

SUPREME COURT OF VICTORIA

COURT OF APPEAL

No 163 of 2005

THE QUEEN

v

PZG

JUDGES: VINCENT and REDLICH JJA and KELLAM AJA
WHERE HELD: MELBOURNE
DATE OF HEARING: 16 January 2007
DATE OF JUDGMENT: 2 April 2007
MEDIUM NEUTRAL CITATION: [2007] VSCA 54

CRIMINAL LAW - Application for leave to appeal against conviction on counts of incest and indecent acts with a child - Evidence of uncharged acts - Adequacy of warning to jury - Propensity warning given in accordance with *R v Grech* [1997] 2 VR 609 before evidence of uncharged acts led - Whether warning needed to be repeated in charge - Desirability of directions and warnings at an earlier stage in the trial - Warning adequate - No need to repeat the propensity warning - Verdict not unreasonable or unsupportable on the evidence - Application refused.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Crown	Mr P A Coghlan QC, DPP with Mr C B Boyce	Ms A Cannon, Solicitor for Public Prosecutions
For the Applicant	Mr G M Hughan	Victoria Legal Aid

VINCENT JA
REDLICH JA
KELLAM AJA:

1 On 11 May 2005 the applicant was arraigned before the County Court at Geelong and pleaded not guilty to six counts of incest and four counts of committing an indecent act with a child. At the conclusion of the Crown's case the jury entered verdicts of not guilty at the direction of the trial judge on three of the counts of incest and on two of the counts of committing an indecent act with a child under 16. On 14 May 2005 the jury returned a verdict of guilty on the remaining counts on the presentment, namely three counts of incest and two counts of committing an indecent act with a child under 16. After a plea in mitigation the applicant was sentenced to six years and six months' imprisonment with a non-parole period of three years and six months. The applicant seeks leave to appeal against his conviction on three grounds.

2 It is necessary to summarize some of the evidence upon which the Crown relied at the trial before turning to the grounds of appeal. The Crown alleged that the applicant committed a number of sexual offences against his daughter, the complainant, between 1 January 1999 and 7 June 2002 when she was between 11 and 15 years of age. At the time of the trial the complainant was 17 years of age and was on a disability pension due to learning difficulties. In April 1996 the complainant and her younger brother, AD, went to live with the applicant and her step-mother, DP, in Whittington. DP subsequently gave birth to two children, TP and MP who resided at the family home. The complainant initially resided in the bedroom next to the applicant's bedroom but later resided in a caravan in the backyard which she occupied for 12 months before being placed into foster care as a result of a complaint of sexual abuse which she made against the applicant. The complainant gave evidence of incestuous acts committed by the applicant which were not referable to any count on the presentment. These were described during the trial as 'uncharged acts'. The complainant testified that the applicant sexually abused her between the ages of 12 and 15 on a weekly basis by placing his penis inside her vagina. She also

testified that on two occasions he placed his penis in her mouth. It remains to summarise the evidence upon which the Crown relied in relation to the counts upon which the applicant was convicted.

Count 2 - After the BMX meeting

3 The complainant recalled that the applicant first sexually abused her when she was 12 or 13 years of age, prior to MP being born. The family had attended a BMX meeting when the complainant's eyes became sore from exposure to the sun. The applicant drove the complainant home. Upon returning home she watched television and subsequently washed her eyes with water. At the applicant's request she made a cup of tea and delivered it to him in his bedroom. The applicant grabbed her arm and commenced to remove her clothes. He had sexual intercourse with her by placing his penis inside her vagina prior to withdrawing and ejaculating on her stomach. At this time nobody else was present at the house. This comprised the substance of the first incest count (count 2).

Counts 3 to 5 - The bathroom incident

4 On or about the 24th day of December 2000 the complainant returned to the family home following an 18th birthday party of her friend HM. During the course of the evening the complainant went for a swim in her friend's swimming pool. The applicant subsequently picked her up from the party and they returned home. No-one else was present. The complainant assisted the applicant with some chores and subsequently had a shower. Whilst she was showering she observed the applicant watching her and asked what he was doing. The applicant then removed his clothes and entered the shower cubicle. He commenced to tongue kiss the applicant on the mouth. This comprised the indecent act the subject of count 3. The applicant subsequently grabbed her wrist and led her out of the shower. He lifted her on to a ledge that was next to the shower. The applicant placed the complainant's hand on his erect penis. This was the indecent act comprising count 4. Subsequently the applicant forced his penis into the complainant's vagina and had sexual intercourse

for approximately five minutes before ejaculating on her stomach. This comprised the second count of incest (count 5).

