

Kilby v The Queen - [1973] HCA 30

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HIGH COURT OF AUSTRALIA

. Barwick C.J., McTiernan, Menzies, Stephen and Mason JJ.

KILBY v. THE QUEEN
(1973) 129 CLR 460
29 August 1973

Criminal Law

Criminal Law—Rape—Consent—Absence of complaint by prosecutrix—Whether evidence of consent.

Following paragraph cited by:

[Deriz v The Queen](#) (24 November 1999) (Ipp J, Wallwork J, Parker J)
[Deriz v The Queen](#) (24 November 1999) (Ipp J, Wallwork J, Parker J)

Decisions

April 12.

[BARWICK C.J.: The Court has considered this matter and has decided to refuse the application for special leave. It will put its reasons for doing so in writing in due course. The order of the Court is that the application is refused. \(at p462\)](#)

August 29. 2. The following reasons for judgment were delivered by the COURT:-

BARWICK C.J. The applicant for special leave to appeal was convicted by a jury on 25th February 1970 at the Central Criminal Court, Sydney, of the rape on 25th January 1969 of Patricia Anne Organ (the prosecutrix) at Old Bar on the North Coast of New South Wales. (at p462)

3. At the time of the commission of the offence for which he was convicted the applicant was a little more than twenty years of age. He was tried along with two other young men, one about twenty-two years of age and the other almost the same age. All were charged that they did on the same evening and at the same place "without her consent ravish and carnally know" the said Patricia Anne Organ. One of the others was also convicted of rape but the jury were unable to agree on a verdict in the case of the third accused. (at p462).

Following paragraph cited by:

Crofts v The Queen (10 October 1996) (Dawson, Toohey, Gaudron, Gummow and Kirby JJ)

4. The evidence against the applicant was that on 24th January 1969 the prosecutrix, then aged fifteen years and ten months, had travelled from Sydney to Taree in the company of a young man, sharing with him a motel room for the night though without the occurrence of sexual intercourse between them. She claimed to have been a virgin at the time of the subsequent intercourse by the applicant's fellow-accused who was convicted of rape in respect of that intercourse. Medical evidence given at the trial tended to confirm her claim. The young man with whom she was travelling sought out in Taree some of his mates without success in the first instance. Later he found them, some 80 or 100 in number - described in the evidence as "bikies" - at or near a hotel. One of these "bikies" was known to the prosecutrix: but she did not associate with any of the "bikies" when first they met. After spending the day in Taree, stopping at a "few hotels", a mixed party, which included the prosecutrix and the young man with whom she was travelling, set off for Old Bar Beach, which was about half an hour's travel by motor cycle from Taree. By the time Old Bar Beach was reached it was "late". On arrival there, desultory conversation seems to have occupied the prosecutrix for a time until she was "tackled" by the co-accused who was convicted. He picked her up and carried her about thirty yards away from the spot where she had been conversing with a group, including young women as well as young men. The prosecutrix claimed to have struggled and screamed and to have endeavoured to escape but without avail. The applicant assisted the other accused to lay the prosecutrix down on the grass, at which time they were joined by other youths who helped to hold her down while her slacks, jumper and underpants were removed. She was in menstruation and was wearing a sanitary pad which was removed. Her hands and legs were held whilst she screamed or attempted to do so and cried. A hand was placed over her mouth to prevent her screams being heard. At an early stage the prosecutrix asked that she be "let go" and this was denied her. Thereupon the co-accused who was later convicted "forced her" to have intercourse with him whilst she was so held. Thereafter four other youths did so including the applicant. A gang of youths stood round during the whole performance. Eventually a youth helped her dress and carried her down near a fire which had been kindled. She stayed the night on the beach, went next day to the motor cycle races with a youth and on the Monday "hitch-hiked" to Sydney. She made no "complaint" until she told her mother of the events of the night some considerable time later at Maitland Court before which she had occasion to appear. (at p463)

5. During the course of the trial a transcript of questioning of the applicant by police officers, which had been read by the applicant and signed by him as a record of the interview, was tendered and, over the objection of counsel, admitted in evidence. That document contained admissions of the truth of a number of the assertions made by the prosecutrix, for example, that she was "carried to the grass"; that some of the boys held her arms above her head; that her slacks, pants and jumper were removed; that the applicant helped to remove her clothing; and that the co-accused who was convicted had intercourse with her. The document further recorded the statements that there had been an arrangement between these accused that the applicant should have intercourse with the prosecutrix first and before his co-accused, an arrangement which through no fault of the co-accused was not fulfilled; that the applicant had intercourse with the prosecutrix; that she screamed till one of "the boys" put his hand over her mouth to stop her screaming; that "we" were putting our hands over her mouth because campers were passing by and "we" thought they would hear her screaming. (at p464)

6. In summing up the learned trial judge instructed the jury as follows:

"I also tell you as a matter of law in a crime of this nature if the woman has made a complaint of what happened to her within a reasonable time, on the first reasonable opportunity that she has, it is open to the Crown to lead that in evidence. It is only open to the Crown to do that if such a complaint is made within a reasonable time after the event. If such a complaint is given in evidence it is not any evidence of the facts, it is only evidence that her conduct was consistent with that of a woman who had been raped. In this case there is not any evidence lead by the Crown of any such complaint."

At the close of the summing up, the following submission was made on behalf of the applicant:

"COUNSEL FOR THE ACCUSED: The...direction I would ask your Honour to give is in these terms: that the failure of the prosecutrix to make a fresh complaint is evidence of consent. Your Honour's only direction, as I recall, on the question of complaint was the customary direction as to the usual evidence of fresh complaints if there is any, plus the added direction that in this case there was none. I ask for a further direction that the absence of fresh complaint is itself evidence of consent. ... HIS HONOUR: You seek a direction from me that because there is no fresh complaint that is evidence of consent? COUNSEL FOR THE ACCUSED: That is my submission. HIS HONOUR: I will not give that direction." (at p464)

7. The applicant's motion for special leave is based on two submissions, each said to raise a matter of general public importance. (at p464)

8. The first submission is that the trial judge was in error in not instructing the jury that the absence of a complaint by the complainant at the earliest reasonable opportunity thereafter, intercourse by the applicant having admittedly taken place with her, was evidence of her consent to that intercourse. (at p464)

9. The second submission was that the above-mentioned record of interview by police officers with

the accused, voluntarily signed by him, was wholly inadmissible, it being said that its only permissible use in the trial was as a means of refreshing the recollection of the officer who conducted the interview. (at p464).

Following paragraph cited by:

[ZBJ v The King \(No 2\)](#) (14 November 2025) (Adamson JA, Chen and Rigg JJ)
[R v KBK](#) (04 November 2025) (Bond JA; Freeburn and Sullivan JJ)
[RM v R](#) (07 August 2024) (Adamson JA, Dhanji and Sweeney JJ)
[RM v R](#) (07 August 2024) (Adamson JA, Dhanji and Sweeney JJ)
[R v Van Wyk](#) (20 December 2018) (Kourakis CJ; Kelly, Lovell, Doyle and Hinton JJ)
[El-Ali v The Queen](#) (02 December 2015) (Ward JA, Adams and R A Hulme JJ)
[Felix Horton \(a pseudonym\)\[1\] v The Queen](#) (26 November 2015) (Redlich and Kaye JJA and Beale AJA)
[Jarrett v R](#) (28 July 2014) (Basten JA, R A Hulme and Campbell JJ)
[R v Dawson-Ryan](#) (28 August 2009) (Gray, Layton and David JJ)
[R v KSC \(No 2\)](#) (30 June 2008) (Goldring DCJ)
[R v Taylor \(No 2\)](#) (23 April 2008) (Ashley and Kellam JJA and Hansen AJA)
[R v Taylor \(No 2\)](#) (23 April 2008) (Ashley and Kellam JJA and Hansen AJA)
[R v Vella](#) (27 February 2008) (Buchanan, Vincent and Kellam JJA)
[R v Wang](#) (14 December 2007) (Buchanan JA and Coldrey and Cavanough Ajja)
[R v BBH](#) (19 October 2007) (Keane and Holmes JJA and Lyons J.)
[R v Gilbert](#) (01 October 2007) (Buchanan and Nettle JJA and Curtain AJA)
[Erohin v Regina](#) (07 April 2006) (James, Simpson and Hall JJ)
[R v Hopper](#) (31 August 2005) (Vincent and Nettle, Jj.A and Osborn, A.J.A)
[R v LTP](#) (01 July 2004)
[R v WEB](#) (18 November 2003) (Winneke, A.C.J, Charles and Eames, Jj.A)
[R v Baker](#) (10 August 2001) (McMurdo P, Davies and Thomas JJA,)
[R v Baker](#) (10 August 2001) (McMurdo P, Davies and Thomas JJA,)
[R v Baker](#) (10 August 2001) (McMurdo P, Davies and Thomas JJA,)
[R v Baker](#) (10 August 2001) (McMurdo P, Davies and Thomas JJA,)
[R v Markuleski](#) (01 August 2001) (Spigelman CJ at 1; Wood CJ at CL at 201; Grove J at 269; Simpson J at 285; Carruthers AJ at 344)

175 As noted above, the trial judge gave the jury a direction as required by s. 107 of the *Criminal Procedure Act 1986* (previously s. 405B of the *Crimes Act 1900*). There is authority that such a direction, which tells the jury that there may be reasons for delay in the complaint, should be balanced by the jury being informed that it was entitled to take into account the delay in assessing the complainant's credibility (see *Crofts v The Queen* (1996) 186 CLR 427). Indeed authority supports the proposition that such a direction should be given "as a general rule" (*Kilby v The Queen* (1973) 129 CLR 460 at 465 ; *R v Davies* (1985) 3 NSWLR 276 at 278). Nevertheless in *Davies* the appeal was dismissed on the basis that in the particular circumstances of the case the issue of the complainant's credibility had been adequately put before the jury (see 279).

[R v Markuleski](#) (01 August 2001) (Spigelman CJ at 1; Wood CJ at CL at 201; Grove J at 269; Simpson J at 285; Carruthers AJ at 344)

R v Markuleski (01 August 2001) (Spigelman CJ at 1; Wood CJ at CL at 201; Grove J at 269; Simpson J at 285; Carruthers AJ at 344)

R v Tubou (28 June 2001) (Heydon JA, Wood CJ, Cl and Sully JJ)

Wimbridge v The Queen (05 May 2000) (Pidgeon J, Wallwork J, Murray J)

R v T (11 June 1999)

16. It is often appropriate for a trial judge to instruct a jury that in evaluating the reliability of the evidence of a complainant in a sexual case the jury can take into account delay in the making of any complaint. In *Kilby v R* [2], Barwick CJ said that a jury can take into account that a complainant had made no complaint at the earliest reasonable opportunity and that particular circumstances may call for such a direction to be given “as a general rule”. That was a case involving the issue of consent. This was not a case where the prosecution had to negative consent with respect to any charge. However, the absence of consent was relevant to the circumstances of the first count though apparently not to the others given the evidence from the complainant about how the relationship developed and how the subsequent sexual exchanges were consensual. The trial judge could have invited the jury to consider whether the absence of a timely complaint, if that be the jury’s conclusion, was relevant to the credibility of the complainant with respect to the first charge in particular and a fact to be considered in evaluating the consistency of his evidence. There may be many reasons to explain why a complaint was not made promptly. The complainant spoke of being shocked and embarrassed by this first act of masturbation, after the complainant said he was encouraged by the appellant to remove his underpants whilst having his jeans dried in a clothes’ drier at the appellant’s house.

via

[2] (1973) 129 CLR 460 at 465.

R v T (11 June 1999)

R v Johnston (31 July 1998) (Spigelman CJ, Sully and Ireland JJ)

Delay in making complaint about sexual assault has posed difficult issues for the administration of justice. At one stage, the courts displayed a distinct scepticism towards complainants. There was a practice of directing a jury that it was unsafe to convict on the uncorroborated evidence of an alleged victim of a sexual assault. Furthermore, it was established that as a general rule a court should direct a jury that a complainant’s failure to complain “at the earliest reasonable opportunity” was something they could take into account in “determining whether to believe her”: *Kilby v The Queen* (1973) 129 CLR 460 at 465.

R v Hewitt (14 May 1998) (Phillips CJ; Charles and Buchanan JJA)

The applicant contended that the learned judge ought to have told the jury that absence of timely complaint was relevant to the credibility of the complainants and was a fact to be considered in evaluating their evidence. The point was advanced as a particular of the ground of appeal that the verdicts were unsafe and unsatisfactory. His counsel said

that the learned judge should have balanced the comments that failure to complain did not necessarily mean that the facts alleged were untrue and there might be good reasons for absence of complaint with a direction that the jury could take into account the fact that the complainants had not complained at the earliest reasonable opportunity. In [Kilby v R.](#) (1973) 129 C.L.R. 460 at 465, Barwick C.J. described the steps a judge should take where the evidence established delay in making complaint in these terms:

[Suresh v The Queen](#) (03 April 1998) (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)
[Suresh v The Queen](#) (03 April 1998) (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)
[Crofts v The Queen](#) (10 October 1996) (Dawson, Toohey, Gaudron, Gummow and Kirby JJ)
[R v Manwaring](#) (22 July 1983) (Street CJ, Begg and Miles JJ)

Mr Barker QC for the appellant Manwaring, in a submission which was adopted by counsel for all appellants, submits that the evidence was not capable of supporting a finding by the jury that G, the victim in the present case, made recent complaint after the offence, and that the trial judge should have so ruled. With commendable candour Mr Barker informed the court that the purpose of obtaining such a ruling would have been to seek a direction to the jury in the terms of what was said by Barwick CJ in [Kilby v The Queen](#) (1973) 129 CLR 460, at 465, as follows:

“It would no doubt be proper for a trial judge to instruct a jury that in evaluating the evidence of a woman who claims to have been the victim of a rape and in determining whether to believe her, they could take into account that she had made no complaint at the earliest reasonable opportunity. Indeed, in my opinion, such a direction would not only be proper but, depending of course on the particular circumstances of the case, ought as a general rule to be given.”

[R v Zorad](#) (02 August 1979) (Street C.J, Reynolds J.A and O'Brien JJ)
[R v Zorad](#) (02 August 1979) (Street C.J, Reynolds J.A and O'Brien JJ)
[R v Zorad](#) (02 August 1979) (Street C.J, Reynolds J.A and O'Brien JJ)

10. It would no doubt be proper for a trial judge to instruct a jury that in evaluating the evidence of a woman who claims to have been the victim of a rape and in determining whether to believe her, they could take into account that she had made no complaint at the earliest reasonable opportunity. Indeed, in my opinion, such a direction would not only be proper but, depending of course on the particular circumstances of the case, ought as a general rule to be given. (at p465)

11. The circumstances of the instant case which I have detailed would, however, in my opinion, be illustrative of an occasion when such an instruction might reasonably be omitted. Clearly, if the evidence of the prosecutrix and the signed statement of the applicant were accepted by the jury, failure to complain could have no relevance. If that statement were not accepted by the jury and the credit of the prosecutrix was under consideration, failure to complain could, in my opinion, have some but very little significance. Her story was that she was held down and raped while physically and vocally resisting, her endeavours by screaming to call attention to her plight being frustrated by her mouth being covered. There was no room to accept a view of the prosecutrix's evidence that intercourse took place with her in any other circumstances. So far as she was concerned it was a case of intercourse whilst she, protesting, was physically overpowered. (at p465)

12. The applicant did not give evidence but made a statement in which he said that, seeing the prosecutrix on the ground talking to one of "the boys", he began to talk to her. As she was endeavouring herself to take her pants off, he helped her. He was kneeling down beside her when she removed her sanitary pad and said "I don't care, but you" - the assembled group - "might". One of those present said he didn't care and had intercourse with her. Then the applicant did so, because, as he said, she was consenting. He denied that she resisted or screamed. He explained the signed statement as due to his confusion and that the police said "that it would be all right, all they wanted was a record and they would fix everything". (at p465).

Following paragraph cited by:

[R v P, TJ](#) (01 October 2019) (Stanley, Nicholson and Doyle JJ)

[R v Green](#) (26 February 2019) (Burns J)

[Griffin v The Queen](#) (14 October 2011) (Redlich, Mandie JJA and Whelan AJA)

[R v HRA](#) (11 April 2008) (Neave and Kellam JJA and Curtain AJA)

65. Even though the authorities establish that a mere narrative of events which were stated to have occurred may not be sufficient to be seen as a complaint, the question must be determined bearing in mind and giving proper weight to the circumstance that the complainant is a young and immature child, not an adult. It cannot be expected that the response of a small child to a sexual assault will be same as that of an adult. The basis upon which such complaints have been admitted as an exception is as evidence of consistency in the conduct of the complainant with the evidence given by her before the Court. [\[26\]](#).

via

[\[26\]](#) [Philby v R](#) (1973) 129 CLR 460, 466 (Barwick CJ).

[Azarian v The State of Western Australia](#) (13 November 2007) (Pullin JA)

[G v The State of Western Australia](#) (28 September 2007) (Wheeler JA Pullin JA Miller JA)

[R v Brdarovski](#) (01 November 2006) (Nettle and Ashley, Jj.A and Coldrey, A.J.A)

[R v B, P](#) (03 August 2006) (Doyle CJ; Gray and Vanstone JJ)

[R v Munro](#) (11 November 2005) (Eames, Nettle and Ashley, Jj.A)

[R v GS](#) (07 October 2005) (McMurdo P, McPherson JA and Fryberg J)

["CJB" v The Queen](#) (17 June 2005) (Wheeler JA, McLure JA, Pullin JA)

["CJB" v The Queen](#) (17 June 2005) (Wheeler JA, McLure JA, Pullin JA)

[R v GG](#) (17 December 2004) (Warren, C.J, Batt and Eames, Jj.A)

[McCreed v The Queen](#) (14 November 2003) (Malcolm CJ, Steytler J, Miller J)

[The Queen v W](#) (10 May 2002) (Gray J)

24. The absence of complaint is a matter that arises in respect of the warnings of which I take account. In addition, where there is evidence of complaint that complaint at common law is not capable of corroborating the evidence of the complainant ([Eade v The King](#) (1924) 34 CLR 154) rather, it may demonstrate the consistency of the conduct of the complainant with the complainant's evidence ([Kilby v The Queen](#) (1973) 129 CLR 460 at 466). The position under

the *Evidence Act 1995* (Cth) , however, may permit evidence to be given of any representations made by the complainant if the conditions of s 66(2) of the *Evidence Act* are met and the use of the evidence of such representations is not limited by s 136 of the *Evidence Act* (*Papakosmas v The Queen* (1999) 196 CLR 297).

Miles v The Queen (22 November 2000) (Wallwork J, Murray J, Miller J)

55 The true basis upon which evidence of complaint is received in a trial of an accused of a sexual assault was stated in *Kilby v The Queen* (1973) 129 CLR 460 where (at 466 and 472) Barwick CJ said:

"Evidence of a complaint at the earliest reasonable opportunity is exceptionally admitted only as evidence of consistency in the account given by the woman claiming to have been raped: that is to say, it is admitted as a matter going to her credit (see *Reg v Lillyman* , per Hawkins J.(1); *Sparks v The Queen* (2).

...

The admission of a recent complaint in cases of sexual offences is exceptional in the law of evidence. Whatever the historical reason for an exception, the admissibility of that evidence in modern times can only be placed, in my opinion. upon the consistency of statement or conduct which it tends to show, the evidence having itself no probative value as to any fact in contest but, merely and exceptionally constituting a buttress to the credit of the woman who has given evidence of having been subject to the sexual offence."

T v The Queen (02 June 2000) (Pidgeon J, Wallwork J, Miller J)

Suresh v The Queen (03 April 1998) (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)

Suresh v The Queen (03 April 1998) (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)

R v Robinson (20 March 1998)

R v Costin (07 August 1997) (Winneke P; Tadgell and Charles JJA)

R v Stoupas (01 July 1997) (Winneke P; Hayne JA; Ashley AJA)

R v Stoupas (01 July 1997) (Winneke P; Hayne JA; Ashley AJA)

R v E (24 May 1996) (Handley JA, Abadee and Sperling JJ)

R v W (03 March 1995)

R v King (03 March 1995) (Fitzgerald P. Pincus JA. Thomas J.)

13. In my opinion, for reasons I shall give, the trial judge, at best, in any case could only instruct the jury that a failure to complain should be taken into consideration by them when they were considering whether they would accept the prosecutrix's evidence. He could not in any case, in my opinion, the basis of which I shall later discuss, tell them that the failure to complain bore out the applicant's statement. Thus, in this case, I would see little need to instruct the jury at all as to the effect upon the prosecutrix's credibility of her failure to complain. (at p466)

14. However, the applicant does not raise or rely on the failure of the judge to instruct the jury as to the effect upon the credibility of the prosecutrix of a failure to complain. His counsel submits that as

a matter of law a judge on a trial of an accused for rape is bound in every case to instruct the jury, no matter what the circumstances, that the failure to make such a complaint is evidence of consent by the woman to the intercourse. The submission is founded on the proposition that because evidence of proximate complaint is evidence, as it was said, that the woman had not consented, the lack of complaint must be evidence of consent. But, in my opinion, even granting the premises, the conclusion does not follow. Further, evidence of a complaint at the earliest reasonable opportunity is exceptionally admitted only as evidence of consistency in the account given by the woman claiming to have been raped: that is to say, it is admitted as matter going to her credit (see *Reg. v. Lillyman*, per Hawkins J. (1896) 2 QB 167, at p 170 ; *Sparks v. The Queen* (1964) AC 964, at p 979). Because the account with which the complaint is said to show consistency is an account of intercourse without consent, it has often been said that the evidence of the complaint is evidence negating consent. In my opinion, this manner of expressing the function of the evidence of proximate complaint is not correct: though, as it shows consistency in her account of rape, the fact of the complaint buttresses her evidence of no consent or, as it was said in *Reg. v. Lillyman* (1896) 2 QB 167 , is inconsistent with consent. At times also it is said with technical inaccuracy that the evidence of such a complaint is corroborative of the woman's evidence of the rape. It is quite clearly not so corroborative (see *R. v. Christie* (1914) AC 545 ; *Eade v. The King* (1924) 34 CLR 154), though it is so spoken of in American literature (see *Wigmore on Evidence*, 3rd ed. (1940), vol. IV, p. 219, par. 1134 and p. 227, par. 1137; vol. VI, p. 173, par. 1761). (at p466)

15. However, having regard to the importance of the matter and the need to have uniformity of practice and the avoidance of laxity in the use of evidence or lack of evidence of proximate complaint, it is proper that I should examine the course of decision in the courts. (at p466)

16. Wigmore, (3rd ed.), vol. IV, p. 219, par. 1134, says as to the admission of evidence of a proximate complaint by a prosecutrix in rape:

"Down to the beginning of the 1800's, evidence of this sort was received by the courts as a matter of old tradition and practice, with little or no thought of any principles to support it. The tradition went back by a continuous thread to the primitive rule of hue-and-cry: and the precise nature of the survival is more fully explained in dealing with the Hearsay Exception of 'Res Gestae'. But as more and more attention began to be given, in the early 1800's, to the principles underlying every sort of evidence, there came to be felt a need of explaining on principle this inherited and hitherto unquestioned practice; and thus the various aspects of its significance began to be thought of."

