UNSAFE & unsatisfactory?

Jenni Millbank and Ronni Lifschitz

The High Court's decision in M v R.

In *M v R* (1994) 126 ALR 325 the High Court sought to clarify the role of appellate courts in reviewing what have become known as 'unsafe and unsatisfactory' criminal convictions.[1] The case it chose for clarification was a NSW case in which a father was convicted of two counts of indecent assault and three counts of sexual intercourse with his 13-year-old daughter, K, who had been staying in his house on an access visit.[2] What constitutes unsafe evidence (and implicitly what constitutes 'evidence' at all)[3] in sexual assault matters is therefore at the crux of this judgment, and informs most if not all of the technocratic legal analysis of appropriate standards for review.

The majority of the court (Mason CJ, Deane, Dawson and Toohey JJ) in holding that the conviction was unsafe on all counts and should be quashed, proposed the following standard for appellate review of criminal matters:

> In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude no miscarriage of justice has occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. [at 329]

Doubting the complainant — the majority view

As the accused was convicted solely on the basis of the detailed testimony of his 13-year-old daughter, it was overwhelmingly her evidence which was found by the majority to lack credibility. The bases of the attacks on her evidence were numerous: some trivial (such as what was on television) and others more serious. The more serious matters were:

- the 'inconsistency' that the complainant had seemed composed on the day following the sexual assault, and that she made no complaint to her step-mother at the time, or later to her own mother;
- the fact that K had made a complaint of an attack of a sexual nature from her half sister (the accused's daughter) some years earlier; and
- medical evidence that K's hymen was substantially intact, regarded by one doctor as inconsistent with one of the counts of penetration, but by another doctor as establishing neither consistency nor inconsistency.

The majority found that all of these things raised doubts, emphasising that the complainant's 'apparent equanimity' after the assault 'suggested the need for careful scrutiny of the allegations' (at 333). Inherent in the majority judgment is the belief that a genuine victim of sexual assault will either complain swiftly, or show such visible manifestation of distress that others will be alerted. There is no attention given to the possibility that the complainant may have been in shock, or in fear of the appellant, or reluctant to complain to an authority figure or family member when she had just been abused by

Jenni Millbank is a Researcher on the DEET Project: Including Gender Issues in the Core Legal Curriculum (Work and Violence Team) at the Faculty of Law, UNSW. Ronni Lifschitz is a Sexual Assault Advocate at Macarthur Sexual Assault Service.
The authors would like to thank Regina Graycar and Fiona Rummery.

someone who was both.[4] (In fact, K told her best friend what had happened within days of the second incident.) A reasonable complainant standard, formulated from some unidentified repository of legal 'common sense' was thus implicitly applied to K without any reference to the context of childhood sexual assault, and she failed to satisfy it, thus rendering her evidence unsafe.

The majority also focused on the behaviour and evidence of the appellant, M. Their Honours noted that witnesses who had given character evidence for M had allowed their own children to stay overnight in his home knowing of the charges against him (at 333). It seems strange the jury's assessment of the accused's guilt should be accorded less weight than that of the accused's friends, particularly as the jury had the evidence of good character before them and clearly formed a different view. Moreover, as McHugh J notes in dissent, 'the commission of sexual assault, especially within the family unit, is certainly not restricted to those people who would be considered of "bad character"' (at 358). The majority summarised M's position by saying 'an innocent man could have done no more than the accused did in conducting himself as he did during his interview with the police or in giving evidence on oath at his trial'. While this is indisputably true, neither, in fact, could a guilty man.

Possibly even more disturbing than the arguments relied on by the majority above was its conclusion in reviewing the evidence as a whole:

> *But more important than any individual matter was the improbability of the appellant acting as he was alleged to have done* in the circumstances prevailing on the night, namely, on a squeaky bed in an unlocked bedroom which was only a short distance from, and within hearing distance of, another bedroom occupied by the appellant's wife, in a fully occupied, small house. [at 333, emphasis added]

The majority thus quietly incorporated a kind of reasonable rapist standard into its method of appellate review. They doubted that the verdict was safe, either because they doubted that the accused would have done what he was convicted of, or that he would have gotten away with it if he had. Such a test surely puts many if not most incestuous sexual assault convictions in doubt, as offences often involve close proximity to other family members and undetected assaults over months and years.[5] Furthermore, whatever the circumstances, such offences are always *inherently improbable* in the sense that non-abusing adults find it hard to believe that other adults could ever do such things not only to children, but to their own children.