Count 6 - The caravan episode

5 Prior to the complainant commencing to reside in the caravan in the backyard of the family home the applicant constructed a top bunk in the caravan. On a date between May 2000 and June 2001 the complainant assisted the applicant in measuring the top bunk to which he intended to attach a shelf. The complainant observed that the applicant had been drinking as she could smell alcohol on his breath. The applicant closed the caravan door and closed the curtains before removing the complainant's clothes and placing her on the bed. He removed his clothes and had sexual intercourse with the complainant by inserting his penis into her vagina before withdrawing and ejaculating on her stomach.

6 The complainant also testified that there was an incident of sexual abuse in the week before she was placed in foster care. This was the subject of count 10. As the complainant was unable to recall the details of this incident and could not say whether it involved vaginal or oral penetration, an acquittal was entered at the direction of the trial judge.

7 On the day prior to the complainant going into foster care she complained to her stepmother about the applicant's conduct. She told DP that the applicant had been forcing her to have sex with him and could not say for how long that had been going on. Her stepmother told her to try not to tell anyone. The complainant also testified that the applicant had told her that if she told anyone he would kill her.

Ground 1 - The trial judge erred in law by failing to direct the jury that, when considering whether to convict the applicant in the absence of corroborating evidence, they must be satisfied of both the truthfulness and reliability of the complainant's evidence

8 The applicant's trial was a short one, the evidence called by the prosecution spanning two days. The closing addresses of the prosecution and defence and much

of the trial judge's charge were concluded by the end of the second day. Before turning to the impugned direction, it is convenient to refer to the careful instructions which the trial judge gave the jury at both the commencement and conclusion of the trial. Following the prosecutor's opening the learned trial judge gave the jury directions as to how they could use evidence of uncharged acts, and the impermissible use of such evidence. His Honour expressly instructed the jury that it was for the prosecution to establish the acts for which it had set out to prove as constituting each count on the presentment. The jury were directed that they were not permitted to substitute other acts of the applicant which might be disclosed by the evidence for those acts which the prosecution alleged constituted the counts on the presentment.

9 Each of the instructions given at the commencement of the evidence after the prosecutor's opening were again repeated in his Honour's charge at the conclusion of the trial. The jury were reminded that before they could convict the applicant on any count, they would have to be satisfied beyond reasonable doubt that the evidence of the complainant supported the allegations outlined by the prosecutor in opening the case. His Honour alerted the jury to the need to consider whether the complainant may have 'transposed' events which may have occurred at a different time with the act relied upon by the prosecution as constituting the relevant count or may have combined other acts with those constituting the count. The jury's attention was drawn to the inconsistencies between the evidence given by the complainant at trial and her previous accounts.

10 Because the complainant had given apparently inconsistent accounts in relation to some of the applicant's conduct upon which the Crown relied in proof of the counts on the presentment, the trial judge instructed the jury that there was a potential for error and warned the jury that it would be dangerous for them to convict the applicant in the absence of evidence which supported the complainant's account. The trial judge drew attention to the complainant's limited memory for detail and reminded the jury of the risk that the complainant might transpose one

event for another or combine events to make up a narrative. His Honour directed the jury that there was no corroboration of the complainant 's account as to any of the applicant's conduct upon which the Crown relied.

11 His Honour gave the jury a direction that it would be dangerous to convict the applicant in the absence of the corroboration of the complainant's account but that it was open to the jury to do so if they accepted the complainant's account which was consistent with the Crown case and were satisfied beyond reasonable doubt of the applicant's guilt. This direction was in accordance with the principles discussed by the High Court in *Bromley v R*,¹ *Longman v R*² and *R v Faure*.³ These cases illustrate that no particular formula of words is required. The need for the direction arises when the evidence of the witness is viewed by the trial judge as potentially unreliable even if the witness does not fall within one of the established categories in relation to which a warning as to the necessity of corroboration must be given.