Wigmore gives the American experience in some detail: but, though this is instructive, we are here concerned with the experience of the common law of England which we have inherited and which in this field we still apply without modification. (at p467)

17. A review of the subject begins, in my opinion, with *Reg. v. Lillyman* (1896) 2 QB 167 . The trial judge at the time of an indictment for rape had admitted, over the objection of counsel for the accused, all that the prosecutrix had said to her mistress very shortly after the commission of the acts of the accused of which the prosecutrix complained. The Court of Crown Cases Reserved (Lord Russell of Killowen C. J., Pollock B., Hawkins, Cave and Wills JJ.) decided that the details of the complaints were admissible and took occasion to state the basis of admissibility and the function of the evidence of a proximate complaint. Prior to that decision there had developed in England a

practice of excluding the details of a complaint by a prosecutrix, whilst admitting the fact that she had complained at a time proximate to the occurrence forming the basis of the charge against the accused. (at p467).

Following paragraph cited by:

R v Murphy (02 August 2013) (Reasons For The Verdict Of Slattery J)

R v Baltensperger (02 December 2004) (Doyle CJ; Bleby and Gray JJ)

R v Hart (12 November 2004) (Perry, Nyland and Gray JJ)

55. The jury were also entitled to consider the evidence of Mr Bottroff's state of distress and the complaints made to his sister, Natalie Mikon, that morning when assessing Mr Bottroff's credibility. Evidence of a victim or witnesses' distressed state immediately after the alleged offending is admissible for the limited purpose of evidence of consistent behaviour and as part of the whole circumstances surrounding an alleged offence. It may be evidence of a witness's credibility, however it cannot be used as evidence of guilt of the accused. As observed in *R v Pahuja (No 2)*, [4] evidence of complaint and distress is not probative but may assist a jury in determining the credibility of the witness. In the case of *Knight*, [5] referred to by Olsson J in *Green*, [6] the court warned against over emphasising the probative value of evidence of distress, re-iterating that evidence of distress will normally only be admissible as evidence of consistency of behaviour.

via

[4] *R v Pahuja (No 2)* (1989) 50 SASR 551 at 575. See also *R v Kilby* (1973) 129 CLR 460 at 468 and *R v Green* [2001] SASC 25.

R v Tofic MUCA No. SCCRM 96/216 Judgment No. 5815 Number of Pages 20 Criminal Law (26 September 1996)

18. It is worth mentioning in passing that Sir Robert Finlay the Solicitor-General in arguing for the Crown in Lillyman's Case (1896) 2 QB, at p 169 submitted that "the principle upon which the fact of the complaint having been made is allowed to be given in evidence is that it is the natural expression of the woman's feelings that as soon as possible after the occurrence she should tell her mother, or her mistress, or some person in a confidential relation, what has happened; it is further admissible as evidence of non-consent". But quite clearly the Court did not accept the whole of that submission. Passages in the judgment delivered for the Court by Hawkins J. to my mind make this quite plain (1896) 2 QB, at p 170 .

"It is necessary, in the first place, to have a clear understanding as to the principles upon which evidence of such a complaint, not on oath, nor made in the presence of the prisoner, nor forming part of the res gestae, can be admitted. It clearly is not admissible as evidence of the facts complained of: those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking,

evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains." (at p468)

19. Here the emphasis is that the complaint is not probative but only an aid to the credibility of the prosecutrix. When it is said that the complaint can be used "as being inconsistent with her consent to that of which she complains" the Court, in my opinion, is but stating the obverse of the statement that the complaint tends to show consistency in the evidence of the prosecutrix which, whether consent be an issue in the trial or not, must in the nature of things be an account of an occurrence taking place without her consent. (at p468)

20. The passage cited by Hawkins J. from Blackstone shows that the admission of evidence of the complaint is based solely on the effect it has on the credit of a prosecutrix (1896) 2 QB, at p 171 .

"...but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance: if the witness be of good fame; if she presently discovered the offence, and made search for the offender...these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned". (at p468)

Following paragraph cited by:

R v KBK (04 November 2025) (Bond JA; Freeburn and Sullivan JJ)

GD v The Queen (21 February 2018) (Macfarlan JA, Hoeben CJ, Cl and Garling JJ)

56. In *The Queen v Lillyman* [1896] 2 QB 167 at 170-1 Hawkins J referred to the statement in *Hawkins' Pleas of the Crown*, in relation to charges of sexual offences, that "[i]t is a strong, but not a conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact". In *Kilby v The Queen* (1973) 129 CLR 460 at 469 ; [1973] HCA 30 Barwick CJ said in relation to this "presumption":

"The word 'presumption', in this connexion, is not, of course, a reference to a presumption of law but is no more, in my opinion, than a statement that a tribunal of fact might well consider that a woman who made no complaint was not to be believed when she gave an account of events to which she gave no consent."

Jarrett v R (28 July 2014) (Basten JA, R A Hulme and Campbell JJ)

40. Bearing these considerations in mind, the operation of s 294(2) involves three elements. The first is that absence of complaint or delay in complaining does not of itself indicate falsity of complaint, because there may be good reasons why the victim hesitated or refrained for a period. That element is inconsistent with the assumption of fact expressed by Barwick CJ in *Kilby* (at 469) that it is "a strong, but not a conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact".

APC v The State of Western Australia (17 August 2012) (Martin CJ, Pullin JA, Mazza JA)
R v El Rifai (10 August 2012) (Gray, David and Kelly JJ)
R v Glennon (No 2) (16 March 2001) (Winneke, P., Ormiston and Callaway, Jj.A)
Lia v Minister for Immigration and Multicultural Affairs (19 February 2001) (Finkelstein J)

33. I regret to say that I have real doubts about the correctness of *Guden*. Properly characterised, I believe that what the tribunal did in that case, and what it did in the present case, was to treat the conduct of the applicant (the failure to answer a question in the one case and the failure to provide certain information in the other) as evidence and draw an inference from that evidence, or perhaps from that evidence together with other evidence. The tribunal did not find as a fact that the applicant was required to provide certain information; it drew certain conclusions from his failure to do so, based on its experience of human nature. This is a process commonly undertaken by a court when it treats conduct as evidence. For example, in criminal trials for sex offences, the failure by a complainant to make a complaint at the earliest reasonable opportunity has traditionally been "a considerable factor where a tribunal of fact is deciding on the credibility of the complainant" (*Kilby v The Queen* (1973) 129 CLR 460 at 469). No finding of fact is involved in this process of reasoning. Also, there is the common example of the failure by a party to call a particular witness. In certain circumstances (those circumstances are well-known) if a party does not call a witness (a fact) that can lead to the inference that if called, the witness would give evidence unfavourable to the party's cause. This does not involve any finding of fact (that the party in question is in a particular circumstance required to call a witness); it is a process of reasoning. The trier of fact draws the inference which the circumstances of the case permit, because it is reasonable to do so.

R v A (19 December 2000) (Pincus JA, Chesterman and Atkinson JJ,)
R v A (19 December 2000) (Pincus JA, Chesterman and Atkinson JJ,)
R v Aston-Brien (02 June 2000) (Davies JA, Mackenzie and Douglas JJ, Judgment of the Court)
Papakosmas v The Queen (12 August 1999) (Gleeson CJ, Gaudron, McHugh, Kirby and Hayne JJ)
Papakosmas v The Queen (12 August 1999) (Gleeson CJ, Gaudron, McHugh, Kirby and Hayne JJ)
R v FJB (26 May 1999) (Winneke, P., Charles and Buchanan, Jj.A)
R v Matthews (24 July 1998) (Callaway, Kenny and Buchanan, Jj.A)

12. As the Full Court explained in *R. v. Freeman* [1980] V.R. 1 at p. 6, lines 42-46, evidence that the alleged victim of a sexual assault complained of it at what is usually called the first reasonable opportunity after the event and evidence that she did not are admitted for similar reasons. In the latter case, the jury may take the complainant's delay in complaining into account in deciding whether to accept her evidence, but they must remember that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining about it. Section 61(1)(b) of the *Crimes Act 1958* was in a different form at the time of the trial but the difference is not material. The second part of what his Honour said was favourable to the

R. v. Matthews KENNY, J.A. applicant. Where there is admissible evidence of complaint, the jury may take that into account in deciding whether to accept the complainant's evidence: see the immediately preceding paragraph in *Freeman's Case*, especially the sentence at lines 38-41. The purpose of leading the evidence is to buttress the complainant's credibility, but the jury are not obliged to regard it in that light: cf. *R. v. Lillyman* [1896] 2 Q.B. 167 at p. 177; *Kilby v. R.* (1973) 129 C.L.R. 460 at pp. 469 and 472; *M. v. R.* (1994) 181 C.L.R. 487 at p. 514 and *Crofts v. R.* (1996) 186 C.L.R. 427 at p. 434. Just as they may think delay in complaining completely irrelevant, so they may think that the making of a complaint does not, in the circumstances of the case before them, make the alleged victim's account more credible.

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R v Costin (07 August 1997) (Winneke P; Tadgell and Charles JJA)

R v Rodriguez (13 June 1997) (Hayne, Charles and Callaway JJA)

R v E (24 May 1996) (Handley JA, Abadee and Sperling JJ)

M v the Queen (31 May 1994) (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ 76 A Crim R 213)

M v the Queen (31 May 1994) (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ 76 A Crim R 213)

Whitehorn v the Queen (08 November 1983) (Gibbs C.j., Brennan, Murphy, Deane and Dawson JJ)

R v Freeman (15 November 1978) (STARKE, MCINERNEY and MURPHY, JJ)

21. Having dealt with the submission that the particulars of the complaint ought not to be admitted and having examined in that connexion a course of decision between 1779 and 1877, the judgment proceeded to express the Court's definite opinion (1896) 2 QB, at p 177 :

"After very careful consideration we have arrived at the conclusion that we are bound by no authority to support the existing usage of limiting evidence of the complaint to

the bare fact that a complaint was made, and that reason and good sense are against our doing so. The evidence is admissible only upon the ground that it was a complaint of that which is charged against the prisoner, and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box negating her consent, and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her." (at p469)

22. In my opinion, nothing in this judgment lends any support to the proposition that evidence of the making of the complaint is evidence of any fact other than the fact of the making of the complaint itself and of the terms in which it is claimed to have been made. When Hawkins J. in the first of the two passages which I have quoted from Lillyman's Case (1896) 2 QB, at p 171 spoke of the evidence of a complaint as being inconsistent with consent he was not, in my opinion, intending to place its admissibility upon a second and different ground from that of its tendency to show consistency in the conduct of the prosecutrix. He was merely indicating the extent of its effect on the credit of the prosecutrix. (at p469)

23. In my opinion, the error which has been made by text writers and in subsequent decisions is in treating this remark of Hawkins J. as if it did set up a second and independent ground of admissibility. In my respectful opinion, it did not. (at p469)

24. In Reg. v. Lillyman (1896) 2 QB, at pp 170-171 ,reference was made to the passage in Hawkins' Pleas of the Crown where it is said "It is a strong, but not a conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact". But just as the fact of a proximate complaint tends to support credibility of the complainant so its absence may be a considerable factor where a tribunal of fact is deciding on the credibility of the complainant. The word "presumption", in this connexion, is not, of course, a reference to a presumption of law but is no more, in my opinion, than a statement that a tribunal of fact might well consider that a woman who made no complaint was not to be believed when she gave an account of events to which she gave no consent. This use of the word "presumption" has assisted to give rise to misconception as to the basis of admissibility of a proximate complaint and as to the effect of the absence of such a complaint. (at p469).

25. In any case, to say that Lillyman's Case (1896) 2 QB 167 recognizes that the evidence of a proximate complaint may be used to negative consent is to make an ambiguous statement. If it means that in so far as a complaint tends to buttress the evidence of the prosecutrix that what occurred did occur without her consent and in so far as belief in the truth of her statement would negative consent, it may be an acceptable statement, though, I think, prone to be, as it has proved to be, misleading. If, of course, it means that the evidence of a complaint is direct evidence negating consent, I am of opinion that the statement is completely unwarranted, both in point of precedent so far as Lillyman's Case (1896) 2 QB 167 is concerned and in point of logic. It is true that Ridley J. in R. v. Osborne (1905) 1 KB 551 treated the evidence of proximate complaint as admissible on two grounds, founding himself on Lillyman's Case (1896) 2 QB 167 . He did not intend to depart from the decision or to enlarge its reasoning. But as I have indicated, Lillyman's Case (1896) 2 QB 167 does not really warrant the conclusion that there are two distinct grounds of admissibility of evidence of proximate complaint. Always the basic authority for the contrary proposition in the texts and in

the decisions has been Lillyman's Case (1896) 2 QB 167 .(at p470).

Following paragraph cited by:

R v Blayney (11 December 2003)

R v Blayney (11 December 2003)

R v E (24 May 1996) (Handley JA, Abadee and Sperling JJ)

26. Phipson in all its editions has stated the rule thus:

"In cases of rape, indecent assault, and similar offences, the fact that the prosecutrix or prosecutor made a complaint, shortly after the outrage, of the matters charged against the prisoner, together with the particulars of the complaint, are admissible as evidence in chief for the prosecution, not to prove the truth of the matters stated, but (1) to confirm her or his testimony and (2) where consent is in issue, to disprove consent." (11th ed. (1972), par. 355).

See also Archbold's Criminal Pleading Evidence and Practice, 36th ed. (1966), p. 392, par. 1077:

"In Reg. v. Lillyman (1896) 2 QB 167 , it was held after consideration of the earlier authorities, that upon the trial of an indictment for rape or other kindred offences against women or girls (including indecent assault and sexual intercourse with girls under thirteen and between thirteen and sixteen) the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence and the particulars of such complaint, may so far as they relate to the charge against the prisoner, be given in evidence by the prosecution, not as being evidence of the facts complained of but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as negating consent on her part. The mere complaint is no evidence of the facts complained of, and its admissibility depends on proof of the facts by sworn or other legalised testimony: R. v. Brasier (1779) 1 Leach 199 (168 ER 202) ; R. v. Wood (1877) 14 Cox 46 ; 1 Hawk, c. 16, s. 9; 4 Bl Com 211,213 . In R. v. Osborne (1905) 1 KB 551 , the indictment was for an indecent assault on a girl under thirteen, and consent was therefore immaterial. It was held that in the case of charges of sexual offences against females, evidence of fresh complaint is admissible 'whether non-consent is legally a necessary part of the issue or whether on the other hand it is what may be called a collateral issue of fact' in consequence of the story told by the complainant in the witness-box, and the complaint is not admissible merely as negating consent, but as being consistent with the sworn evidence of the complainant." (at p471)

27. Though Ridley J. in R. v. Osborne (1905) 1 KB 551 said that evidence was admitted because, if believed, it was consistent with a complainant's story in evidence and also that it was inconsistent with consent, he did not say at any time that it was evidence of the absence of consent. Indeed on

neither of the bases of the admissibility which his Lordship expressed is the complaint probative of any fact, not even of the facts made in the complaint. (at p471)

28. The definitive passage in the judgment of Hawkins J. in *Reg. v. Lillyman* (1896) 2 QB, at p 177 finds its echo and endorsement in *Sparks v. The Queen* (1964) AC 964 . The conclusion there expressed that the evidence of a complaint is not admissible in the absence of evidence by the prosecutrix is emphatic of the proposition that the evidence of a complaint is not probative of the absence of consent. (at p471) .

Following paragraph cited by:

Suppressed (10 May 2024) (Buss P; Mazza and Vandongen JJA)

R v KBC (04 April 2023) (Morrison, McMurdo and Bond JJA)

12. Mr Copley KC, who appeared with Mr Black of Counsel for the appellant, focussed on that part of the direction where reference was made to the evidence of what M and P separately told their stepmother and mother. Essentially that is the passage highlighted in the preceding paragraph. The submission made was:[6]
- (a) the directions amounted to an invitation to accept as the truth what each complainant said in proof of the case that there had been no collusion;
 - (b) if the jury accepted that each complainant made a complaint (or complaints) of a sexual nature prior to Easter Sunday, 2019, that might have been a permissible consideration on the issue of collusion, [7] but the truth of the complaints was not;
 - (c) prior complaints are not admissible for the truth of them, they are only relevant to credit; [8]
 - (d) the use that the jury was permitted to make of the details of what each complainant said to the mother and stepmother conflicted with the correct directions given regarding the limited use that could be made of preliminary complaint evidence; and
 - (e) the erroneous direction occasioned a miscarriage of justice because there is a reasonable possibility that the jury dismissed the risk of collusion due to the jury being permitted to consider the details of each complainant's complaints as the truth of what occurred.

via

[8] Referring to *Kilby v The Queen* (1973) 129 CLR 460 at 472 , 474 ; *Jones v The Queen* (1997) 71 ALJR 538 at 539 ; *R v LSS* [2000] 1 Qd R 546 at [15] .

Weragoda v The Queen (28 October 2021)

Weragoda v The Queen (28 October 2021)

R v Henningsen (05 March 2021) (Fraser and McMurdo JJA and Boddice J)

R v Van Wyk (20 December 2018) (Kourakis CJ; Kelly, Lovell, Doyle and Hinton JJ)

Collins v The Queen (09 May 2018) (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ)
KSN v The State of Western Australia (18 August 2017) (Buss P; Mazza JA; Hall J)
R v Collins (02 June 2017) (Gotterson and Morrison JJA and Burns J,)

54. Evidence of preliminary complaint is admissible as an exception to the hearsay rule but, as Barwick CJ remarked in *Kilby v The Queen*, [108] “the admissibility of that evidence ... can only be placed ... upon the consistency of statement or conduct which it tends to show, the evidence having itself *no probative value* as to any fact in contest”. [109] Since those remarks were made, s 4A was inserted in the *Criminal Law (Sexual Offences) Act 1978 (Qld)* with effect from 5 January 2004. [110] By s 4A(2), evidence of how and when any “preliminary complaint” [111] was made by a complainant about the alleged commission of a sexual offence by an accused is admissible in evidence, regardless of when such a complaint was made. [112]

via

[109] *Ibid* 472 (emphasis added). These remarks were quoted with approval in *Bull v The Queen* (2000) 201 CLR 443 at 466 per McHugh, Gummow and Hayne JJ.

Panda v The State of Western Australia (12 January 2017) (Buss P; Mazza and Mitchell JJA)

42. *Crofts* concerned an accused charged with thirteen counts of committing sexual offences against a child aged between 10 and 16 years. The complainant had delayed in making complaints about the alleged offending for periods of between six months and six years from the dates on which the acts were alleged to have occurred. Section 61 of the *Crimes Act 1958 (Vic)* provided, relevantly, that on the trial of a person for certain sexual offences, the judge must not warn, or suggest in any way to, the jury, that the law regards complainants in sexual cases as an unreliable class of witness. Section 61 also contained provisions substantially similar to s 36BD of the Western Australian *Evidence Act*. Toohey, Gaudron, Gummow and Kirby JJ referred to the statement of Barwick CJ (with whom McTiernan, Stephen and Mason JJ concurred) in *Kilby v The Queen* [1973] HCA 30; (1973) 129 CLR 460, 472, in relation to the significance of a want of timely complaint, where his Honour said:

In my opinion, quite apart from the fact that there may be many reasons why a complaint is not made, the want of a complaint does not found an inference of consent. It does tell against the consistency of the woman's account and accordingly is clearly relevant to her credibility in that respect (448).

Cawthray v R (09 May 2013) (Hoeben CJ, Cl, Adams and Beech-Jones JJ)

R v El Rifai (10 August 2012) (Gray, David and Kelly JJ)

SPW v The State of Western Australia (24 February 2012) (Pullin JA, Buss JA, Mazza JA)

PRW v The Queen (24 November 2011) (Buchanan JA and Whelan and Robson AJJA)

Narkle v The State of Western Australia (26 July 2011) (McLure P, Buss JA, Hall J)

R v S, DD (24 December 2010) (Duggan, Anderson and Peek JJ)

R v Amjad (07 December 2010) (Duggan, Anderson and David JJ)

R v H, T (24 August 2010) (Gray, White and Kourakis JJ)

R v Laa (22 June 2010) (Holmes JA and Cullinane and McMeekin JJ,)

17. The distinguishing feature of the evidence on counts 1, 3, 4 and 6, as counsel for the appellant pointed out, was that B complained of the masturbation involved in those offences to his mother and Ms Rodriguez; but in respect of the fellatio which was the subject of counts 2 and 5, there was no such preliminary complaint. The evidence of preliminary complaint was admissible as going to the consistency and hence, the credibility, of B's story. [3] But the existence of complaint in respect of some of the counts, and its effect in buttressing B's credit, did not mean that the jury must, acting rationally, have accepted his account on the remaining counts so as to convict on them also.

via

[3] *Kilby v The Queen* (1973) 129 CLR 460 at 472.

R v J, JA (23 December 2009) (Duggan, Nyland and White JJ)

R v J, JA (23 December 2009) (Duggan, Nyland and White JJ)

CGS v The State of Western Australia (19 November 2009) (McLure P, Pullin JA, Buss JA)

Prazmo v The State of Western Australia (29 January 2009) (Miller JA)

29. The direction given by the trial judge on complaint simply related to the complaint that the complainant made to her partner after the alleged event. A proper direction was given that a complaint could not be proof that the event had occurred, but that the evidence was led to show consistency of conduct and could be taken into account in relation to the complainant's credibility: see *Kilby v The Queen* [1973] HCA 30; (1973) 129 CLR 460 per Barwick CJ at 472.