Believing the jury, believing the complainant? — the minority views

Gaudron, Brennan and McHugh JJ delivered separate dissenting judgments, disagreeing with the majority for a variety of reasons. All of these dissenting judgments are worth exploring at least briefly, as they cast significant light on the 'facts' of the case. In particular, all three minority judgments raise very different interpretations of the evidence found so doubtful by the majority, regardless of which test of appellate doubt is used.[6]

Brennan J was of the opinion that a jury was entitled to believe K's explanations as to why she did not immediately complain to her own mother: 'I was scared of telling her. I didn't know how she'd react, and I don't think Mum is very good at handling it.' His Honour emphasised that the issues surrounding such 'inconsistencies' were primarily concerned with credit and were best assessed by the jury (noting moreover that the jury 'did not come lightly to a verdict', as they spent over a day in deliberation and also sought redirection). McHugh J agreed that it was the role of the jury to assess the complainant's credibility and also stated:

> [The appellant's counsel] submitted that a 13-year-old girl who was assaulted in the way that K alleged could not be supposed to have so quickly recovered from her ordeal as to behave as she did at the barbecue [the following day]. But, in the absence of expert evidence as to how a young woman of K's age and background would react and interact with people including her assaulter after the events of the kind that K described, I do not think that it is open to this court to set aside the conviction of M because K did not act in accordance with some perceived stereotype of a victim of sexual assault. [at 355]

Brennan J noted that the medical evidence of an intact hymen need not be inconsistent with penetration according to one of the two doctors involved, but emphasised that K's evidence was that it *felt like* complete penetration (she had no means of comparison) and so whether it was or not 'must surely be a matter for speculation'. His Honour held the jury was entitled to believe that penetration had occurred to a sufficient degree to constitute a breach of s.61A of the *Crimes Act 1900* (NSW). McHugh J agreed with this point and also noted that two of the three counts of sexual intercourse would stand regardless of the medical evidence,[7] and it was thus largely redundant in proving the conviction unsafe. (McHugh J also made the point that the degree of penetration was not in issue at the trial, as the charges had been fought on an 'all or nothing' basis of complete denial.) Gaudron J was the only one of the dissenting judges to hold that the medical evidence was sufficiently inconclusive that the jury should have entertained a doubt as to the three sexual intercourse counts. However, her Honour made it clear that these doubts did not carry over to the rest of the prosecution case:

> Leaving aside the question of penetration, the arguments for the appellant do not cast any doubt on the case presented by the prosecution. Rather, an analysis of the evidence reveals a substantial case without significant weaknesses. [at 346]

Thus, her Honour would not have quashed the conviction as the majority did, but rather ordered a retrial on lesser charges for these counts and upheld the conviction on the two indecent assault convictions.

Gaudron J rejected the claim that K's early complaint against her half-sister had any bearing on the case, noting that there was no evidence whatsoever to suggest that the claim was false, and also that the complaint had been elicited rather than offered (at 343). Her Honour also examined at length and rejected the claim that K's composure and delay in complaint weakened her evidence in any way. Gaudron J noted that circumstances of complaint vary greatly, that assumptions about the veracity of fresh complaints were not helpful, and furthermore were completely inapplicable to child complainants who were sexually assaulted by adults whom they trusted (at 344-5).

Like Brennan J, McHugh J emphasised that there was nothing in reading the transcripts of the case which made the appellate court's position in reviewing the evidence preferable to that of the jury. His Honour argued that the discrepancies in the evidence were primarily concerned with credit — that is, K's version versus her father's. In dismissing each of the matters which were alleged to have made the conviction unsafe, McHugh J quoted extensively from K's testimony in order to illustrate the strength of her evidence and

thus why a jury was entitled to believe it. In performing the role of appellate court and assessing the 'cumulative effect of the criticisms' of the evidence (otherwise phrased as the 'overall picture' or 'totality of the evidence'), McHugh J took a position in stark contrast to that of the majority. While it may be recalled that the majority looked at the totality of the evidence from the accused's perspective (in concluding that it was unlikely he would have committed the offences in the manner which was alleged), McHugh J looked at the totality of evidence from the complainant's perspective:

