# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Lawton* [2010] QCA 353 |
| PARTIES: | **R**<br>**v**<br>**LAWTON, Peter William John**<br>(appellant) |
| FILE NO/S: | CA No 114 of 2010<br>DC No 3325 of 2008 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 14 December 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 26 November 2010 |
| JUDGES: | Muir and Chesterman JJA and Philippides J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. Appeal allowed.**<br>**2. The appellant's convictions on counts 1, 3, 5 and 6 should be quashed.**<br>**3. Verdicts of acquittal should be entered with respect to counts 1, 3, 5 and 6.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – OTHER CASES – where complainant gave a recorded interview with police in which she described instances when the appellant had sexually assaulted her – where in a second interview nine months later the complainant raised new instances including one which she had denied in the first interview – where the police officer's questioning during second interview was leading, persistent and repetitious – where the interviews were admitted into evidence and became the complainant's evidence-in-chief – whether the contents of the second interview was unfairly prejudicial to appellant – whether the recording of second interview should have been admitted into evidence<br><br>CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL |

ALLOWED – where appellant was charged with maintaining an unlawful sexual relationship with the complainant child – where complainant gave inconsistent and contradictory accounts of instances of abuse – where complainant's incriminating account was elicited by persistent and intimidating police questioning – whether the convictions were unsafe and unsatisfactory – whether the verdicts were unreasonable and should be set aside

*Criminal Code* 1899 (Qld), s 229B, s 229B(2), s 590AA
*Evidence Act* 1977 (Qld), s 21AK, s 93A, s 98, s 130

*House v The King* (1936) 55 CLR 499; [1936] HCA 40, applied
*M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, followed

COUNSEL: P E Smith, with L P Burrow, for the appellant
R G Martin SC for the respondent

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

[1] **MUIR JA**: I agree with the reasons of Chesterman JA and with the orders he proposes.

[2] **CHESTERMAN JA**: The appellant was arraigned in the District Court on an indictment which charged him with:

(1) Between 28 June 2002 and 25 December 2004 at Brooloo maintaining an unlawful relationship of a sexual nature with N, a child under 16 years;

(2) Between 28 June 2002 and 18 November 2002 at Brooloo unlawfully and indecently dealing with N, a child under 12 years, who was, to his knowledge, his daughter;

(3) Between 31 May 2003 and 1 September 2003 at Brooloo unlawfully procuring N, a child under 12 years, who was, to his knowledge, his daughter, to commit an indecent act;

(4) Between 31 May 2003 and 1 September 2003 at Brooloo unlawfully and indecently dealing with N, a child under 12 years, who was to his knowledge, his daughter;

(5) Between 12 December 2003 and 27 January 2004 at Noosa North Shore unlawfully and indecently dealing with N a child under 12 years, who was, to his knowledge, his daughter;

(6) Between 1 December 2004 and 25 December 2004 at Woodgate unlawfully and indecently dealing with N a child under 16 years, who was, to his knowledge, his daughter.

[3] After a five day trial the appellant was, on 23 April 2010, convicted of counts 1, 3, 5 and 6. He was acquitted of count 4. The jury could not reach a verdict on count 2 and on 10 May 2010 the prosecution endorsed the indictment that it would not further prosecute that charge.

[4] Also on 10 May 2010 the appellant was sentenced to two and a half years' imprisonment for the charge of maintaining the sexual relationship and 18 months' imprisonment on each of the conviction on counts 3, 5 and 6. All sentences were to be served concurrently. No recommendation was made for parole.

[5] The appellant appeals against his conviction. He does not seek leave to appeal against his sentence. He advances two grounds of appeal:

(a) A recording of an interview between the complainant N and police should not have been admitted into evidence;

(b) The convictions were unsafe and unsatisfactory by reason of the verdicts on counts 2 and 4 and inconsistencies in the accounts given by the complainant.

[6] N is the appellant's natural daughter. She was born on 31 August 1992 and was therefore 10 or 11 at the time alleged in count 3; 11 at the time alleged for count 5, and 12 at the time alleged for count 6. Although count 1 alleged maintaining an unlawful sexual relationship between 28 June 2002 and 25 December 2004 the earliest particular proved, that in count 3, was alleged to have occurred between 31 May 2003 and 1 September 2003. The longest possible duration of the relationship was therefore between 31 May 2003 and 25 December 2004.