12 His Honour, in the clearest terms, explained to the jury that the need for the warning arose because the variations in the complainant's account made her a potentially unreliable witness. Early in his Honour's charge the jury was reminded of the primary defence argument concerning the inconsistent account which the complainant had given at the committal proceedings. His Honour directed the jury that it was necessary for them to assess both the honesty and reliability of the complainant. His Honour referred to the risk that the complainant might be honest but quite unreliable.

13 Despite the obvious context in which the warning was given, counsel for the applicant submitted that the subsequent direction as to the danger of convicting on the complainant's uncorroborated account was inadequate because it failed to instruct the jury that they had to be satisfied as to both the truthfulness and the reliability of the complainant's testimony. The impugned passage appears at the

¹ (1986) 161 CLR 315 at 319.

² (1989) 168 CLR 79 at 85 and 107.

³ (1993) 67 A Crim R 172 at 179-180.

very end of his Honour's extensive direction to the jury, to which we have already made reference, concerning the complainant's potential unreliability as a consequence of the inconsistencies in her account. That passage, when considered in its context and in conjunction with his Honour's careful and detailed explanation as to why it might be dangerous to convict the applicant on the uncorroborated evidence of the complainant, did not leave open any appreciable risk that the jury would not have understood that they could not convict the applicant unless they were satisfied as to the reliability of her account. There is no substance in this ground. It is another illustration of the danger referred to in *Zoneff v R* arising from "minute and pernicky attention to the words of the judge's charge, divorced from their context and expressed purposes."⁴

Ground 2 - The trial judge erred in law by failing to direct the jury that, when considering evidence led by the prosecution on uncharged acts, they must not reason that the applicant was the kind of person who was likely to commit the offences with which he was charged.

14 At the commencement of the trial the prosecutor informed the learned trial judge of his intention to lead evidence of uncharged acts in addition to the evidence in support of the ten specific counts on the presentment. No issue is taken as to the admission of such evidence at the trial. Immediately following the prosecutor's opening and before the complainant testified, the learned trial judge gave the jury appropriate directions in accordance with the principles expressed in *R v Grech*,⁵ *R v FJB*⁶ and *R v BJC*.⁷ His Honour instructed the jury that the evidence of a sexual relationship between the applicant and the complainant was admitted to establish the actual setting in which the Crown alleged that the offences charged were committed, that the jury could not substitute the evidence of other sexual conduct for the offences alleged on the presentment, that the jury could not reason that because

⁴ (2000) 200 CLR 234 at [55] per Kirby J.

⁵ (1997) 2 VR 609.

⁶ (1999) 2 VR 425.

⁷ (2005) 154 A Crim R 109.

the accused committed sexual acts with the complainant he must have committed the acts charged on the presentment and the jury must not reason that because the applicant engaged in sexual conduct with the complainant on other occasions, that he was the kind of person who committed the offences charged. The last of these directions was explained by Callaway JA in *Grech* as being concerned with impermissible propensity reasoning.⁸ All but the last of these directions were repeated in his Honour's charge. His Honour directed the jury in these terms:

"In relation to all those incidents, they can be used and only used as evidence of background. [Is that] capable of being used as evidence of an incestuous relationship against which you assess the evidence applicable to each count. However and this is the point I want to emphasise, it would be in wrong for you for example to say, where you are satisfied that there was an incestuous relationship that is the determinate of the guilt of the accused in each count. In particular it would be wrong for you to substitute the evidence of some other event of sexual activity for specific activity alleged on the presentment. As I emphasise you are to be satisfied beyond reasonable doubt that if anything did occur, it is what the Crown said occurred and not something or some other occasion. You will have to consider the evidence applicable to each count separately and ask yourselves have the prosecution satisfied me of the guilt in relation to that count on the evidence that they lead in respect of that count [and/or] any other piece of evidence. It would also be wrong for you to reason because the accused may have done something wrong with Natalie on some other occasion or occasions, he must have also done the same on the occasion under consideration, which is the subject of the offence charged in the presentment."

Sufficiency of a Beserick direction

15 Counsel for the applicant in this Court submits that his Honour's direction was inadequate because of the failure to repeat the warning as to propensity reasoning. It was submitted that such a direction must be given in the judge's charge at the conclusion of the trial if the warning is to be effective. Furthermore it was submitted that the warning that was given by the trial judge in his charge, at best, would have been understood by the jury as a "separate consideration" direction.

