SUPREME COURT OF QUEENSLAND

CITATION:	*R v PAZ* [2017] QCA 263
PARTIES:	**R** **v** **PAZ** (appellant)
FILE NO/S:	CA No 323 of 2016 DC No 344 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Maroochydore – Date of Conviction: 14 November 2016 (Robertson DCJ)
DELIVERED ON:	7 November 2017
DELIVERED AT:	Brisbane
HEARING DATES:	2 June 2017; 18 August 2017
JUDGES:	Morrison and Philippides JJA and Boddice J
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was charged with 16 counts of child sex offences committed against his step-son – where the appellant was convicted of 11 of those counts after a five day trial – where the appellant appeals the conviction on the ground that the verdicts are unreasonable and cannot be supported by the evidence – where the principal witness was the complainant – where evidence was also given by the complainant's mother, siblings, and friends – where the appellant submitted that there were problems with the reliability of the complainant's evidence and a lack of impartial supporting evidence – where the respondent submitted that the evidence was rightly accepted by the jury and that the trial judge gave appropriate directions about issues in the evidence – where this Court is required to make an independent assessment of the evidence – whether the evidence supports the verdict – whether it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – where the appellant was convicted of sodomy, and

acts of sodomy formed part of the offence of maintaining a sexual relationship with a child – where amendments to the *Criminal Code* (Qld) abolished the offence of unlawful sodomy, amended the prescribed age for the purposes of the offence of maintaining an unlawful sexual relationship to 16 years, and lowered the age of consent for anal intercourse to 16 shortly before the appellant's trial – where the appellant submitted that the changes to the *Code* meant that the charges of sodomy, and the charge of maintain a sexual relationship with a child under 18 years were invalid – where that submission is based on the relationship between the *Criminal Code* and the *Acts Interpretation Act* 1954 (Qld) – where s 11 of the *Code* requires a criminal act to be an offence at the time it occurred and when the person is charged for it to be punishable – where the issue was therefore when the appellant was charged – where there are multiple definitions of 'charge' in Queensland statutes – where the appellant also contends that s 20 of the *Acts Interpretation Act* has a significant impact on the validity of the appellant's punishment – where case law suggests that liability for punishment arises when the criminal act first occurs – whether the appellant was charged before the acts were decriminalised – whether the appellant's liability for punishment is preserved by the *Acts Interpretation Act* – whether the appellant's conviction and sentence is valid

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISDIRECTION AND NON-DIRECTION – where the learned trial judge gave a direction that consent was irrelevant to the jury's consideration of the sodomy counts that occurred when the complainant was aged between 16 and 18 years – where those counts were relevant to the count of maintaining a sexual relationship with a child under 18 years – where evidence of sexual acts occurring after the complaint turned 18 was led as relationship evidence – where the appellant submitted that the jury should have been told that the age of consent had been lowered and failure to do so resulted in a miscarriage of justice – where the respondent contended that there was no need to direct the jury as to the changes in the law because the charges were still lawful, even if not punishable – where the learned trial judge gave a number of directions, including a direction on the relevant law – where that direction was wrong at the time it was given, but correctly described the state of the law at the time the offences were committed – whether the trial judge's directions have led to miscarriage of justice

Acts Interpretation Act 1954 (Qld), s 20
Criminal Code (Qld), s 11, s 554, s 560, s 590
Health and Other Legislation Amendment Act 2016 (Qld)
Justices Act 1886 (Qld), s 84(1), s 104, s 108, s 132

Commissioner of Taxation v Price [2006] 2 Qd R 316; [2006]

QCA 108, followed
Goli (Commissioner of State Revenue) v Thompson & Ors [2017] QDC 4, considered
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, followed
Mansray v Rigby (2014) 292 FLR 404; [2014] NTSC 62, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, followed
R v HXY & Ors [2017] QSC 108, followed
R v Pritchard [1999] 107 A Crim R 88; [1999] NSWCCA 182, considered
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, followed
The Queen v Brancourt (2013) 280 FLR 356; [2013] NTSC 56, considered
Wilson v Director of Public Prosecutions (NSW) [2017] NSWCA 128, considered

COUNSEL: N V Weston, with D MacKenzie, for the appellant
J A Wooldridge for the respondent

SOLICITORS: Carswell and Co Solicitors for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** The appellant married the complainant's mother in 1999, when the complainant (**K**) was ten and a-half years old. According to K, there was persistent course of sexual acts performed on him by the appellant from late 1999: by late 1999 the appellant had started doing masturbation and oral sex; by 2001 the appellant was regularly performing oral sex on him, and fondling his genitals; that progressed to the appellant making K masturbate the appellant; by 2003 the appellant was performing acts of attempted sodomy.

[2] K turned 16 on 5 May 2004. In the 2004/2005 school holidays K and the appellant travelled to the United Kingdom. When they returned, the appellant and K's mother separated, and K went to live with the appellant. From then the sexual acts occurred on multiple occasions, including masturbation, oral sex and attempted sodomy and actual sodomy. These acts also included the appellant causing K's penis to penetrate his own anus. The sexual activity continued after K turned 18 on 5 May 2006.

[3] After a five day trial the appellant was convicted of the following:

(a) count 1: maintaining an unlawful sexual relationship with a child under 18 years, with circumstances of aggravation;

(b) counts 4, 5, 6 and 8: indecent treatment of a child under 16, under care;

(c) counts 10 and 12: attempted sodomy;

(d) count 13: sodomy; and

(e) count 15: permitting sodomy.

[4] The jury were unable to reach a verdict on counts 3, 7, 9, 14 and 16,[1] and a *nolle prosequi* was entered on those counts.

[5] The appellant has appealed against his convictions on the following grounds:

(a) ground 1: the verdicts are unreasonable or cannot be supported by the evidence;

(b) ground 2:[2] there was a miscarriage of justice in that counts 1, 12, 13, 14, 15 and 16 no longer constituted criminal offences at the time of the trial; and

(c) ground 3: a miscarriage of justice occurred due to the reception of evidence of sexual acts between the appellant and the complainant when the complainant was aged between 16 and 18, on the basis that such acts were punishable; there was a failure to properly direct the jury as to that evidence.

The evidence at trial

[6] The principal witness at the trial was K. Other evidence came from:

(a) K's mother, F;

(b) S, a neighbour for a time;

(c) N, another neighbour;

(d) M and A, the owners of a shed/residence where the appellant and K lived for a time;

(e) Q, M and A's son;

(f) K's siblings T and X;

(g) H, a childhood friend;

(h) A and L, owners of a guest house where the appellant and K stayed; and

(i) two investigating police officers.

K's evidence

[7] K gave evidence of meeting the appellant when K was in primary school and the appellant was a teacher there. He lived with his mother (F) and younger siblings, T and X. The appellant married F in 1999 when K was almost 11. Soon after the wedding the family moved to Rosedale. F worked and that, together with shopping for the family, meant she was absent from the home from time to time, when the appellant was in charge of the children's care.

Count 3 – indecent treatment

[8] K said he could distinctively remember the first incident with the appellant. K and the appellant were sleeping in the lounge room on air mattresses. The appellant put his hands down K's chest and started rubbing his genitals.[3] K tried to wriggle away

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1 Count 3, indecent treatment of a child under 12, under care; counts 7 and 9, indecent treatment of a child under 16, under care; count 14, attempted sodomy; count 16, sodomy. Count 2 was an alternative to count 1, and count 11 was alternative to count 10.

2 Added by leave at the hearing of the appeal.

3 Appeal Book (**AB**) 37.

but the appellant signalled him to remain quiet. The appellant masturbated K to ejaculation. It was the first time K had ejaculated.[4]

Count 4 – indecent treatment

[9] K said "that type of scenario happened multiple times … in the lounge room".[5] He recalled another specific occasion at Rosedale. The appellant called K in from his bedroom to the lounge room, while T and X were outside. The appellant rubbed himself against K and said, referring to an erection, "see what you do to me". The appellant then laid K on the bed in the master bedroom and performed oral sex. When K tried to squirm and roll the appellant told him to "relax, it was okay, that he wasn't going to hurt me". While performing oral sex the appellant masturbated himself, making groaning and grunting noises. K managed to get away and went outside. K said his memory of that event was "very vivid, because it was the first time that it wasn't sleeping out on the air mattress … the first time it had been done in the bedroom and him performing that oral sex on me".[6]

Count 5 – indecent treatment

[10] After the family moved again, to Baffle Creek Road, F and the appellant had a child together, R. K and his brother X shared a room, and his sisters, T and R, shared another room. K said he remembered a particular incident when he and X were doing homework and the appellant told X to go for a ride on his bike. The appellant took K into the master bedroom and pushed himself against K, fondling him. He took K's clothes off and performed oral sex, initially with K standing and then with K on the bed. K ejaculated.[7]

[11] K said that the appellant performed multiple sexual acts on him, predominantly in the master bedroom but also in K's room. This included rubbing his hands on K, and fondling his genitals. He said "that type of event, or very similar sequence of events, depending if [X] was in the house or out of the house … happened multiple times".[8]

Count 6 – indecent treatment

[12] The family moved to Kawungan at the end of 2000. Initially K and X shared a room, then K had his own room. T and R shared a room, behind which was an office space used by the appellant. The master bedroom had a walk-in wardrobe that led to the bedroom. Outside was a spa. K said that offending conduct occurred in the office, spa, K's room and the master bedroom.

[13] One particular event, which K said "sticks vividly in my mind … very, very clear in my head",[9] took place when the appellant called K into the office, and got K to rub his shoulders. The appellant reached around and fondled K's genitals, then turned K to face him. He pulled K's pants down and performed oral sex. It was only for a short time and K did not ejaculate.[10]

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4 AB 38, 121.
5 AB 40 line 15.
6 AB 40-41.
7 AB 43-44.
8 AB 44 line 23.
9 AB 53 line 39.
10 AB 53-54.

[14] K said "that scenario, or that sequence of events, occurred multiple times … in my time there". They took place "three or four times a week every week". The door to the office would be closed. Quite often the pants were only pulled part way down so they could be pulled up quickly if someone was coming.[11]

Count 7 – indecent treatment

[15] Count 7 occurred at Kawungan, but in K's bedroom, in 2002 when K was in grade 9. The appellant came in and ran his hands down K's front to his genitals, fondling them outside K's pants. The appellant whispered "is he awake … is he excited and ready to play?" while fondling K's penis inside his pants. K told him that he needed the appellant to leave him alone as he had a lot of schoolwork. The appellant was not happy but desisted, telling K not to tell anyone.[12]

[16] K said that sort of touching happened frequently, "a couple of times a week … usually … late at night".[13]

Count 8 – indecent treatment

[17] Count 8 occurred in the spa, at a time when K and X, and a friend (S), were in the spa with the appellant. K recalled the event because it was the year that S was being tutored by the appellant. He was pulled over onto the appellant's lap, noticing that the appellant was "semi-aroused … hard but not a full state of erection". The appellant fondled K's genitals outside his speedos. K wriggled free and went to the other side of the spa to "compose myself and, you know, make sure that nothing was standing out, so to speak". Shortly afterwards the appellant sat X and then S on his lap.[14]

[18] Earlier in his evidence K had recalled a previous incident between himself and the appellant when X was in the spa (but not S). He was pulled over onto the appellant's lap, noticing that the appellant had an erection. The appellant's penis was "pushing into my backside" and the appellant was fondling K's genitals. At the time X was on the other side of the spa, which had bubbles on the surface. K said that stood out in his mind because "it was … first time that … something happened in the spa and with someone else there".[15]

[19] K said "that situation with myself being … put onto his lap" would happen a couple of times a month when the spa was used.[16] K also said that incidents happened in the walk-in wardrobe three to four times a week, and more if his siblings or mother were outside or away.[17]

Count 9 – indecent treatment

[20] K said he could recall the first time something happened in the wardrobe. The appellant called him into the wardrobe and pressed himself against K, and pulling K against him. The appellant put his hands down K's pants, fondling him. He took

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11 AB 55.
12 AB 56.
13 AB 57 line 7.
14 AB 58-59.
15 AB 57-58.
16 AB 59.
17 AB 60 lines 4-19.