R v Kovacs (23 December 2008) (de Jersey CJ, Muir and Fraser JJA,)

R v Williams (19 December 2008) (Fraser JA, Cullinane and Jones JJ,)

R v Bertrand (19 September 2008) (Vincent, Redlich and Weinberg JJA)

R v Bertrand (19 September 2008) (Vincent, Redlich and Weinberg JJA)

DS v The State of Western Australia (02 September 2008) (Wheeler JA Miller JA Murray AJA)

31. In the present case, events happened quickly. The complainant's mother observed her husband leave the complainant's room. She got out of bed, took her boys back to their room and then went in to see the complainant. She observed the complainant to be crying. She asked her whether her father had been in the room and having received an affirmative answer, then asked the question, 'Did he touch you?' When she got no answer, she said, 'Did he touch you on the wee?', and she received a nod in response. In my view, the evidence met the test of admissibility and was properly admitted by the trial judge. Once admitted, it was evidence which constituted a buttress to the credit of the complainant: *Kilby v The Queen* (1973) 129 CLR 460, 472 (Barwick CJ). That was the direction given to the jury by the trial judge and there is no complaint made about that direction.

HML v The Queen (24 April 2008) (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ)

HML v The Queen (24 April 2008) (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ)

[FGC v The State of Western Australia](#) (04 March 2008) (Wheeler JA)
[Leeks v XY](#) (20 February 2008) (Buchanan, Vincent and Redlich JJA)
[Azarian v The State of Western Australia](#) (13 November 2007) (Pullin JA)
[Azarian v The State of Western Australia](#) (13 November 2007) (Pullin JA)
[Donaldson v The State of Western Australia](#) (16 October 2007) (McLure JA)
[R v Brdarovski](#) (01 November 2006) (Nettle and Ashley, Jj.A and Coldrey, A.J.A)
[Bropho v The State of Western Australia](#) (20 June 2006) (Roberts-Smith JA)
["R" v The State of Western Australia](#) (09 June 2006) (Steytler P)
[Dye v The State of Western Australia](#) (08 December 2005) (Wheeler, Roberts-Smith and Pullin JJA)
[R v AJS](#) (07 December 2005) (Maxwell, P., Nettle, J.A and Redlich, A.J.A)
[R v RH](#) (15 December 2004) (Chernov and Vincent, Jj.A and Gillard, A.J.A)
[Hewett v Medical Board of Western Australia](#) (11 August 2004) (Miller J)
[R v Koolmatrie No. Sccrm-03-223](#) (18 December 2003)

7. In the course of his reasons, Bleby J observed:

“Another formulation of the test is whether, having regard to all the circumstances, including delay, the complaint is capable of supporting the credibility of the complainant: [R v King](#) ;[\[5\] R v W](#) . [\[6\]](#) That test has some attraction as the complaint cannot be used as evidence of the fact of the offence, but can only go to the credibility of the complainant and the consistency or otherwise of her evidence: [R v Kilby](#) ; [\[7\] Ugle v R](#) . [\[8\]](#) ”.

via

[\[7\]](#) (1973) 129 CLR 460 at 472. .

[R v Knigge](#) (01 August 2003) (Winneke, P., Phillips and Chernov, Jj.A)
[R v Mill No. Sccrm-02-289](#) (30 August 2002)
[R v Pidoto](#) (10 May 2002) (Callaway, Batt and Vincent, Jj.A)
[R v Baker](#) (10 August 2001) (McMurdo P, Davies and Thomas JJA,)
[Zoneff v The Queen](#) (25 May 2000) (Gleeson Cj,gaudron, Gummow, Kirby and Callinan JJ)
[Bull v The Queen](#) (11 May 2000) (Gleeson Cj,mchugh, Gummow, Kirby and Hayne JJ)
[R v M](#) (11 February 2000) (McMurdo P, Davies JA and Helman J,)
[R v PLK](#) (30 November 1999) (Tadgell, Charles and Buchanan, Jj.A)
[R v James](#) (23 July 1999) (Beazley JA, Simpson and Bell JJ)
[R v Camilleri](#) (23 February 1999) (Vincent, J)
[R v LSS](#) (02 October 1998) (Pincus JA Thomas JA Ambrose J)
[R v SZEJNOGA No. Sccrm-98-72 Judgment No. S6853](#) (18 September 1998)
[Graham v The Queen](#) (06 August 1998) (Gleeson CJ,Gaudron, Gummow, Hayne and Callinan JJ)
[R v Abraham No. Sccrm-97-19, Sccrm-97-128 Judgment No. S6654](#) (06 May 1998)
[Suresh v The Queen](#) (03 April 1998) (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)

4. Evidence of prior complaint is admissible in sexual offence cases by way of exception to the rule against hearsay. It is admissible because of the tendency of people to assume, at least in earlier times, that the victim of a sexual offence will complain at the first reasonable opportunity and that, if complaint is not then made, a subsequent complaint is likely to be false [\[3\]](#) . It follows that evidence

of complaint is only admissible if it is evidence of early complaint or, as is usually said, of "recent complaint". And it is admitted not as evidence of the facts in issue [\[4\]](#) , but as evidence of consistency which buttresses the credit of the complainant [\[5\]](#) .

via

[\[5\]](#) [Kilby v The Queen](#) (1973) 129 CLR 460 at 472 per Barwick CJ .

[R v McKellin](#) (19 December 1997) (Phillips CJ; Charles JA; Vincent AJA)
[Vincent Raymond Jones v The Queen](#) (02 December 1997) (Brennan CJ, Gaudron, McHugh, Gummow and Kirby JJ)
[R v Stoupas](#) (01 July 1997) (Winneke P; Hayne JA; Ashley AJA)
[R v Stoupas](#) (01 July 1997) (Winneke P; Hayne JA; Ashley AJA)
[Crofts v The Queen](#) (10 October 1996) (Dawson, Toohey, Gaudron, Gummow and Kirby JJ)
[Crofts v The Queen](#) (10 October 1996) (Dawson, Toohey, Gaudron, Gummow and Kirby JJ)
[R v Miletic](#) (09 August 1996) (Winneke P; Charles and Callaway JJA)
[R v King](#) (03 March 1995) (Fitzgerald P. Pincus JA. Thomas J.)
[Carindale Country Club Estate Pty Ltd v Astill](#) (15 April 1993) (Gallop(1), Davies(2) and Wilcox(1) JJ)
[Ugle v The Queen](#) (21 November 1989) (Brennan, Dawson, Toohey, Gaudron and McHugh JJ.)
[R v Keeley and Alexander](#) (01 November 1979) (MCINERNEY, MURPHY and FULLAGAR, JJ)

[29. Jordan C.J. in Smith v. Commonwealth Life Assurance Society Ltd. \(1935\) 35 SR \(NSW\) 552, at p 556 , said:](#)

"Such evidence is admissible, not because what was said by way of complaint can be treated as corroborating the evidence of the facts of the alleged happening given by the witness in the witness-box, but, firstly, because absence of complaint is strong evidence of consent in any case in which consent is material, and secondly because the fact that a complaint was made at the time in terms similar to the evidence afterwards given, goes to negative the possibility that what is now said in evidence is an afterthought - an invented story prepared after the event - a possibility which is regarded as existing in a special degree in this class of case."

In support of these propositions the learned Chief Justice cited [R. v. Osborne \(1905\) 1 KB 551](#) and [R. v. Christie \(1914\) AC 545](#) . [In my respectful submission neither of these cases lends support for either of these propositions. Halsbury \(1952\), 3rd ed., vol. 10, p. 468, par. 859, in my opinion, puts the matter in proper perspective when it is there said:](#)

"The admissibility of the particulars of a complaint made soon after the commission of an alleged offence in the absence of the defendant by the person in respect of whom a crime is alleged to have been committed is peculiar to rape, indecent assault and similar offences upon females, and also offences of indecency between male persons. This

evidence is not to be taken in proof of the facts complained of, but only as matter to be borne in mind by the jury in considering the consistency, and, therefore, the credibility, of the complainant's story, including the consideration of the question of consent if the prisoner raises that as a defence." (at p472)

30. The admission of a recent complaint in cases of sexual offences is exceptional in the law of evidence. Whatever the historical reason for an exception, the admissibility of that evidence in modern times can only be placed, in my opinion, upon the consistency of statement or conduct which it tends to show, the evidence having itself no probative value as to any fact in contest but, merely and exceptionally constituting a buttress to the credit of the woman who has given evidence of having been subject to the sexual offence. (at p472)

31. To understand the reasons for the admissibility and the use which can properly be made of the evidence of recent complaint is to deny the validity of the applicant's proposition that lack of complaint is probative of consent. I can see no ground in logic for saying that because evidence of complaint is admitted to show consistency in the story told by the woman, evidence of non-complaint is evidence of her consent to the intercourse. In my opinion, quite apart from the fact that there may be many reasons why a complaint is not made, the want of a complaint does not found an inference of consent. It does tell against the consistency of the woman's account and accordingly is clearly relevant to her credibility in that respect. (at p472)

32. I am clearly of opinion therefore that a trial judge is not only not bound as a matter of law but not entitled to instruct a jury in the trial of an accused on a charge of rape that the failure of the woman claiming to have been raped to complain at the earliest possible opportunity is evidence of her consent to the intercourse. Statements to the contrary in *Reg. v. Hinton (1961) Qd R 17* and in *Reg. v. Mayberry (Court of Criminal Appeal of Queensland 1973, unreported)* are not, in my opinion, supportable. (at p472)

33. The second submission made on behalf of the applicant is, in my opinion, unacceptable. The "record of interview" is a written document, accepted as to its contents and signed by the accused. To the extent that its contents are relevant it is in my opinion clearly admissible, assuming its signature and the material it contains to have been voluntarily given. That it comes into existence at the instance of the police and as the result of police questioning does not mean that for those reasons alone it is inadmissible. (at p472)

34. Of course, if the document contains inadmissible or irrelevant matter, that matter should not be admitted, but should be excised from the document and not placed before the jury. But to the extent that it contains an admission of guilt, or an admission of a fact or facts relevant to an issue in the trial or from which such a fact or facts may be inferred or statements connecting the story it tells, clearly it will be admissible. No doubt counsel for an accused and the trial judge will both scan such a record of interview with scrupulous care to ensure that only so much of it is admitted as is relevant and admissible to the extent I have indicated. (at p473)

35. Over and above the question of admissibility is the general discretion of the trial judge to ensure fairness both to the Crown and to the accused. He will exercise that discretion in deciding whether to admit the document and in controlling the use made of it if and when admitted into evidence. In all that I have said, I have assumed voluntariness and an absence of unlawful or unfair procurement

calling for the exclusion of the document in the exercise of the judicial discretion. (at p473)

36. In my opinion, the applicant's submission that the signed record of interview irrespective of what it contains cannot be admitted but used only to refresh recollection is quite clearly not sustainable. (at p473)

37. Having made these observations on the submissions of the applicant, I am of opinion that the case is not a case in which we should grant special leave. (at p473).

McTIERNAN J. I have had the advantage of reading and considering the judgment of the Chief Justice which he has just handed down and I entirely agree with it. (at p473) .

MENZIES J. Two grounds for the grant of special leave to appeal from a decision of the Court of Criminal Appeal of New South Wales were urged by counsel for the applicant, an accused convicted upon a charge of rape. (at p473)

2. The first is that there was a misdirection at the trial in that the learned trial judge did not direct the jury that the absence of a recent complaint, by the girl alleged to have been raped, was evidence that she consented to the intercourse which took place between the accused and herself. (at p473).

Following paragraph cited by:

R v Maiolo (No 3) (07 August 2014) (David, Peek and Stanley JJ)

75. As alluded to above, the law of recent complaint existed as a small area of law encircled by two larger areas of the common law. The first larger area was the rule against reception of hearsay evidence; the second larger area was the rule against self bolstering of evidence by reliance upon previous consistent statements made by the complainant. Evidence of recent complaint in sexual cases co-existed with the rule against hearsay in circumstances where an apparent conflict (or at least tension) was recognised, but sought to be explained in different ways. [35]. However, whatever the precise rationale for the apparent conflict with the rule against hearsay, it has always been recognised that the common law doctrine of recent complaint in sexual cases is clearly inconsistent with the general common law prohibition of self bolstering of evidence through reliance upon previous consistent statements. [36].

via

[35] Even today, one sees clear differences of expression in this area. Some authorities treat recent complaint evidence as an *exception* to the rule against hearsay; examples include: Suresh v The Queen (1998) 102 A Crim R 18, 19-20 (Gaudron and Gummow JJ); R v Szejnoga [1998] SASC 6853 (Doyle CJ). Other authorities treat such evidence as not infringing the rule against hearsay due to the *limited purpose* for which it is tendered; examples include: Papakosmas v The Queen (1999) 196 CLR 297, 302-303 (Gleeson CJ and Hayne J); R v Kilby (1973) 129 CLR 460, 474 (Menzies J) .

Smith v The State of Western Australia (28 April 2014) (McLure P; Buss and Mazza JJA)

3. The complaint at the earliest reasonable opportunity that offers by a woman alleged to have been raped is, it has long been established, admissible evidence against the man charged with the offence. The basis of the admission of such a complaint has been explained, from time to time, in language which has not always been exactly to the same effect. It has, however, always been recognized that the making of such a complaint is a matter going to support the credibility of evidence of the woman alleged to have been raped. (at p474)

4. In Sparks v. The Queen (1964) AC 964, the House of Lords decided that, upon the trial of a man charged with the indecent assault of a girl just under the age of four, evidence by the girl's mother of a complaint by the girl was inadmissible because the girl had not herself given evidence. Lord Morris, speaking for the House of Lords said (1964) AC, at p 979 :

"If the girl had been old enough to give evidence and if she had given evidence, and if the mother had given evidence as to a complaint made to her by the girl shortly after the alleged assault, the latter evidence would not be evidence which proved the truth of anything that the girl had said. If admitted it would be received on the basis that it tended to show consistency in her conduct and consistency with the evidence given by her in court: it would relate to her credibility."

This decision shows that in cases where complaints are admissible, the complaint is not admitted as hearsay evidence of the relevant facts. Were that the case, the complaint would be admissible whether or not the female assaulted or raped gave evidence. (at p474)

5. It is also established that, when admitted, the complaint does not merely support a woman's denial of consent to intercourse; it may support the whole of her story including for instance the identification of her attacker. It is because this is so that the details of the complaint and not merely the fact of the complaint may be proved: Reg. v. Lillyman (1896) 2 QB 167. There, in a judgment which said all that needs to be said on the matter, this appears (1896) 2 QB, at pp 177, 178 :

"The evidence is admissible only upon the ground that it was a complaint of that which is charged against the prisoner, and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box negating her consent, and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her. It has been sometimes urged that to allow the particulars of the complaint would be calculated to prejudice the interests of the accused, and that the jury would be apt to treat the complaint as evidence of the facts complained of. Of course, if it were so left to the jury they would naturally so treat it. But it never could be legally so left; and we think it is the duty of the judge to impress upon the jury in every case that they are not entitled to make use of the complaint as any evidence whatever of those facts, or for any other purpose than that we have stated. With such a direction, we think the interests of an innocent accused would be more protected than they are under the present usage. For

when the whole statement is laid before the jury they are less likely to draw wrong and adverse inferences, and may sometimes come to the conclusion that what the woman said amounted to no real complaint of any offence committed by the accused." (at p475)

6. Not infrequently the main issue in a trial for rape is the absence of the consent of the woman in respect of whom the charge is made. Where this is so, it is, of course, natural enough to speak, without precision, of the proof of a recent complaint as evidence of the absence of consent. It is, for instance, this consideration that explains the language of judges in cases such as *R. v. Osborne* (1905) 1 KB 551, at pp 560, 561 in a judgment which strongly emphasizes that evidence of the recent complaint is admitted not as evidence of the acts complained of, but as affording greater probability that the evidence of the woman who has made such a complaint is true. (at p475).

7. That the law for potent reasons so admits evidence of a recent complaint against an accused charged with rape affords no basis for the contention of counsel for the applicant here that, in a case of rape where there has been no complaint, the judge must, as a matter of law, instruct the jury that the absence of recent complaint affords evidence of the consent to intercourse of the woman alleged to have been raped. To decide that the absence of the complaint is evidence of such consent would be an unwarranted generalization for the absence of complaint might, in a particular case, be due to other considerations. A generalization that the absence of complaint renders it probable that there was consent to intercourse, is to my mind without justification either in law or in life, yet the direction here contended for would be proper only if the absence of complaint tended to support that conclusion. It is, of course, true that in a particular case the explanation of an absence of complaint might be that there was consent, but the correct way to deal with that possibility, in an appropriate case, is for the judge to tell the jury that in considering the evidence that the intercourse was had without consent, it is a circumstance that is to be taken into account that there was no complaint by the woman at the first reasonable opportunity for making it. This is, however, another matter. Such a direction would be based upon like considerations to those rendering a complaint admissible whereas the direction here sought would depart from those considerations and would rest rather upon what, in one aspect, has been decisively rejected i.e., that a complaint or the absence of a complaint is material evidence about what had happened. (at p476)

8. The second matter relates to the admissibility of a record of interview between the accused and a police officer which the accused signed as correct. The record contains admissions by the accused of matters tending to establish his guilt. (at p476)

9. I consider the signed record was admissible. In this case, I am disposed to think that the record contained nothing inadmissible although some of the questions and answers do no more than show the setting of the interview and provide background of completeness and continuity for what is of evidential value. It hardly needs to be said, however, that if there were any part of the record which contained inadmissible matter either because of the irrelevance to the charge or because what was said if admitted would infringe the rules of evidence, e.g., as tending to show that the accused was of bad character or had previous convictions, so much of the statement would have to be excised before the document could be admitted. (at p476)

10. It is for the reasons now stated that I considered that special leave to appeal should be refused. (at p476).

STEPHEN J. I agree in the judgment of the Chief Justice. (at p476).

MASON J. I am in agreement with the reasons for judgment which have been prepared by the Chief Justice and my brother Menzies. (at p476)

2. For these reasons it is my opinion that the application for special leave to appeal should not be granted. (at p476)

Orders

Special leave to appeal refused.

Cited by:

Criminal Charge Book [2023] JCV Criminal_Charges_Book (24 August 2026)

A judge must not instruct the jury that the failure of the complainant to complain at the earliest possible opportunity is evidence of consent (Kilby v R (1973) 129 CLR 460).

Criminal Charge Book [2023] JCV Criminal_Charges_Book -

Criminal Charge Book [2023] JCV Criminal_Charges_Book -

Evidence Act 1929 (SA) [1929] SALegAct 1907 -

Jury Directions Act 2015 (Vic) [2015] VICLegAct 14 -

Fletcher (a pseudonym) v The King [2026] SASCA 35 -

R v T, D [2026] SADC 24 -

Cox v Hollway (a pseudonym) [2026] ACTSC 69 (20 March 2026) (McWilliam J)

40. ... Although the actual decision in Kilby turned upon a disputed confession signed by the accused, the statement of common law principles contained in the judgment of Barwick CJ, as to the significance of a want of timely complaint, was accepted thereafter as stating the applicable law. In appropriate cases juries were told that the absence of timely complaint (if that be their conclusion) was relevant to the credibility of the complainant and a fact to be considered in evaluating the consistency of the complainant's evidence. There might be "many reasons" to explain why the complaint was not made promptly. It was for the jury to weigh up those possible reasons. But it was also for the jury to weigh up the significance of the delay in complaining.

Cox v Hollway (a pseudonym) [2026] ACTSC 69 (20 March 2026) (McWilliam J)

Note – See Kilby v The Queen [1973] HCA 30; (1973) 129 CLR 460 ; Crofts v The Queen [1996] HCA 22; (1996) 186 CLR 427..

Cox v Hollway (a pseudonym) [2026] ACTSC 69 -

Cox v Hollway (a pseudonym) [2026] ACTSC 69 -

Cox v Hollway (a pseudonym) [2026] ACTSC 69 -

Cox v Hollway (a pseudonym) [2026] ACTSC 69 -

Cox v Hollway (a pseudonym) [2026] ACTSC 69 -

Kennedy v The King [2026] SASCA 10 -

R v Bekele; Haile v The King; Bekele v The King [2026] SASCA 9 -

R v C, JJ [2025] SADC 138 -

ZBJ v The King (No 2) [2025] NSWCCA 187 -

R v KBK [2025] QCA 214 (04 November 2025) (Bond JA; Freeburn and Sullivan JJ)

50. Recourse to the explanatory memorandum and to the reports to which it refers suggest that the legislative reform seeks to address what have, in the years since the 1973 High Court decision of Kilby v The Queen [15] been identified as the deficiencies in the common law concerning the issue of absent or delayed complaint.

via

[15] *Kilby v The Queen* (1973) 129 CLR 460 .

R v KBK [2025] QCA 214 -
R v KBK [2025] QCA 214 -
R v KBK [2025] QCA 214 -
R v KBK [2025] QCA 214 -
R v KBK [2025] QCA 214 -
R v KBK [2025] QCA 214 -
R v W, JM [2025] SADC 69 -
R v D, DJ [2025] SADC 57 -
RM v R [2024] NSWCCA 81 -
RM v R [2024] NSWCCA 81 -
R v P, RJ [2024] SADC 64 -
Suppressed [2024] WASCA 50 (10 May 2024) (Buss P; Mazza and Vandongen JJA)

Kilby v The Queen [1973] HCA 30 ; (1973) 129 CLR 460 .

Suppressed [2024] WASCA 50 -
Suppressed [2024] WASCA 50 -
Kendall v The King [2024] SASCA 54 -
Anderson v The King [2024] SASCA 36 -
TM v The King [2024] SASCA 5 -
R v TRKJ (No. 2) [2023] QDC 231 -
R v S, PM [2023] SADC 83 -
Kakule v The King [2023] SASCA 51 -
R v S, JM [2023] SADC 50 -
R v KBC [2023] QCA 60 (04 April 2023) (Morrison, McMurdo and Bond JJA)

12. Mr Copley KC, who appeared with Mr Black of Counsel for the appellant, focussed on that part of the direction where reference was made to the evidence of what M and P separately told their stepmother and mother. Essentially that is the passage highlighted in the preceding paragraph. The submission made was:[\[6\]](#)
 - (a) the directions amounted to an invitation to accept as the truth what each complainant said in proof of the case that there had been no collusion;
 - (b) if the jury accepted that each complainant made a complaint (or complaints) of a sexual nature prior to Easter Sunday, 2019, that might have been a permissible consideration on the issue of collusion, [\[7\]](#) but the truth of the complaints was not;
 - (c) prior complaints are not admissible for the truth of them, they are only relevant to credit; [\[8\]](#)
 - (d) the use that the jury was permitted to make of the details of what each complainant said to the mother and stepmother conflicted with the correct directions given regarding the limited use that could be made of preliminary complaint evidence; and
 - (e) the erroneous direction occasioned a miscarriage of justice because there is a reasonable possibility that the jury dismissed the risk of collusion due to the jury being permitted to consider the details of each complainant's complaints as the truth of what occurred.

via

[8] Referring to *Kilby v The Queen* (1973) 129 CLR 460 at 472, 474; *Jones v The Queen* (1997) 71 ALJR 538 at 539; *R v LSS* [2000] 1 Qd R 546 at [15].