⁸ [1997] 2 VR 609 at 613.

16 The directions given by his Honour following the prosecutor’s opening are drawn from the judgments of Hunt CJ at CL in *R v Beserick*⁹ and the judgment of Callaway JA in *Grech*. It is now settled that a direction that follows that approved in *Beserick* will ordinarily constitute a sufficient warning although the language of a *Grech* direction is to be preferred.¹⁰

17 There is no prescribed form of words that must be employed when warning the jury as to the impermissible use of propensity evidence.¹¹ The absence of an explicit warning that “kind of person” reasoning was impermissible, does not mean that the warning given by his Honour was insufficient, as the direction that was given did not expose the applicant to any significant risk that the jury would engage in impermissible propensity reasoning. The second limb of the warning enunciated by Hunt CJ in *Beserick* that the jury must not reason “that because the accused may have done something wrong with the complainant on some other occasion or occasions, he must also have done so on the occasion which is the subject of the offence charged” will, in the context of a warning concerning relationship evidence, clearly illustrate the reasoning process which the jury must avoid.

A warning at the time the evidence is given is desirable

18 While legal accuracy is required in a judge’s directions to the jury, in most circumstances particular verbal formulae are not.¹² Nor do we consider that the point of time at which the directions are given is necessarily determinative of the question of their adequacy. The critical question will be whether the judge has given a direction which is sufficient, having regard to the circumstances of that trial, to

⁹ (1993) 30 NSWLR 510.

¹⁰ *R v DCC* (2004) 11 VR 129 at [14]-[15] per Callaway JA, [55]-[60] per Eames JA with whom Nettle JA agreed; *R v J (No. 2)* (1998) 3 VR 602 at 641 per Callaway JA, with whom Winneke P and Charles JA agreed; *R v Glennon (No. 2)* (2001) 7 VR 631 at 637 [120] per Winneke P and Ormiston JA; *R v Vas* [2006] VSCA 159 at [19] per Maxwell P, Vincent JA and Bongiorno AJA; *R v LRG* [2006] VSCA 288 at [27] per Callaway JA with whom Ashley and Vincent JJA agreed; *R v Kerbatieh* (2005) 155 A Crim R 367 at 391.

¹¹ *R v DCC* (2004) 11 VR 129 at 31 per Eames JA.

¹² *Zoneff v R* (2000) 200 CLR 234 at [55] per Kirby J.

avoid the perceptible risk of miscarriage of justice from the impermissible use of the evidence. In the present matter, if it be assumed that a *Grech* propensity reasoning direction was necessary, such a direction was given immediately before the evidence to which it related. We reject the contention that in the circumstances of this case it was insufficient to provide the direction at that time.

19 The provision of adequate instructions to the jury in the charge is a critical function performed by a judge presiding in a criminal trial. But the underlying reality should not be forgotten that it is the jury that delivers the verdict and that they must be equipped to perform that task if their decision is to be accepted as just. The judge's role in providing adequate and effective instruction to the jury is crucial to their understanding of the relevant principles of law and the manner in which they will impact in the particular case. Accordingly, a vast body of law has been developed concerning what must and must not be said in judge's instructions in given situations so that the potential for injustice and confusion can be minimized. Traditionally, judges gave virtually all necessary directions in the course of their charge at the end of the trial. In earlier times, when trials were usually quite short, this could be seen to present no major problem. The evidence and submissions, which were usually of short compass, were immediately followed by the charge which was also normally much shorter and simpler.¹³

20 The giving of directions in the course of the charge is designed to maximise the jury's recall of those instructions. As trials have become longer and more complex generally, with the number of instructions that judges are obliged to provide increasing dramatically, reliance upon the charge as the sole time for their provision to juries has been recognized as problematic. It has been said that the giving of necessary directions at the conclusion of the trial relies "on the implicit legal assumption that jurors store but do not evaluate the evidence until the end of the trial and [it] ignores the probability that jurors are actively evaluating the

¹³ Heaton-Armstrong, Shepherd, Gudjonsson and Wolchover (eds), *Witness testimony: Psychological, Investigative and Evidential Perspectives* (2006) 429.