K's clothes off, and his own as well. The appellant had an erection. He started masturbating, and put K's hand on his penis forcing K to masturbate him. K said that was the first time he masturbated the appellant. He remembered it "because it was …to me, it was, like, an escalation of seriousness".[18]

Count 10 – attempted sodomy

[21] K said count 10 was also in the wardrobe, in 2003. K was outside playing when the appellant called him inside. He took K's clothes off and performed oral sex. At the same time the appellant was "playing with himself" and had an erection. The appellant put some lubricant on his penis, turned K around, and tried to insert his penis into K's anus. By then K was face down and the appellant was on top of him. K tensed his buttocks and sphincter so he could not be penetrated. The appellant asked K what was wrong and why would he not let the appellant penetrate him. K replied that he did not want that. The appellant then thrust his penis against K's buttocks and thighs until he ejaculated on the back of K's legs, buttocks and back.[19]

[22] K said he remembered that occasion because it was the first time that the appellant tried to penetrate him, and the first time that he ejaculated over K.[20]

[23] K recalled other times in the wardrobe when the appellant took K's clothes off, took his own clothes off, performed oral sex, made K perform oral sex, or fondled his genitals. Some involved K being made to straddle the appellant's face while he performed oral sex. On two occasions K's sister R came looking for the appellant, on one occasion because she wanted some food. The appellant signalled to K to be quiet, and sent R away by telling her "I'm just in here getting changed. Go look for [K]". On the second occasion he told R that he would come out in a minute and get what she wanted. On each occasion when R interrupted once she left the appellant resumed the oral sex until K ejaculated in his mouth.[21]

[24] K said that if he fought against what the appellant was doing he would "be getting in trouble and … not an ideal situation for me in the house", and he would be victimised.[22] He was asked to explain that further, and said:[23]

> "So I found [the appellant] to be quite manipulative or very manipulative. You know, … you could probably say I was favoured, generally, out of all the siblings. You know, I was given probably a little bit of preferential treatment [by the appellant]. I was allowed to, you know, stay up a bit later, or, you know, have a few extra freedoms around the house, so to speak. You know, get away with maybe not doing a couple extra chores. You know, might get away with not washing up the dishes or something like that if I needed to go and do assignments or whatever it may be."

[25] K was then asked to explain what he meant by "manipulative" in that passage and he responded:[24]

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18 AB 60-61.
19 AB 61-62.
20 AB 62 lines 27, 41.
21 AB 63-67, 69-70.
22 AB 64 lines 13-16.
23 AB 67 lines 10-17.
24 AB 67 line 36 to AB 68 line 2.

> "So just … in his actions between … his reaction – the way he would speak to me … would be quite … affectionate usually, but if I was non-compliant or … I didn't quite go along with … everything that he wanted me to do or do what I needed to all the time … he would be pretty harsh, and … sort of almost like I wouldn't exist for a period of time [indistinct] ignore me, knowing that his usual interaction with me was quite … lovey and friendly. … I was … ignored or told off or … I was glared at – I particularly remember, in a way, a facial expression … that he would look at me and – with a bit of a glare in his eye, and his nose would have a little – like, slightly downturned in a frown type thing. … it was just a little bit more hostile, I would say … in his reception in the way he would speak to me, or that he wouldn't speak to me."

[26] K reiterated that the appellant gave him preferential treatment and the appellant's way of treating K's siblings "wasn't as lovey or affectionate in his tone or the way he interacted with them".[25]

Count 12 – attempted sodomy

[27] K said count 12 occurred after F and the appellant separated, and he and the appellant moved to Point Vernon. K said offences continued. He identified one that "really stuck out to me" because of the fact that it was a "new environment, a new sequence of events". He was called into the appellant's bedroom, where the appellant was in the bed. The appellant got up, and was naked. He took K's hand and put it on his penis, and put his hands on K's penis. He took off K's clothes and told K to get on the bed. K complied. The appellant started to perform oral sex, then masturbated K while masturbating himself. The appellant then put lubricant on his penis, and tried to insert it in K's anus. K tensed his buttocks. The appellant was unable to penetrate him, and "reverted back to his … pattern of using my thighs and buttocks" to masturbate to ejaculation.[26]

[28] While the appellant was attempting to achieve penetration he was saying "it was about … showing that he loved me and that I should appreciate everything that he did for me … and … why I wouldn't let him do it ..."[27]

Count 13 - sodomy

[29] Count 13 also occurred at Point Vernon. K was in bed and the appellant came in and put his hands on K's genitals. He told K to go to the appellant's bedroom, and called out when he did not do so immediately. K complied. He took K's hand and put it on the appellant's genitals, putting the hands down the front of his pants. The appellant then pulled down his own pants, and K removed his own clothing. The appellant commenced oral sex while K was standing, then pushed K down on the bed and continued. The appellant put lubricant on his penis, turned K over and attempted to penetrate K's anus. He did so a couple of times. K said this incident stood out because the appellant was able to penetrate him notwithstanding that he was resisting by clenching his buttocks. When the appellant could not achieve

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25 AB 69 lines 1-12.
26 AB 90-92.
27 AB 92 line 37.

penetration a second time he used K's thighs and buttocks to masturbate to ejaculation.[28]

[30] K said that "type of scenario" was a regular pattern of behaviour, over 15 to 20 times. On a few occasions the appellant achieved penetration.[29]

Count 14 – attempted sodomy

[31] K said count 14 occurred after he and the appellant moved to Dundowran Beach, living in a granny flat. He said he could recall one particular incident when he was asleep and the appellant came in and told him to go to the appellant's bedroom. When he did not comply immediately the appellant called out to him aggressively. K complied. The appellant put his hands down K's pants taking off his own clothes. When the appellant was naked he pulled down K's pants and pushed him on the bed. K put his head into the pillows. The appellant lubricated his penis and "started thrusting in a sexual manner using my thighs and buttocks until he reached climax". He tried to penetrate K but could not because K clenched his buttocks and sphincter. The appellant ejaculated into his hand.[30]

Count 15 – attempted sodomy

[32] Some months later they moved again, to a granny flat on the property owned by M and A at a different location in Dundowran. K recalled sexual acts including masturbation while in the shower. However there was one which he said he particularly remembered. The appellant woke him up and K got into bed with him. The appellant removed their clothes and started oral sex on K. The appellant then straddled K while kissing him. He tried to put his tongue in K's mouth but K resisted. The appellant then put lubricant on K's penis and tried to have K's penis penetrate him. At that point he was straddling K, facing his head. The appellant was saying: "You can show me that you love me. You can show me that you appreciate everything that I do for you. … This is me showing that I love you." The appellant lowered himself onto K's penis and achieved penetration. K told him that it hurt and he was uncomfortable but the appellant kept moving up and down. After about 20 minutes, when K had not ejaculated and the lubricant wore off, the appellant stopped.[31]

Count 16 – sodomy

[33] The last incident that K said he could recall "vividly" was also at Dundowran. K was in bed when the appellant came in and took him to the front of the bed. The appellant was naked and partially aroused. He took off K's clothes, put some lubricant on K's penis and got on all fours on the edge of the bed. The appellant reached behind and pulled K forward, controlling the direction of K's penis so that it entered his anus. The appellant used one hand to make K thrust sexually. That continued until K felt he was going to ejaculate, when he withdrew and ejaculated into his hand.[32]

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28 AB 94-95.
29 AB 95 line 19.
30 AB 96-97.
31 AB 99-102.
32 AB 102.

[34] K said that at that address the appellant got K to penetrate him "most nights". Once that happened and K ejaculated, the appellant would try to penetrate K's anus, unsuccessfully because K would tense his buttocks and sphincter.

Later events

[35] K said that they moved to another address at Point Vernon just before K turned 18. K gave evidence of continued sexual activity from that point, including masturbation, oral sex, and anal intercourse when K penetrated the appellant. K said he continued to resist being penetrated by the appellant. K had no contact with his family, and felt emotionally bullied and blackmailed into doing what he was told. The appellant told K that K's family did not want anything to do with him, that he loved K and K did not need a girlfriend as he was all that K needed. When K suggested he might go to see his family the appellant would sternly tell him it was not to happen.[33]

[36] When K did get a girlfriend the appellant was angry and upset:[34]

> " … there was some physicality … [the appellant] … being right up in my face, telling me that I didn't need a girlfriend, that he was all I needed, that he loved me and that I should love him and appreciate all that he did for me. … a girlfriend was only going to take that away: … being quite forceful in what he was saying to me, and I remember being physical and pushing him back … and then taking off out of the … property on that occasion in my car."

[37] When K was 19 he moved out. He moved away to Brisbane in 2008. He approached the police in late 2012.

[38] In cross-examination K adhered to his account. Matters arising out of the cross-examination were:

(a) it took until March 2015 for K to complete his police statement;

(b) K disagreed with some matters concerning the layout he had given for the Kawungan house;[35]

(c) K accepted that at age 16 he was doing well at sport and in school;[36] he was made a prefect in 2004 and achieved an OP9 and glowing school reports at the end of 2005;[37]

(d) the UK soccer tour went from 6 November to 12 December, but K stayed on the appellant until 5 or 6 January 2005; K agreed that nothing sexual happened while in the UK;[38]

(e) K disagreed that he moved out with the appellant because he a was angry with his mother;[39]

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33 AB 105-108, 136.
34 AB 109 lines 24-30.
35 AB 124.
36 AB 126-127.
37 AB 134.
38 AB 128.
39 AB 129.

(f) K agreed that at some point F indicated she was not going to contribute to K's school fees;[40] he was shown a letter from himself to the school in which he said that he did not want contact with his mother; K denied it was written by him; he said that was written by the appellant and he had to sign it and give it to the school;[41] in re-examination K said it came about because he was worried that the appellant would discover that K had been interacting with his mother after the appellant had told him to have nothing to do with her; the appellant told K that "we need to write a letter to your school so that they keep an eye out for her and don't let her come and have anything to do with [you]";[42]

(g) K could recall some disputes between the appellant and F over issues relating to the daughter, R;[43]

(h) K disagreed that he moved about because of disputes with the appellant over a lot of things such as not going to University, spending time with motor vehicles, not doing housework, and the girlfriend; K accepted there were two arguments, one over his having a girlfriend and the other about moving out;[44]

(i) K agreed that since he moved out he had hated the appellant;[45]

(j) K said he changed his surname to that of the appellant in December 2006 but at the appellant's insistence; he attributed the fact that he did what he was told to the appellant's "ability to manipulate and blackmail and mind control";[46]

(k) it was put to K , and he denied, that none of the sexual transactions took place, and K was not overborne by the appellant at any time;[47] and

(l) it was put to K, and he denied, that he moved out with the appellant because he did not want to have anything to do with his mother.[48]

[39] In re-examination K explained why he hated the appellant:[49]

> "I hated [the appellant] because of everything that had occurred over the years from, you know, late – not January, sorry, late 1999, all the abuse and all the sexual acts that he had offended against me and for everything that had occurred. You know, I'd missed out on – not only had those acts occurred, but I'd, you know, missed out on time with my family in the latter part."

Evidence of K's mother, F

[40] F gave evidence of the family history and the fact that she would be absent from the house from time to time, and up to three hours at a time, during which time the appellant looked after K and X. The absences were for work, shopping and going to church, which only F and her daughters attended. She said that she encouraged

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40 AB 131.
41 AB 150.
42 AB 165 lines 14-22.
43 AB 135-136.
44 AB 158-159.
45 AB 161.
46 AB 161.
47 AB 162 lines 1-17.
48 AB 163 line 4.
49 AB 169 lines 15-20.

contact between the children and the appellant "as much as possible" after she and the appellant separated.