R v KBC [2023] QCA 60 -
R v M, PM [2022] SADC 133 -
JGS v The Queen (No 2) [2022] SASCA 72 -
Boyle (a Pseudonym) v The Queen [2022] NCE - RES GESTAE - STATEMENTSCRIMINAL LAW -
APPEAL AND NEW TRIAL - MISCARR 50 -
R v BCW [2022] SADC 68 -
R v L Os [2021] SADC 125 -
R v L Os [2021] SADC 125 -
Weragoda v The Queen [2021] SASCA 123 -
Weragoda v The Queen [2021] SASCA 123 -
Weragoda v The Queen [2021] SASCA 123 -
R v Henningsen [2021] QCA 34 -
MSP v The Queen [2019] SASCFC 120 -
R v P, TJ [2019] SASCFC 114 -
R v P, TJ [2019] SASCFC 114 -
R v P, TJ [2019] SASCFC 114 -
Pell v The Queen [2019] VSCA 186 -
Pell v The Queen [2019] VSCA 186 -
R v Ferri [2019] QCA 67 (18 April 2019) (Sofronoff P and McMurdo JA and Bradley J)

41. The principle remains applicable today. The Court of Criminal Appeal of South Australia applied it in 1937 in *R v Karpany* [9] and applied it again in *Spence v Demasi*, [10]. The Western Australian Court of Criminal Appeal applied it in *S v The Queen*, [11]. In *Kilby v The Queen*, [12], Barwick CJ said that to the extent that a record of interview contains material that is relevant, it is admissible subject to the exclusion of irrelevant and inadmissible material. The reference to “inadmissible” matter must be understood as a reference to statements that are irrelevant to any issue, or that would be unfair to tender against an accused; this is apparent from his Honour’s statement that “statements connecting the story it tells” are admissible as part of such a record. Moreover, notwithstanding the form of the exculpatory statements, once tendered by the prosecution, they become proof of the truth of their contents, [13]. Of course, the weight to be given to such statements is another matter.

via

[12] (1973) 129 CLR 460 at 472-473.

R v Ferri [2019] QCA 67 -
R v Ferri [2019] QCA 67 -
R v Green [2019] ACTSC 43 -
R v Green [2019] ACTSC 43 -
R v Dickson [2019] SADC 4 -
R v Dickson [2019] SADC 4 -
R v Van Wyk [2018] SASCFC 138 -
R v Van Wyk [2018] SASCFC 138 -
R v Van Wyk [2018] SASCFC 138 -
R v Van Wyk [2018] SASCFC 138 -
R v Van Wyk [2018] SASCFC 138 -
R v Van Wyk [2018] SASCFC 138 -
R v Van Wyk [2018] SASCFC 138 -
R v Van Wyk [2018] SASCFC 138 -
R v L-D [2018] SADC 126 -

[R v L-D](#) [2018] SADC 126 -
[R v G, AD](#) [2018] SADC 109 -
[R v W, J](#) [2018] SADC 95 -
[R v Sears](#) [2018] SADC 94 (07 September 2018) (Reasons For The Verdict Of Millstead J)
[Howe v R](#) (1980) 32 ALR 478; [Chiro v The Queen](#) [2017] HCA 37; [Hamra v The Queen](#) (2017) 260 CLR 479;
[R v Nesbitt](#) [1953] VLR 298; [R v Court](#) [1989] AC 28; [Harkin \(1989\) 38 A Crim R 296](#); [Drago v R](#) (1992) 8
 WAR 488; [R v C, M](#) (2014) 246 A Crim R 21; [R v Johnson](#) [1968] SASR 132; [Britten v Alpogut](#) [1987] VR
 929; [R v Whittingham](#) (1988) 49 SASR 67; [R v Climas](#) (1999) 74 SASR 411; [Abrahamson v The Queen](#) (1994
) 63 SASR 139; [Subramanian v Public Prosecutor](#) [1956] 1 WLR 965; [Walton v R](#) (1989) 166 CLR 283; [Kilby
 v The Queen](#) (1973) 129 CLR 460; [Crofts v The Queen](#) (1996) 186 CLR 427; [R v Maiolo \(No 2\)](#) (2010) 109
 SASR 46; [R v Schlaefer](#) (1984) 37 SASR 207; [R v Pitman](#) (1985) 38 SASR 566; [R v Baltensperger](#) (2004) 90
 SASR 129; [R v B, P](#) [2006] SASC 229; [Douglass v The Queen](#) [2002] HCA 34; [Edwards v R](#) (1993) 178 CLR
 193; [Longman v The Queen](#) (1989) 168 CLR 79; [R v Bakhuis](#) (2012) 112 SASR 536; [Palmer v R](#) (1998) 193
 CLR 1; [R v N](#) [2004] SASC 409; [R v Van Der Zyden](#) (2012) 261 FLR 419; [R v Corrigan](#) (1998) 74 SASR 545;
[Gipp v The Queen](#) (1998) 194 CLR 106; [R v Nieterink](#) (1999) 76 SASR 56; [Roach v The Queen](#) (2011) 85
 ALJR 558, considered.

[R v Sears](#) [2018] SADC 94 -
[R v Jones](#) [2018] SASCFC 80 -
[R v Rendell](#) [2018] SASCFC 71 -
[Collins v The Queen](#) [2018] HCA 18 -
[Collins v The Queen](#) [2018] HCA 18 -
[GD v The Queen](#) [2018] NSWCCA 18 (21 February 2018) (Macfarlan JA, Hoeben CJ, Cl and Garling JJ)

56. In [The Queen v Lillyman](#) [1896] 2 QB 167 at 170-1 Hawkins J referred to the statement in *Hawkins v Pleas of the Crown*, in relation to charges of sexual offences, that “[i]t is a strong, but not a conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact”. In [Kilby v The Queen](#) (1973) 129 CLR 460 at 469; [1973] HCA 30 Barwick CJ said in relation to this “presumption”:

“The word ‘presumption’, in this connexion, is not, of course, a reference to a presumption of law but is no more, in my opinion, than a statement that a tribunal of fact might well consider that a woman who made no complaint was not to be believed when she gave an account of events to which she gave no consent.”

[KSN v The State of Western Australia](#) [2017] WASCA 156 -
[KSN v The State of Western Australia](#) [2017] WASCA 156 -
[R v Moores](#) [2017] SASCFC 95 (11 August 2017) (Vanstone, Blue and Doyle JJ)

176. In [R v Markuleski](#), [64] Spigelman CJ (with whom Carruthers AJ agreed) said:

In the light of the number of cases it is desirable that the traditional direction as to treating each count separately is supplemented in a word against word case. Some reference ought to be made to the effect upon the assessment of the credibility of a complainant if the jury finds itself unable to accept the complainant’s evidence with respect to any count.

Some form of direction assisting the jury in this respect should be given, to employ the terminology found in [Kilby](#) and [R v Davies](#) “as a general rule”. Its absence is not necessarily fatal (as it was not in *R v Davies* itself). Furthermore, as the joint judgment in [Crofts](#) affirmed, the “general rule” does not apply “where the peculiar facts of the case and the conduct of the trial do not suggest the need for a warning to restore a balance of fairness”.

It is not necessary to specify any precise words for such a direction. That will depend on the circumstances of the case. It will often be appropriate to direct a jury that where they entertain a reasonable doubt concerning the truthfulness or reliability of a complainant’s evidence in relation to one or more counts, that must be taken into account in assessing the truthfulness or reliability of the complainant’s evidence generally.

On other occasions it may be appropriate for a judge to indicate to the jury, whilst making it clear that it remains a matter for the jury, that it might think that there was nothing to distinguish the evidence of the complainant on one count from his or her evidence on another count.

Or it may be appropriate to indicate that, if the jury has a reasonable doubt about the complainant's credibility in relation to one count, it might believe it difficult to see how the evidence of the complainant could be accepted in relation to other counts.

The precise terminology must remain a matter for the trial judge in all the particular circumstances of the specific case. The crucial matter is to indicate to the jury that any doubt they may form with respect to one aspect of the complainant's evidence, ought be considered by them when assessing the overall credibility of the complainant and, therefore, when deciding whether or not there was a reasonable doubt about the complainant's evidence with respect to other counts.^[65]

Wood CJ at CL said:

... there is merit, as a matter of common sense, in reminding the jury that the existence of a question mark in their minds concerning the credibility, or reliability of the evidence given by a complainant or central witness in relation to one count, may properly be taken into account, in conjunction with all the other circumstances of the case, when they consider the reliability or credibility of the evidence of that complainant or witness in relation to the other counts.^[66]

R v Moores [2017] SASFC 95 -

R v Rax [2017] QCA 133 -

R v Rax [2017] QCA 133 -

R v Collins [2017] QCA 113 (02 June 2017) (Gotterson and Morrison JJA and Burns J,)

Kilby v The Queen (1973) 129 CLR 460; [1973] HCA 30, followed

R v Collins [2017] QCA 113 (02 June 2017) (Gotterson and Morrison JJA and Burns J,)

54. Evidence of preliminary complaint is admissible as an exception to the hearsay rule but, as Barwick CJ remarked in Kilby v The Queen,^[108] "the admissibility of that evidence ... can only be placed ... upon the consistency of statement or conduct which it tends to show, the evidence having itself *no probative value* as to any fact in contest".^[109] Since those remarks were made, s 4A was inserted in the Criminal Law (Sexual Offences) Act 1978 (Qld) with effect from 5 January 2004.^[110] By s 4A(2), evidence of how and when any "preliminary complaint"^[111] was made by a complainant about the alleged commission of a sexual offence by an accused is admissible in evidence, regardless of when such a complaint was made.^[112]

via

^[109] Ibid 472 (emphasis added). These remarks were quoted with approval in Bull v The Queen (2000) 201 CLR 443 at 466 per McHugh, Gummow and Hayne JJ.

R v Collins [2017] QCA 113 -

R v Collins [2017] QCA 113 -

R v Collins [2017] QCA 113 -

Panda v The State of Western Australia [2017] WASCA 5 (12 January 2017) (Buss P; Mazza and Mitchell JJA)

Kilby v The Queen [1973] HCA 30; (1973) 129 CLR 460

42. Crofts concerned an accused charged with thirteen counts of committing sexual offences against a child aged between 10 and 16 years. The complainant had delayed in making complaints about the alleged offending for periods of between six months and six years from the dates on which the acts were alleged to have occurred. Section 61 of the Crimes Act 1958 (Vic) provided, relevantly, that on the trial of a person for certain sexual offences, the judge must not warn, or suggest in any way to, the jury, that the law regards complainants in sexual cases as an unreliable class of witness. Section 61 also contained provisions substantially similar to s 36BD of the Western Australian Evidence Act. Toohey, Gaudron, Gummow and Kirby JJ referred to the statement of Barwick CJ (with whom McTiernan, Stephen and Mason JJ concurred) in Kilby v The Queen [1973] HCA 30; (1973) 129 CLR 460, 472, in relation to the significance of a want of timely complaint, where his Honour said:

In my opinion, quite apart from the fact that there may be many reasons why a complaint is not made, the want of a complaint does not found an inference of consent. It does tell against the consistency of the woman's account and accordingly is clearly relevant to her credibility in that respect (448).

Panda v The State of Western Australia [2017] WASCA 5 -

Panda v The State of Western Australia [2017] WASCA 5 -

Tandy (a pseudonym) v The Queen [2016] VSCA 229 (21 September 2016) (Priest and Beach JJA, and Cavanough AJA)

49. The applicant's essential complaint under cover of ground 1 was that the judge — as the law permitted her to do at the time — should have given a Kilby [22] direction, instructing the jury that they could use BT's delay in complaining as casting doubt upon the credibility of her evidence. During her charge, the judge gave a direction in accordance with s 61(1)(b)(i), but did not give what counsel described as a 'balancing' direction. In developing his arguments, counsel drew attention to Svajcer, [23], where Redlich JA said: [24].

Section 60(1)(b)(i) provides that where delay in complaint is in issue, the trial judge must inform the jury that 'there may be good reasons' why a complainant may delay in making such a complaint. Section 60(1)(b)(ii), has a different focus. In certain prescribed circumstances, it preserves the obligation of the trial judge to warn the jury that delay in making complaint may be relevant in assessing the credit of the complainant. The Act is concerned with the circumstance where evidence has been given or a suggestion made during the trial that there was delay in making complaint as to an offence. The trial judge is not permitted to give such a warning unless an application is made on behalf of the accused that a warning be given and the judge is then is [sic] satisfied that the complainant's credibility is sufficiently affected by the delay so as to justify giving such a warning.

And also observed: [25].

... But the mere fact of a lapse of time between the alleged offence and the making of a complaint will not necessarily be such as to permit reasoning that the complainant's credit is affected. It is necessary for the trial judge to consider how the period of time between the relevant offence and the making of the complaint, might affect the jury's assessment of the credibility of the complainant. The lapse of time will become relevant to an assessment of the complainant's credit where it may be viewed as inconsistent with aspects of the complainant's account.

Tandy (a pseudonym) v The Queen [2016] VSCA 229 -

Tandy (a pseudonym) v The Queen [2016] VSCA 229 -

[Tandy \(a pseudonym\) v The Queen](#) [2016] VSCA 229 -
[Tandy \(a pseudonym\) v The Queen](#) [2016] VSCA 229 -
[R v P, S](#) [2016] SASCFC 97 -
[R v G, Da](#) [2016] SADC 36 -
[El-Ali v The Queen](#) [2015] NSWCCA 300 -
[R v Hollsten](#) [2015] SASCFC 178 (30 November 2015) (Sulan, Peek and Nicholson JJ)

9. Section 34M of the *Evidence Act 1929* (the Act) was enacted in 2008, [2]. It deals with complaint evidence in sexual cases and provides as follows:

(1) This section abolishes the common law relating to recent complaint in sexual cases.

Note—See [Kilby v The Queen](#) (1973) 129 CLR 460 ; [Crofts v The Queen](#) (1996) 186 CLR 427.

(2) In a trial of a charge of a sexual offence, no suggestion or statement may be made to the jury that a failure to make, or a delay in making, a complaint of a sexual offence is of itself of probative value in relation to the alleged victim's credibility or consistency of conduct.

(3) Despite any other rule of law or practice, evidence related to the making of an initial complaint of an alleged sexual offence is admissible in a trial of a charge of the sexual offence.

[Felix Horton \(a pseudonym\)\[1\] v The Queen](#) [2015] VSCA 319 (26 November 2015) (Redlich and Kaye JJA and Beale AJA)

28. The countervailing [Kilby](#) direction which counsel might have had in mind, was not given. It could not be given until counsel had made a successful application pursuant to s 61(1)(b)(ii) of the *Crimes Act*.

[Felix Horton \(a pseudonym\)\[1\] v The Queen](#) [2015] VSCA 319 -
[Felix Horton \(a pseudonym\)\[1\] v The Queen](#) [2015] VSCA 319 -
[Felix Horton \(a pseudonym\)\[1\] v The Queen](#) [2015] VSCA 319 -
[Felix Horton \(a pseudonym\)\[1\] v The Queen](#) [2015] VSCA 319 -
[Felix Horton \(a pseudonym\)\[1\] v The Queen](#) [2015] VSCA 319 -
[Felix Horton \(a pseudonym\)\[1\] v The Queen](#) [2015] VSCA 319 -
[Felix Horton \(a pseudonym\)\[1\] v The Queen](#) [2015] VSCA 319 -
[Felix Horton \(a pseudonym\)\[1\] v The Queen](#) [2015] VSCA 319 -
[Felix Horton \(a pseudonym\)\[1\] v The Queen](#) [2015] VSCA 319 -
[Felix Horton \(a pseudonym\)\[1\] v The Queen](#) [2015] VSCA 319 -
[Felix Horton \(a pseudonym\)\[1\] v The Queen](#) [2015] VSCA 319 -
[R v Johnson](#) [2015] SASCFC 170 (24 November 2015) (Sulan, Peek and Stanley JJ)

39. Section 34M of the *Evidence Act 1929* was enacted in 2008, [27]. It deals with complaint evidence in sexual cases and provides as follows:

(1) This section abolishes the common law relating to recent complaint in sexual cases.

Note—

See [Kilby v The Queen](#) (1973) 129 CLR 460 ; [Crofts v The Queen](#) (1996) 186 CLR 427.

(2) In a trial of a charge of a sexual offence, no suggestion or statement may be made to the jury that a failure to make, or a delay in making, a complaint of a sexual offence is of itself of probative value in relation to the alleged victim's credibility or consistency of conduct.

(3) Despite any other rule of law or practice, evidence related to the making of an initial complaint of an alleged sexual offence is admissible in a trial of a charge of the sexual offence.

[R v Place](#) [2015] SASCFC 163 -
[R v Place](#) [2015] SASCFC 163 -
[Constantinou v The Queen](#) [2015] VSCA 177 -
[R v Landmeter](#) [2015] SASCFC 3 -
[R v Landmeter](#) [2015] SASCFC 3 -
[R v Wilson](#) [2014] SADC 139 (15 August 2014) (Reasons For The Verdict Of Davison J)

See [Kilby v The Queen](#) (1973) 129 CLR 460 ; [Crofts v The Queen](#) (1996) 186 CLR 427.

[R v Maiolo \(No 3\)](#) [2014] SASCFC 89 (07 August 2014) (David, Peek and Stanley JJ)

75. As alluded to above, the law of recent complaint existed as a small area of law encircled by two larger areas of the common law. The first larger area was the rule against reception of hearsay evidence; the second larger area was the rule against self bolstering of evidence by reliance upon previous consistent statements made by the complainant. Evidence of recent complaint in sexual cases co-existed with the rule against hearsay in circumstances where an apparent conflict (or at least tension) was recognised, but sought to be explained in different ways. [35] However, whatever the precise rationale for the apparent conflict with the rule against hearsay, it has always been recognised that the common law doctrine of recent complaint in sexual cases is clearly inconsistent with the general common law prohibition of self bolstering of evidence through reliance upon previous consistent statements. [36]

via

[35] Even today, one sees clear differences of expression in this area. Some authorities treat recent complaint evidence as an *exception* to the rule against hearsay; examples include: [Suresh v The Queen](#) (1998) 102 A Crim R 18, 19-20 (Gaudron and Gummow JJ); [R v Szejnoga](#) [1998] SASC 6853 (Doyle CJ). Other authorities treat such evidence as not infringing the rule against hearsay due to the *limited purpose* for which it is tendered; examples include: [Papakosmas v The Queen](#) (1999) 196 CLR 297, 302-303 (Gleeson CJ and Hayne J); [R v Kilby](#) (1973) 129 CLR 460, 474 (Menzies J).

[R v Maiolo \(No 3\)](#) [2014] SASCFC 89 -
[R v Maiolo \(No 3\)](#) [2014] SASCFC 89 -
[Jarrett v R](#) [2014] NSWCCA 140 (28 July 2014) (Basten JA, R A Hulme and Campbell JJ)

40. Bearing these considerations in mind, the operation of s 294(2) involves three elements. The first is that absence of complaint or delay in complaining does not of itself indicate falsity of complaint, because there may be good reasons why the victim hesitated or refrained for a period. That element is inconsistent with the assumption of fact expressed by Barwick CJ in [Kilby](#) (at 469) that it is "a strong, but not a conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact".

[Jarrett v R](#) [2014] NSWCCA 140 -
[Jarrett v R](#) [2014] NSWCCA 140 -
[R v March](#) [2014] SASCFC 54 -
[Smith v The State of Western Australia](#) [2014] WASCA 90 -
[Smith v The State of Western Australia](#) [2014] WASCA 90 -
[Smith v The State of Western Australia](#) [2014] WASCA 90 -
[Smith v The State of Western Australia](#) [2014] WASCA 90 -
[Smith v The State of Western Australia](#) [2014] WASCA 90 -
[R v Usher](#) [2014] SASCFC 32 (10 April 2014) (Kourakis CJ; Gray and Peek JJ)

46. It remains an aspect of the common law rule that complaints about other incidents not the subject of a charge are inadmissible. [34] As I have observed, the use of complaint evidence is limited to enhancing the credibility of the complainant by showing a consistency between the conduct of the alleged victim in making the complaint of the offence, and her testimony

of its commission. [35]. That consistency can only lie in the disclosure of the offence charged, and not in a reference to a different offence.

via

[35] *Kilby v The Queen* (1973) 129 CLR 460 .

R v Usher [2014] SASCFC 32 -

R v Usher [2014] SASCFC 32 -

R v Usher [2014] SASCFC 32 -

R v O, B [2014] SADC 12 -

R v D, C [2013] SADC 168 -

R v England [2013] SASCFC 79 -

R v Murphy [2013] SADC 102 -

R v Murphy [2013] SADC 102 -

R v B,FA [2013] SADC 85 -

R v Z, J [2013] SADC 83 -

Cawthray v R [2013] NSWCCA 105 -

R v Ball [2013] SADC 21 -

R v Ball [2013] SADC 21 -

R v Buttery [2012] NTSC 103 -

R v Buttery [2012] NTSC 103 -

ISJ v The Queen [2012] VSCA 321 (18 December 2012) (Nettle, Redlich and Osborn JJA)

57. Although s 136 may be used to limit the use that may be made of complaint evidence to buttressing the complainant's credit, Gleeson CJ and Hayne J in their joint judgment in *Papakosmas v The Queen* [25] made it clear that s 136 should not generally be used to that effect:

The appellant's second submission is that, even assuming the hearsay evidence in the present case was relevant, and fell within the exception created by s 66, nevertheless there was a miscarriage of justice because the trial judge (although not asked to do so) failed to apply one of the additional safeguards, being that expressed in s 136.

In brief, the appellant contends that this was a case in which s 136 should have been applied to limit the use that could be made of the evidence of complaint to the use which could have been made of such evidence at common law, as explained in cases such as *Lillyman* and *Kilby*. The jury, it is argued, should have been given the standard common law direction in relation to the use of evidence of recent complaint in sexual assault cases.

Counsel went so far as to argue that, as a general rule, a court which receives evidence of complaint in any criminal case should limit its use under s 136 so that it is not used for a hearsay purpose.

The submissions must be rejected. They amount to an unacceptable attempt to constrain the legislative policy underlying the statute by reference to common law rules, and distinctions, which the legislature has discarded.

There may well arise circumstances in which a court, in the exercise of a discretion enlivened by the requirements of justice in the facts and circumstances of the particular case, will see fit to limit the use of complaint evidence, and, in some instances, it may be appropriate to effect that limitation in a manner which corresponds to the previous common law. To assert a general principle of the kind for which the appellant contends, however, would be to subvert the policy of the legislation.