[7] N was interviewed twice by police officers, on 16 February 2007 and 28 November 2007. The recordings of both interviews were admitted into evidence pursuant to s 93A of the *Evidence Act* 1977. When tendered they became N's evidence-in-chief. She was then cross-examined, in advance of the trial, pursuant to s 21AK of the *Evidence Act*.

[8] The appellant's first ground is that the recording of the second interview should not have been admitted into evidence. An application to have it excluded was made to a District Court judge pursuant to s 590AA of the *Criminal Code*, but was unsuccessful. The appellant complains that the admission of the recording was unfair and its contents unfairly prejudicial.

[9] Section 93A of the *Evidence Act* provides:

"(1) In any proceeding where direct oral evidence of a fact would be admissible, any statement tending to establish that fact, contained in a document, shall, subject to this part, be admissible as evidence of that fact if –

(a) the maker of the statement was a child … at the time of making the statement and had personal knowledge of the matters dealt with by the statement; and

(b) the maker of the statement is available to give evidence in the proceeding.

…

(3) Where the statement of a person is admitted as evidence … pursuant to subsection (1) … the party tendering the statement shall, if required to do so by any other party … call as a witness the person whose statement is so admitted … ."

[10] Section 98 gives the court hearing the proceedings power to refuse to admit the statement of evidence. It provides:

> "(1) The court may in its discretion reject any statement … notwithstanding that the requirements of this part are satisfied with respect thereto, if for any reason it appears … to be inexpedient in the interests of justice that the statement … be admitted."

[11] There is, as well, the general power recognised by s 130 of the *Evidence Act* to exclude evidence:

> "if the court is satisfied that it would be unfair to the person charged to admit that evidence."

[12] The offence charged as count 1 in the indictment is provided for by s 229B of the *Criminal Code*:

> "(1) Any adult who maintains an unlawful sexual relationship with a child under the prescribed age commits a crime.
>
> Maximum penalty – life imprisonment.
>
> (2) An unlawful sexual relationship is a relationship that involves more than 1 unlawful sexual act over any period.
>
> (3) For an adult to be convicted of the offence … all the members of the jury must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship with the child involving unlawful sexual acts existed.
>
> (4) …
>
> (5) …
>
> (6) …
>
> (7) An adult may be charged in 1 indictment with –
>
> (a) the offence of maintaining an unlawful sexual relationship with a child … ; and
>
> (b) 1 or more other offences of a sexual nature alleged to have been committed by the adult in relation to the child in the course of the alleged unlawful sexual relationship … .
>
> (8) …
>
> (9) …
>
> (10) …
>
> ***prescribed age*** … means –
>
> …
>
> (b) … 16 years."

[13] Section 229B was amended with effect from 1 May 2003. Prior to the amendments s 229B(2) provided that an accused could not be convicted of the offence:

> "… unless it is shown that the accused … has, during the period in which it is alleged that he … maintained the relationship … done an act defined to constitute an offence of a sexual nature … on 3 or more occasions and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship … ."

[14] Count 1 charged the appellant with maintaining an unlawful sexual relationship with N between 28 June 2002 and 25 December 2004, a period which both predates and postdates the amendments to s 229B. The amendments were effected by the *Sexual Offences (Protection of Children) Amendment Act* 2003 which, although it contained a transitional provision allowing evidence of unlawful sexual acts done before the commencement of the amendments to be admitted for the purpose of deciding whether unlawful sexual acts after its commencement established the existence of an unlawful sexual relationship, says nothing about the question which arose in the prosecution of the appellant. That question is whether it was necessary for the prosecution to prove at least three offences of a sexual nature, or more than one, as an element in the charge of maintaining the relationship over the period before and after 1 May 2003.

[15] Having heard argument on the point the learned trial judge instructed the jury, out of fairness to the appellant, that they could not convict him of count 1 unless satisfied that at least three of the offences charged as counts 2 to 6 had been committed.

[16] His Honour said:

> "In relation to … count 1 the prosecution must prove, firstly, that the (appellant) did an act defined as an offence of a sexual nature in relation to the child on three or more occasions. In this case the prosecution relies on the offences in 2 to 6 of the indictment … .
>
> … Before you can be satisfied of this element you must all agree as to the same three or more offences. If you cannot be satisfied of the same three or more offences, then the charge of maintaining has not been established."