[41] F said the appellant became very possessive of K after they moved to Rosedale; he "wouldn't let [K] out of his sight and he … would insist on [K] had to go with him" when he was tutoring. If that was questioned the appellant would "just explode". The appellant would yell and scream at K and the other children, but with K the appellant would then cuddle him, put him on his knee and say "hug me"; he was "all over [K]".[50]

[42] F said the appellant, K and X sometimes slept in the lounge room at Rosedale. That was instigated by the appellant. It was always K who slept beside the appellant.[51]

[43] At the time they separated the appellant spoke to K, after which K told F: "If he goes, I go".[52] F did not know where they moved to, and she had no meaningful contact with K after he left in 2005. She saw him on occasion when there was a custody handover of R, but any conversation was through a car window. She had seen a solicitor who advised her to relinquish paying for K's school fees, so she wrote a letter to the school saying: "Due to family circumstances and advice from legal authorities, I relinquish responsibility of all costs incurred for [K]".[53]

[44] In cross-examination the following matters arose in F's evidence:

(a) she agreed that she had been hospitalised for some weeks when pregnant with R and during that time the appellant looked after the children;

(b) F denied that she insisted on the children calling the appellant "dad" or "daddy"; she agreed that she wrote a letter to the school advising that K preferred to use the appellant's surname;

(c) she said the separation was not caused by them having arguments; the appellant wanted to stay but F told him to leave; she was not happy that K had left and told him he was welcome to come back at any time;

(d) the Family Court proceedings concerned access to R; both F and the appellant had been granted responsibility for R's long term care, welfare and development; R regularly stayed with the appellant and K for several years, under the court orders; at one point in 2014 F became aware that R had been taking items of her belongings to school and then to the appellant's house, which annoyed her; and

(e) she agreed that in 2014 R had some behavioural issues which F said was "because she was coming to terms – to hear that [the appellant] had done things to her brother"; R was placed under a psychologist's care; because R wanted to try living alternate weeks with F and the appellant, F let her try that; that arrangement lasted six months.

Evidence of M and A, and Q

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50 AB 179-180.
51 AB 198-199.
52 AB 203 line 18.
53 AB 203-205.

[45] M and A owned a house next to which was a shed converted into living quarters at Dundowran. The appellant and K stayed in the shed for a time before moving to Point Vernon.

[46] M described the relationship between K and the appellant as being that K was very obedient to the appellant, and that if the appellant said they were leaving K would "jump to attention and he'd go straightaway", and if the appellant insisted on them leaving then K "would just drop things and just go". The appellant was very assertive to the point of dominance.[54] M said that K had never disclosed anything that caused him concern.

[47] A gave evidence that the relationship between the appellant and K was such that there were no arguments but "if [the appellant] spoke to [K], [K] would react immediately … [K] appeared to panic".[55]

[48] Q said he was about 17 when K and the appellant lived in the shed on their property. He and K played soccer together in the back yard. He described the relationship between the appellant and K as "definitely strained at times", the appellant was "a more controlling kind of parent", and though K sometimes showed visible frustration. He did not speak about it. He said it was not uncommon for the appellant to stop what he was doing as they had to leave and K would always comply. It was an "overprotective and controlling sort of relationship".[56] In cross-examination Q said he never saw anything of concern and did not have concerns about the appellant's behaviour towards K.[57]

Evidence of S

[49] S was a neighbour of K's family at Baffle Creek Road. The two families socialised. He described the relationship he observed between K and the appellant:[58]

> "[The appellant] had a control over [K] like I've never seen any other kid. [K] did everything, … without question, that [the appellant] asked of him. I used to witness [K] sitting on [the appellant's] knee at the house at Baffle Creek. … [K] just complied with everything that he – basically, that he asked of him."

[50] S saw them a couple of times after they moved to Hervey Bay, and witnessed the same dynamic. S never witnessed anything of a sexual nature between the appellant and K.

Evidence of N

[51] When N was a boy he lived next door to K's family at Kawungan. He and his brother would play with K and B. He could recall occasions when they were playing in the yard and the appellant called K inside. Sometimes K would come back out after an hour to hour and-a half, and sometimes N would go home. On those occasions he said F would say she was going out and a while later the

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54 AB 247 lines 11-23.
55 AB 312-313.
56 AB 309.
57 AB 310.
58 AB 250 lines 22-32.

appellant would call K inside, and they would not see K "for quite some time". N had no idea of what happened inside.[59]

Evidence of L and D

[52] The appellant provided some tutoring for L and D's daughter, at Dundowran. They had a guest house where the appellant and K stayed for about six to eight weeks. The guest house was quite private from D and L's house, with a wall in between. L said that shortly after moving in the appellant put up curtains: "they were blocked all the way around, so you couldn't see anything in there at all".[60] She said the appellant and K were always with each other and K was never left on his own. The appellant always answered for K. She said she saw nothing of a sexual nature between them.

[53] D said much the same thing.

Evidence of T

[54] T was K's younger sister. She said that the appellant was negative towards her ("wasn't very nice at all"), but "very loving towards [K]":[61]

> "He cared a lot about him and it was very evident because he had the time and day for [K] and not the time and day for me. So … if he gets angry at … [K], he will the next day then apologise and have him sitting on his lap and be sort of touching his back and rubbing it and saying oh, I'm so sorry for smacking you or I'm so sorry for getting angry at you last night."

[55] T said that her mother took her to dancing lessons which involved travelling to Bundaberg, about an hour each way. Her mother worked and took her shopping. She and her sister and mother also went to church. During those times the appellant looked after her siblings. She said there were times when her mother was out and they were playing with neighbouring children, and the appellant would call K inside.[62] On one such occasion she went inside to complain that K had been called inside, and saw the appellant and K in bed together, under a blanket.[63]

[56] In cross-examination T said she did not have happy memories of loving with the appellant and did not like him at the time. She now had no emotion towards him. It was put to her, and she denied it, that her evidence about seeing K and the appellant in bed was untrue. She was unsure if she raised it with her mother or anyone else.[64]

Evidence of X

[57] X said he had sustained a brain injury in 2010, which affected his short-term memory. He could recall that there were times when they were playing with neighbouring children (including N) when his mother was out and the appellant called K inside. K would then come back out "after quite a while". He said there

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59 AB 251-254.
60 AB 256-258.
61 AB 263 lines 41-47.
62 AB 264-266.
63 AB 266 lines 7-25.
64 AB 267.

were times when the appellant and the children were in the spa, including when H was there. There were instances where the appellant pulled them onto his lap.[65]

[58] He said that the appellant pulled him onto his lap on one occasion and touched him on his "private areas", meaning his penis and testicles. X could feel the appellant's "semi-hard" penis touching his bottom.[66] The spa had bubbles so you could not see what was happening underwater. The appellant pulled the others (K and H) onto his lap, in much the same position as he had been.

[59] He described the relationship between the appellant and K as one where there was a lot of "mind-controlling", "moods and looks", and giving him the cold shoulder or not talking to him. K was always doing a lot of things for the appellant, at the appellant's request.[67]

[60] In cross-examination, X was confronted with a statement he made in 2015, in which he said that he had never seen anything happen himself and never spoke to K about it. He said: "It was a brother thing. We didn't speak about incident specifics but … we knew what was going on. We could look – obviously, brothers have that connection, that – look at each other. You know, we just know."[68] However, he did not depart from the evidence he gave, except to say he could not see what happened beneath the surface because of the bubbles.

[61] It was put to him, and denied, that he had discussed his evidence with H. He agreed that R had stayed regularly with the appellant, had expressed a wish to live with the appellant, and that there were arguments with their mother about it.[69]

[62] It was put to X that at no time did the appellant touch X's penis or bottom while in the spa. X said that was a lie, and that it happened.[70]

Evidence of H

[63] H was a childhood friend who lived next door to K at Hervey Bay. He described going into the spa with K, X and the appellant: "[The appellant] leaned towards [K] and pulled him onto himself. … he pulled [K] onto his lap. And made pelvic thrust movements towards [K]". K was on his lap, with his back to the appellant's torso. Then the appellant grabbed X and did the same. He said the appellant was trying to do pelvic thrusts into X's backside. Then the appellant did the same thing to H. He said he could feel the appellant's erect penis. The appellant touched him in the area of his genitals, on his testicles.[71]

[64] H described a physical struggle between himself and the appellant as he tried to get away. As a result the appellant went underwater.[72]

[65] H said on another occasion, when he was at the appellant's house to be tutored, he looked in through the window in K's bedroom and saw the appellant and K in bed

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65 AB 271-273.
66 AB 273 line 4 to AB 274 line 2.
67 AB 277.
68 AB 279 line 16.
69 AB 282.
70 AB 283.
71 AB 285-288.
72 AB 286, 291.

together. They were partly covered with a sheet and the appellant was "doing pelvic thrusters into [K's] rectal area".[73]

[66] In cross-examination the following matters arose:[74]

(a) H agreed that his statement to the police was in March 2015, many years after the event;

(b) it was put to him that in his statement he did not refer to K being on the appellant's lap; H said: "Sometimes you do forget certain times. Sometimes you do remember stuff, especially when it gets dragged up in court all like this."[75]

(c) H said he did not tell anyone, but he mentioned it to K, saying it would be a good idea to tell his mother; "[K] didn't discuss anything. It was more than obvious that [K] was terrified of this individual, and that he literally felt like his life was in danger."

(d) H said he was scared of the appellant because he had made a threat against H's life, and had told H that he (the appellant) had offended against another boy, as a result of which he had murdered that boy by hanging him and making it to look like suicide; when asked why it was not in his police statement H responded:[76]

> "Funny, that. In a court of law, it would never actually go anywhere, because, see, we actually need a body, need other witnesses, to corroborate that kind of a story. So you're talking a whole different trial. So that could go ahead; you wouldn't even know."

[67] H adhered to the evidence that he had seen the appellant and K in bed together.

Police evidence

[68] Two police officers gave evidence about the investigation. Detective Senior Constable Foster described the taking of K's statement. The first contact was when K went to the police on 31 December 2012. At that time he provided scant details about the actual offending. Between January and October 2013, she attempted to obtain a statement but contact with K was difficult because he was living at various places. K had given information about places where things happened at various houses but had not specified exactly what had happened on each occasion. As a result there was not enough detail to continue the investigation so it was deactivated until 2014, when DSC Anderson took it over.[77]

[69] DSC Anderson gave evidence as to the conduct of the investigation from 2014.[78] The appellant was arrested on 12 March 2015.[79] In cross-examination he said that he believed that in late 2013, K had told police that he did wish to proceed with the complaint. In May 2014, he asked H to contact K to make arrangements so that K would attend and give a statement. By August 2014, he still did not have the

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73 AB 288-289.
74 AB 291-295.
75 AB 291 line 26.
76 AB 292 lines 43-47.
77 AB 315- 318.
78 AB 319-329.
79 AB 324 line 6.

necessary detailed statement, due to K's being a different locations around Australia, and difficulties in establishing contact. There was correspondence after that and the statement was eventually signed on 15 March 2015. H did not provide any of the details for K's statement. In re-examination, he said that the police were never told that K did not want to proceed at any time.

The defence case

[70] The appellant did not give evidence or call witnesses. However, as put to K the defence case was that none of the sexual incidents ever occurred.[80]

The appeal

[71] I intend to deal with the relevant submissions as each ground is considered.

Ground 1- unreasonable verdict

[72] In a case where the ground is that the conviction is unreasonable or cannot be supported having regard to the evidence, *SKA v The Queen*[81] requires that this Court perform an independent examination of the whole evidence to determine whether it was open to the jury to be satisfied of the guilt of the convicted person on all or any counts, beyond reasonable doubt. It is also clear that in performing that exercise the Court must have proper regard for the pre-eminent position of the jury as the arbiter of fact. *SKA* adopted a passage from *M v The Queen*,[82] which said:[83]

> "In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, "none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand"."

[73] In *M v The Queen* the High Court said:[84]

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

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80 AB 162 lines 1-10.
81 (2011) 243 CLR 400; [2011] HCA 13, at [20]-[22] per French CJ, Gummow and Kiefel JJ.
82 (1994) 181 CLR 487; [1994] HCA 63.
83 *SKA* at [14]; *M v The Queen* at 492-493.
84 *M v The Queen* at 493. Internal citations omitted. Reaffirmed in *SKA v The Queen* (2011) 243 CLR 400.