In the instant case, the facts and circumstances surrounding the complaint were not such as to make the use of the evidence for a hearsay purpose either unfairly prejudicial to the appellant, or misleading or confusing. The recency and spontaneity of the complaint, and its consistency with other aspects of the complainant's appearance and demeanour, meant that it was not unfairly prejudicial. There is nothing to suggest such evidence was either misleading or confusing in its use for a hearsay purpose. [26].

[ISJ v The Queen](#) [2012] VSCA 321 -

[R v Kemp](#) [2012] SADC 149 -

[R v Devadas](#) [2012] SADC 135 -

[APC v The State of Western Australia](#) [2012] WASCA 159 -

[APC v The State of Western Australia](#) [2012] WASCA 159 -

[R v El Rifai](#) [2012] SASCF 98 (10 August 2012) (Gray, David and Kelly JJ)

24. At common law, prior to the enactment of section 34M, a trial judge in sexual cases was required to provide certain directions in relation to an initial complaint made by a victim. One such direction arose from the case of [Kilby](#) [5] in relation to recent complaints. A [Kilby](#) direction required a trial judge to direct the jury that delay in making a complaint was significant in assessing the credibility of a complainant. [6] [Kilby](#) [7] was emphatic in rejecting inferences of consent from failure to complain immediately after the alleged sexual act occurred. In light of [Kilby](#), a complaint at common law is only ever admissible in support of a complainant's credibility, irrespective of whether consent is in issue. [8].

[R v El Rifai](#) [2012] SASCF 98 (10 August 2012) (Gray, David and Kelly JJ)

24. At common law, prior to the enactment of section 34M, a trial judge in sexual cases was required to provide certain directions in relation to an initial complaint made by a victim. One such direction arose from the case of [Kilby](#) [5] in relation to recent complaints. A [Kilby](#) direction required a trial judge to direct the jury that delay in making a complaint was significant in assessing the credibility of a complainant. [6] [Kilby](#) [7] was emphatic in rejecting inferences of consent from failure to complain immediately after the alleged sexual act occurred. In light of [Kilby](#), a complaint at common law is only ever admissible in support of a complainant's credibility, irrespective of whether consent is in issue. [8].

via

[8] [Kilby v The Queen](#) (1973) 129 CLR 460 .

[R v El Rifai](#) [2012] SASCF 98 (10 August 2012) (Gray, David and Kelly JJ)

See [Kilby v The Queen](#) (1973) 129 CLR 460 ; [Crofts v The Queen](#) (1996) 186 CLR 427.

[R v El Rifai](#) [2012] SASCF 98 -

[R v El Rifai](#) [2012] SASCF 98 -

[R v El Rifai](#) [2012] SASCF 98 -

[R v El Rifai](#) [2012] SASCF 98 -

[R v El Rifai](#) [2012] SASCF 98 -

[R v El Rifai](#) [2012] SASCF 98 -

[R v El Rifai](#) [2012] SASCF 98 -

[R v El Rifai](#) [2012] SASCF 98 -

[R v El Rifai](#) [2012] SASCF 98 -

[R v El Rifai](#) [2012] SASCF 98 -

[R v El Rifai](#) [2012] SASCF 98 -

[R v El Rifai](#) [2012] SASCFC 98 -

[R v El Rifai](#) [2012] SASCFC 98 -

[SPW v The State of Western Australia](#) [2012] WASCA 41 -

[R v D, WJ](#) [2012] SADC 16 -

[SPW v The State of Western Australia](#) [2012] WASCA 41 -

[R v G, PM](#) [2012] SADC 14 -

[CJF v The State of Western Australia](#) [2012] WASCA 14 (25 January 2012) (McLure P, Buss JA, Mazza JA)

35. It is settled law that evidence of complaint is only relevant to a complainant's credibility. It is not evidence of the truth of the matters complained of: [Kilby v The Queen](#) [1973] HCA 30; (1973) 129 CLR 460 .

[CJF v The State of Western Australia](#) [2012] WASCA 14 -

[R v S, DD](#) [2011] SADC 188 (08 December 2011) (Reasons For The Verdict Of Soulio J)

13. The provisions of s 34M of the [Evidence Act 1929 \(SA\)](#) apply [\[3\]](#) and evidence of the initial complaint by J was led in accordance with that section which provides:

- (1) This section abolishes the common law relating to recent complaint in sexual cases.

Note—

See [Kilby v The Queen](#) (1973) 129 CLR 460 ; [Crofts v The Queen](#) (1996) 186 CLR 427.

(2) In a trial of a charge of a sexual offence, no suggestion or statement may be made to the jury that a failure to make, or a delay in making, a complaint of a sexual offence is of itself of probative value in relation to the alleged victim's credibility or consistency of conduct.

(3) Despite any other rule of law or practice, evidence related to the making of an initial complaint of an alleged sexual offence is admissible in a trial of a charge of the sexual offence.

Examples—

Evidence may be given by any person about—

- when the complaint was made and to whom;
- the content of the complaint;
- how the complaint was solicited;
- why the complaint was made to a particular person at a particular time;
- why the alleged victim did not make the complaint at an earlier time.

(4) If evidence referred to in subsection (3) is admitted in a trial, the judge must direct the jury that—

(a) it is admitted—

- (i) to inform the jury as to how the allegation first came to light; and
- (ii) as evidence of the consistency of conduct of the alleged victim; and

(b) it is not admitted as evidence of the truth of what was alleged; and

(c) there may be varied reasons why the alleged victim of a sexual offence has made a complaint of the offence at a particular time or to a particular

person, but that, otherwise, it is a matter for the jury to determine the significance (if any) of the evidence in the circumstances of the particular case.

(5) It is not necessary that a particular form of words be used in giving the direction under subsection (4).

(6) In this section—

complaint, in relation to a sexual offence, includes a report or any other disclosure (whether to a police officer or otherwise);

initial complaint, in relation to a sexual offence, includes information provided by way of elaboration of the initial complaint (whether provided at the time of the initial complaint or at a later time),

[PRW v The Queen](#) [2011] VSCA 381 -
[Spurway v Police](#) [2011] SASC 177 (14 October 2011) (Blue J)

54. In [Kilby v The Queen](#), [12] Barwick CJ (McTiernan, Stephen and Mason JJ agreeing) said:

evidence of a complaint at the earliest reasonable opportunity is exceptionally admitted only as evidence of consistency in the account given by the woman claiming to have been raped: that is to say, it is admitted as going to her credit ... the fact of the complaint buttresses her evidence of no consent or, as was said in *R v Lilyman*, is inconsistent with consent ...

A review of the subject begins, in my opinion, with *Reg v Lilyman* ... [in which] the Court of Crown Cases Reserved ... [said] “It clearly is not admissible as evidence of the facts complained of ... the complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, as being inconsistent with her consent to that of which she complains ... the evidence ... can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness box negating her consent”.

Halsbury (1952) 3rd ed vol 10 p 468 para 859 in my opinion, puts the matter in proper perspective where it is there said “the admissibility of the particulars of a complaint made soon after the commission of an alleged offence in the absence of the defendant by the person in respect of whom a crime is alleged to have been committed is peculiar to rape, indecent assault and similar offences upon females, and also offences of indecency between male persons ...” The admission of a recent complaint in cases of sexual offences is exceptional in the law of evidence.

via

[12] [Kilby v The Queen](#) (1973) 129 CLR 460 at 466-472 .

[Spurway v Police](#) [2011] SASC 177 -

[Spurway v Police](#) [2011] SASC 177 -

[Griffin v The Queen](#) [2011] VSCA 304 -

[R v Sullivan](#) [2011] NTSC 66 -

[R v Sullivan](#) [2011] NTSC 66 -

[R v O'DOWD](#) [2011] SADC 130 -

[R v O'DOWD](#) [2011] SADC 130 -

[R v O'DOWD](#) [2011] SADC 130 -

[Narkle v The State of Western Australia](#) [2011] WASCA 160 (26 July 2011) (McLure P, Buss JA, Hall J)

[Kilby v The Queen](#) [1973] HCA 30 ; (1973) 129 CLR 460 .

[M v The Queen](#)

[Narkle v The State of Western Australia](#) [2011] WASCA 160 -

[Narkle v The State of Western Australia](#) [2011] WASCA 160 -

[Narkle v The State of Western Australia](#) [2011] WASCA 160 -

[Narkle v The State of Western Australia](#) [2011] WASCA 160 -
[Narkle v The State of Western Australia](#) [2011] WASCA 160 -
[R v McCormack](#) [2011] SADC 56 (18 April 2011) (Reasons For The Verdict Of Soulio J)

See [Kilby v The Queen](#) (1973) 129 CLR 460 ; [Crofts v The Queen](#) (1996) 186 CLR 427.

[R v S, DD](#) [2010] SASCFC 80 -
[R v S, DD](#) [2010] SASCFC 80 -
[R v S, DD](#) [2010] SASCFC 80 -
[R v S, DD](#) [2010] SASCFC 80 -
[R v S, DD](#) [2010] SASCFC 80 -
[R v S, DD](#) [2010] SASCFC 80 -
[R v W](#) [2010] SADC 153 -
[R v W](#) [2010] SADC 153 -
[R v W](#) [2010] SADC 153 -
[R v Amjad](#) [2010] SASCFC 68 -
[R v Amjad](#) [2010] SASCFC 68 -
[R v Amjad](#) [2010] SASCFC 68 -
[R v XY](#) [2010] NSWCCA 181 -
[R v XY](#) [2010] NSWCCA 181 -
[R v H, T](#) [2010] SASCFC 24 -
[R v H, T](#) [2010] SASCFC 24 -
[R v H, T](#) [2010] SASCFC 24 -
[R v H, T](#) [2010] SASCFC 24 -
[R v H, T](#) [2010] SASCFC 24 -
[R v H, T](#) [2010] SASCFC 24 -
[Gordon v R](#) [2010] VSCA 207 -
[Gordon v R](#) [2010] VSCA 207 -
[Gordon v R](#) [2010] VSCA 207 -
[Gordon v R](#) [2010] VSCA 207 -
[Gordon v R](#) [2010] VSCA 207 -
[Worsnop v The Queen](#) [2010] VSCA 188 (28 July 2010) (Buchanan and Ashley JJA and Beach AJA)

4. The grounds ultimately pursued were these:

1. A miscarriage of justice occurred by the learned trial judge failing to give a [Kilby direction](#).
2. A miscarriage of justice occurred by the learned trial judge failing to give a balanced direction on delay.
3. A miscarriage of justice occurred by the learned trial judge failing to give an innocent infection direction.
- ...
5. A miscarriage of justice occurred by the learned trial judge failing to give a prior inconsistent statement direction.
6. A miscarriage of justice occurred by the learned trial judge failing to direct that the jury requisite intention of the applicant necessary to prove stalking had to be in existence at the time of the acts that the jury finds constituted stalking.
7. The count of stalking as directed upon was latently duplicitous.
8. A miscarriage of justice occurred by the learned trial judge failing to direct that the jury must be unanimous as to the kind of mental element proven for stalking.

9. A miscarriage of justice occurred by the learned trial judge directing that the applicant could be convicted of rape if the jury found that he believed that the complainant was consenting.

...

11. The learned trial judge erred in directing that if the jury were not satisfied that the words to the witnesses McCurdy or Jacobs were a complaint, then that evidence could not be used in any way.

12. A miscarriage of justice occurred by the prosecution failing to call the witnesses McCurdy or Jacobs.

13. A miscarriage of justice occurred by the learned trial judge failing to direct on the complainant's motive to lie.

[Worsnop v The Queen](#) [2010] VSCA 188 -

[Worsnop v The Queen](#) [2010] VSCA 188 -

[Worsnop v The Queen](#) [2010] VSCA 188 -

[Worsnop v The Queen](#) [2010] VSCA 188 -

[R v Laa](#) [2010] QCA 155 (22 June 2010) (Holmes JA and Cullinane and McMeekin JJ,)

17. The distinguishing feature of the evidence on counts 1, 3, 4 and 6, as counsel for the appellant pointed out, was that B complained of the masturbation involved in those offences to his mother and Ms Rodriguez; but in respect of the fellatio which was the subject of counts 2 and 5, there was no such preliminary complaint. The evidence of preliminary complaint was admissible as going to the consistency and hence, the credibility, of B's story. [3] But the existence of complaint in respect of some of the counts, and its effect in buttressing B's credit, did not mean that the jury must, acting rationally, have accepted his account on the remaining counts so as to convict on them also.

via

[3] [Kilby v The Queen](#) (1973) 129 CLR 460 at 472.

[R v Laa](#) [2010] QCA 155 -

[R v J, JA](#) [2009] SASC 401 -

[R v J, JA](#) [2009] SASC 401 -

[R v J, JA](#) [2009] SASC 401 -

[CGS v The State of Western Australia](#) [2009] WASCA 208 -

[CGS v The State of Western Australia](#) [2009] WASCA 208 -

[R v IAB](#) [2009] VSCA 229 -

[R v IAB](#) [2009] VSCA 229 -

[R v IAB](#) [2009] VSCA 229 -

[R v IAB](#) [2009] VSCA 229 -

[R v BURGESS](#) [2009] SADC 105 (09 October 2009) (Reasons For The Verdicts Of Brebner J)

Note— See [Kilby v The Queen](#) (1973) 129 CLR 460 ; [Crofts v The Queen](#) (1996) 186 CLR 427.

[R v Dennis](#) [2009] SADC 103 -

[R v Dawson-Ryan](#) [2009] SASC 259 (28 August 2009) (Gray, Layton and David JJ)

84. At the time of the trial, the Judge was also under the misapprehension that section 34M of the [Evidence Act](#) applied in relation to recent complaint in sexual cases. That section provides:

Evidence relating to complaint in sexual cases

- (1) This section abolishes the common law relating to recent complaint in sexual cases.

Note—

See *Kilby v The Queen* (1973) 129 CLR 460; *Crofts v The Queen* (1996) 186 CLR 427.

- (2) In a trial of a charge of a sexual offence, no suggestion or statement may be made to the jury that a failure to make, or a delay in making, a complaint of a sexual offence is of itself of probative value in relation to the alleged victim's credibility or consistency of conduct.
- (3) Despite any other rule of law or practice, evidence related to the making of an initial complaint of an alleged sexual offence is admissible in a trial of a charge of the sexual offence.

Examples—

Evidence may be given by any person about—

- when the complaint was made and to whom;
 - the content of the complaint;
 - how the complaint was solicited;
 - why the complaint was made to a particular person at a particular time;
 - why the alleged victim did not make the complaint at an earlier time.
- (4) If evidence referred to in subsection (3) is admitted in a trial, the judge must direct the jury that—
- (a) it is admitted—
- (i) to inform the jury as to how the allegation first came to light; and
 - (ii) as evidence of the consistency of conduct of the alleged victim; and
- (b) it is not admitted as evidence of the truth of what was alleged; and
- (c) there may be varied reasons why the alleged victim of a sexual offence has made a complaint of the offence at a particular time or to a particular person,
- but that, otherwise, it is a matter for the jury to determine the significance (if any) of the evidence in the circumstances of the particular case.
- (5) It is not necessary that a particular form of words be used in giving the direction under subsection (4).
- (6) In this section—

complaint, in relation to a sexual offence, includes a report or any other disclosure (whether to a police officer or otherwise);

initial complaint, in relation to a sexual offence, includes information provided by way of elaboration of the initial complaint (whether provided at the time of the initial complaint or at a later time),

[R v Dawson-Ryan](#) [2009] SASC 259 -
[R v Dawson-Ryan](#) [2009] SASC 259 -
[R v Dawson-Ryan](#) [2009] SASC 259 -
[R v Dawson-Ryan](#) [2009] SASC 259 -
[R v Dawson-Ryan](#) [2009] SASC 259 -
[R v Dawson-Ryan](#) [2009] SASC 259 -
[R v James Duncan Smith](#) [2009] NSWDC 410 (11 May 2009) (Cogswell SC DCJ)

9. I accept Mr Gibson's submission. The law about delay in complaint in Australia took much of its subsequent initiative from a decision of the High Court in [Kilby v The Queen](#) (1973) 129 CLR 460, and to the Chief Justice's remarks about whether to believe a witness who has failed to make a complaint at the earliest reasonable opportunity.

[R v James Duncan Smith](#) [2009] NSWDC 410 -
[R v Smith](#) [2009] VSCA 85 -
[R v Inston](#) [2009] SASC 89 -
[R v Inston](#) [2009] SASC 89 -
[R v Inston](#) [2009] SASC 89 -
[R v Inston](#) [2009] SASC 89 -
[R v BDX](#) [2009] VSCA 28 -
[R v BDX](#) [2009] VSCA 28 -
[R v BDX](#) [2009] VSCA 28 -
[R v BDX](#) [2009] VSCA 28 -
[R v BDX](#) [2009] VSCA 28 -
[R v BDX](#) [2009] VSCA 28 -
[R v BDX](#) [2009] VSCA 28 -
[R v BDX](#) [2009] VSCA 28 -
[R v BDX](#) [2009] VSCA 28 -
[R v Seigneur](#) [2009] SASC 59 -
[R v Seigneur](#) [2009] SASC 59 -
[R v Seigneur](#) [2009] SASC 59 -
[R v Seigneur](#) [2009] SASC 59 -
[R v Humble](#) [2009] SASC 51 (27 February 2009) (White, Kelly and Kourakis JJ)

6. Evidence of a complaint made at the first reasonable opportunity after the commission of an alleged sexual assault is admissible as an exception both to the hearsay rule and to the rules concerning self-serving statements because the complaint may demonstrate, first, consistency between the complainant's behaviour, including her reaction, at the time of the alleged incident and her account in the witness box of what occurred and, secondly, consistency in her accounts of what occurred. [7]. In [R v E](#) [8], Sperling J, having referred to [Kilby v The Queen](#) [9] and to [R v Lillyman](#), [10] summarised the uses to which evidence of a complaint by the victim of an alleged sexual assault may be put in the following terms:

Evidence of complaint is an exception to the hearsay rule. Whatever the historical origin of the exception, it is now justified as a matter of practical necessity. If no evidence of complaint is adduced, a jury is likely to assume that the victim did not complain and to draw an inference against the Crown case on that account; where there has been a complaint, evidence of the complaint is admitted to avoid any such inference being drawn...

Evidence of complaint is also relevant to the credit of the complainant. If a complaint has been made in substantially the same terms as the complainant's sworn evidence, that may be treated as enhancing the credibility of the sworn account. If, on the other hand, a complaint has been made in substantially

different terms (because it was altogether different or because it contained additional allegations or did not contain all the allegations made in the sworn evidence), that may be treated as detracting from the credibility of the sworn account of events. This is because consistency, in giving the same account after the event as in the sworn evidence, may be treated as enhancing the likelihood that the sworn account is true, and inconsistency may be treated as having the converse effect... [11]

[R v Humble](#) [2009] SASC 51 -

[R v Humble](#) [2009] SASC 51 -

[Prazmo v The State of Western Australia](#) [2009] WASCA 25 (29 January 2009) (Miller JA)

[Kilby v The Queen](#) [1973] HCA 30; (1973) 129 CLR 460

[Prazmo v The State of Western Australia](#) [2009] WASCA 25 (29 January 2009) (Miller JA)

29. The direction given by the trial judge on complaint simply related to the complaint that the complainant made to her partner after the alleged event. A proper direction was given that a complaint could not be proof that the event had occurred, but that the evidence was led to show consistency of conduct and could be taken into account in relation to the complainant's credibility: see [Kilby v The Queen](#) [1973] HCA 30; (1973) 129 CLR 460 per Barwick CJ at 472.

[R v Kovacs](#) [2008] QCA 417 -

[R v Kovacs](#) [2008] QCA 417 -

[R v Kovacs](#) [2008] QCA 417 -

[R v Kovacs](#) [2008] QCA 417 -

[R v Kovacs](#) [2008] QCA 417 -

[R v Williams](#) [2008] QCA 411 -

[R v Williams](#) [2008] QCA 411 -

[R v Williams](#) [2008] QCA 411 -

[R v Bertrand](#) [2008] VSCA 182 -

[R v Bertrand](#) [2008] VSCA 182 -

[DS v The State of Western Australia](#) [2008] WASCA 182 (02 September 2008) (Wheeler JA Miller JA Murray AJA)

31. In the present case, events happened quickly. The complainant's mother observed her husband leave the complainant's room. She got out of bed, took her boys back to their room and then went in to see the complainant. She observed the complainant to be crying. She asked her whether her father had been in the room and having received an affirmative answer, then asked the question, 'Did he touch you?' When she got no answer, she said, 'Did he touch you on the wee?', and she received a nod in response. In my view, the evidence met the test of admissibility and was properly admitted by the trial judge. Once admitted, it was evidence which constituted a buttress to the credit of the complainant: [Kilby v The Queen](#) (1973) 129 CLR 460, 472 (Barwick CJ). That was the direction given to the jury by the trial judge and there is no complaint made about that direction.

[DS v The State of Western Australia](#) [2008] WASCA 182 -

[R v KSC \(No 2\)](#) [2008] NSWDC 172 -

[R v KSC \(No 2\)](#) [2008] NSWDC 172 -

[R v Ellul](#) [2008] VSCA 106 -

[R v Ellul](#) [2008] VSCA 106 -

[R v R W](#) [2008] VSCA 79 -

[Cavill v The State of Western Australia](#) [2008] WASCA 108 (08 May 2008) (McLure JA)

[Kilby v The Queen](#) (1973) 129 CLR 460

[Cavill v The State of Western Australia](#) [2008] WASCA 108 -

HML v The Queen [2008] HCA 16 -

HML v The Queen [2008] HCA 16 -

HML v The Queen [2008] HCA 16 -

R v Taylor (No 2) [2008] VSCA 57 (23 April 2008) (Ashley and Kellam JJA and Hansen AJA)

39. Upon the footing that the trial and appeal were conducted, I think that the appeal must succeed. The judge had to do three things: First, by reason of s 61(1)(b) of the *Crimes Act*, she was obliged to inform the jury that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining about it. Second, it was necessary for her Honour to give a *Kilby* [32] direction. That is, the judge should have instructed the jury that in evaluating the evidence of the complainant, and in determining whether to believe him, it could take into account that he had not complained at the earliest reasonable opportunity. [33] Third, the critical evidence of the complaint being uncorroborated, in circumstances where there had been a delay in complaining between 1986 and 2001 in respect of the earliest alleged abuse, and between 1988 and 2001 in the case of the abuse alleged to have last occurred, the judge was obliged to give a *Longman* [34] warning.

via

[32] *Kilby v The Queen* (1973) 129 CLR 460 .