evidence as they hear it – despite the lack of a legal framework to use in doing so.”¹⁴ By the time of the charge the jury will to some degree have assessed the evidence and may face difficulty in being able to “retrospectively evaluate and judge the evidence” in accordance with later given instructions.¹⁵ Juries are often required to endeavour to reassess the reliability and credibility of the witnesses and the importance of particular evidence in the light of later given directions, many of which are conceptually difficult and require careful explanation if they are to be understood. Unless some guidance is provided during the trial, they may receive instructions in the charge that necessitate putting to one side reasoning based upon an impermissible use of the evidence or based upon well entrenched impressions of witnesses’ reliability. It is obvious that problems can arise in this process which could result in or contribute to a miscarriage of justice, particularly in a long trial where weeks or even months may elapse before the delivery of the charge.¹⁶

21 In consequence, it is now common practice for trial judges, at the outset of the trial, to give the jury some explanation of their task and to refer to some of the ineluctable directions that are subsequently given in the judge’s charge. A variety of instructions are often also given in the course of the trial. Such practices are to be encouraged. Particularly in the United States and the United Kingdom there has been considerable writing and research in support of “early” and “continuing jury instructions” during the course of the trial to facilitate the jury’s better evaluation of the evidence and comprehension of the issues.¹⁷ While the results of such research

¹⁴ J R P Ogloff and V G Rose, “The Comprehension of Judicial Instructions” in Brewer, Williams, and Kipling (eds), *Psychology and Law: An Empirical Perspective* (2005) 431.

¹⁵ New South Wales Law Reform Commission, *Criminal Procedure: the Jury in a Criminal Trial*, Discussion Paper 12 (1985).

¹⁶ E Barrett Prettyman, “Jury Instructions – First or Last?” (1960) 46 *American Bar Association Journal* 1066.

¹⁷ Mathews, Hancock and Briggs, Home Office Report, *Jurors’ Perceptions, Understanding and Confidence in the Jury System* (05/04), Robert Forston, “Sense and Non-Sense: Jury Trial Communication” (1975) *Brigham Young Law Review* 601-637; Neil Cohen, “The Timing of Jury Instructions (1999-2000) 67 *Tennessee Law Review* 681; B Dumas, “Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues” (1999-2000) 67 *Tennessee Law Review* 701; R Lempert, “Telling Tales in Court: Trial Procedure and the Story Model” (1991) 13 *Cardozo Law Review* 559; V L Smith, “Prototypes in the Courtroom: Lay Representations of Legal Concepts” (1991) 61 *Journal of Personality and Social Psychology* 857-872; K Auty and

may have to be approached with some reservations,¹⁸ there is no reason to doubt that the jury, once provided with such a framework, are not only capable of interpreting and applying such instructions,¹⁹ but will benefit from their timely provision.

22 Thus it will often be appropriate and desirable that the jury be given directions at about the time that the evidence is introduced which affect the way in which they may view the testimony of a particular type of witness or which explain how a particular category of evidence may be used or warn the jury as to the impermissible use of such evidence. Directions given in this timely fashion ensure that the jury will receive the greatest assistance in assessing the significance of the evidence which it hears.²⁰

23 Directions or warnings concerning the unreliability of particular evidence or its prejudicial nature or the limited use to which it can be put are designed to reduce the danger that the jury will misuse or overestimate the probative value of the evidence, thereby reducing any unfairly prejudicial effect it might have.²¹ Such instructions, if given at or about the time of the evidence to which they relate, can only serve to enhance their efficacy.²² This Court has, for example, on previous

S Toussaint, *A Jury of Whose Peers? The Cultural Politics of Juries in Australia* (2004), cited in New South Wales Law Reform Commission, *Majority Verdicts*, Report No 111 (2005) at [4.32] and [4.25]; Y Tinsley, "Jury Decision - Making: A Look Inside the Jury Room" *The British Criminology Conference: Selected Proceedings* (2001); New Zealand Law Commission, *Juries in Criminal Trials*, Report No 69 at [304]-[308]; Alexander Tanford, "Law Reform by Courts, Legislatures and Commissions following Empirical Research on Jury Instructions" (1991) 25(1) *Law & Society Review* 155-175.