[17] The appellant and N's mother lived together, on and off for a few years. They separated when he discovered that Ms N (as I shall call her) was pregnant with N. In fact she gave birth to twins the other of whom was a boy, A. The appellant had no contact with his twin children until they were almost five years of age. They expressed curiosity about their father and Ms N effected an introduction. From about June 2002 N and her brother visited their father, stayed overnight at his house at Brooloo and spent part of the school holidays with him. The visits came to an end at Christmas 2004 after a disagreement between the appellant, his children and Ms N.

[18] Brooloo is a hamlet near Imbil. The appellant's home was a small tumbledown cottage. The nearest shops were at Imbil.

[19] The offence alleged in count 2 was particularised as occurring on one of the early access visits to Brooloo. The complaint was that the appellant drove N to the shops at Imbil and on the way home drove off the road into bushland where he stopped his

vehicle, told N to take her pants off, and kneeling down in front of her in the cabin of his vehicle pushed her seat back and licked her genital area.

[20] Count 3 was said to be an occasion when the appellant was alone in the house with N. Her brother A and the appellant's older son S had gone camping. The appellant bought fish and chips for dinner, which was a treat. They afterwards played strip poker. N lost and according to the appellant's rules of the game was obliged to take her clothes off. The appellant also lost occasionally and took most of his clothes off but N stopped playing when the appellant had only pants to remove.

[21] Count 4 was an occasion following the game of poker. N went to sleep in S's bedroom but being cold went to the appellant's bedroom and got into bed with him. She woke to find his hand rubbing her genitals.

[22] Count 5 occurred during the 2003 Christmas school holidays. The appellant, N, A and S camped on the North Shore at Noosa. N's versions differed slightly as to whether she slept in her own tent or she had a tent with the appellant. One night when she was sleeping in his tent, or the appellant came to her tent, she woke to find his hand stoking her genitals.

[23] Count 6 occurred in the appellant's campervan which he had driven to Woodgate for the 2004 Christmas holidays. N and A went with him. On one occasion he sat next to her on a couch in the van and put his hand between her legs.

[24] It was following this holiday that the appellant argued with Ms N and his children, and returned them to their mother after which he did not see them again.

[25] N finished her primary schooling, grade 7, at the end of 2004. She then attended Morayfield State High School for the next two years, which were troubled ones for her. She attended the school nurse, Ms Scriven and the chaplain Ms McLean for counselling about a number of problems but made no mention of sexual abuse. She also attended the Caboolture Mental Health Service on several occasions but again made no complaint of sexual abuse.

[26] The first complaint N made against the appellant was on 30 May 2006 after she had attended a youth camp at which the topic of sexual abuse had been discussed. N told Ms Scriven:

> "… sexual abuse has happened (to me). … It started off when I was about eight … or 10, and it started in a shower … and also … when I used to go and stay, sleep, I'd have to sleep in the same bed as my dad and he would put his hand down my pants and get me to try and do the same to him.
>
> … The last time I remember this happening was about three or four years ago … just before Christmas … and (I) said … I want to go home."

[27] She identified the location of these events as the appellant's mobile home which was parked in the front yard of the appellant's mother's house at Beachmere. N told Ms Scriven that she had reported to Ms N what had happened in the shower. She said that every time she and A returned from the appellant Ms N would ask her if anything had happened, and N said it had not, "because (she) did not want anything to happen to (the appellant)." N identified Gympie (to which Imbil and Brooloo are adjacent) as the location in which the appellant would "put his hands in (her) pants

… ." She made no mention of any improper conduct occurring at Woodgate when they were there on holidays.

[28] N told the chaplain Ms McLean in 2006 that "she'd been continually abused while … visiting (the appellant's) house." N was upset and gave no particulars. She said the abuse occurred when she was 12 years old.

[29] N made no complaint against the appellant to her mother until late 2006 when she wrote a letter expressing distress with several aspects of her life and in which she wrote:

> "(the appellant) sexually abused me he made me do stuff that I didn't feel comfortable with but he bribed me to do he use (sic) to stick his face down there & his hands to (sic) and he would make me put my hands down his to (sic) but I told him clearly not (sic) and that is over half the reason why he dumped us if you wan (sic) to take this to court you can but he has left and I am happy but he hurt me so he needs to be delt (sic) with."