R v Taylor (No 2) [2008] VSCA 57 (23 April 2008) (Ashley and Kellam JJA and Hansen AJA)

72. The effect of the enactment of s 61(1)(b) of the *Crimes Act 1958* was considered by the majority in *Crofts v The Queen*: [38].

The overriding duty of the trial judge remains to ensure that the accused secures a fair trial. It would require much clearer language than appears in s 61 of the Act to oblige a judge, in a case otherwise calling for comment, to refrain from drawing to the notice of the jury aspects of the facts of the case which, on ordinary human experience, would be material to the evaluation of those facts.

Had the Victorian Parliament intended to overrule the practice followed in Australian courts, at least after *Kilby*, s 61(1)(b) would have been expressed in much clearer language than appears ...

Two qualifications to the duty to provide the warning suggested by *Kilby* may be accepted. The first is where the peculiar facts of the case and the conduct of the trial do not suggest the need for a warning to restore a balance of fairness. The second is that the warning should not be expressed in such terms as to undermine the purpose of the amending Act by suggesting a stereotyped view that complainants in sexual assault cases are unreliable or that delay in making a complaint about an alleged sexual offence is invariably a sign that the complainant's evidence is false. So long as the purpose of the legislation, to rid the law of such stereotypes, is kept in mind and the terms in which the legislation is expressed are followed, judges striving to assist juries in their consideration of the facts are unlikely to fall into the kind of error that occurred in this case.

R v Taylor (No 2) [2008] VSCA 57 (23 April 2008) (Ashley and Kellam JJA and Hansen AJA)

39. Upon the footing that the trial and appeal were conducted, I think that the appeal must succeed. The judge had to do three things: First, by reason of s 61(1)(b) of the *Crimes Act*, she was obliged to inform the jury that there may be good reasons why a victim of a sexual

assault may delay or hesitate in complaining about it. Second, it was necessary for her Honour to give a *Kilby* [32] direction. That is, the judge should have instructed the jury that in evaluating the evidence of the complainant, and in determining whether to believe him, it could take into account that he had not complained at the earliest reasonable opportunity. [33]

Third, the critical evidence of the complaint being uncorroborated, in circumstances where there had been a delay in complaining between 1986 and 2001 in respect of the earliest alleged abuse, and between 1988 and 2001 in the case of the abuse alleged to have last occurred, the judge was obliged to give a *Longman* [34] warning.

R v Taylor (No 2) [2008] VSCA 57 -
R v Taylor (No 2) [2008] VSCA 57 -
R v Taylor (No 2) [2008] VSCA 57 -
R v Taylor (No 2) [2008] VSCA 57 -
R v Taylor (No 2) [2008] VSCA 57 -
R v Taylor (No 2) [2008] VSCA 57 -
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R v Taylor (No 2) [2008] VSCA 57 -
R v Taylor (No 2) [2008] VSCA 57 -
R v Taylor (No 2) [2008] VSCA 57 -
R v HRA [2008] VSCA 56 (11 April 2008) (Neave and Kellam JJA and Curtain AJA)

65. Even though the authorities establish that a mere narrative of events which were stated to have occurred may not be sufficient to be seen as a complaint, the question must be determined bearing in mind and giving proper weight to the circumstance that the complainant is a young and immature child, not an adult. It cannot be expected that the response of a small child to a sexual assault will be same as that of an adult. The basis upon which such complaints have been admitted as an exception is as evidence of consistency in the conduct of the complainant with the evidence given by her before the Court. [26]

via

[26] *Philby v R* (1973) 129 CLR 460, 466 (Barwick CJ) .

Dair v The State of Western Australia [2008] WASCA 72 -
Dair v The State of Western Australia [2008] WASCA 72 -
FGC v The State of Western Australia [2008] WASCA 47 -
FGC v The State of Western Australia [2008] WASCA 47 -
FGC v The State of Western Australia [2008] WASCA 47 -
FGC v The State of Western Australia [2008] WASCA 47 -
FGC v The State of Western Australia [2008] WASCA 47 -
FGC v The State of Western Australia [2008] WASCA 47 -
FGC v The State of Western Australia [2008] WASCA 47 -
FGC v The State of Western Australia [2008] WASCA 47 -
FGC v The State of Western Australia [2008] WASCA 47 -
FGC v The State of Western Australia [2008] WASCA 47 -
FGC v The State of Western Australia [2008] WASCA 47 -
FGC v The State of Western Australia [2008] WASCA 47 -
FGC v The State of Western Australia [2008] WASCA 47 -
R v Vella [2008] VSCA 28 -
Leeks v XY [2008] VSCA 21 -
Statutes Amendment (Evidence and Procedure) Act 2008 (SA) [2008] SAllegAct 7 -

5. It is fundamental to proper criminal procedure that each count on a presentment be the subject of separate consideration by the jury. It is necessary for the judge's directions to separate the evidence admissible on any count from evidence only admissible on other counts on the same presentment. In this case, had Count 3 not been the subject of a successful no case submission, it would have been necessary for specific directions to be given as to the very limited use which could be made of the evidence of complaints made by the complainant to the police officer and the ambulance driver. None of that evidence was ever admissible on the attempted murder or serious injury charges. A direction would have been necessary to ensure that the jury applied that evidence only to the rape count, assuming it was admissible on that count, having regard to the very limited nature of the complainant's evidence-in-chief [1]. But its admissibility was never challenged on the ground that because the complainant gave no evidence a recent complaint was irrelevant. It appeared that the accused wished to rely on discrepancies between the two complaints reported in the evidence. In one complaint the complainant told an ambulance driver that four men had raped her, without identifying the accused as one of them. In the other, to a police officer, she implicated only one person. In any event, it will be now necessary to direct the jury clearly that these complaints have no relevance to the counts they must now consider and explain why this is so. There is no more reason to believe that the jury will be in any way less able to comply with this direction now than they would have been had the rape counts been still alive. If the accused still seeks to rely on the apparent discrepancy in the complainant's accounts to throw doubt on the identity of her assailant, a direction to the jury as to that will have to be formulated taking into account how the argument for the accused is put.

via

[1] [Kilby v R](#) (1973) 129 CLR 460 ; [Sparks v R](#) (1964) AC 964.

[Azarian v The State of Western Australia](#) [2007] WASCA 249 (13 November 2007) (Pullin JA)

[Kilby v The Queen](#) [1973] HCA 30 ; (1973) 129 CLR 460 .

[Azarian v The State of Western Australia](#) [2007] WASCA 249 -

[Azarian v The State of Western Australia](#) [2007] WASCA 249 -

[Azarian v The State of Western Australia](#) [2007] WASCA 249 -

[Azarian v The State of Western Australia](#) [2007] WASCA 249 -

[R v BBH](#) [2007] QCA 348 -

[Donaldson v The State of Western Australia](#) [2007] WASCA 216 (16 October 2007) (McLure JA)

46. **Crofts** concerned an accused charged with thirteen counts of committing sexual offences against a child aged between 10 and 16 years. The complainant had delayed in making complaints about the alleged offending for periods of between six months and six years from the dates on which the acts were alleged to have occurred. Section 61 of the [Crimes Act 1958 \(Vic\)](#) provided, relevantly, that on the trial of a person for certain sexual offences, the judge must not warn or suggest in any way to the jury, that the law regards complainants in sexual cases as an unreliable class of witness. Section 61 also contained provisions substantially similar to s 36BD of the Western Australian *Evidence Act*. Toohey, Gaudron, Gummow and Kirby JJ referred, at 448, to the statement of Barwick CJ (with whom McTiernan, Stephen and Mason JJ concurred) in [Kilby v The Queen](#) (1973) 129 CLR 460 at 472, in relation to the significance of a want of timely complaint, where his Honour said:

In my opinion, quite apart from the fact that there may be many reasons why a complaint is not made, the want of a complaint does not found an inference of consent. It does tell against the consistency of the woman's account and accordingly is clearly relevant to her credibility in that respect.

Their Honours recorded that after the decision in [Kilby](#) :

In appropriate cases, juries were told that the absence of timely complaint (if that be their conclusion) was relevant to the credibility of the complainant and a fact to be considered in evaluating the consistency of the complainant's evidence. There might be 'many reasons' to explain why the complaint was not made promptly. It was for the jury to weigh up the significance of the delay in complaining.

[Donaldson v The State of Western Australia](#) [2007] WASCA 216 -
[Donaldson v The State of Western Australia](#) [2007] WASCA 216 -
[Donaldson v The State of Western Australia](#) [2007] WASCA 216 -
[Donaldson v The State of Western Australia](#) [2007] WASCA 216 -
[R v Gilbert](#) [2007] VSCA 216 -
[G v The State of Western Australia](#) [2007] WASCA 202 -
[G v The State of Western Australia](#) [2007] WASCA 202 -
[G v The State of Western Australia](#) [2007] WASCA 202 -
[R v GX](#) [2006] QCA 564 -
[R v GX](#) [2006] QCA 564 -
[R v Brdarovski](#) [2006] VSCA 231 -
[R v Brdarovski](#) [2006] VSCA 231 -
[Sloane v The State of Western Australia](#) [2006] WASCA 202 -
[Thorne v The State of Western Australia](#) [2006] WASCA 218 -
[Thorne v The State of Western Australia](#) [2006] WASCA 218 -
[R v B, P](#) [2006] SASC 229 -
[R v B, P](#) [2006] SASC 229 -
[Bropho v The State of Western Australia](#) [2006] WASCA 109 -
[Bropho v The State of Western Australia](#) [2006] WASCA 109 -
[Bropho v The State of Western Australia](#) [2006] WASCA 109 -
[Bropho v The State of Western Australia](#) [2006] WASCA 109 -
["R" v The State of Western Australia](#) [2006] WASCA 101 -
["R" v The State of Western Australia](#) [2006] WASCA 101 -
["R" v The State of Western Australia](#) [2006] WASCA 101 -
[R v Wannan](#) [2006] SASC 151 -
[Erohin v Regina](#) [2006] NSWCCA 102 -
[Erohin v Regina](#) [2006] NSWCCA 102 -
[Dye v The State of Western Australia](#) [2005] WASCA 239 -
[Dye v The State of Western Australia](#) [2005] WASCA 239 -
[Dye v The State of Western Australia](#) [2005] WASCA 239 -
[R v AJS](#) [2005] VSCA 288 -
[R v Glennon \(No 3\)](#) [2005] VSCA 262 (17 November 2005) (Callaway, Buchanan and Eames, Jj.A)

20. In those circumstances the other grounds may be briefly dispatched. If the new trial proceeds, a [Kilby](#) [12] warning should be given in conventional terms. It need not be elaborate. [13] It would be better not to say that the jury may take the complainant's delay in complaining into account only if the complainant did not have good reasons to delay or hesitate in complaining. Theoretically the victim of a sexual offence may have good reasons for delay but the delay may still be taken into account in deciding whether to accept his or her evidence. It would be preferable for the evidence of Woodward and Danaher not to be led. Its probative value is limited and its potential for causing trouble is considerable. Ms Dickason was not an eyewitness, nor was she in a position to give evidence as to JC's presence at the camp. The Crown will not be obliged to call her if the prosecutor considers that her evidence is unreliable.

[R v Glennon \(No 3\)](#) [2005] VSCA 262 -
[R v Glennon \(No 3\)](#) [2005] VSCA 262 -
[R v Munro](#) [2005] VSCA 260 -
[R v Munro](#) [2005] VSCA 260 -
[R v Munro](#) [2005] VSCA 260 -
[R v GS](#) [2005] QCA 376 -
[R v Hopper](#) [2005] VSCA 214 -
[R v BJC](#) [2005] VSCA 154 -
[R v BJC](#) [2005] VSCA 154 -
[R v BJC](#) [2005] VSCA 154 -
[R v BJC](#) [2005] VSCA 154 -
["CJB" v The Queen](#) [2005] WASCA 113 -
["CJB" v The Queen](#) [2005] WASCA 113 -
["CJB" v The Queen](#) [2005] WASCA 113 -
[R v Rutherford](#) [2004] QCA 481 -
[R v GG](#) [2004] VSCA 238 -
[R v Rutherford](#) [2004] QCA 481 -
[R v GG](#) [2004] VSCA 238 -
[R v RH](#) [2004] VSCA 231 -
[R v RH](#) [2004] VSCA 231 -
[R v Baltensperger](#) [2004] SASC 392 -
[R v Hart](#) [2004] SASC 363 (12 November 2004) (Perry, Nyland and Gray JJ)

55. The jury were also entitled to consider the evidence of Mr Bottroff's state of distress and the complaints made to his sister, Natalie Mikon, that morning when assessing Mr Bottroff's credibility. Evidence of a victim or witnesses' distressed state immediately after the alleged offending is admissible for the limited purpose of evidence of consistent behaviour and as part of the whole circumstances surrounding an alleged offence. It may be evidence of a witness's credibility, however it cannot be used as evidence of guilt of the accused. As observed in [R v Pahuja \(No 2\)](#), [4] evidence of complaint and distress is not probative but may assist a jury in determining the credibility of the witness. In the case of [Knight](#), [5] referred to by Olsson J in [Green](#), [6] the court warned against over emphasising the probative value of evidence of distress, re-iterating that evidence of distress will normally only be admissible as evidence of consistency of behaviour.

via

[4] [R v Pahuja \(No 2\)](#) (1989) 50 SASR 551 at 575. See also [R v Kilby](#) (1973) 129 CLR 460 at 468 and [R v Green](#) [2001] SASC 25

[R v Hart](#) [2004] SASC 363 -
[R v P, BR](#) [2004] SASC 323 -
[R v P, BR](#) [2004] SASC 323 -
[R v P, BR](#) [2004] SASC 323 -
[RBK v The Queen](#) [2004] WASCA 216 -
[Hewett v Medical Board of Western Australia](#) [2004] WASCA 170 -
[Hewett v Medical Board of Western Australia](#) [2004] WASCA 170 -
[Hewett v Medical Board of Western Australia](#) [2004] WASCA 170 -
[R v LTP](#) [2004] NSWCCA 109 (01 July 2004)

103. In the light of these warnings and directions, I am satisfied that a further direction to the effect that they could take the delay in complaint into account in assessing the complainant's credibility would have made no difference whatsoever. On my own independent assessment of the evidence, I am satisfied that in respect of count 5, it was a strong Crown case, that the absence of the [Kilby](#) direction has not caused the appellant to lose a real chance of acquittal

fairly open to him, and that there has been no substantial miscarriage of justice: Festa v The Queen [2001] HCA 72, 208 CLR 593. It follows that in accordance with the proviso to s 6(1) of the Criminal Appeal Act 1912, the appeal against the conviction on count 5 should be dismissed.

R v LTP [2004] NSWCCA 109 (01 July 2004)

130. In Markuleski the Chief Justice and Wood CJ at CL were of the view that the trial miscarried because of the combined impact of the failure to give a Kilby direction taken in conjunction with an erroneous direction as to the jury's approach to the issue of credibility in a case of multiple counts arising from the evidence of a single complainant. Grove J found there was no error or defect in the summing up. Simpson J was of the view that the summing up failed to adequately warn the jury of the consequences of long delay upon the defence in accordance with Crompton v The Queen (2000) 75 ALJR 133. The remaining member of the bench, Carruthers AJ agreed with the judgment of the Chief Justice.

R v LTP [2004] NSWCCA 109 -

R v LTP [2004] NSWCCA 109 -

R v LTP [2004] NSWCCA 109 -

R v LTP [2004] NSWCCA 109 -

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R v LTP [2004] NSWCCA 109 -

R v LTP [2004] NSWCCA 109 -

R v LTP [2004] NSWCCA 109 -

R v LTP [2004] NSWCCA 109 -

R v LTP [2004] NSWCCA 109 -

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R v LTP [2004] NSWCCA 109 -

R v LTP [2004] NSWCCA 109 -

R v LTP [2004] NSWCCA 109 -

R v LTP [2004] NSWCCA 109 -

R v LTP [2004] NSWCCA 109 -

Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney [2004]

NSWIRComm 65 -

R v Koolmatrie No. Sccrm-03-223 [2003] SASC 412 (18 December 2003)

7. In the course of his reasons, Bleby J observed:

“Another formulation of the test is whether, having regard to all the circumstances, including delay, the complaint is capable of supporting the credibility of the complainant: R v King ;[5] R v W . [6] That test has some attraction as the complaint cannot be used as evidence of the fact of the offence, but can only go to the credibility of the complainant and the consistency or otherwise of her evidence: R v Kilby ; [7] Ugle v R . [8] ”

via

[7] (1973) 129 CLR 460 at 472.

34. The sole issue on this appeal is whether the complaint was sufficiently proximate to the occasions of the alleged sexual offending. In *Kilby v The Queen* (1973) 129 CLR 460, Barwick CJ discussed the admissibility and purpose of evidence of complaint and accepted that the complaint must be made at “the earliest reasonable opportunity” after the sexual conduct: 464-465. In *The Queen v Peake* (1974) 9 SASR 458 Bray CJ expressed the test as whether the complaint was made “as soon as could reasonably be expected”: 463. In *The Queen v Gallagher* (1986) 41 SASR 73 King CJ accepted the test as stated in *Kilby*.

R v Koolmatrie No. Sccrm-03-223 [2003] SASC 412 -

R v Koolmatrie No. Sccrm-03-223 [2003] SASC 412 -

R v Lebler [2003] NSWCCA 362 (11 December 2003) (Meagher ACJ, Kirby and Shaw JJ)

104 The real grievance of the appellant is not based upon admissibility, but rather the terms of the direction which his Honour gave about the use of early complaint. However, that direction was, in substance, the usual direction given where complaint evidence is admitted. Such a direction (and the companion direction when there is no evidence of complaint or delayed complaint (*Kilby v The Queen* (1973) 129 CLR 460; *Crofts v The Queen* (1996) 186 CLR 427)) derives not from the Evidence Act but the Common Law. There was, under the Common Law, no obligation to give the direction which was sought. Accordingly, there was no error in refusing it. Refusing it, in my view, did not even involve unfairness to the appellant. His position was clear. He immediately denied the allegations when confronted by the police that morning at the scene. He repeated his denials in sworn evidence the day before the summing up. I believe there is no substance in ground 6.

Order

R v Blayney [2003] SASC 405 (11 December 2003)

90. In *R v Kilby* [10], Barwick CJ quoted with approval the following passage from Halsbury's Laws of England [11]:

The admissibility of the particulars of a complaint made soon after the commission of an alleged offence in the absence of the defendant by the person in respect of whom a crime is alleged to have been committed is peculiar to rape, indecent assault and similar offences upon females, and also offences of indecency between male persons. This evidence is not to be taken in proof of the facts complained of, but only as matter to be borne in mind by the jury in considering the consistency, and, therefore, the credibility, of the complainant's story, including the consideration of the question of consent if the prisoner raises that as a defence.

These observations confirm that the evidence of complaint is admissible because the making of a complaint may be supportive of the complainant's credibility.

R v Blayney [2003] SASC 405 -

R v Blayney [2003] SASC 405 -

R v Lebler [2003] NSWCCA 362 -

R v Munday [2003] VSCA 189 -

R v Munday [2003] VSCA 189 -

R v Munday [2003] VSCA 189 -

R v WEB [2003] VSCA 205 (18 November 2003) (Winneke, A.C.J, Charles and Eames, Jj.A)

Criminal Law and Procedure – Sexual offences – Young children as complainants – Long delay in making complaint – *Longman* warning – *Kilby* warning – *Kilby* warning not given - Principles regarding directions to juries – Relevant considerations – No corroboration – *Crimes Act 1958* (No. 6231) s. 61 – *Evidence Act 1958* (No. 6246) ss. 23(2A) and (2B).

R v WEB [2003] VSCA 205 -

[R v WEB](#) [2003] VSCA 205 -
[R v WEB](#) [2003] VSCA 205 -
[R v WEB](#) [2003] VSCA 205 -
[R v WEB](#) [2003] VSCA 205 -
[R v WEB](#) [2003] VSCA 205 -
[R v WEB](#) [2003] VSCA 205 -
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[R v WEB](#) [2003] VSCA 205 -
[R v WEB](#) [2003] VSCA 205 -
[R v WEB](#) [2003] VSCA 205 -
[R v WEB](#) [2003] VSCA 205 -
[R v WEB](#) [2003] VSCA 205 -
[McCreed v The Queen](#) [2003] WASCA 275 -
[McCreed v The Queen](#) [2003] WASCA 275 -
[McCreed v The Queen](#) [2003] WASCA 275 -
[Hill v The Queen](#) [2003] WASCA 177 -
[Hill v The Queen](#) [2003] WASCA 177 -
[Hill v The Queen](#) [2003] WASCA 177 -
[R v Knigge](#) [2003] VSCA 94 -
[R v Martin](#) [2003] VSCA 80 -
[R v VST](#) [2003] VSCA 35 -
[R v VST](#) [2003] VSCA 35 -
[R v VST](#) [2003] VSCA 35 -
[Todd v Police No. Sccrm-02-1796](#) [2003] SASC 62 -
[R v FVK](#) [2002] VSCA 225 -
[R v FVK](#) [2002] VSCA 225 -
[R v Alexander and McKenzie](#) [2002] VSCA 183 -
[R v DBG](#) [2002] NSWCCA 328 (10 September 2002) (Meagher JA, Simpson and Howie JJ)

55 The credibility rule is found in s 102 of the *Evidence Act*. That rule provides that evidence, which is relevant only to a witness's credibility, is not admissible. Evidence of recent complaint is admitted now, not as evidence relevant to the complainant's credibility per se, as it was at common law, but as first person hearsay under s 66(2) of the Act, see [Papakosmas v The Queen](#) (1999) 196 CLR 267. It is, therefore, admissible both as to the truth of the allegation made in the complaint and (because it is not relevant only to the complainant's credibility) as to the consistency of conduct on the part of the complainant that makes it more likely that she is credible in respect of the allegation she makes: [R v Lillyman](#) [1896] 2 QB 167 at 170; [Kilby v The Queen](#) (1973) 129 CLR 460.

[R v DBG](#) [2002] NSWCCA 328 -
[R v Mill No. Sccrm-02-289](#) [2002] SASC 290 -
[R v Salter](#) [2002] VSCA 128 (22 August 2002) (WINNEKE, P., BUCHANAN, J.A. and O'BRYAN, A.J.A.)