[74] More recently the High Court has restated the pre-eminence of the jury and the role of a criminal appellate court, in *R v Baden-Clay*:[85]

> "[65] It is fundamental to our system of criminal justice in relation to allegations of serious crimes tried by jury that the jury is "the constitutional tribunal for deciding issues of fact." Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect, the setting aside of a jury's verdict on the ground that it is "unreasonable" within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial. Further, the boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way by the considerations expressed in the passages from the reasons of the Court of Appeal explaining its disposition of the appeal.
>
> [66] With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court "must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

Submissions

[75] For the appellant it was submitted that the lack of specificity in the particulars and the absence of reliable independent evidence created insuperable difficulties given that the offence was an historical one. There were problems about the reliability of K's evidence, including:

(a) there were no details as to time, date and circumstance over a seven month period in count 1;

(b) the sexual transactions could not be linked to any discernible objective fact apart from residency periods;

(c) there was no real detail as to what occurred; some was implausible such as acts performed in a cupboard during daylight hours with others in the house;

(d) family photos did not suggest K was repressed or dysfunctional;

(e) there was no sexual activity while in the UK on the soccer tour;

(f) K went to live with the appellant without complaint; after leaving school K continued to live with the appellant;

(g) the complaints first emerged when Family Court proceedings were involved; and

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85 (2016) 258 CLR 308; [2016] HCA 35, at [65]-[66]. Internal citations omitted.

(h) the supporting evidence was not from impartial sources.

[76] The appellant submitted that K's evidence was so lacking in probative force that it should be concluded that an innocent person had been convicted.

[77] For the Crown it was submitted that there was no issue as to the sufficiency of the directions given, nor that the inability to reach a verdict on five counts revealed any deficiency in the jury's considerations. The evidence was such as could be accepted by the jury:

(a) the inability to link conduct to objective details was not surprising given that some of the residency periods were short; the fact that there was similarity in relation to the various acts was explicable by the nature of the relationship between K and the appellant, K's age at the time and the opportunities to offend;

(b) K gave substantial detail of the occasions of offending; the deficiencies were to be expected given the historical nature of the complaint;

(c) there was supporting evidence from other witnesses; it was not surprising that such evidence came from K's friends or relatives, and that did not necessitate rejecting K's evidence;

(d) the implausibility of the cupboard incidents had to be judged by the fact that it was walk in area with a door; the evidence did not suggest offending regardless of whether other people were in the house; there was evidence of K being called inside from playing;

(e) the fact that photos did not show K to be repressed or dysfunctional, and did well at school and in sport, was of little weight; witnesses spoke to the dominant nature of the appellant towards K; the fact that K went to live with the appellant had to be considered in the context of a secret sexual relationship commencing from when K was 11; they were matters for the jury;

(f) the evidence did not establish any relevant connection to Family Court proceedings; and

(g) the issues raised were advanced to the jury in address, and the jury were reminded of them in the summing up; a Longman direction was given, and a warning of the danger of convicting on the basis of K's evidence alone.

Discussion – ground 1

[78] The jury were confronted with a stark set of choices. The defence case was not that something happened but innocently, but rather that nothing at all happened at any time. Implicitly, if not explicitly, the jury were asked to conclude that K was a liar who had concocted his account.[86] Of course the jury might not reach that conclusion but still have sufficient doubt about all or part of K's evidence such that they rejected it. The latter seems the likely explanation of the differing verdicts. Guilty verdicts were returned on counts 1, 4, 5, 6, 8, 10, 12, 13 and 15. The jury could not agree on counts 3, 7, 9, 14, 16.[87]

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86 Defence Counsel addressed the jury on that basis: AB 386 line 22.

87 Counts 2 and 11 were alternatives to counts 1and 10.

[79] That the jury might reject parts of K's account but accept other parts probably indicates, in my view, that they followed the directions they were given. Thus, they were told:

(a) they had to consider the evidence relevant to each count and deliver a separate verdict in relation to each count, the evidence in relation to each depending upon K's evidence as a whole;[88]

(b) on each count they had to be satisfied beyond reasonable doubt to convict;[89]

(c) the case stood or fell on K's evidence; unless they accepted his evidence as truthful and reliable they had to acquit;[90]

(d) they could accept or reject the whole or any part of the evidence a witness gave; if they rejected a part it did not mean they had to reject the whole;[91]

(e) a reasonable doubt with respect to K's evidence on any specific count should be taken into account and considered in their assessment of his credibility, but it was a matter for them which evidence they accepted or rejected;[92]

(f) if they were satisfied that some or all of the uncharged acts occurred it did not necessarily follow that they would find guilt on individual charges; they had to be satisfied beyond reasonable doubt, having regard to the whole of the evidence, whether the charges had been established; they had to be satisfied beyond reasonable doubt that the charge had been proved by the evidence relating to that charge;[93] and

(g) because of the delay it would be dangerous to convict on the basis of K's evidence alone unless, after scrutinising it with great care, having regard to all of the evidence and bearing in mind that warning, they were satisfied beyond a reasonable doubt of the truth and accuracy of K's evidence.[94]

[80] A reading of K's evidence reveals a consistent account across the events, without embellishment as the evidence progressed, and with concessions made from time to time. For example it would have been easy, if K were embellishing things or lying, to have said that penetration occurred on those counts of attempted sodomy. However, K adhered to what he said in the statement given in 2015.

[81] I do not accept the contention that the jury could not have accepted K's evidence as truthful and reliable to the requisite degree, because of the alleged lack of details as to time and date, or that the incidents could not be linked to discernible objective facts. K related each event to a particular time defined by where they were living at the time.

[82] Further, the particular counts were those where K said he had a vivid memory for one reason or another. Thus: count 4 was the first time not on the air mattress; count 6 was the first time in the office; count 8 was recalled because it was the year S was being tutored by the appellant; count 9 was the first time in the wardrobe; count 10 was the first attempt at sodomy and the first time the appellant ejaculated on K;

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88 AB 371 lines 19-26.
89 AB 373 line 45 to AB 374 line 8.
90 AB 374 line 45 to AB 375 line 3.
91 AB 377 line 44 to AB 378 line6.
92 AB 383 lines 7-11.
93 AB 384 lines 25-29; AB 385 line 5.
94 AB 385 line 44 to AB 386 line 2.

count 12 because it was soon after moving to Point Vernon which was a new environment; count 13 because it was the first time he was penetrated; and count 15 was the first time that K penetrated the appellant. The jury may well have considered that these gave reasons why the account was true and reliable.

[83] The contentions that there was no real detail as to what occurred and some events were implausible, such as acts performed in a cupboard during daylight hours with others in the house, does not offer a solid basis to conclude that the jury could not have accepted K's evidence. There was a considerable degree of detail for each event, accepting that the acts were repetitive to some degree. For example details of what was said and done by the appellant were not just repeated, but individual to each count.[95] And there were details about the houses (including plans and layout descriptions), places where the conduct occurred, such as the office and wardrobe. There were details that varied from event to event, such as whether K ejaculated,[96] whether the appellant ejaculated and how,[97] whether the appellant had an erection or not,[98] and whether the appellant masturbated K or otherwise.[99]

[84] Further, count 8 (in the spa) was supported by the evidence of X and H. It may well be the case that the jury were not readily accepting of H's evidence, given his propensity to editorialise in a way that was directed against the appellant, but even if that was the case they still had the evidence of X. Further, there was support from X and H as to have seen the appellant and K in bed together. Even if H was discounted that still left X's evidence.

[85] The wardrobe incidents (counts 9 and 10) were not implausible just because they were in the wardrobe or in daylight hours. The evidence of K was that the door could be closed, that his mother was out when the offending conduct happened, and that the children were outside. He gave evidence of R seeking out the appellant once or twice while he and K were in the wardrobe, and R being successfully being deflected by the appellant. The evidence of N, X and T also supported the conclusion that it could have occurred as K said. Each of them said that there were occasions when they were all playing together outside when the appellant would call K inside, and he stayed inside for some time while the rest of them stayed outside.

[86] I do not accept the submission that the evidence of N, X and T had to be rejected by the jury as partisan or not independent. There was no credible suggestion of collusion, and K had not really resumed much of a relationship with his siblings after he moved out. Further, given the nature of the offences it is not surprising that supporting evidence came from K's friends or relatives.

[87] The submission was made that the photographs of K do not suggest a person being oppressed or dysfunctional, and he was doing so well at school and other areas that the jury should have had such a doubt about K's evidence that they could not

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95 Count 4: "see what you do to me"; the appellant was making grunting, groaning noises; count 10: asking K why he would not let the appellant penetrate him; count 12: "it was about showing that he loved me"; count 15: "you can show me you love me", and "this is me showing that I love you".

96 Count 5 contrasted with count 6 and count 15.

97 Counts 10, 12 and 13 where he did, contrasted with; count 10 where it was onto K's legs, buttocks and back, contrasted with count 15 where the appellant ejaculated into his hand.

98 Count 8, for example, where he was said to be "semi-aroused", contrasted with count 10.

99 Count 9 where K masturbated the appellant, contrasted with count 4 where the appellant masturbated himself, and count 12 where they each masturbated the other.

convict. I reject that submission. Different people react differently to events. There was nothing to say that K must have looked a particular way, and that if he had been suffering the conduct he described he must necessarily have reflected it on his face, especially on special occasions such as a birthday. A number of independent witnesses gave evidence of the dominant and controlling nature of the appellant towards K, and of K's subservience to the appellant's demands. I do not consider that the jury were bound to reject K as inaccurate or unreliable on this basis.

[88] The appellant placed weight upon the fact that K went to live with the appellant upon separation. However, that fact had to be considered in the context of the appellant's manipulative and dominant control over K, and the fact that there had been a secret sexual relationship commencing from when K was 11. This was one of many matters that were for the jury to weigh.

[89] Nor am I persuaded by the submission that there was significance in the fact that K did not complain of offending conduct during the weeks while he stayed with the appellant in the UK after the soccer tour. To accept that submission would be to adopt a form of reverse propensity reasoning to the effect that if the appellant really was offending in Australia he must necessarily have done so in the UK. To the contrary, the fact that K did not suggest any offending conduct then might have been seen by the jury as the mark of a reasonable and reliable witness, i.e. one not prepared to embroider the evidence.

[90] The supposed connection with the Family Court proceedings can be put to one side. There was simply no compelling reason to conclude that the one influenced the other.

[91] The appellant also placed some weight on the fact that K left to live with the appellant once the separation occurred, it being suggested that would cast doubt on whether he was really being subjected to attacks. I do not consider that there is much in this point. K explained the reason why he left with the appellant when the family split up. It was that the appellant said "You need to come with me. If you don't come with me I don't know what'll happen".[100] He explained his reaction to that:[101]

> "I … didn't know initially what to do. … I was worried about my own safety, I was worried about the safety of my family and what was going to happen if I didn't comply and go with him, if something was going to happen to my family, if it was a threat or … if he was going to harm himself or self-harm and go that sort of path and whether I was … then going to be responsible. … I'd been sort of … up until that point being fairly well controlled is probably the only way to put it by [the appellant] and … his actions and him directing me to do stuff and do everything for him, including, obviously, the offending against me. Yeah, I wasn't sure if I was going to get in trouble, if I was going to be hit or punished or something like that. I was …it was just … a real state of – yeah, unsure of what was happening."

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100 AB 73 line 17.

101 AB 73 line 35 to AB 74 line 2.

[92] K said he went to "appease [the appellant's] stress and anger and anguish over the situation".[102]

[93] In my view there are discernible reasons why the jury may not have been satisfied beyond reasonable doubt about counts 3, 7, 9, 14 and 16. It must be borne in mind that those counts did not result in acquittals; the jury could not reach a verdict in each case. Thus:

(a) the evidence on count 3 lacked some of the specificity of the others, and the jury may have doubted that the very first act could have occurred without any grooming of K;

(b) count 7 was said to have occurred late at night at their home when K was doing homework; on that basis K's mother would probably have been home, and therefore the jury may have had some doubt about the event;

(c) count 9 was said to be the first time anything happened in the wardrobe; K's account was short on detail compared to others, and as to who was where in the house may not have seemed as confident as other evidence he gave;

(d) K's evidence on count 14 used phrasing which might have suggested to the jury that it was a generic memory rather than a genuine one; for example K said he remembered putting the pillows over his head, burying his face in the bed "as [the appellant] **would then** lubricate…"; then, when asked if the appellant did anything else with his penis, K answered "**It was the usual sequence of him** trying to put it inside…";

(e) as to count 16, the evidence was that the appellant was on all fours on the edge of the bed and, balancing on one hand and using the other hand, was able to reach behind with enough control to direct K's penis into his anus, and with sufficient power that he could cause K to thrust strongly enough to penetrate the appellant; the jury may have had some doubt about the likelihood of that account.