The letter went on to complain about other men who had troubled her.

[30] In her evidence Ms N denied that N had ever complained about the appellant when she returned from visiting him. Ms N also denied asking N, on her returns, whether the appellant had touched her.

[31] N and her mother went to the police on 16 February 2007. This was the occasion of the first interview, a recording of which was tendered into evidence pursuant to s 93A of the *Evidence Act*. In answer to a question N said that she was in the police station:

> "… because my dad sexually abused me … he use to do it whilst I was sleeping and I'd wake up … he used his fingers … ."

This happened at the appellant's house in Imbil when she:

> "might have been eleven or twelve"

or

> "… maybe seven or eight."

She was asked what would happen when she woke up and she said:

> "… he was rubbing me on the vagina and I just thought that it was normal so I'd let him do it. … there were times that I would wake up with my hand down his pants. … I was only young when it first started I probably would have been seven or eight … . it just happened every time we went to see him. … and he left because I told him no. … And he got angry at me … I would have been twelve … he would just use his tongue on my vagina. Sometimes … we went to this place out near imbil. And he would do it in the four wheel drive. … we would just go out to get bread and milk and then on the way home he would … take me to this place … he would just drive up there and take my pants off me … then he would use his tongue to lick me … every time we went to get bread and milk once a day or something like that."

[32] N said that she would have visited the appellant once a month. When asked for details about what happened in the appellant's vehicle she said:

> "he would push the seat back and get down on the floor and then he would start licking me and he would bribe me not to tell anyone … he would give me money … ."

[33] N also said that the appellant would rub her with his fingers:

> "probably three to four times a weekend."

The occasions when N woke to find her hand down the appellant's pants were:

> "probably only … five times."

[34] N said that the appellant's misconduct happened only at his house at Imbil and in his motor home which was "based" at the appellant's mother's house, on the lawn at Beachmere.

[35] N was asked whether anything ever happened when she and the appellant went camping. She said:

> "… we'd go camping on the Noosa north shore and … cause we all had separate tents. He would just come into my tent and do it then … he would rub me (and stay in my tent) five to ten minutes."

[36] N said that her "favourite" places were Noosa and Woodgate. When asked whether anything happened at Woodgate she said:

> "no not that I can remember because I wouldn't let him."

Later in the interview the conversation returned to their stay at Woodgate and N said:

> "… he went to woodgate and I … clearly told him no and he just kept asking me and I just said no and I just kept going out … he kept asking me if he could rub me and I told him no … so when my brother went out I went out. … ."

[37] N was asked if the appellant had touched her when she was sleeping in the same bed as the appellant. She said:

> "no because I told him no … I think that he tried it but I just kept moving away rolling over because my brother was sleeping on the lounge."

[38] N's evidence concerning the appellant and the shower was:

> "I would just get up when I was younger I'd get up and normally have a shower and he would come in and help me dry myself … it only happened twice that he had a shower with me … he would just wash me just get out and help me dry myself … ."

N said that the appellant did not touch her while she was in the shower, but:

> "… when he got in the shower as soon as I got home I told my mum and that was the first thing she knew."

[39] There are a number of puzzling features about N's account of the appellant's molestation. The first is that there is no mention at all of the events which were alleged as counts 3 and 4 on the indictment. She denied altogether the event which was charged as count 6. The occurrences involving the appellant in the shower appear to have been completely innocent and could not sensibly have founded a complaint of sexual abuse which N claimed she made to her mother, and did make

to Ms Scriven. The complaint that episodes of abuse occurred in the appellant's campervan parked at his mother's house at Beachmere was not the subject of any count in the indictment.

[40] N was reinterviewed nine months later, on 28 November 2007. In the interim N was living with her mother and A. The investigating police officer accepted that that circumstance and the length of time between interviews made the second interview unusual. In the period between interviews the investigating police officer spoke to N on a number of occasions, without recording what was said. She accepted that she told N that "she had to come up with particulars of these allegations" because "(N's) allegations were very broad".

[41] The second interview commenced with the police officer explaining to N the importance of telling her:

> "what really happened … to make sure that (she had) got the full picture and to clarify some things … ."