71. Mr Desmond next submitted that the judge erred in failing to give a full and proper [Kilby](#) direction [19] which was required in the interests of justice. Mr Desmond conceded that in conformity with s. 61(1)(b) of the Act 1958 the judge was required to, and did, warn the jury that delay in complaining does not necessarily indicate that a complainant's allegation is false and that there may be good reasons why a victim of sexual assault may hesitate in complaining about it. His complaint was that the judge did not clearly tell the jury that it was entitled to take delay into account in assessing the complainant's credibility. Further, in referring to the reasons why the complainant did not complain at all, or delayed making a complaint the [Kilby](#) direction was ineffective or "played down", to use Mr Desmond's expression,

[R v Salter](#) [2002] VSCA 128 -
[R v Salter](#) [2002] VSCA 128 -
[R v Salter](#) [2002] VSCA 128 -
[R v Salter](#) [2002] VSCA 128 -
[R v Salter](#) [2002] VSCA 128 -

R v Salter [2002] VSCA 128 -
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R v Salter [2002] VSCA 128 -
R v Salter [2002] VSCA 128 -
R v Salter [2002] VSCA 128 -
The Queen v W [2002] ACTSC 36 (10 May 2002) (Gray J)

24. The absence of complaint is a matter that arises in respect of the warnings of which I take account. In addition, where there is evidence of complaint that complaint at common law is not capable of corroborating the evidence of the complainant (*Eade v The King* (1924) 34 CLR 154) rather, it may demonstrate the consistency of the conduct of the complainant with the complainant's evidence (*Kilby v The Queen* (1973) 129 CLR 460 at 466). The position under the *Evidence Act 1995* (Cth), however, may permit evidence to be given of any representations made by the complainant if the conditions of s 66(2) of the *Evidence Act* are met and the use of the evidence of such representations is not limited by s 136 of the *Evidence Act* (*Papakosmas v The Queen* (1999) 196 CLR 297).

R v Pidoto [2002] VSCA 60 -
R v Pidoto [2002] VSCA 60 -
R v Pidoto [2002] VSCA 60 -
R v Pidoto [2002] VSCA 60 -
Turner v Visser [2001] TASSC 135 (23 November 2001) (Slicer J)

33. The evidence was relevant and admissible (*Kilby v R* (1973) 129 CLR 460), and the use made of it by the learned magistrate was in accordance with legal principle (*Jones v R* A46 /1996). The amended notice to review claims error on the grounds that:

"5 THE learned Magistrate in convicting the Applicant erred in law by finding that the evidence of Megan Jayne [sic] Reilly, said to be evidence of recent complaint, amounted to corroboration of the evidence of Yolande Brown when such evidence was neither capable of amounting to such corroboration nor did it in fact corroborate that evidence.

6 THE learned Magistrate in convicting the Applicant erred in law by failing to place any or any significant weight on the conflicts between the evidence of Yolande Brown and the evidence of Megan Jane Reilly as to statements which had allegedly been made to Megan Jane Riley by Yolande Brown after the offences were committed."

Turner v Visser [2001] TASSC 135 -
Dawe v The Queen [2001] WASCA 306 -
Havord v Chief of Navy [2001] ADFDAT 3 (22 August 2001)
Kilby v The Queen (1973) 129 CLR 460 applied

Havord v Chief of Navy [2001] ADFDAT 3 -
R v Baker [2001] QCA 326 (10 August 2001) (McMurdo P, Davies and Thomas JJA,)

29. It is noteworthy that his Honour's direction says nothing about any potential adverse effect upon the complainant's credit by reason of the late complaint. His Honour had earlier indicated that he would give such a direction, but obviously overlooked the matter at the appropriate time. Such a direction is sometimes called a *Kilby* [9] direction. In *Kilby* Barwick CJ said:

“It would no doubt be proper for a trial judge to instruct a jury in evaluating the evidence of a woman who claims to have the victim of a rape and in determining whether to believe her, could take into account that she had made no complaint at earliest reasonable opportunity. Indeed, in my opinion, such direction would not only be proper but, depending of course on particular circumstances of the case, ought as a general rule be given.” [\[10\]](#).

In that case Barwick CJ rejected a submission that evidence of noncomplaint should be regarded as evidence of consent. His Honour went on to observe that “it does tell against the consistency of the woman’s account and accordingly is clearly relevant to her credibility in that respect”.

[R v Baker](#) [2001] QCA 326 (10 August 2001) (McMurdo P, Davies and Thomas JJA,)

36. In the end I have concluded that a [Kilby](#) direction should have been given and that neither of the exceptions or qualifications recognised in [Crofts](#) is here applicable. However, counsel for the appellant at no stage complained of the omission to give a [Kilby](#) direction, and sought no relevant redirection.

[R v Baker](#) [2001] QCA 326 -

[R v Baker](#) [2001] QCA 326 -

[R v Baker](#) [2001] QCA 326 -

[R v Baker](#) [2001] QCA 326 -

[R v Baker](#) [2001] QCA 326 -

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[R v Baker](#) [2001] QCA 326 -

[R v Baker](#) [2001] QCA 326 -

[R v Baker](#) [2001] QCA 326 -

[R v Sheehan No. DCCRM-01-101](#) [2001] SADC 104 -

[R v Markuleski](#) [2001] NSWCCA 290 (01 August 2001) (Spigelman CJ at 1; Wood CJ at CL at 201; Grove J at 269; Simpson J at 285; Carruthers AJ at 344)

175 As noted above, the trial judge gave the jury a direction as required by s 107 of the [Criminal Procedure Act 1986](#) (previously s 405B of the [Crimes Act 1900](#)). There is authority that such a direction, which tells the jury that there may be reasons for delay in the complaint, should be balanced by the jury being informed that it was entitled to take into account the delay in assessing the complainant’s credibility (see [Crofts v The Queen](#) (1996) 186 CLR 427). Indeed authority supports the proposition that such a direction should be given “as a general rule” ([Kilby v The Queen](#) (1973) 129 CLR 460 at 465; [R v Davies](#) (1985) 3 NSWLR 276 at 278). Nevertheless in [Davies](#) the appeal was dismissed on the basis that in the particular circumstances of the case the issue of the complainant’s credibility had been adequately put before the jury (see 279).

[R v Markuleski](#) [2001] NSWCCA 290 (01 August 2001) (Spigelman CJ at 1; Wood CJ at CL at 201; Grove J at 269; Simpson J at 285; Carruthers AJ at 344)

A direction should have been given by the trial judge to the jury that the complainant's delay in complaint may be taken into account in its assessment of the complainant's credibility. *Crofts v The Queen* (1996) 186 CLR 427; *Kilby v The Queen* (1973) 129 CLR 460 applied. *R v Davies* (1985) 3 NSWLR 276 referred to.

R v Markuleski [2001] NSWCCA 290 -
R v Markuleski [2001] NSWCCA 290 -
R v Markuleski [2001] NSWCCA 290 -
R v Markuleski [2001] NSWCCA 290 -
R v Markuleski [2001] NSWCCA 290 -
R v Markuleski [2001] NSWCCA 290 -
R v Markuleski [2001] NSWCCA 290 -
R v Markuleski [2001] NSWCCA 290 -
R v PLV [2001] NSWCCA 282 (25 July 2001) (Spigelman CJ, Simpson J and Smart AJ)

53 In *R v Davies* (1985) 3 NSWLR 276 the issue before the court concerned the failure of the trial judge to give a direction that failure to make a complaint could be taken into account on the credibility of the complainant in accordance with the High Court's decision in *Kilby v The Queen* (1973) 129 CLR 460 at 465-466. Hunt J, with whom Slattery CJ at CL and Carruthers J agreed, said that a direction of that character should be given as a general rule. Nevertheless, the court held that the issue of the credibility of the complainant was plainly before the jury and notwithstanding the failure to put the *Kilby* direction in terms to the jury, leave under r 4 was refused. Hunt J indicated that experienced counsel at the trial did not think it necessary to ask the trial judge to give such a direction. Counsel in this case made submissions about the need to add to the warnings given, and the judge did so. No warning about the youth of the complainant or her younger brother was sought.

R v PLV [2001] NSWCCA 282 -
R v PLV [2001] NSWCCA 282 -
R v Tubou [2001] NSWCCA 243 -
Roberts v The Queen [2001] WASCA 191 (27 June 2001) (Kennedy J, Steytler J, Miller J)
Kilby v The Queen (1973) 129 CLR 460
R v Freeman

Roberts v The Queen [2001] WASCA 191 -
Roberts v The Queen [2001] WASCA 191 -
BRK v The Queen [2001] WASCA 161 -
BRK v The Queen [2001] WASCA 161 -
BRK v The Queen [2001] WASCA 161 -
Blight v The Queen [2001] WASCA 122 (20 April 2001) (Kennedy J, Wallwork J, Murray J)
Kilby v The Queen (1973) 129 CLR 460
Kilner v The Queen

Blight v The Queen [2001] WASCA 122 -
R v Glennon (No 2) [2001] VSCA 17 -
R v Glennon (No 2) [2001] VSCA 17 -
R v Glennon (No 2) [2001] VSCA 17 -
R v Glennon (No 2) [2001] VSCA 17 -
R v Glennon (No 2) [2001] VSCA 17 -
R v Glennon (No 2) [2001] VSCA 17 -
Lia v Minister for Immigration and Multicultural Affairs [2001] FCA 65 (19 February 2001) (Finkelstein J)

33. I regret to say that I have real doubts about the correctness of *Guden*. Properly characterised, I believe that what the tribunal did in that case, and what it did in the present case, was to treat the conduct of the applicant (the failure to answer a question in the one case and the

failure to provide certain information in the other) as evidence and draw an inference from that evidence, or perhaps from that evidence together with other evidence. The tribunal did not find as a fact that the applicant was required to provide certain information; it drew certain conclusions from his failure to do so, based on its experience of human nature. This is a process commonly undertaken by a court when it treats conduct as evidence. For example, in criminal trials for sex offences, the failure by a complainant to make a complaint at the earliest reasonable opportunity has traditionally been “a considerable factor where a tribunal of fact is deciding on the credibility of the complainant” (*Kilby v The Queen* (1973) 129 CLR 460 at 469). No finding of fact is involved in this process of reasoning. Also, there is the common example of the failure by a party to call a particular witness. In certain circumstances (those circumstances are well-known) if a party does not call a witness (a fact) that can lead to the inference that if called, the witness would give evidence unfavourable to the party’s cause. This does not involve any finding of fact (that the party in question is in a particular circumstance required to call a witness); it is a process of reasoning. The trier of fact draws the inference which the circumstances of the case permit, because it is reasonable to do so.

Dawson v The Queen [2001] WASCA 2 -

Dawson v The Queen [2001] WASCA 2 -

R v A [2000] QCA 520 (19 December 2000) (Pincus JA, Chesterman and Atkinson JJ,)

6. On the other hand, as Chesterman J points out, in *Crofts* (1996) 186 CLR 427, the delay between the offences alleged and complaint about them was within the range of 6 months to 6 years. It was held, without discriminating between the 6 months and the 6 year delay, that a direction in accordance with *Kilby* (1973) 129 CLR 460 should have been given; it should be noted, however, that the directions approved in *Kilby* did not go as far as those required by *Longman* and *Crampton*.

R v A [2000] QCA 520 -

R v A [2000] QCA 520 -

R v A [2000] QCA 520 -

R v A [2000] QCA 520 -

R v A [2000] QCA 520 -

R v A [2000] QCA 520 -

R v A [2000] QCA 520 -

R v A [2000] QCA 520 -

Miles v The Queen [2000] WASCA 364 (22 November 2000) (Wallwork J, Murray J, Miller J)

55 The true basis upon which evidence of complaint is received in a trial of an accused of a sexual assault was stated in *Kilby v The Queen* (1973) 129 CLR 460 where (at 466 and 472) Barwick CJ said:

"Evidence of a complaint at the earliest reasonable opportunity is exceptionally admitted only as evidence of consistency in the account given by the woman claiming to have been raped: that is to say, it is admitted as a matter going to her credit (see *Reg v Lillyman* , per Hawkins J.(1); *Sparks v The Queen* (2)).

...

The admission of a recent complaint in cases of sexual offences is exceptional in the law of evidence. Whatever the historical reason for an exception, the admissibility of that evidence in modern times can only be placed, in my opinion, upon the consistency of statement or conduct which it tends to show, the evidence having itself no probative value as to any fact in contest but, merely and exceptionally constituting a buttress to the credit of the woman who has given evidence of having been subject to the sexual offence."

[Miles v The Queen](#) [2000] WASCA 364 -
[Miles v The Queen](#) [2000] WASCA 364 -
[Miles v The Queen](#) [2000] WASCA 364 -
[T v The Queen](#) [2000] WASCA 153 (02 June 2000) (Pidgeon J, Wallwork J, Miller J)

[Kilby v The Queen](#) (1973) 129 CLR 460 .

[R v Aston-Brien](#) [2000] QCA 211 -
[T v The Queen](#) [2000] WASCA 153 -
[Zoneff v The Queen](#) [2000] HCA 28 -
[Bull v The Queen](#) [2000] HCA 24 -
[Bull v The Queen](#) [2000] HCA 24 -
[Wimbridge v The Queen](#) [2000] WASCA 117 -
[Wimbridge v The Queen](#) [2000] WASCA 117 -
[Wimbridge v The Queen](#) [2000] WASCA 117 -
[Cook v The Queen](#) [2000] WASCA 78 (28 March 2000) (Pidgeon, Wallwork and Anderson JJ)

[Kilby v The Queen](#) (1973) 129 CLR 460 .

[Cook v The Queen](#) [2000] WASCA 78 -
[R v M](#) [2000] QCA 20 -
[The Queen v Kenneth Kirkman](#) [2000] ACTSC 2 -
[The Queen v Kenneth Kirkman](#) [2000] ACTSC 2 -
[R v PLK](#) [1999] VSCA 194 -
[Deriz v The Queen](#) [1999] WASCA 267 -
[Deriz v The Queen](#) [1999] WASCA 267 -
[Deriz v The Queen](#) [1999] WASCA 267 -
[Deriz v The Queen](#) [1999] WASCA 267 -
[Deriz v The Queen](#) [1999] WASCA 267 -
[R v NRC](#) [1999] VSCA 184 -
[R v NRC](#) [1999] VSCA 184 -
[Oladejo v The Queen](#) [1999] WASCA 247 (17 November 1999) (Ipp J, Wallwork J, White J)
[Kilby v R](#) (1973) 129 CLR 460 .
[Ling v R](#)

[Oladejo v The Queen](#) [1999] WASCA 247 -
[Regina v Naudi](#) [1999] NSWCCA 259 (25 August 1999) (Newman, Windeyer and Sperling JJ)
[Berrigan CCA\(NSW\)](#) 7 October 1994, unreported; [Jones](#) (1997) 72 ALJR 78 ; [Kilby](#) (1973) 129 CLR 461 ;
[Longman](#) (1989) 168 CLR 78 ; [Matthews CCA\(NSW\)](#) 28 May 1996, unreported; [Reeves](#) (1992) 29 NSWLR 109 ;

[Regina v Naudi](#) [1999] NSWCCA 259 -
[Regina v Naudi](#) [1999] NSWCCA 259 -
[Papakosmas v The Queen](#) [1999] HCA 37 (12 August 1999) (Gleeson CJ, Gaudron, McHugh, Kirby and Hayne JJ)

20. Insisting upon the observance of the common law rule against hearsay, whilst, at the same time, receiving evidence of recent complaint, and instructing juries, consistently with [Lillyman](#) and [Kilby](#) , as to the use that could be made of such evidence, involved the drawing of a distinction which juries might not have found easy to comprehend or apply. The facts of the present case provide a good example. The issue was that of consent. There was no dispute that sexual intercourse had occurred between the appellant and the complainant. There was evidence, from the complainant herself, and from a number of witnesses, that almost immediately after the intercourse had occurred, the complainant was in a very distressed condition, crying uncontrollably, and saying that she had been raped. Evidence of her condition, and her distress, was admissible, and in the circumstances could be considered by the jury in determining whether or not she was telling the truth when she said that she had

not consented to what occurred. However, when it came to the matter of her statements that she had been raped, at common law a jury would have been directed that they could consider such evidence, not as evidence of the truth of what she was asserting, but as evidence which had a bearing upon her credibility, and in particular, upon the consistency of her behaviour and her allegations.

Papakosmas v The Queen [1999] HCA 37 (12 August 1999) (Gleeson CJ, Gaudron, McHugh, Kirby and Hayne JJ)

64. In support of these propositions, the appellant relies on the common law which prevailed prior to the Act: *R v Lillyman* [39], *R v Osborne* [40] and *Kilby v The Queen* [41]. He submits that the Act must be read in light of the common law, particularly having regard to s 9(1), which provides:

"This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment."

via

[41] (1973) 129 CLR 460.

Papakosmas v The Queen [1999] HCA 37 (12 August 1999) (Gleeson CJ, Gaudron, McHugh, Kirby and Hayne JJ)

19. The English authorities were considered by this Court in *Kilby v The Queen* [15]. In that case, the Court considered, and rejected, a submission that a trial judge should direct a jury that failure of a prosecutrix to complain is evidence of her consent to the intercourse. In rejecting that argument, Barwick CJ said [16] that there was some ambiguity about the proposition, stated in *Lillyman*, that evidence of a proximate complaint may be used to negative consent. His Honour was prepared to accept that if that simply meant that a complaint "tends to buttress the evidence of the prosecutrix that what occurred did occur without her consent" it may be acceptable, but it could not be taken to mean that evidence of complaint was "direct evidence negating consent". If by "direct evidence" the Chief Justice was referring to the fact that evidence of this kind could not be used at common law for a hearsay purpose, then there can be no question about it. At common law, the rule against hearsay did not yield to evidence of complaint, and judicial comments as to the use of such evidence need to be understood in that light.

Papakosmas v The Queen [1999] HCA 37 -
Papakosmas v The Queen [1999] HCA 37 -
Papakosmas v The Queen [1999] HCA 37 -
Papakosmas v The Queen [1999] HCA 37 -
Papakosmas v The Queen [1999] HCA 37 -
Papakosmas v The Queen [1999] HCA 37 -
Papakosmas v The Queen [1999] HCA 37 -
Papakosmas v The Queen [1999] HCA 37 -
R v James [1999] NSWCCA 191 -
R v James [1999] NSWCCA 191 -
R v T [1999] SASC 242 (11 June 1999)

58. In my view, this direction was inadequate for three reasons. It was essential that the jury be given clear and accurate directions about this long delay and the use which could permissibly be made of it. A recent complaint or its absence is often of little assistance in the resolution of facts in issue (*Jones v The Queen* (1997) 191 CLR 439 at p453) and is usually only relevant as to the credit or reliability of the alleged victim: *Kilby v The Queen* (1973) 129 CLR

460 at p472, *Sparks v The Queen* [1964] AC 964 at p979 and *Jones* at p454. Where there is substantial delay, as in the present case, there is all the more reason to give such a direction to the jury. It is for the jury to assess the reason for the delay or for not having made any complaint at all depending upon what view the jury took of A's explanation. If the jury accepted his explanation, the delay would not be likely to impugn his credit or raise doubt about his reliability. Whilst it is unlikely that in the circumstances of the present case the failure by a young boy to disclose homosexual conduct with his cricket coach would be likely to affect his credit, that was a matter for the jury and a clear direction about that matter should have been, and was not, given. As may be seen from the direction given in the present case, the jury were not told of the use which could be made of the delay in disclosing the conduct which was a misdirection.

R v T [1999] SASC 242 (11 June 1999)

16. It is often appropriate for a trial judge to instruct a jury that in evaluating the reliability of the evidence of a complainant in a sexual case the jury can take into account delay in the making of any complaint. In *Kilby v R* [2], Barwick CJ said that a jury can take into account that a complainant had made no complaint at the earliest reasonable opportunity and that particular circumstances may call for such a direction to be given "as a general rule". That was a case involving the issue of consent. This was not a case where the prosecution had to negative consent with respect to any charge. However, the absence of consent was relevant to the circumstances of the first count though apparently not to the others given the evidence from the complainant about how the relationship developed and how the subsequent sexual exchanges were consensual. The trial judge could have invited the jury to consider whether the absence of a timely complaint, if that be the jury's conclusion, was relevant to the credibility of the complainant with respect to the first charge in particular and a fact to be considered in evaluating the consistency of his evidence. There may be many reasons to explain why a complaint was not made promptly. The complainant spoke of being shocked and embarrassed by this first act of masturbation, after the complainant said he was encouraged by the appellant to remove his underpants whilst having his jeans dried in a clothes' drier at the appellant's house.

via

[2] (1973) 129 CLR 460 at 465.

R v T [1999] SASC 242 -

R v T [1999] SASC 242 -

R v FJB [1999] VSCA 90 -

Abebe v Commonwealth [1999] HCA 14 -

R v Camilleri [1999] VSC 160 -

R v Camilleri [1999] VSC 160 -

R v Williams [1999] NSWCCA 9 -

R v Robins No. Sccrm-98-66 Judgment No. S7013 [1998] SASC 7013 -

R v Aristidis [1998] QCA 422 (18 December 1998)

Kilby (1973) 129 C.L.R. 460

R v Aristidis [1998] QCA 422 -

R v D S J [1998] VSCA 63 (09 October 1998) (Phillips, C.J, Batt and Kenny, Jj.A)

23. Mr. Dane submitted her Honour's charge to close and penetrating scrutiny. In developing his argument orally he said that the charge failed to concentrate on the issue of the *credibility* of the complainant and that, rather, her Honour had compartmentalised her charge, selecting topics and doing her "bare duty", with the result that the charge was a disjointed mixture of references to counsel's arguments, comments and timid warnings. Was, he asked rhetorically, saying that it was dangerous to convict on the complainant's evidence alone

unless, after very carefully scrutinising it and paying heed to the warning, the jury were satisfied of its truth and accuracy, too simple or too favourable to the applicant? He conceded that on the authorities no formula for the warning was laid down, but submitted that age could not be separated out as a separate issue, as he contended her Honour had done by introducing her *Longman* warning with the words "Now, another matter ...". He complained that her Honour's discussion of the complainant's age, "set in an exercise in commonsense", went, not to veracity (as he contended it should have done), but to capacity to understand and give evidence. Referring to *Kilby v. R.* (1973) 129 C.L.R. 460, *R. v. Davies* (1985) 3 N.S.W.L.R. 276 at 278 and *Miletic* at 603, he complained, too, that the *Kilby* warning to balance the s.61(1)(b) direction was deprived of balancing effect by reference to "consistency" and, also, that it should have been directed to veracity, not consistency or inconsistency with the happening of offences. The essence of Mr. Dane's oral argument was, as it seemed to me, that in the portion of her charge which I have quoted verbatim, first, her Honour had failed to tell the jury *why* they must scrutinise the evidence of the complainant very carefully, and, secondly, her Honour had failed to refer to the complainant's age and the delay in complaining and to state authoritatively that they were grounds for seriously questioning the complainant's *veracity*.