[94] As to count 14, the fact is that the jury did not agree on a verdict, even on a majority verdict basis. That indicates that there was some doubt affecting their state of satisfaction.

[95] All of the matters raised before this Court were agitated before the jury by defence counsel and the jury were reminded of them by the learned trial judge in the summing up. As mentioned above the directions to the jury included a *Longman* direction and a warning of the danger of convicting on the basis of K's evidence alone. The matters raised were eminently ones for the jury, which had the benefit of seeing and hearing the witnesses, something which this Court cannot enjoy.

[96] This Court has to be careful not to substitute trial by appellate court for trial by the body entrusted with that duty, namely the jury.[103] I am unpersuaded that the matters raised reach the point that one must conclude that the jury should have had a doubt about the appellant's guilt. On my review of the whole of the evidence it was, in my view, open to the jury to be satisfied of the guilt of the appellant, beyond reasonable doubt.

[97] This ground fails.

Ground 2 – conduct no longer an offence at trial

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102 AB 74 line 29.

103 *Baden-Clay* at [66].

[98] This ground depends upon the contended effect of the *Health and Other Legislation Amendment Act* 2016 (Qld) which commenced on 23 September 2016 and did three things:

(a) by s 4 it abolished s 208 of the *Criminal Code* (Qld) which provided for the offence of unlawful sodomy; and

(b) s 9(1) amended the prescribed age for the purposes of the offence of maintaining an unlawful sexual relationship to 16 years; and

(c) lowered the age of consent for anal intercourse to 16.

[99] The relevance of the 2016 amendments was that for all acts of sodomy or attempted sodomy, except count 10, K was over 16.

Submissions

[100] The appellant submitted that the effect of the lowering of the age of consent to anal intercourse to 16 was that at the date of the trial there was no offence that the appellant could be charged with or convicted, at least in respect of counts 12-16. Further, because count 1 depended upon those counts, the appellant was wrongly convicted on that count.

[101] The contention followed several steps. First, s 11(1) of the *Criminal Code* had the effect that an act was only punishable if it constituted an offence at the time it was done and at the time the accused was charged. Secondly, an accused is charged upon indictment and that occurred for the appellant when he was called upon to plead to the indictment at trial on 7 November 2016. Thirdly, by the time the appellant was charged at the trial acts of anal intercourse with a person over 16 years old were no longer criminal offences. Fourthly, that meant the indictment was flawed in that it charged counts that were no longer offences. Fifthly, in turn that meant the trial was flawed and the appellant suffered a miscarriage of justice by reason of his being put on trial on counts 14 and 16, and his convictions on counts 1 and 12, 13 and 15. Sixthly, no-one at the trial adverted to the amending legislation and its effect. Upon the appellant having been called upon to plea to the indictment, trial counsel ought to have demurred to the indictment under s 603 or sought to quash it under s 596 of the *Criminal Code*. Therefore the appellant was denied a proper chance to defend the case.

[102] Counsel for the appellant accepted that as a general proposition, an accused person was charged when they were charged by the police. However, it was submitted that there was a distinct act of charging on 7 November 2016 when the indictment was presented at the trial and the appellant was called on to plead. That was said to follow because count 1 (maintaining) was a charge that could only proceed with the consent of the Crown Law Officer.[104]

[103] For the Crown it was submitted that there was no motion to quash the indictment prior to empanelment of the jury, or later, and no application was made under s 649 of the *Criminal Code* for arrest of judgment prior to sentence. The real question was whether the appellant could have been lawfully convicted of the offences in the indictment. The appellant was charged by police well before the amendments under the *Health and Other Legislation Amendment Act*, the initial indictment having been

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104 Appeal transcript T1-4 lines 15-28.

presented to the court on 7 April 2016. The trial indictment was presented after a successful application to sever the charges relating to another complainant, X. In those circumstances s 11(1) of the *Criminal Code* did not exempt the appellant from liability.

[104] Further, the word "charge" with reference to an offence is defined in the *Acts Interpretation Act*, Schedule 1, as including a charge on an arrest or an indictment. There is no reason to read s 11(1) of the *Criminal Code* as restricting the word "charge" to the time when an indictment is presented. Provisions of the *Criminal Code* show that a person is "charged" prior to arraignment of the indictment: ss 560, 563, 564, 567, 590, 592, 597A, 597C and 615A. A restrictive interpretation of the phrase "at the time when the person is charged" in s 11(1) would result in inconsistent application of s 11 between offenders, depending on whether they were conducted on indictment, as simple offences, or as indictable offences that are permitted to be dealt with summarily.

[105] It was submitted that s 20 of the *Acts Interpretation Act* 1954 (Qld) had effect so that the appellant's liability to prosecution and penalty for the acts committed contrary to s 208 of the *Criminal Code* was not adversely affected by the repeal of that section. In that respect reliance was placed on *Deputy Commissioner of Taxation v Price*,[105] *Goli (Commissioner of State Revenue) v Thompson & Ors*[106] and *R v HXY & Ors*.[107] "Charged" in s 11 of the *Criminal Code* is to be understood as referring to the time when a defendant is first charged, rather than solely to a charge on indictment.

[106] The legislative history of s 20 of the *Acts Interpretation Act* reveals an intention that it displaces s 11 of the *Criminal Code*. Section 20 governs where liability exists (both arises and remains) in the context of legislative repeal and amendment, whereas s 11 relates to the separate concept of punishment only, consequential upon liability.

[107] Further: (i) that the term "punished" when used in s 11 of the *Criminal Code* means, in context, something different to the act of "conviction", being the finding of guilt; (ii) alternatively, "punished" in s 11 does not include the act of being "convicted"; and (iii) s 11 does not preclude the prosecution or conviction of the appellant.

[108] As to the maintaining charge and the requirement for the consent of the Crown Law Officer, the respondent pointed out that the original indictment, presented on 7 April 2016, included count 1, the maintaining charge.[108]

Discussion

[109] Count 1 was maintaining an unlawful sexual relationship contrary to s 229B of the *Criminal Code*, and counts 12-16 were acts of sodomy (or attempted sodomy) contrary to s 208 of the *Criminal Code*. Because of the issues in the appeal, and because K turned 16 on 5 May 2004 and 18 on 5 May 2006, it is necessary to have a detailed appreciation of the time period particularised in the indictment for each relevant count:

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105 [2006] 2 Qd R 316.
106 [2017] QDC 4.
107 [2017] QSC 108.
108 Appeal transcript T1-13 lines 23-29.

(a) count 1: maintaining a sexual relationship with a child under 18, between 16 January 1999 and 4 May 2006;

(b) count 3: indecent treatment of a child under 12, under care, on a date unknown between 16 January 1999 and 1 January 2000;

(c) count 4: indecent treatment of a child under 16, under care, on a date unknown between 16 January 1999 and 12 May 2000;

(d) count 5: indecent treatment of a child under 16, under care, on a date unknown between 11 May 2000 and 17 December 2000;

(e) count 6: indecent treatment of a child under 16, under care, on a date unknown between 31 December 2000 and 1 January 2002;

(f) count 7: indecent treatment of a child under 16, under care, on a date unknown between 31 December 2001 and 1 January 2003;

(g) count 8: indecent treatment of a child under 16, under care, on a date unknown between 31 December 2001 and 5 May 2004;

(h) count 9: indecent treatment of a child under 16, under care, on a date unknown between 31 December 2002 and 1 January 2004;

(i) count 10: attempted sodomy, on a date unknown between 31 December 2002 and 1 January 2004;

(j) count 12: attempted sodomy, on a date unknown between 31 December 2004 and 1 June 2005;

(k) count 13: sodomy, on a date unknown between 31 December 2004 and 1 June 2005;

(l) count 14: attempted sodomy, on a date unknown between 30 April 2005 and 1 August 2005;

(m) count 15: sodomy, on a date unknown between 30 June 2005 and 1 April 2006;

(n) count 16: sodomy, on a date unknown between 30 June 2005 and 1 April 2006.

[110] As particularised the maintaining charge extended beyond K's 16th birthday, until just before he was 18. The date for the offence in counts 10, 12, 13 and 15 was after K turned 16

[111] Section 11 of the *Criminal Code* provides as follows:

> "11 Effect of changes in law
>
> (1) A person can not be punished for doing or omitting to do an act unless the act or omission constituted an offence under the law in force when it occurred; nor unless doing or omitting to do the act under the same circumstances would constitute an offence under the law in force at the time when the person is charged with the offence.

> (2) If the law in force when the act or omission occurred differs from that in force at the time of the conviction, the offender can not be punished to any greater extent than was authorised by the former law, or to any greater extent than is authorised by the latter law."

[112] When regard is had to the words used in s 11(1) there are two points at which the act or omission must have constituted an offence, if a person is to be punished. One is "when it occurred". The other is "when the person is charged with the offence".

[113] The first point is satisfied here. The acts in counts 12-16 were all before the commencement of the *Health and Other Legislation Amendment Act* 2016. Therefore at the time the acts were committed s 208 of the *Criminal Code*, as it stood before 23 September 2016, was in force. Consequently the acts in counts 12-16 were all offences when they occurred.

[114] It is the second point that is in issue here. The acts must constitute an offence when the person is charged with the offence. When that is depends on what is meant by "charged with an offence". More specifically, the question is whether, as the appellant contends, that occurs for the first time when an accused person is called upon to plead to an indictment, or whether, as the Crown contends, that can occur at an earlier time.

[115] The term "charge" is not defined in the *Criminal Code* but it is defined in the *Acts Interpretation Act*, and the *Justices Act* contains a definition of "charge of an indictable offence". In the *Acts Interpretation Act*, Schedule 1, "charge" means:

> "***charge,*** of an offence, means a charge in any form, including, for example, the following—
>
> (a) a charge on an arrest;
>
> (b) a complaint under the *Justices Act 1886*;
>
> (c) a charge by a court under the *Justices Act 1886*, section 42(1A) or another provision of an Act;
>
> (d) an indictment."

[116] The breadth of a "charge" is obvious from the description of it being "in any form". What follows are examples but significantly they include "a charge on arrest". As will become apparent a charge on arrest precedes any indictment that flows from that arrest, if it is for an indictable offence.

[117] In the *Justices Act* s 4 defines "charge of an indictable offence" as: "a charge of an indictable offence as such".

Legislative indications

[118] There are a number of provisions in the *Criminal Code* and the *Justices Act* 1886 (Qld) from which one can conclude that where an accused person is charged with an indictable offence, the charge takes place before the indictment is presented at trial.

[119] Section 554 of the *Code* provides that the "practice and procedure relating to the examination and committal for trial of persons charged with indictable offences are

set forth in the laws relating to justices of the peace, their powers and authorities". As that makes plain, the examination and committal follow the fact that a person has been charged with the offence.

[120] Section 560(1) of the *Code* deals with the presentment of an indictment, by providing when "a person charged with an indictable offence has been committed for trial and it is intended to put the person on trial for the offence, the charge is to be reduced to writing in a document which is called an indictment". Thus the formulation of the indictment itself follows after the charging of the accused with the offence.

[121] Section 590 of the *Code* deals with bringing an accused person to trial and provides that, subject to s 561, "when a person charged with an indictable offence has been committed for trial and it is intended to put the person upon his or her trial for the offence, the director of public prosecutions or a Crown prosecutor must present the indictment no later than 6 months after the date on which the person was committed for trial". As that section says, an accused can be charged and committed for trial before the indictment is presented.