¹⁸ James Wood QC, "Jury Directions" (2007) 16 *Journal of Judicial Administration* 151.

¹⁹ *Zoneff v The Queen* at [66] per Kirby J; J R P Ogloff and V G Rose, "The Comprehension of Judicial Instructions" at 407; J R P Ogloff, *Perspectives in Law & Psychology: Taking Psychology and Law into the Twenty-First Century*" (2002) 225-283.

²⁰ *R v Kirby* (2000) NSWCCA 330 at [68] per Wood CJ at CL.

²¹ Australian Law Reform Commission, *Uniform Evidence Law*, Report 102, Section 18 "Comments, Warning and Directions to the Jury".

²² For example, directions that it is the answer and not the question which constitutes the evidence; directions concerning the process of drawing inferences; directions about the use that may be made of the evidence of expert witnesses; the use of prior inconsistent statements and warnings about the dangers of acting upon the uncorroborated evidence of a particular witness, will be of considerable assistance to the jury if given at the time that they first commence to evaluate particular pieces of evidence.

occasions approved the passage from *Beserick* that an explanation as to the use to which propensity evidence could be put and a warning as to its impermissible use “should invariably be given to the jury as soon as the first of that evidence is given and, *if necessary*, again in the summing up.”²³

24 In most circumstances, and certainly where there is any substantial time lapse between the receipt of the evidence and the delivering of the charge,²⁴ the trial judge will repeat such directions and warnings in his or her charge to the jury.²⁵ Such further instruction in the charge is conducive to an enhanced comprehension by the jury of their task.²⁶ In the present trial however there is simply no reason to suppose that the jury would not have been mindful of an instruction given only a very short time before. In any event, even if it were necessary for the trial judge to repeat any of those directions and warnings within twenty four hours,²⁷ his Honour’s instructions to the jury in the charge whether viewed alone or in conjunction with the earlier instructions given to the jury, were sufficient to avoid any perceptible risk of a miscarriage of justice.

25 The submission that the warning would have been understood by the jury as limited to a “separate consideration” of the evidence relating to each count on the presentment cannot be sustained. This argument is similar to that advanced by

²³ See *R v Vas* at [19] which referred with approval to this passage.

²⁴ Limited empirical evidence points juries being assisted by the summing up particularly in longer cases. See Heaton-Armstrong, Shepherd, Gudjonsson, and Wolchover (eds) *Witness testimony: Psychological, Investigative and Evidential Perspectives*, (2006) 433.

²⁵ American writing on the value of early and continuing instructions to the jury does not suggest that those instructions should replace final instructions: see Robert Forston, “Sense and Non-Sense: Jury Trial Communication”, above, at 601-637; “The Timing of Jury Instructions”, above at 690.

²⁶ Elwork, Sales & Alfini, “Juridic Decisions: In Ignorance of the Law or in Light of it?” (1977) 1 *Law & Human Behaviour* 163-189; Cruse and Browne “Reasoning in a Jury Trial: the Influence of Instructions (1987) 114 *Journal of General Psychology* 129-133; Tanford, Alexander, J, “The Law and Psychology of Jury Instructions” (1990) 69 *Nebraska Law Review* 71-111.

²⁷ The gap between the provision of the instructions here and the retirement of the jury is significantly shorter than that which is sometimes encountered between the giving of directions in the course of a lengthy charge and the jury retirement.

counsel in *R v D*²⁸ and *R v DCC*²⁹ and should be rejected for the same reasons. The language employed by his Honour would not have led the jury to conclude that the warning against impermissible reasoning did not extend to uncharged acts of sexual misconduct by the applicant or was limited to evidence relating to the counts on the presentment. In our view the warning did not create a danger that the jury may have confined the application of the propensity direction to evidence of charged acts.

26 It is not without significance that counsel for the applicant at trial sought no further directions from the trial judge on this issue. Neither the prosecutor nor defence counsel considered that there was any risk that his Honour's warnings to the jury in the charge would be treated as limited to the "separate consideration" of the evidence led in support of each count.