N said she did not know where to start and was urged to "Tell … everything about the last incident that (she could) remember". N said:

> "we were at Woodgate and … my brother … wasn't there. And I was sitting on the lounge and he would try and touch me."

N was then urged to tell "everything about Woodgate" but said she did not know what the question meant. She was urged again to "tell (the police officer) everything about Woodgate." N then gave an innocuous account of a holiday but was brought to the point by the police officer who told her to "tell (her) everything about what he would do when … he tried to touch you." N repeated that:

> "We'd be sitting there and then he would come and sit beside me and then he'd try to, try to touch me in the vaginal area and … I told him no and … I would walk out 'cause I didn't … want it to happen."

[42] Not content with that apparently plain answer the senior constable insisted upon being given a detailed description of the campervan so she "could understand what it looks like". N obliged with a description at the end of which the questioner reminded her that she had said she could recall sitting on the couch and the appellant trying to touch her and requested N again to "Tell … everything about how he tried to touch you." N again said that she did not know what the questioner meant, and was asked directly "what did he do". She replied:

> "I'd just be sitting there and he'd try and … . I'd be sitting there and he'd put his hand in my lap and try to rub me and that's when I would tell him no."

[43] Having got a little more on this occasion the questioner pressed on and asked for details about the hand on the lap. She was asked to demonstrate by putting her hand on her lap where "he would put his hand". N was reluctant to provide a demonstration but was encouraged. She said:

> "he'd put his hand on my by my … leg and then move his hand closer to my … vagina. Then he would start rubbing."

[44] She was then asked how close the hand was to her vagina and to say "what happened then". Her answer was indistinctly recorded but was to the effect that he started rubbing but she moved his hand away.

[45] There was then talk about the date of the holiday at Woodgate but the questioning shortly returned to the earlier topic. This was said:

"Q And your dad would sit beside you?
N Yep.
Q And he would try and touch you? And you described that he would put his hand on your lap?
N Yep.
Q And by that you described that he would put his hand up quite high on your leg?
N Yep.
Q Um, very close to your vagina?
N Yep.
Q And that he would start rubbing?
N Yep.
Q … when you said … close to your vagina, can you describe that? … can you tell me more about that?
N Um, what do you mean?
Q Well can you, in words, describe exactly where his hand was?
N … on the inside of my upper leg.
Q … And how high?
N … like right next to my vagina."

[46] The questioning then turned to incidental matters during which N mentioned that when she returned to the campervan for lunch and the appellant was there but A was not the appellant "would start touchin' me". That led to a further series of questions about the topic which had already been thoroughly investigated. This occurred:

"Q … you said went home for lunch, that's when he'd start touching you. Now is that the same time you're talking about? The couch incident?
N Yep.
Q Was there another time at Woodgate when he touched you?
N … I don't think so … when he started I was like no. I got pretty angry … and … stormed out."

[47] The police officer was not content with the answer. She persisted:

"Q … is there another time he touched you at Woodgate?
N No … I think he got the message … But I think he tried but didn't get that far. I think, before we left. I think it was the day before we left and he … just put hand in my lap and that's when I was like nope, not at all and then I walked out.
Q Tell me more about that --?
…
N I, I just, I simply said no. … and I was like, I'm never, I said to him I'm going to keep telling you no. And then I walked out."

[48] The police officer then got N to draw a plan of the interior of the campervan and asked a number of questions about completely irrelevant details of holiday activities. Having got the plan drawn by N the police officers asked her to indicate where she was sitting when the appellant approached her and touched her. The second police officer present took on the task.

Q … so you walked in, sat down--?
N Yep.

Q There was some space between you and dad?
N Yep.
Q He's then moved across to you?
N Mm.
Q And that's when he's put his hand out?
N Yep.
Q And just, just explain … again what … he's done with his hand?
N Um he put it in my lap and started rubbing me.
Q … And when you say your lap, what do you mean by your lap?
N The … is my vaginal area.
Q … Do you remember which hand he used?
N Um I think it would have been his left hand maybe?
….
Q … Alright so dad's placed his hand … on your vaginal area?
N Yep.
Q Now, you said you were wearing clothes?
N Yep.
Q So was this on the outside of your clothes?
N Yeah.
Q … and how long does this occur for?
N Um I think it would have been like maybe thirty seconds or less or something … It wasn't that long 'cause I, I was like no, no refusing--
Q Mm. And you said he was rubbing?
N Yeah.
Q What do you mean by rubbing?
N He was, he was rubbing my hand and rubbing my vagina.
Q He was rubbing your hand?
N No my vagina.
Q Oh okay.
N Because my hand was like here. … And he … put his arm underneath."