[122] Section 84(1) of the *Justices Act* deals with the situation where a person has been charged with an indictable offence and is to be brought before the justices, but the hearing has to be deferred. It provides:

> "In any case of a charge of an indictable offence, if from the absence of witnesses or from any other reasonable cause it becomes necessary or advisable to defer the hearing of the case, the justices before whom the defendant appears or is brought may adjourn such hearing to the same or some other place and may from time to time remand the defendant to some prison, lockup, or other place of security, for such period as they may in their discretion deem reasonable, but not exceeding 8 clear days (or such longer period as may be consented to by the defendant) at any one time, to be there kept, and to be brought before the same or such other justices as shall be acting at the time or place appointed for continuing the hearing."

[123] As is evident from s 84(1) the accused person has been charged with the indictable before the justices' hearing takes place.

[124] The examination of witnesses in relation to an indictable offence takes place initially before justices under the *Justices Act*. Section 104(2) provides that the justices can, if the evidence is not sufficient to put the person on trial, discharge the person "as to the charge the subject of that examination". Section 104(2)(b) provides for an accused to be given the chance to "answer the charge" if there is evidence sufficient to put the person on trial for the indictable offence. And s 104(4) provides that an accused can "offer evidence with respect to the charge the subject of the examination". As is evident the charge for the indictable offence occurs prior to the examination before the justices.

[125] Part 5 of the *Justices Act* makes provision for proceedings in the case of indictable offences,[109] and Division 5 deals with examination of witnesses on a committal in such a case. Part 6 then deals with proceedings for simple offences.

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109 Which a Magistrates Court has no jurisdiction to hear and determine: s 19.

[126] If a person is before the justices for an examination under s 104 of the *Justices Act*, when called on under s 104(2), the person can say they are "guilty of the charge", in which case "the justices, instead of committing the defendant to be tried, shall order the defendant to be committed for sentence before some court of competent jurisdiction".[110] Thus one can plead guilty to a charge before the indictment is drawn up or presented.

[127] Section 108(1) of the *Justices Act* provides that if the justices conducting an examination "in relation to an indictable offence" are of the opinion that the evidence is not sufficient to put the person on trial, they "shall order the defendant, if the defendant is in custody, to be discharged as to the charge the subject of the examination". In that case the charge has plainly preceded the examination and therefore also the indictment.

[128] Hand-up committals are dealt with under s 110A, and s 110A(6E) provides that at the end of that process the justices then "formally charge the defendant" and commit that person for trial. Again the defendant is charged prior to the indictment.

[129] Under s 132 of the *Justices Act*, where a person "is charged before justices with an indictable offence alleged to have been committed in a place situated elsewhere than within the Magistrates Courts district within which the justices are then sitting but within the jurisdiction of the Supreme Court", the justices can commit the person for trial. That means the accused in such a case is charged with the offence before the examination, committal or presentment of indictment.

Amendments to s 20, Acts Interpretation Act

[130] The legislative history of s 20 of the *Acts Interpretation Act* reveals a legislative intention that its operation is not overridden by s 11 of the *Criminal Code*.

[131] Section 20 of the *Acts Interpretation Act* provides for situations where an Act has been repealed:

> "20 Saving of operation of repealed Act etc.
>
> (1) In this section—
>
> ***Act*** includes a provision of an Act.
>
> ***repeal*** includes expiry.
>
> (2) The repeal or amendment of an Act does not—
>
> (a) revive anything not in force or existing at the time the repeal or amendment takes effect; or
>
> (b) affect the previous operation of the Act or anything suffered, done or begun under the Act; or
>
> (c) affect a right, privilege or liability acquired, accrued or incurred under the Act; or

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[110] Section 113A deals with the similar position of a corporation "charged with an indictable offence".

(d) affect a penalty incurred in relation to an offence arising under the Act; or

(e) affect an investigation, proceeding or remedy in relation to a right, privilege, liability or penalty mentioned in paragraph (c) or (d).

(3) The investigation, proceeding or remedy may be started, continued or completed, and the right, privilege or liability may be enforced and the penalty imposed, as if the repeal or amendment had not happened.

(4) Without limiting subsections (2) and (3), the repeal or amendment of an Act does not affect—

(a) the proof of anything that has happened; or

(b) any right, privilege or liability saved by the operation of the Act; or

(c) any repeal or amendment made by the Act; or

(d) any savings, transitional or validating effect of the Act.

(5) This section is in addition to, and does not limit, sections 19 and 20A, or any provision of the law by which the repeal or amendment is made."

[132] In 1991 the legislature passed an Act amending the *Acts Interpretation Act*. At that point s 20 included subsection 3 which provided that:

> "This section does not affect the operation of s 11 of the *Criminal Code* in its application to punishments on changes in the provisions of the *Code*".

[133] In 1992 the *Penalties and Sentences Act* was passed, amending s 20(3) to provide that it also did not affect s 180 of the *Penalties and Sentences Act*.

[134] In 1993 and 1994 s 20 was amended again, but s 20(3) was retained, albeit reworded. Then in 1995 the *Criminal Code Act* 1995 (Qld) was enacted. It replaced s 20(3) as it then stood with the following provisions:

> "(3) If a provision of an Act makes an act or omission an offence, the act or omission is only an offence if committed after the provision commences.
>
> (4) If a provision of an Act increases the maximum or minimum penalty, or the penalty for an offence, the increase applies only to an offence committed after the provision offences."[111]

[135] Thus s 20(3), in the form in which it which provided that s 20 "does not affect the operation of s 11 of the *Criminal Code*", was removed.

Construction of s 20 Acts Interpretation Act

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111 These provisions were removed from s 20 in 1995 by the *Statute Law Revision (No 3) Act* 1995 (Qld), and placed into the new s 20C, where they remain.

[136] The relevant parts of s 20 are those in s 20(2)(c), (d) and (e). They provide that the repeal of an Act does not affect:

> (c) a … liability … accrued or incurred under the Act; or
>
> (d) a penalty incurred in relation to an offence arising under the Act; or
>
> (e) an investigation, [or] proceeding … in relation to a … liability or penalty mentioned in paragraph (c) or (d).

[137] At the time when the acts the subject of counts 12-16 were committed they were offences under s 208 of the *Criminal Code*. That meant that the appellant was then subject to a liability accrued or incurred under the *Criminal Code*, namely that he could be charged with, and prosecuted for, those offences. The appellant was also subject to a penalty incurred, in that the penalty was incurred at the time the offence was committed.[112] A prosecution was commenced in relation to the offences, before the repeal of s 208. In my view that was a proceeding in relation to a liability or penalty mentioned in s 20(2)(c). Therefore, under s 20 of the *Acts Interpretation Act* the repeal of s 208 does not mean that the prosecution can no longer be maintained, nor that the penalty cannot be imposed.

[138] There is considerable judicial support for that view.

[139] *Commissioner of Taxation v Price*[113] involved penalties imposed for contraventions of s 117 and s 119 of the *Excise Act* 1901 (Cth) as the result of the possession and unlawful conveyance respectively of manufactured excisable tobacco on which excise duty had not been paid. The penalties were imposed pursuant to s 129 of the *Excise Act*, which had been repealed before the proceedings were commenced. The Court considered the operation of s 8 of the *Acts Interpretation Act* 1901 (Cth), the analogue of s 20 of the Queensland Act. Keane JA said:[114]

> "[57] Section 8 of the *Acts Interpretation Act* provided relevantly:
>
> "Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not —
>
> …
>
> (b) affect the previous operation of any Act so repealed, or anything duly done or suffered under any Act so repealed; or
>
> (c) affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed; or
>
> (d) affect any penalty forfeiture or punishment incurred in respect of any offence committed against any Act so repealed; or
>
> (e) affect any investigation legal proceeding or remedy in respect of any such right privilege obligation liability penalty forfeiture or punishment as aforesaid;

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112 *Commissioner of Taxation v Price* [2006] 2 Qd R 316; [2006] QCA 108, at [58], citing *R v Scarlett & Anor; ex parte McMillan* [1972] 20 FLR 349 at 351–352; *Butler v Garrisson* [1965] VR 523 at 527–531; *Samuels v Songaila* (1977) 16 SASR 397.

113 [2006] 2 Qd R 316; [2006] QCA 108.

114 *Commissioner of Taxation v Price* at [57] and [58], McMurdo P and Holmes J concurring.

> and any such investigation legal proceeding or remedy may be instituted continued or enforced, and any such penalty forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

> [58] In considering the language of s 8(d) and (e) of the *Acts Interpretation Act*, the authorities make it plain that, in a "proceeding" related to a "penalty", there is no requirement that a penalty must have already been imposed by a court or other authority in order for s 8(d) and (e) to operate: it is sufficient that a penalty has been incurred. In the case of a criminal or quasi-criminal offence, a penalty is incurred at the time at which the offence takes place."

[140] In *R v HXY*[115] Douglas J considered a case where the defendants were charged with offences affected by the *Vicious Lawless Association Disestablishment Act* 2013 (Qld). The VLAD Act had been repealed after the offences were committed but before most of the indictments were presented. Two indictments were presented before the repeal. All the defendants had been arrested and charged with the offences prior to the repeal. One question raised was whether s 20 of the *Acts Interpretation Act* applied to permit the proceedings to continue and be completed, or whether s 11 of the *Criminal Code* affected matters.

[141] Having examined the legislative history of s 20 and its references to s 11, Douglas J said:[116]

> "When one construes s 20 of the *Acts Interpretation Act* and s 11 of the *Criminal Code* as one should, on the basis that they are intended to give effect to harmonious goals, it is reasonably obvious that s 20(2)(c), s 20(2)(d) and s 20(2)(e) of the *Acts Interpretation Act* allow the liabilities and penalties allegedly incurred under the *Drugs Misuse Act* 1986 and the VLAD Act to continue to be the subject of a proceeding in relation to a liability or a penalty as if the repeal of the VLAD Act had not happened. That is on the basis that the liability or penalty is incurred at the time at which the offence takes place. That conclusion, namely that a penalty is incurred at the time at which the offence takes place, was put in issue for the applicants but my view is that the decision in *Commissioner of Taxation v Price* applies and binds me and that the liability incurred includes one to the increased penalties under the VLAD Act."

[142] A similar conclusion was reached by Kelly J in *The Queen v Brancourt*.[117] That case involved a mandatory sentencing provision applicable at the time the offence was committed, but which had been subsequently repealed. Kelly J considered the effect of s 12(c) and (d) of the *Interpretation Act* (NT), which is the analogue of s 20.

[143] Kelly J held that s 12(d), which provided that the repeal of an Act did not "affect a penalty, forfeiture or punishment incurred in respect of an offence against the Act or

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115 [2017] QSC 108.
116 *HXY* at [22]; internal citations omitted.
117 [2013] NTSC 56; (2013) 280 FLR 356.

part of the Act so repealed", was inapplicable as the offence in that case was under a different Act from that which was repealed.[118] However, her Honour held that s 12(c) was applicable. It provided that the repeal did not affect a "liability acquired, accrued or incurred under an Act or the part of the Act so repealed". Relying on *R v White*,[119] where Mildren J held that the reference to "liability" in s 12(c) was apt to embrace criminal responsibility, Kelly J adopted the passage from *Deputy Commissioner of Taxation v Price* cited above, and said:[120]

> "[15] It seems to me that, logically, the same reasoning should apply to the expression "a … liability … incurred under an Act or the part of the Act so repealed" in s 12(c). Given that (as held by Mildren J in *R v White*) a "liability" includes criminal responsibility, a liability to a punishment for the commission of a criminal offence is "incurred" not when sentence is passed, but when the offence is committed. Mr Brancourt therefore "incurred" a liability to punishment for the offence of aggravated assault on 23 December 2012, before the repeal of s 78BA.
>
> [16] It remains to consider what that "liability" consisted of. Did it include the mandatory sentencing provisions of s 78BA? In my view it did.
>
> [17] … What Mr Brancourt became liable to on 23 December 2012, was a penalty for the offence of aggravated assault to be determined in accordance with the law as it stood at that date, including s 78BA of the *Sentencing Act*. By virtue of s 12(c) of the *Interpretation Act*, that liability was not affected by the repeal of s 78BA on 1 May 2013."

