristers for a very long time** and the essence of the argument is this, it's very easy for someone to make an allegation of this nature. All you have to do is go to the police and say, "Someone had sex with me and I didn't consent." It's easy enough to make an allegation of this nature, you very often hear it said. But it's very difficult for a person to defend something like that. All he can say is, well either "I wasn't there", "It didn't happen" Or "She consented."[16]

[29] Counsel for the appellant submitted that the comments of the kind highlighted distract the jury from their role in favour of seeing the case as one of a type of rape that should inevitably lead to conviction. The prosecutor's comments about what defence counsel might say by referring to his comments in other cases is suggestive that typical defence lawyer tricks/tactics were being adopted.

[30] Such comments are tantamount to the prosecutor giving evidence of matters and at the same time they were deprecating of opposing counsel. In *R v Rigney*[17] the Court of Criminal Appeal in South Australia said of similar conduct (at 177 [24] and [25]:-

> "[24] There is no doubt that it would be reprehensible for a prosecutor to convey to the jury that the particular defence advanced by an accused person should be discounted by reason of its being, in that prosecutor's experience, commonplace in the situation faced by the accused, or the resort of guilty persons, or indeed the current vogue. To address the jury in that way would be to imply that exposure to other cases would cause the jury to view the defence with scepticism. It would be an attempt to introduce evidence from the bar table, that is, evidence of the stances of accused persons in other cases. That is to be contrasted, though, with counsel appealing to the jury's experience of human reactions.
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> [25] Similarly, counsel may not convey by words or by inference what is their personal opinion about the case generally or any of the persons involved, or about any issue. To do so breaches both the professional conduct rules which apply in this State and long accepted principles governing the conduct of an advocate…A prosecutor must not address the jury in language which is intemperate or over zealous in its nature. Nor may a prosecutor criticise the framework designed to ensure that accused persons receive a fair trial." (Citations not included)

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16 Record book at p 225

17 (2005) 240 LSJS 172; [2005] SASC 264

[31] The prosecutor's comments complained of in this instance were inappropriate and were apt to confuse the jury. Having said that, however, the prosecutor's words did not go unchallenged. Defence counsel at trial commenced his address by picking up the comments and continued –

> "My learned friend made a lot of comments, and I'm not going to deal with them all, but, right at the very beginning, for example he said to you something about "this is a classic rape. It's a textbook rape". I don't know what textbook he's waving around or he's reading. It's a girl that has complained that sexual intercourse has been performed on her without her consent."

[32] Defence counsel engaging in this forensic jousting suggested that the prosecutor had taken some licence. In fact defence counsel at trial used the challenge to point to the issue of consent and the absence of any signs to corroborate the complainant's assertion that she did not consent. He sought no direction from the learned primary judge to correct any perceived injustice and the controversy was not mentioned by his Honour in the course of his summing up.

[33] In the final analysis it is necessary to consider the combined impact of the three transgressions by the prosecutor which have been discussed. The overall impact in this instance has been significantly reduced by the taking of objections, by, in one instance, the emphatic and comprehensive correction by the learned primary judge and by the thrust and parry of legal argument. In my view, the transgressions by the Crown prosecutor, though deserving of censure, were not such as to result in a miscarriage of justice.

[34] The further specific ground of appeal relates to the inadvertent retention of a witness screen during the taking of the evidence of witnesses other than the complainant. The witnesses who gave evidence whilst the screen unnecessarily remained in place included the arresting police officer whose evidence related principally to the taking of the record of interview and other witnesses who simply provided background evidence to the events of the evening. Though this was a procedural irregularity, it was not suggested that on its own it would amount to a mistrial. Rather it is simply to be looked at as another unsatisfactory feature to be considered with the prosecutor's conduct.

Unsafe and unsatisfactory verdicts

[35] The court pursuant to s 668E of the *Criminal Code* should allow the appeal if it is of the opinion that the verdict of the jury is unreasonable, or cannot be supported on the evidence or that on any ground whatsoever there was a miscarriage of justice. That requires the Court to ask itself whether it thinks on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offences for which guilty verdicts were returned.[18]

[36] The prosecution case against the appellant depended entirely upon the jury's acceptance of the complainant's evidence. The verdict of not guilty on the attempted rape case did not give rise to any suggestion that the jury regarded the complainant as an unreliable witness. Her own evidence was consistent with that count not having been proven. As to the guilty verdicts, they were based principally upon the evidence of the complainant's allegations against the background of her

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[18] *M v The Queen* (1994) 181 CLR 487

behaviour and the preliminary complaints she made. In my view it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt in respect of those offences.

[37] I would therefore dismiss the appeal.

[38] **DAUBNEY J**: I respectfully agree with the reasons for judgment of Jones J, and with the order proposed by his Honour.