[49] The interview is remarkable for its repetition and persistence. Perhaps unintentionally but nevertheless effectively the police questioners informed N that they were not satisfied with her answers and demanded more information. N was only 15 at the time. It is clear that at times she was confused by the demands made upon her to provide information but wished to cooperate. There is a distinct possibility that the answers given by N were provided to please her interrogators. It is significant that in the first interview she was adamant that the appellant had committed no impropriety at Woodgate and that was her initial response to questions in the second interview. It is noticeable that when pressed to tell "everything about Woodgate" N volunteered a little further information which then became the focus for further questions and she would be implored, again, to "tell everything". When this elicited a further detail the process was repeated.

[50] The questioning continued, turning to other topics. N said she could recall a weekend when A went camping with his half brother S leaving N with the appellant. She was upset because she had not been permitted to camp with the

others and the appellant bought her fish and chips as a treat. When they finished she wanted to play backgammon which she usually won but the appellant:

> "… said something about playing strip poker … . … and he pushed me. And he pushed me and he pushed me. … And so I played. And because I suck at poker … he made me take all my clothes off. And then … when it was his turn … 'cause he lost … I was like no, leave your pants on. 'Cause he was going to take them off. … And then he made me play for a few games … and then I was like, I don't wanna play this any more 'cause it's stupid and I threw the cards … and went to bed. … I was sleeping in (S's) room … he was camping … and I was freezing. And um I was scared so I went in and laid next to my dad 'cause I sort of felt safer. But not as safe. And I rolled over, I went to sleep. … when I was sleeping, he tried to, he put his hands down my pants to try and rub my vagina. And he did it. And I just kept rolling over and I'd lie on my stomach so he couldn't do it. And that way he couldn't roll me over because I was snoring. And then it was the next day we went and picked my brother up, in the morning."

[51] There followed a number of questions designed, perhaps, to elicit more detail but which brought nothing new of any significance, despite much repetition.

[52] N was asked again about the occasions when the appellant performed cunnilingus in his car. She gave an account more or less similar to what she had said earlier though on this occasion mentioned for the first time that she was wearing a pink dress and said that she, not the appellant, took her pants off. Another inconsistency was that in the first interview N said the acts of cunnilingus occurred on every, or almost every, trip to buy groceries. In the second interview, she described only the one occasion.

[53] In relation to the camping trip at Noosa, the subject of count 5, N said:

> "… we slept in tents … . … he had a big tent with the food … and he was sleeping in there. And then I had my tent and my brother had his tent. And my other brother had his tent. And one night he made me sleep on the airbed with him. It was only a single airbed and he made me sleep in there and I was like I didn't understand why? And … that night, again, I woke up … he had his hands down my pants. And I just rolled over but the sun was coming up and I just rolled over. And then … went back to sleep. And he walked out of the tent."

[54] The account differs from the earlier one in that on that occasion N said the appellant came to her tent. On the second occasion her account was that he insisted she sleep in his tent.

[55] The appellant gave evidence and denied the charges against him. He called evidence in support of his denials. A gave evidence in the prosecution case. He said that on most occasions when the appellant drove from his home to Imbil to buy groceries both he and N went too.

[56] The lack of verdict on count 2 may be explained by A's evidence. The acquittal on count 4 may be explained by the fact that in cross-examination N said she could not recall the incident. The acquittal may also have been occasioned by the

implausibility of the account. It was a strange thing for N to go to the appellant's bed for warmth and comfort if, as she also said, it was his habit to fondle her, an activity which she disliked and tried to discourage.

[57] The conviction on count 3 also has its odd aspects. The poker game was mentioned only in the second interview. No hint of it appeared in the complaints made by N to Ms Scriven, or to the chaplain, or in the first interview when N was asked specifically to recall all of the appellant's misconduct towards her. As well there is the point that N claimed in cross-examination that she had never forgotten the occasion, which makes overlooking it on the occasions when she did make complaints puzzling. There was also the point that the poker game was the antecedent to the touching alleged in count 4, N's account of which the jury did not accept.