R v D S J [1998] VSCA 63 -

R v D S J [1998] VSCA 63 -

R v D S J [1998] VSCA 63 -

R v LSS [1998] QCA 303 (02 October 1998) (Pincus JA Thomas JA Ambrose JJ)

15. The main problem on this aspect of the case is that the learned trial Judge gave no directions at all on how the jury could use the evidence of the complaint. There is no doubt that it was an important factor in the trial, because it had led directly to a report to the police followed by investigation and prosecution of the appellant. The limited basis upon which such evidence may be received and used has been well established in Australia since *Kilby*, and probably much earlier. Its effect is confined to showing consistency of statement or conduct, the evidence having itself no probative value or capacity to prove the truth of what is said (or written). The familiar direction given in summings up is that such evidence constitutes a buttress to the credit of the complainant but that it does not independently prove anything.

R v LSS [1998] QCA 303 -

R v SZEJNOGA No. Sccrm-98-72 Judgment No. S6853 [1998] SASC 6853 -

R v Noonan [1998] VSCA 8 -

R v Noonan [1998] VSCA 8 -

Graham v The Queen [1998] HCA 61 (06 August 1998) (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ)

36. It must be accepted that the directions did not make clear to the jury as they should have that the delay in making the complaint was relevant to the credibility of the complainant, [16] and that the appellant may have been prejudiced in attempting to meet the allegations.

via

[16] *Crofts v The Queen* (1996) 186 CLR 427; *Kilby v The Queen* (1973) 129 CLR 460; *Young* (1996) 90 A Crim R 80 at 84-87; *Longman v The Queen* (1989) 168 CLR 79; *R v K* (1997) 68 SASR 405 at 409-412 per Doyle CJ.

Graham v The Queen [1998] HCA 61 -

R v Johnston 45 NSWLR 362 (31 July 1998) (Spigelman CJ, Sully and Ireland JJ)

Delay in making complaint about sexual assault has posed difficult issues for the administration of justice. At one stage, the courts displayed a distinct scepticism towards complainants. There was a practice of directing a jury that it was unsafe to convict on the uncorroborated evidence of an

alleged victim of a sexual assault. Furthermore, it was established that as a general rule a court should direct a jury that a complainant's failure to complain "at the earliest reasonable opportunity" was something they could take into account in "determining whether to believe her": [Kilby v The Queen](#) (1973) 129 CLR 460 at 465.

[R v Johnston](#) 45 NSWLR 362 (31 July 1998) (Spigelman CJ, Sully and Ireland JJ)
[Bromley v The Queen](#) (1986) 161 CLR 315, [Carr v The Queen](#) (1988) 165 CLR 314, [Crofts v The Queen](#) (1996) 186 CLR 427, [Jones v The Queen](#) (1997) 191 CLR 439, [Kilby v The Queen](#) (1973) 129 CLR 460, [King v The Queen](#) (1986) 161 CLR 423, [Longman v The Queen](#) (1989) 168 CLR 79, [M v The Queen](#) (1994) 181 CLR 487, [Palmer v The Queen](#) (1998) 193 CLR 1, [Public Prosecutions \(Nauru\), Director of v Fowler](#) (1984) 154 CLR 627, [R v Davies](#) (1985) 3 NSWLR 276, [R v E](#) (1996) 39 NSWLR 450, [R v F](#) (1995) 83 A Crim R 502, [R v Harvey](#) (Court of Criminal Appeal, 9 April 1998, unreported), [R v K](#) (1997) 68 SASR 405, [R v Kenny](#) (Court of Criminal Appeal, 29 August 1997, unreported), [R v McDonald](#) (Court of Criminal Appeal, 10 September 1993, unreported), [R v Miletic](#) [1997] 1 VR 593, [R v Spencer](#) [1987] AC 128, [R v Uhrig](#) (Court of Criminal Appeal, 24 October 1996, unreported)

[R v Johnston](#) 45 NSWLR 362 -

[R v Matthews](#) [1998] VSCA 2 (24 July 1998) (Callaway, Kenny and Buchanan, JJ.A)

12. As the Full Court explained in [R. v. Freeman](#) [1980] V.R. 1 at p. 6, lines 42-46, evidence that the alleged victim of a sexual assault complained of it at what is usually called the first reasonable opportunity after the event and evidence that she did not are admitted for similar reasons. In the latter case, the jury may take the complainant's delay in complaining into account in deciding whether to accept her evidence, but they must remember that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining about it. Section 61(1)(b) of the [Crimes Act 1958](#) was in a different form at the time of the trial but the difference is not material. The second part of what his Honour said was favourable to the

R. v. Matthews KENNY, J.A. applicant. Where there is admissible evidence of complaint, the jury may take that into account in deciding whether to accept the complainant's evidence: see the immediately preceding paragraph in *Freeman's Case*, especially the sentence at lines 38-41. The purpose of leading the evidence is to buttress the complainant's credibility, but the jury are not obliged to regard it in that light: cf. [R. v. Lillyman](#) [1896] 2 Q.B. 167 at p. 177; [Kilby v. R.](#) (1973) 129 C.L.R. 460 at pp. 469 and 472; [M. v. R.](#) (1994) 181 C.L.R. 487 at p. 514 and [Crofts v. R.](#) (1996) 186 C.L.R. 427 at p. 434. Just as they may think delay in complaining completely irrelevant, so they may think that the making of a complaint does not, in the circumstances of the case before them, make the alleged victim's account more credible. 8

[R v Hewitt](#) [1998] 4 VR 862 (14 May 1998) (Phillips CJ; Charles and Buchanan JJA)

The applicant contended that the learned judge ought to have told the jury that absence of timely complaint was relevant to the credibility of the complainants and was a fact to be considered in evaluating their evidence. The point was advanced as a particular of the ground of appeal that the verdicts were unsafe and unsatisfactory. His counsel said that the learned judge should have balanced the comments that failure to complain did not necessarily mean that the facts alleged were untrue and there might be good reasons for absence of complaint with a direction that the jury could take into account the fact that the complainants had not complained at the earliest reasonable opportunity. In [Kilby v R.](#) (1973) 129 C.L.R. 460 at 465, Barwick C.J. described the steps a judge should take where the evidence established delay in making complaint in these terms:

[R v Hewitt](#) [1998] 4 VR 862 -

[R v Hewitt](#) [1998] 4 VR 862 -

[R v Hewitt](#) [1998] 4 VR 862 -

[R v Abraham No. Sccrm-97-19, Sccrm-97-128 Judgment No. S6654](#) [1998] SASC 6654 -

[Suresh v The Queen](#) [1998] HCA 23 (03 April 1998) (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)

4. Evidence of prior complaint is admissible in sexual offence cases by way of exception to the rule against hearsay. It is admissible because of the tendency of people to assume, at least in earlier times, that the victim of a sexual offence will complain at the first reasonable opportunity and that, if complaint is not then made, a subsequent complaint is likely to be false [3]. It follows that evidence of complaint is only admissible if it is evidence of early complaint or, as is usually said, of "recent complaint". And it is admitted not as evidence of the facts in issue [4], but as evidence of consistency which buttresses the credit of the complainant [5].

via

[5] *Kilby v The Queen* (1973) 129 CLR 460 at 472 per Barwick CJ .

Suresh v The Queen [1998] HCA 23 -

Suresh v The Queen [1998] HCA 23 -

Suresh v The Queen [1998] HCA 23 -

Suresh v The Queen [1998] HCA 23 -

R v Robinson [1998] QCA 50 -

R v McKellin [1998] 4 VR 757 (19 December 1997) (Phillips CJ; Charles JA; Vincent AJA)

The failure of a trial judge in like circumstances to achieve appropriate balance by giving a *Kilby* direction has repeatedly caused trials to miscarry: see, e.g., *R. v Davies* (1985) 3 N.S.W.L.R. 276 at 278 per Hunt J.; *R. v Omarjee* (1995) 79 A. Crim. R. 355 at 368 ; *R. v Miletic* at 602-3 ; *Crofts v R.* (1996) 186 C.L.R. 427 , per Dawson J. at 436, and per Toohey, Gaudron, Gummow and Kirby JJ. at 452; and *R. v Rodriguez* [1998] 2 V.R. 167 . The importance of the trial judge giving clear directions to the jury in relation to the use which the jury may make of a failure to complain were recently emphasised by this court in *R. v Robertson* [1998] 4 V.R. 30 (in the judgment of Winneke P., with whom Callaway and Kenny JJ.A. agreed, at 38-9). As this court said, in *Miletic* at 603 :

R v McKellin [1998] 4 VR 757 (19 December 1997) (Phillips CJ; Charles JA; Vincent AJA)

The accused was convicted on three counts of indecent assault, one count of attempting to take part in an act of sexual penetration with a child under 10 and three counts of taking part in an act of sexual penetration with a child under 10. The offences involved the accused's four stepdaughters and were alleged to have occurred between October 1988 and July 1991. No complaint was made until late 1993 and the allegations were first put to the accused in October 1994. An application was made for separate trials with respect to each of the complainants. The application was considered by the judge on a voir dire and rejected. The accused sought leave to appeal against conviction on grounds that the judge erred in not ordering separate trials, that his directions to the jury were inadequate in failing to summarise the evidence and put the defence case, that he failed to give the jury a warning in accordance with *Kilby v R.* (1973) 129 C.L.R. 460 concerning the delay in the complaints and that he misdirected the jury by repeating a remark by the prosecutor that the accused, unlike the complainants, had a motive to lie. No exception to these directions was taken by defence counsel at the trial.

R v McKellin [1998] 4 VR 757 (19 December 1997) (Phillips CJ; Charles JA; Vincent AJA)

This direction was clearly designed to accord with *Longman v R.* (1989) 168 C.L.R. 79 ; but, with respect, it gave the jury no assistance as to the use they might make of the delay in complaint when they considered the credibility of the complainants. In the present case, Mr. Flatman Q.C., who appeared with Mr. Kidd for the Crown, contended that delay was not an issue in the trial, or if it was, it was an insignificant one; and that a *Kilby* warning was not therefore required because the facts of the case and the conduct of the trial did not suggest the need for it to be given to restore a balance of fairness. A reading, however, of the cross-examination of S.M., C.M. and T.M. does not support that contention. The delay in making complaint had in each case been substantial, and the reasons for delay were a matter of serious contention. It was, we think, a case where the jury should

have been told that the delay was a fact that they could take into account in evaluating the testimony of three of the complainants, and in determining whether they were to be believed: [Kilby v R.](#) (1973) 129 C.L.R. 460 at 472 ; [R. v Miletic](#) [1997] 1 V.R. 593 at 603. In the present case the learned judge, having given the [Longman](#) direction previously referred to, then, without any request from counsel, brought the jury back to add a further warning in accordance with s. 61(1)(b) of the [Crimes Act 1958](#). In redirecting, his Honour, in effect, did no more than read the relevant portion of the section to the jury, again without any balancing comment as to the use the jury might make of any absence of, or delay in, complaint in the assessment of the credibility of any of the complainants.

[R v McKellin](#) [1998] 4 VR 757 -

[R v McKellin](#) [1998] 4 VR 757 -

[R v McKellin](#) [1998] 4 VR 757 -

[Vincent Raymond Jones v The Queen](#) [1997] HCA 56 -

[Vincent Raymond Jones v The Queen](#) [1997] HCA 56 -

[R v Costin](#) [1998] 3 VR 659 (07 August 1997) (Winneke P; Tadgell and Charles JJA)

In these circumstances, there was simply no evidence before the jury to establish when the victim made her first complaint about the applicant's conduct, or whether there had been any delay in complaining. The learned judge's charge to the jury on the question of delay in complaint was, if anything, favourable to the applicant. No basis for a [Longman](#) warning has been established, nor would it have been appropriate, in this state of the evidence, to give a [Kilby](#) direction.

[R v Costin](#) [1998] 3 VR 659 -

[R v Costin](#) [1998] 3 VR 659 -

[R v Costin](#) [1998] 3 VR 659 -

[R v Costin](#) [1998] 3 VR 659 -

[R v Costin](#) [1998] 3 VR 659 -

[R v Stoupas](#) [1998] 3 VR 645 -

[R v Stoupas](#) [1998] 3 VR 645 -

[R v Stoupas](#) [1998] 3 VR 645 -

[R v Stoupas](#) [1998] 3 VR 645 -

[R v Stoupas](#) [1998] 3 VR 645 -

[R v G](#) [1997] QCA 175 -

[R v G](#) [1997] QCA 175 -

[R v Rodriguez](#) [1998] 2 VR 167 (13 June 1997) (Hayne, Charles and Callaway JJA)

On 27 February 1997 the court quashed the applicant's convictions and directed a new trial to be had. I joined in those orders because I considered that we should accept the concession made by the Crown that, in the circumstances of this case, a [Kilby](#) direction should have been given and that its omission occasioned a miscarriage of justice. See [Kilby v R.](#) (1973) 129 C.L.R. 460 ; [R. v Miletic](#) [1997] 1 V.R. 593 at 602-4 and [Crofts v R.](#) (1996) 186 C.L.R. 427. Unlike [R. v Miletic](#) and [Crofts v R.](#), this is an appeal which succeeds solely on that ground. It is unnecessary to decide whether, in the light of the observations of Toohey, Gaudron, Gummow and Kirby JJ. at 451, such a case should still be regarded as exceptional. Compare [R. v Miletic](#) at 603-4. I gratefully adopt the account given by Charles J.A. as showing that there were in any event special circumstances.

[R v Rodriguez](#) [1998] 2 VR 167 -

[R v Rodriguez](#) [1998] 2 VR 167 -

[R v Rodriguez](#) [1998] 2 VR 167 -

[R v Rodriguez](#) [1998] 2 VR 167 -

[R v Rodriguez](#) [1998] 2 VR 167 -

[R v Rodriguez](#) [1998] 2 VR 167 -

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[R v Rodriguez](#) [1998] 2 VR 167 -
[R v Rodriguez](#) [1998] 2 VR 167 -
[R v Rodriguez](#) [1998] 2 VR 167 -
[R v Rodriguez](#) [1998] 2 VR 167 -
[R v Rodriguez](#) [1998] 2 VR 167 -
[R v Rodriguez](#) [1998] 2 VR 167 -
[Jones v The Queen](#) [1997] HCA 12 -
[Jones v The Queen](#) [1997] HCA 12 -
[Jones v The Queen](#) [1997] HCATrans 73 -
[Jones v The Queen](#) [1997] HCATrans 73 -
[Jones v The Queen](#) [1997] HCATrans 73 -
[Jones v The Queen](#) [1997] HCATrans 73 -
[Jones v The Queen](#) [1997] HCATrans 73 -
[Jones v The Queen](#) [1997] HCATrans 73 -
[Jones v The Queen](#) [1997] HCATrans 73 -
[R v J \(No 2\)](#) [1998] 3 VR 602 -
[R v J \(No 2\)](#) [1998] 3 VR 602 -
[Crofts v The Queen](#) [1996] HCA 22 (10 October 1996) (Dawson, Toohey, Gaudron, Gummow and Kirby JJ)
 54. On 14 August 1996, the Court pronounced the orders stated at the outset of these reasons. The appellant has already served a significant part of the custodial sentence imposed upon him. It is appropriate to repeat McHugh J's closing comment in Longman (53): "In all the circumstances of the case, it is arguable that the interests of the public, the complainant, and the applicant are best served if the expense and psychological trauma of a new trial are avoided. But that is a matter for the Crown to decide." I See Winsor v The Queen (1866) LR 1 QB 390 at 394 ; Swinburne v David Syme and Co (1909) VLR 550 at 563, affd David Syme and Co v Swinburne (1909) 10 CLR 43 ; R v Boland (1974) VR 849 at 866. 2 (1973) 129 CLR 460 .

[Crofts v The Queen](#) [1996] HCA 22 -
[Crofts v The Queen](#) [1996] HCA 22 -
[Crofts v The Queen](#) [1996] HCA 22 -
[Crofts v The Queen](#) [1996] HCA 22 -
[Crofts v The Queen](#) [1996] HCA 22 -
[R v Tofic MUCA No. SCCRM 96/216 Judgment No. 5815 Number of Pages 20 Criminal Law](#) [1996] SASC 5815 -
[Crofts v The Queen](#) [1996] HCATrans 239 -
[Crofts v The Queen](#) [1996] HCATrans 239 -
[R v Miletic](#) [1997] 1 VR 593 -
[R v Miletic](#) [1997] 1 VR 593 -
[Malcolm John McEachern v R No. SCCRM 95/593 Judgment No. 5668 Number of Pages 16 Criminal Law](#) [1996] SASC 5668 -
[Malcolm John McEachern v R No. SCCRM 95/593 Judgment No. 5668 Number of Pages 16 Criminal Law](#) [1996] SASC 5668 -
[Malcolm John McEachern v R No. SCCRM 95/593 Judgment No. 5668 Number of Pages 16 Criminal Law](#) [1996] SASC 5668 -
[Malcolm John McEachern v R No. SCCRM 95/593 Judgment No. 5668 Number of Pages 16 Criminal Law](#) [1996] SASC 5668 -
[R v E](#) 39 NSWLR 450 (24 May 1996) (Handley JA, Abadee and Sperling JJ)

(2)Evidence of complaint is also relevant to the credit of the complainant. If a complaint has been made in substantially the same terms as the complainant's sworn evidence, that may be treated as enhancing the credibility of the sworn account. If, on the other hand, a complaint has been made in substantially different terms (because it was altogether different or because it contained additional allegations or did not contain all the allegations made in the sworn evidence), that may be treated as detracting from the credibility of the sworn account of events. This is because consistency, in giving the same account after the event as in the sworn evidence, may be treated as enhancing the likelihood that the sworn account is true, and inconsistency may be treated as having the converse effect: see generally [Kilby](#) ; [R v Lillyman](#) ; [R v Osborne](#) [1905] 1 KB 551.

[R v E](#) 39 NSWLR 450 -
[R v E](#) 39 NSWLR 450 -
[R v E](#) 39 NSWLR 450 -
[R v E](#) 39 NSWLR 450 -
[R v E](#) 39 NSWLR 450 -
[Keevers v The Queen](#) [1995] HCATrans 121 -
[Keevers v The Queen](#) [1995] HCATrans 121 -
[Keevers v The Queen](#) [1995] HCATrans 121 -
[Keevers v The Queen](#) [1995] HCATrans 121 -
[R v W](#) [1995] QCA 49 -
[R v King](#) [1995] QCA 48 -
[R v King](#) [1995] QCA 48 -
[M v the Queen](#) [1994] HCA 63 -
[M v the Queen](#) [1994] HCA 63 -
[M v the Queen](#) [1994] HCA 63 -
[Carindale Country Club Estate Pty Ltd v Astill](#) [1993] FCA 218 (15 April 1993) (Gallop(1), Davies(2) and Wilcox(1) JJ)

Kilby v The Queen (1973) 129 CLR 460 .

[Carindale Country Club Estate Pty Ltd v Astill](#) [1993] FCA 218 -
[Ugle v The Queen](#) [1989] HCA 55 -
[R v Murray](#) 11 NSWLR 12 -
[R v Murray](#) 11 NSWLR 12 -
[R v WILLIAMS](#) [1988] VR 261 -
[Wentworth v Rogers \(No 10\)](#) 8 NSWLR 398 -
[R v Davies](#) 3 NSWLR 276 -
[R v Davies](#) 3 NSWLR 276 -
[R v Davies](#) 3 NSWLR 276 -
[R v Davies](#) 3 NSWLR 276 -
[R v Davies](#) 3 NSWLR 276 -
[R v Davies](#) 3 NSWLR 276 -
[R v Davies](#) 3 NSWLR 276 -
[R v Davies](#) 3 NSWLR 276 -
[R v Davies](#) 3 NSWLR 276 -
[R v Rosemeyer](#) [1985] VR 945 -
[R v Rosemeyer](#) [1985] VR 945 -
[Whitehorn v the Queen](#) [1983] HCA 42 -
[Whitehorn v the Queen](#) [1983] HCA 42 -
[R v Manwaring](#) [1983] 2 NSWLR 82 (22 July 1983) (Street CJ, Begg and Miles JJ)

Mr Barker QC for the appellant Manwaring, in a submission which was adopted by counsel for all appellants, submits that the evidence was not capable of supporting a finding by the jury that G, the victim in the present case, made recent complaint after the offence, and that the trial judge should have so ruled. With commendable candour Mr Barker informed the court that the purpose of obtaining such a ruling would have been to seek a direction to the jury in the terms of what was said by Barwick CJ in [Kilby v The Queen](#) (1973) 129 CLR 460, at 465 , as follows:

“It would no doubt be proper for a trial judge to instruct a jury that in evaluating the evidence of a woman who claims to have been the victim of a rape and in determining whether to believe her, they could take into account that she had made no complaint at the earliest reasonable opportunity. Indeed, in my opinion, such a direction would not only be proper but, depending of course on the particular circumstances of the case, ought as a general rule to be given.”

[R v Manwaring](#) [1983] 2 NSWLR 82 -
[R v Keeley and Alexander](#) [1980] VR 571 -

[R v Zorad](#) [1979] 2 NSWLR 764 (02 August 1979) (Street C.J, Reynolds J.A and O'Brien JJ)
[Kilby v. The Queen](#) (1973) 129 C.L.R. 460, at pp. 465, 466 [Kilby v. The Queen](#) (1973) 129 C.L.R. 460, at pp. 465, 466.

[R v Zorad](#) [1979] 2 NSWLR 764 (02 August 1979) (Street C.J, Reynolds J.A and O'Brien JJ)

In [Kilby v. The Queen](#),

(1973) 129 C.L.R. 460, at pp. 465, 466.

Barwick C.J. said: "In my opinion, for reasons I shall give, the trial judge, at best, in any case could only instruct the jury that a failure to complain should be taken into consideration by them when they were considering whether they would accept the prosecutrix's evidence. He could not in any case, in my opinion, the basis of which I shall later discuss, tell them that the failure to complain bore out the applicant's statement. Thus, in this case, I would see little need to instruct the jury at all as to the effect upon the prosecutrix's credibility of her failure to complain."

[R v Zorad](#) [1979] 2 NSWLR 764 -

[R v Zorad](#) [1979] 2 NSWLR 764 -

[R v Zorad](#) [1979] 2 NSWLR 764 -

[R v Zorad](#) [1979] 2 NSWLR 764 -

[R v Freeman](#) [1980] VR 1 -

[R v Freeman](#) [1980] VR 1 -