> If M was innocent, then his 13-year-old daughter, for no known or plausible motive, decided to invent a story that her father had sexually assaulted her on two occasions. Having fixed a weekend visit as the scene of the first incident, she told her friend that her father had played with her breasts and kissed her with his tongue. She broke down and cried while doing so and, by chance, her sister saw her crying and later asked her why she was crying. She then repeated the allegation to her sister. She then waited until the next access visit and on the following Monday told her friend of even graver assaults. For some reason, she decided not to tell her sister of the further assaults that she had invented. Nor at this stage did she tell her mother about either incident. By chance, her friend suggested that she should tell the school counsellor. So she did. She then repeated her lies to the counsellor, to welfare and police officers, to doctors and to her own mother. Eighteen months later she completed the course of deception that she had embarked on in September 1990 by telling a jury of the sexual assaults that she had invented. She supported her allegations with a wealth of detail concerning statements and actions of her father that made her evidence sound true. So confident was she that her lies would be accepted that she even claimed that her father had had penile intercourse with her even though she knew that she was a virgin.
>
> A reasonable jury might well think that it was unlikely that a 13-year-old girl, with no known or plausible motive, could tell such a detailed story of sexual assault and maintain it as well as she did unless the events which she related in evidence were substantially true. If she created a favourable impression in the witness box, as she obviously did, and if M's demeanour did not impress the jury, how can it be said that on all the evidence a reasonable jury must have had a doubt about his guilt? [at 361]

The future of 'unsafe and unsatisfactory' appellate review

Clearly, the decision of the High Court in *M v R* has disturbing implications for the widening of scope for appellate courts to substitute their own views for those of the jury at trial. There have already been a number of subsequent cases applying *M v R* and it is instructive to mention one such case concerning a complaint by an adult woman of childhood sexual assault by her stepfather. In *R v LFM* the NSW Court of Criminal Appeal applied *M v R* in quashing a conviction on five counts of sexual assault (unreported, Grove, Abadee, James JJA, 27 March 1995). The evidence relied on by the Court to cast doubt on the conviction was almost entirely credit evidence. The Court found it important that the accused's wife and son supported aspects of his evidence (against the complainant's uncorroborated evidence) and would not accept that 'a mother has protected a defiler of her daughter by perjury', even if the jury had. Thus, partisan witness evidence was assessed on appeal as objective in *LFM*, and weighed against the complainant's evidence to render it unsafe.

This is surely not an application which even the majority in *M v R* could have countenanced, and it is suggested that the High Court may wish to consider clarifying its decision in *M v R* at the earliest possible opportunity to ensure that it does not become the means by which appellate courts engage in weighing the credit of witnesses from transcript evidence. Until such clarification occurs, it is submitted that the majority judgment should be confined to apply only where there is objective evidence on the record which must have cast a doubt on a reasonable jury's decision to convict. The minority judgments in *M v R* are significant in that they offer valuable guidance in terms of trial strategy and appellate argument in sexual assault matters. All three minority judgments contain useful and authoritative argument rebutting common assumptions and errors which still persist about sexual assault, and they should be utilised to the fullest degree possible.

References

1. In fact this term is borrowed from English law and does not appear in the *Criminal Appeal Act 1912* (NSW) where the terminology of 'unreasonable' verdicts and 'miscarriage of justice' is used.
2. The NSW Court of Appeal had unanimously dismissed the appeal, although Sully J indicated that he would rather not have done so, due to his 'purely subjective . . . feeling of anxiety and discomfort' over the verdicts of guilty. See *R v M* (1994) 72 *A Crim R* 269. Sully J preferred the view that a Court of Appeal should be able to quash convictions, as is done in the UK, where it experiences lurking doubts upon review of the evidence in total.
3. For an incisive analysis of 'what counts as evidence' and the issues facing subordinated people in giving evidence in the context of the USA, see Scheppele, Kim Lane 'Manners of Imagining the Real' (1994) 19 *Law and Social Inquiry* 995.
4. See Herman, Judith, *Trauma and Recovery,* Basic Books, New York, 1992; Waites, Elizabeth, *Trauma and Survival,* Norton, New York, 1993.
5. See Russell, Diana, *The Secret Trauma: Incest in the Lives of Girls and Women,* Basic Books, New York, 1986; Herman, Judith, *Father-Daughter Incest,* Harvard University Press, Cambridge, 1981.
6. Gaudron J appears to agree with the majority test (at 340). Brennan J emphatically rejected the majority test. His Honour applied the standard of whether a reasonable jury *must* have had a reasonable doubt, taking care to defer to a jury's ability to find facts, assess credibility and apply the broad experience of life to their assessment of witnesses (see 335, 339). His Honour held that 'an appellate court can seldom interfere with the verdict of a jury merely on the ground that the verdict is unsafe and unsatisfactory where there is evidence to support the verdict' (at 335). McHugh J applied substantially the same test proposed by Brennan J, involving whether a jury *must* have doubt, but held that a conviction could be unsafe even if there existed evidence to support the verdict (at 352-3).
7. As they involved a much lesser degree of penetration, with a tongue and finger. A single count involved penile penetration, and one of the two doctors was of the opinion that this was inconsistent with the state of K's hymen.