[58] The second ground of appeal argued was that the convictions were unsafe and unsatisfactory, or unreasonable. When such a ground of appeal is advanced:

> "… the question which the court must ask itself is whether 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. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

Per Mason CJ, Deane, Dawson and Toohey JJ: *M v The Queen* (1994) 181 CLR 487 at 493.

[59] Their Honours also pointed out (at 494):

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, that the court is bound to act and to set aside a verdict based upon that evidence."

[60] Applying this test the conviction on count 6 cannot stand. It is unreasonable. The only support for it comes from the second record of interview which I have set out at length. That account contradicts N's earlier statement that there had been no sexual impropriety at Woodgate. The contradiction was not examined by the police officers who, indeed, ignored it and pressed on importunately until N supplied a version which satisfied her questioners.

[61] Not only is there the unexplained discrepancy between accounts, the manner in which the incriminating account was elicited was deplorable. The persistent imploration, the explicit expression of dissatisfaction with the initial account given by N of the event, or non-event at Woodgate, means her evidence of touching on that occasion lacks credibility, and is tainted.

[62] I would, with some hesitation, reach the same conclusion with respect to the evidence in support of count 3, the game of strip poker. The inadequacy of N's evidence in this regard is not as clear as the other but is, I think, sufficient to give rise to a doubt which the jury should have entertained. The inadequacy of the evidence comes from the fact that there was no mention of the episode in any complaint made by N other than the second interview in which she was pressed, and indeed urged, to provide further incriminating detail against the appellant. The manner of the questioning, though not so obnoxious with respect to this aspect as it was with respect to the Woodgate incident, is nevertheless tainted by that improper mode of questioning. There is as well the point that the jury rejected N's account of the touching which followed on from the game of poker.

[63] These factors give rise to a doubt over the acceptability of N's testimony in support of count 3 which should have led to an acquittal.

[64] The consequence of setting aside the appellant's convictions on counts 3 and 6 is that only count 5 is left to support count 1, the charge of maintaining an unlawful sexual relationship. Section 229B requires more than one unlawful sexual act in the period of the relationship. The conviction on count 1 must also be quashed.

[65] That leaves the conviction on count 5, the only criticism of which is that N differed in her accounts of the tent, hers or the appellant's, in which the touching occurred. This is not, I think, by itself sufficient to say the jury could not reasonably have convicted.

[66] The result is not that that conviction stand because the appellant has also made out his second ground of appeal. The judge who heard the pre-trial application should have ruled the second record of interview inadmissible because its reception was inexpedient in the interests of justice. It was also unfair to the appellant that it go into evidence in the manner proposed, standing as N's evidence-in-chief. I have already explained why. The questioning which elicited the evidence was wholly inappropriate. The questions were leading, not always in form but always in effect. N was pushed and prompted into giving evidence contrary to that which she had given earlier.

[67] Senior counsel who appeared for the respondent on the appeal pointed to the discretionary nature of the order admitting the statement into evidence and submitted that the appellant had not demonstrated an error of the kind described in *House v The King* (1936) 55 CLR 499. The short answer is that the learned judge did not advert to the objectionable nature of the questioning which elicited the testimony against the appellant, and therefore failed to take into account a relevant fact.

[68] It was unfair to the appellant, and therefore inexpedient in the interests of justice, to admit the statement when N's testimony had been procured by objectionable questioning. Solicitude for a child witness has to be balanced against an accused's right to a fair trial. It was not right that N's evidence-in-chief should have been

provided in such a form. Rejection of the statement would not have had the result that the information contained in the statement could not go before the jury. The prosecutor could, relying on the statement, have examined N in chief in the protective environment provided for by Subdivision 3 of Div 4A Pt 2 of the *Evidence Act*.

[69] The appellant's convictions on counts 1, 3, 5 and 6 should be quashed. Verdicts of acquittal are appropriate with respect to counts 1, 3 and 6. I would not order a retrial of count 5 because the appellant has already served seven months in prison, a term about as long as one which would be imposed for that offence. The evidence in support of it, while sufficient, was not strong because of the discrepancy noted. Because there is not to be a retrial a verdict of acquittal should be entered for count 5 as well.

[70] **PHILIPPIDES J**: I have read the reasons for judgment of Chesterman JA and agree with those reasons and with the orders proposed.