[144] *White* and *Brancourt* were followed in *Mansray v Rigby*.[121]

[145] *Deputy Commissioner of Taxation v Price* has been followed by the New South Wales Court of Appeal in *Wilson v Director of Public Prosecutions (NSW)*.[122] That case involved an offence committed in 1971 under a provision repealed in 1984. The original provision set a penalty of "penal servitude for five years". In 2000, statutory reforms abolished the concept of "penal servitude" and provided that such sentences were to be taken to be a sentence of imprisonment. Meagher JA addressed the question of the legal characterisation of the offence in question, in the course of which he referred to s 30(1) of the *Interpretation Act* 1987 (NSW), the analogue of s 20 of the Queensland Act:[123]

> "46. Addressing the question of legal characterisation of the predicate offence in 2004, the repeal of s 81 did not, because of the application of *Interpretation Act,* s 30(1), have the consequence that Father Fletcher ceased to have committed the offence because criminal proceedings had not been

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118 *Brancourt* at [7].
119 [2006] NTSC 95.
120 *Brancourt* at [15]-[17].
121 [2014] NTSC 62; (2014) 292 FLR 404, at [15]-[19].
122 [2017] NSWCA 128, at [49] per Meagher JA, Bathurst CJ and Basten JA concurring.
123 *Wilson v DPP* at [46]-[49].

> commenced by that time: cf the position under the common law as described in *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 105-106 (Dixon J).
>
> [Meagher JA then set out s 30(1) and continued]
>
> 48. There being no contrary intention expressed in the Act repealing s 81 (*Interpretation Act,* s 30(3)), if Father Fletcher committed the predicate offence s 30 applied to preserve his liability to being prosecuted, convicted and punished "as if" s 81 had not been repealed. In *R v Fisher (Charles)* (1969) 1 WLR 8 at 12 the English Court of Appeal described the application in similar circumstances of *Interpretation Act 1889* (UK), s 38, from which the provisions of s 30 were ultimately derived, as having the effect that "the statutory provisions providing for [the offence's] indictment and punishment remained in force".
>
> 49. That description was approved by the House of Lords in *R v West London Stipendiary Magistrate, Ex parte Simeon* [1983] 1 AC 234 at 243 (Lord Roskill) and applied by the Court of Criminal Appeal in *R v Plummer* (Court of Criminal Appeal (NSW), Gleeson CJ, Lee CJ at CL and Campbell J, 12 July 1989, unrep) to two counts of alleged breaches of s 81 prosecuted in 1989. See also *NSW v Corbett* (2007) 230 CLR 606 at [10] (Gummow J, Gleeson CJ agreeing) and *Commissioner of Taxation v Price* (2006) 2 Qd R 316; [2006] QCA 108 at [57]-[58] (Keane JA, McMurdo P and Holmes J agreeing)."

[146] The same conclusion was reached in *R v Pritchard*,[124] where an accused pleaded guilty to an offence committed in 1982 under s 79 of the *Crimes Act* 1900 (NSW). That section was repealed in 1984. The court held that the NSW analogue to s 20 preserved both the ability to prosecute the offence, and the penalty that could be imposed.[125]

[147] *Deputy Commissioner of Taxation v Price* should be followed by this Court unless plainly wrong. I do not consider it is, and note that it was adopted in *Wilson v DPP*.

[148] *HXY* also considered the question of when the person "is charged" for the purposes of s 11(1) of the *Criminal Code*. Douglas J concluded that it occurred when the initial charges were laid by the police upon arrest:[126]

> "[30] … the real issue seems to me to be whether the relevant charges are the ones contained in the indictment or the charges earlier laid by police. The language of s 11(1) focuses on punishment for an act constituting an offence when it occurred and when the person is charged with the offence. Here the applicants were charged when arrested. They may well also have been charged when the earlier indictments were presented. Nonetheless, it seems clear to me that the word

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124 [1999] 107 A Crim R 88; [1999] NSWCCA 182.

125 *Pritchard* at [52]-[53] and [55]-[56], per Abadee J, Grove and Barr JJ concurring.

126 *HXY* at [30]-[31], internal citations omitted.

> "charged" used in s 11(1) means the initial charge, commonly laid by police either at the time of arrest or by a complaint. It can also include the earlier indictments presented during the period before the VLAD Act was repealed.
>
> [31] I say that because the *Criminal Code*, when it uses the word "charged" appears to distinguish between its use in general to include summary charges and its use in the context of a charge on indictment. The structure of the *Criminal Code* suggests that, were it intended that the relevant charge in this context should be the charge made in the current indictment, then that would have been made clear in the section by using language such as "charged on indictment" as occurs elsewhere in the *Criminal Code*. It is also relevant that "charge" is defined in Schedule 1 of the *Acts Interpretation Act* to mean a charge in any form, including, for example, a charge on an arrest, a complaint under the *Justices Act 1886*, a charge by a court under the *Justices Act 1886* s 42(1A) or another provision of an Act and an indictment."

[149] I respectfully agree with the conclusions reached by Douglas J in *HXY*, as set out above.

When was the appellant charged?

[150] The chronology of events was as follows:

(a) the appellant was arrested on 12 March 2015;[127]

(b) K signed his police statement on 24 March 2015;[128]

(c) the initial indictment (No. 54 of 2016) was presented on 7 April 2016;[129] and

(d) the amended indictment (No. 344 of 2016)[130] was presented on 7 November 2016;[131]

[151] There can be no real doubt that the appellant was charged upon his arrest. As the chronology above demonstrates: (i) all charged acts of sodomy or attempted sodomy were performed before the 2016 amendments; (ii) the appellant was charged before the amendments; and (iii) the indictment was first presented before the amendments. Therefore the acts were unlawful when they were done, and unlawful when the appellant was charged.

[152] The same result applies if one takes the original presentment of the indictment on 7 April 2016.

[153] Further, as mentioned in paragraph [103] above, the trial indictment was presented after a successful application to sever the charges relating to X. The order severing the charges was made on 3 November 2016, four days before the commencement of

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127 AB 226, 324.
128 AB 352, 385 line 24.
129 Respondent's outline, paragraph 4.6.
130 AB 1 and 6.
131 AB 15-16.

the trial.[132] The appellant was therefore applying to separate existing charges from other existing charges. He can hardly take advantage of that application to contend that there were no charges until the trial indictment was presented.

Conclusion – ground 2

[154] For the reasons expressed above there is no merit in this ground.

Ground 3 –evidence of sexual acts when the complainant was between 16 and 18

[155] This ground depended on a direction by the learned trial judge, that consent was irrelevant to the jury's consideration of acts of anal intercourse when the complainant was aged between 16 and 18 years.

[156] The learned trial judge gave this direction to the jury:[133]

> "As I have explained to you, a sexual touching of a child under 16 is an offence if not authorised, justified or excused by law, but once a child turns 16 until he attains the age of 18, it's only an offence to attempt or commit or permit or commit or permit sodomy. As I've said, of course, sexual activity directed at a person over 16 without that person's consent may also be unlawful, but that doesn't arise in this case.
>
> Once a person turns 18, provided the sexual activity is consensual, then it is not considered by the law to be an offence."

Submissions

[157] The appellant submitted that counts 12-16 were discrete charges of unlawful anal intercourse occurring when the complainant was between 16 and 18 years. Those acts formed part of the charge under count 1, the maintaining offence. Evidence of similar acts after the complainant turned 18 was led, without objection, as relationship evidence. The jury were told that consent is irrelevant when considering acts of anal intercourse when the complainant was aged between 16 and 18. They were also directed that an act of anal intercourse after the complainant turned 18 could only amount to a crime if it was non-consensual.[134] The jury were not told that the age of consent had been lowered to 16. Therefore the effect was that the jury were told that acts that were no longer criminal could be used to prove count 1 and counts 12-16. That was a fundamental defect in the trial. If the jury had been told that the age of consent had been lowered a "merciful verdict" may have been returned.

[158] It was also submitted that the Crown case was not litigated on the basis that counts 12-16 involved non-consensual acts. Had that been so the jury would have been directed on the issue of consent. In other words, the Crown ran the case on the basis that consent was not an issue, in that they were not seeking to prove the extra element of lack of consent and were content to run the case on the basis that K was incapable of consenting.

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132 AB 15 line 12.
133 AB 383 lines 31-38.
134 AB 380 lines 10-25.

[159] It was further submitted that even if the trial could proceed no punishment could be imposed by operation of s 11(2) of the *Code*. The appropriate course would have been for the trial counsel to challenge the indictment under s 603 or s 596, there being really no proper purpose to be served by prosecuting the appellant for those offences when no lawful punishment would be imposed.

[160] For the Crown it was submitted that the characterisation of the body of evidence as being of "lawful acts" was misconceived. The repeal of s 208 of the *Criminal Code* did not render the previous unlawful acts of the appellant "lawful", or no longer "unlawful". Whether the sexual acts were punishable was distinct from whether they were "lawful".

[161] Further, the indictment period did not end when the complainant turned 16, but continued until 5 May 2006, as alleged in count 1. If the Crown was entitled at law to proceed in relation to each count on the indictment, then there was no miscarriage of justice. Moreover, the jury were entitled to consider the evidence of acts which had occurred after the complainant turned 16, as part of its consideration whether the elements of count 1 had been established beyond reasonable doubt.

[162] Counsel for the Crown submitted that that the Crown was entitled to proceed with the offence of maintaining a sexual relationship after the age of 18 years. That being so, the jury were properly entitled to hear evidence relating to the offence of maintaining a sexual relationship after 18 years, and they were also entitled to hear the evidence of the counts that went to the individual charges of sodomy. That was because the legislation had yet to be repealed at the time the appellant was charged, and secondly, s 11 goes to punishment as opposed to liability.

[163] It was further submitted that apart from ground 3 there was no complaint as to the directions. The learned trial judge was required to direct upon the offences charged. The explanation that consent was irrelevant might have been inaccurate if the offences had been committed after the amending legislation but that was not the case. His Honour's statements reflected the law at the time the offences were committed. Further, there was no requirement to explain the way the law had changed. Consideration as to whether the jury might have returned a merciful verdict invited impermissible speculation. There was no miscarriage of justice.

Discussion

[164] The learned trial judge's directions in respect of the maintaining charge, count 1, were as follows:[135]

> "The prosecution case is that the defendant maintained an unlawful sexual relationship with [K] from when he was 11 in 1999 until when he turned 18 on the 5th of May 2006. As I said before, he turned 16 on the 5th of May 2004. Counts 12 to 16 are alleged to have occurred after his 16th birthday and before he turned 18 and at a time when he was living with the defendant at various addresses and away from his mother and siblings.
>
> … Secondly, the prosecution must prove that [K] was between the dates set out in count 1 a child under the prescribed age, which, in

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135 AB 381 line 33 to AB 382 line 45.

> relation to that count, is 18, and in relation to count 2, the prescribed age is 16. …
>
> Thirdly, they have to prove, that is, the prosecution, that an unlawful sexual relationship occurred, and that is a relationship that involves three or more unlawful sexual acts over any period within those dates. An unlawful sexual act means an act that constitutes an offence of a sexual nature which is not authorised, justified or excused by law. …
>
> In relation to count 1, the prosecution rely on the specific acts alleged by [K] in counts 3 to 16 as well as all of the other unspecified sexual acts which he alleges took place from when he was 11 until he turned 18. It is not in issue that these other unspecified acts as described by [K] as occurring prior to his 16th birthday are as a matter of law unlawful sexual acts.
>
> … Keep in mind that sexual acts, other than sodomy or attempted sodomy, are not unlawful sexual acts when committed against a child who has attained the age of 16 years. In relation to this element, you must all agree as to the same three or more unlawful sexual acts. …
>
> In addition, the prosecution have to satisfy you that the relationship was maintained. …
>
> In this case, as I've said, as well as relying on the specific sexual acts identified in counts 3 to 16 above, the prosecution rely on the many other sexual acts which [K] alleges occurred from when he was 11 until when he was 18."