Ground 3 - The verdicts of guilty on counts 2 to 6 were unreasonable and/or cannot be supported having regard to the evidence

27 To make out this ground it is necessary for the applicant to demonstrate that it was not open to the jury upon the whole of the evidence to be satisfied beyond reasonable doubt that the applicant was guilty.³⁰ In substance it was submitted that notwithstanding the complainant's testimony that the applicant had committed each act comprising each count upon which he was convicted, the nature and quality of the complainant's evidence was so inherently suspect and devoid of probative value that it should be concluded that the jury should have experienced a reasonable doubt.³¹

28 Counsel for the applicant relied upon various inconsistencies between the evidence given by the complainant at trial and the committal proceedings, the uncertainty and the lack of particularity of much of the complainant's evidence, the absence of any kind of complaint in relation to any of the incidents, the lack of

²⁸ [1999] VSCA 148.

²⁹ (2004) 11 VR 129 at [49].

³⁰ *M v R* (1994) 181 CLR 487.

³¹ See *R v VN* (2006) A Crim R 195 at [135].

corroboration of the complainant's testimony, the applicant's denial to investigators of any offending and the applicant's good character. In particular it was contended that the complainant's evidence in relation to the three incidents was unsatisfactory.

29 As to the events following the BMX meeting, it was submitted that there were aspects of the complainant's evidence which made her account inherently unlikely. Reliance was placed upon the complainant's evidence that she thought that there was only one car that went to the BMX track. It was submitted that it was unlikely that the applicant would have returned home alone with the complainant leaving the other members of the family at the club meeting. DP had testified that she could not recall an occasion when the complainant and the applicant left a BMX meeting alone. It was submitted that the complainant's explanation that she left the BMX meeting because she had sore eyes was inconsistent with her claim that she watched television when she came home.

30 In relation to the bathroom incident it was submitted that the physical dimensions of the bathroom made the complainant's account of what the applicant did highly improbable. Reliance was again placed upon the evidence of DP who thought she had collected the complainant from the party. Emphasis was placed upon the inconsistency between the complainant's evidence at trial and her evidence at committal that she testified that the sexual intercourse took place in the shower. Mr Hughan, who appeared in this court for the applicant, relied upon the complainant's re-examination at trial in which she said that she was not sure and could not remember whether there had been more than one incident of sexual abuse in the bathroom. She testified that she could not recall another incident in which the applicant had sexual intercourse with her whilst they were both in the shower cubicle. In substance it was submitted that the complainant's evidence left open as a reasonable possibility that there were different acts of incest committed by the applicant on different occasions or alternatively that the complainant had given inconsistent descriptions of the same alleged act of incest and that in either event the prosecution had failed to establish the incidents of sexual abuse which it set out to

prove in counts 3 to 5.

31 In relation to the caravan incident it was submitted that the complainant's
testimony had been undermined by that of DP who testified that she and not the
complainant had assisted the applicant in making the shelving in the caravan.
Reliance was also placed upon inconsistencies between the complainant's testimony
and her statement to investigators as to whether her clothes had been removed by
the applicant before or after he pushed her on to the bed.

32 It is unnecessary to refer in further detail to the respondent's outline of
submissions which deals extensively with each of the criticisms, advanced on the
appeal, of the complainant's testimony.

33 In the absence of some compelling circumstance we are required to act upon
that view of the facts which the jury were entitled to take having seen and heard the
witnesses, and in particular the complainant. We are not persuaded that there was
any aspect of the complainant's testimony which was inherently improbable. The
alleged discrepancies and inconsistencies in the complainant's testimony do not
engender in our minds a reasonable doubt which would lead us to conclude that the
jury was bound to have entertained a reasonable doubt as to the applicant's guilt.

34 Although the complainant's testimony differs from that of her stepmother in
a number of material respects, it was plainly open to the jury to reject the testimony
of DP in relation to those issues. The learned trial judge in his charge referred to the
Crown submission to the jury that it did not accept DP as a witness of truth in
relation to all of her testimony. It was open to the jury to conclude that DP may have
changed her testimony on the significant matter of whether she collected the
complainant from the 18th birthday party of HM. We agree with the submission
made on the respondent's behalf that the nature of DP's responses to leading
questions from counsel for the applicant would have permitted the jury to form an
opinion adverse to DP's honesty and reliability. In our view it was open to the jury
to be satisfied beyond a reasonable doubt that the applicant was guilty.

As the applicant has failed to make out any of his grounds, his application for leave to appeal should be refused.