[165] For count 10 (attempted sodomy between 31 December 2002 and 1 January 2004) the direction was:[136]

> "Now, if you go to count 10, that's an allegation of attempted sodomy. Mr Hanna correctly described what has to be proved to prove sodomy in his opening address and that is the prosecution have to prove that [K] was under 18 at the time, and clearly between those dates, he was …"

[166] For counts 12-16 (sodomy and attempted sodomy) the learned trial judge directed the jury as follows:[137]

> "… Counts 12 to 16, on the prosecution case, these occurred after his 16th birthday, which was on the 5th of May 2004.
>
> Just to explain all that to you, the charges are presented in this way because the law creates different sexual offences depending on the age of a complainant. So the prescribed age that is chosen now for a child is 16 and any sexual touching or sexual activity with a child under the age of 16 is an offence unless it's authorised, justified or excused by law. Once a person turns 16 and before they turn 18, if a person attempts to sodomise them or sodomises them, that itself is a discrete offence, but if a person has oral sex with them – and [K] has

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136 AB 379 lines 44-47.

137 AB 380 line 42 to AB 381 line 18.

> alleged that this occurred before he turned 18 – or masturbates their penises or – penis or has them have oral sex with them, that's not an offence of indecent dealing because they're over 16, and it's – it's not an offence unless it's non-consensual, and that's not suggested in this case.
>
> So, for example, an act of sodomy – an act of oral sex which wasn't consensual would be, as a matter of definition, an allegation of rape. So that's not suggested in this case, but that's why the charges are placed before you, because the law creates a different body of offending for children under the age of 16, and then a different body of offending for children between the age of 16 and 18. There is a lot of overlap, but that is why – for example, in relation to count 14, the attempt to sodomise [K] at the place at Dundowran Beach, there's no alternative there of indecent dealing because that's not an offence for a person who's over 16 and under 18."

[167] When the learned trial judge came to the uncharged acts which took place **before** the complainant turned 18, and how the jury might use that evidence, his Honour directed the jury in these terms:[138]

> "That evidence, as I've told you, is relevant to two of the elements in the maintaining charge. It is also relevant to your consideration of the specific offences in counts 3 to 16, but can only be used by you in accordance with this direction. [K] has sworn that in all the residences … many other sexual acts occurred involving the defendant about which he's not been able to be specific.
>
> As I have explained to you, a sexual touching of a child under 16 is an offence if not authorised, justified or excused by law, but once a child turns 16 until he attains the age of 18, it's only an offence to attempt or commit or permit or commit or permit sodomy. As I've said, of course, sexual activity directed at a person over 16 without that person's consent may also be unlawful, but that doesn't arise in this case.
>
> Once a person turns 18, provided the sexual activity is consensual, then it is not considered by the law to be an offence. …
>
> The prosecution relies on this evidence to prove that the defendant had a sexual interest in [K] and was willing to give effect to that interest. You can only use the evidence against the defendant if you're satisfied beyond a reasonable doubt that one or more of those other acts occurred and if you do not accept that any of these acts occurred that finding may affect your assessment of [K's] evidence relating to the specific offences on the indictment."

[168] The learned trial judge also dealt with the uncharged acts, which took place **after** the complainant turned 18, and how the jury might use that evidence. His Honour directed the jury in these terms:[139]

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138 AB 383 line 25 to AB 384 line 9.

139 AB 381 line 20.

> "There are no charges before you relating to sexual activity which [K] says after he turned 18 … because once a person turns 18, sexual activity is not considered an offence unless it's non-consensual, and that's not suggested in this case. It does have some relevance depending on your – your assessment of it, which I will refer to in a few moments, but it's not the subject of any charge, and it's not part of count 1 or count 2."

[169] K turned 16 on 5 May 2004 and 18 on 5 May 2006. K moved out in 2007 when he was 19. The last sexual act with which the appellant was charged occurred no later than 1 April 2006 (counts 15 and 16), and the maintaining count had, as the last date, 4 May 2006. Therefore all sexual acts with which the appellant was charged had occurred before K turned 18, and before the age of consent for anal intercourse was lowered to 16. All uncharged sexual acts which were said to have taken place after K turned 18 were still before the 2016 amendments.

[170] The statement of the law in the direction set out in paragraph [156] above was wrong as at the time it was said, in so far as it referred to the then state of the law, because by then the 2016 amendments had come into force, lowering the age of consent to 16. However, it was a correct statement of the law as at the time the offences were committed, as at the time the appellant was charged on his arrest, and as at the time the original indictment was presented on 7 April 2016.

[171] As the respondent submitted that statement did not lead the jury into error. Their task was to consider the evidence and decide if they were satisfied of guilt on the various counts, on which, as I have said above in respect of ground 2, the Crown was entitled to proceed to prosecute through to punishment by the imposition of the penalty that was still applicable. The learned trial judge was required to direct upon the offences charged. The explanation that consent was irrelevant might have been inaccurate if the offences had been committed after the amending legislation but that was not the case. His Honour's statements reflected the law at the time the offences were committed. Further, there was no requirement to explain the way the law had changed.

[172] For that reason there was no miscarriage of justice caused by that direction.

[173] The appellant's submitted that a miscarriage of justice occurred at the point of sentence. Section 11(2) of the *Criminal Code* relevantly provides that:

> "If the law in force when the act or omission occurred differs from that in force at the time of the conviction, the offender can not be punished to any greater extent … than is authorised by the latter law."

[174] The appellant was sentenced to concurrent terms as follows:

(a) count 1, ten years' imprisonment, which carried an automatic serious violent offence declaration;

(b) counts 4, 5, 6 and 8, on each, four years' imprisonment;

(c) counts 10 and 12, six years' imprisonment; and

(d) counts 13 and 15, seven years' imprisonment.

[175] The sentence was reopened on 20 January 2017, and adjusted to take account of the law as it stood at the time of conviction.[140] As a consequence the sentences imposed on counts 12 , 13 and 15 were set aside and instead the appellant was convicted and no further punishment was imposed. On count 1 the sentence of ten years' imprisonment was reduced to eight years, to be served concurrently with the other sentences imposed.

[176] Section 11(2) of the *Criminal Code* provides:

> "If the law in force when the act or omission occurred differs from that in force at the time of the conviction, the offender can not be punished to any greater extent than was authorised by the former law, or to any greater extent than is authorised by the latter law."

[177] Section 20(2) of the *Acts Interpretation Act* relevantly provides:

> "(2) The repeal or amendment of an Act does not—
>
> …
>
> (d) affect a penalty incurred in relation to an offence arising under the Act; or
>
> (e) affect an investigation, proceeding or remedy in relation to a right, privilege, liability or penalty mentioned in paragraph (c) or (d)."

[178] The effect of s 20(2)(d) is that the repeal of s 208 of the *Criminal Code* and the amendment to s 229B of the *Criminal Code* do not affect the penalty incurred in relation to each offence. As *Deputy Commissioner of Taxation v Price* establishes, those penalties were incurred when the offence was committed. Here that was well before the 2016 amendments. Because the repeal and amendment does not affect the penalty, nor the proceedings in relation to it, s 11(2) should not be construed, in my view, as meaning that the "law in force" at the time of conviction refers to the amended law.

[179] The *Acts Interpretation Act* lends support to that conclusion. Section 41 provides that, in an Act, "a penalty specified at the end of … a section" indicates that an offence is "punishable on conviction (whether or not a conviction is recorded) … by a penalty" in accordance with the penalty specified, whether it be a maximum or minimum, or a specified penalty. Section 41A provides similarly in the case of a penalty specified but not at the end of a section. However, the provision make two concepts clear; one is that an offence is "punishable", and the second is the punishment is administered "by a penalty". Section 20(2)(d) preserves the penalty, which must mean that the punishment is preserved also.

[180] In *HXY* Douglas J came to the same view. His Honour considered the impact of s 11(2) in a situation where, as here, the statutory provision has been repealed, and said:[141]

> "[33] Where s 11(2) of the *Criminal Code* applies, in my view, is when it comes to determine the punishment that should be applied once it has been determined in a proceeding that liability for a penalty has been incurred. The *Acts*

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140 AB 433.

141 *HXY* at [33]-[35].

Interpretation Act, in s 36 and Schedule 1, defines "penalty" to include "punishment" but the distinction between a penalty, often specified at the end of a section, such as s 5 of the *Drugs Misuse Act* 1986, and the punishment imposed on a conviction is made, for example, in s 41 and s 41A of the *Acts Interpretation Act* when those sections provide that an offence is punishable on conviction by a penalty not more than the specified penalty.

[34] Section 11(2) then sets out the principle that, the offender cannot be punished to any greater extent than is authorised by the law in force at the time of conviction. Where, as here, the law in force at the notional time of conviction when this application was heard includes the potential liability to the mandatory penalty incurred in relation to the offences charged because of the effect of s 20(2)(d) of the *Acts Interpretation Act*, it cannot be said that the law differs from that applicable at the time the act or omission occurred.

[35] Even though the maximum sentence for the offence of trafficking with the circumstances of aggravation alleged under the VLAD Act has been reduced because of the repeal of the legislation creating those circumstances of aggravation, the applicants, if convicted, can still be punished to the extent authorised by the former law, including the relevant circumstances of aggravation. So s 11(2) does not limit the extent of the punishment that may apply to the applicants."

[181] The same conclusion was reached by Kelly J in *Brancourt*. The submission was made there that s 14 of the *Criminal Code* (NT), the analogue of the Queensland s 11, should be applied. His Honour rejected that submission:[142]

"[19] The Defence contends that the law in force at the present time, when Mr Brancourt is being dealt with for this offence, provides for a lesser punishment than that which was authorised at the time of the offence. At the time of the offence, s 78BA applied to mandate a penalty of an actual sentence of imprisonment. However, that section was repealed on 1 May 2013 and s 78EA of the *Sentencing Act* provides that the new mandatory sentencing regime does not apply to offences which were committed before 1 May 2013.

[20] It seems to me that that reasoning is very much circular: it assumes what it purports to conclude, namely that there is a lacuna created by s 78EA. In my view there is no such lacuna because s 12(c) of the *Interpretation Act* applies to preserve the operation of the provisions of the *Sentencing Act* (including s 78BA) for offences committed before the new provisions came into force."

[182] This part of *Brancourt* were followed in *Mansray v Rigby*.[143]

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142 *Brancourt* at [19]-[20].

143 [2014] NTSC 62; (2014) 292 FLR 404, at [20]-[23].

[183] *R v Pritchard*[144] was concerned with an offence of buggery under s 79 of the *Crimes Act* 1900 (NSW). The offence was committed in 1982 and in 1984 that section was repealed. At issue was the impact of the repeal. The *Interpretation Act* 1987 (NSW) had two provisions relevant to the consideration. One was s 55 which provided that if an Act reduced a penalty for an offence, the reduced penalty applied to offences committed before the Act commenced. The second was s 30(1), which was the analogue of the Queensland s 20. Section 30 relevantly provided:

> "(1) The amendment or repeal of an Act or statutory rule does not:
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act or statutory rule, or
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability or penalty
>
> and any such penalty may be imposed and enforced, and any such investigation, legal proceeding or remedy may be instituted continued or enforced, as if the Act or statutory rule had not been amended or repealed."

[184] Abadee J[145] held that s 30(1) preserved both the offence and the penalty:[146]

> "[52] Thus as a matter of statutory construction Mr Byrne's submissions fail. They fail for additional reasons. If Mr Byrne's argument is true that abolition of an offence is capable of being treated as being a reduction of penalty for the purposes of s 55, dealing as that section does with the specific subject matter of reductions of sentence, then it is inconsistent with the general provisions of s 30 of the Interpretation Act. In my view s 55 and s 30 deal with different subject matters with s 55 operating only in respect of the subject matter expressly referred to on its terms, that is, reduction in penalty and with s 30 applying in the case of "repeal". What occurred in this case was a repeal of s 79 of the Act. Such repeal having occurred, the provisions of s 30(1)(c) and particularly s 30(1)(e) continued to apply in respect of penalty. Section 30 addressed the repeal situation, not s 55.
>
> [53] That there may be a continuation of liabilities and penalties under a repealed Act is well recognised. Section 30 itself recognises such. Indeed, s 30 of the *Interpretation Act* in continuing the liability to prosecution for breach of a repealed Act reverses the common law position that a liability to punishment for contravention of a penal statute did not continue after the repeal of the enactment: see *R v Scarlett; Ex parte McMillan* (1972) 20 FLR 349 per Fox J at 351-352 (a case concerning s38(d) of the *Interpretation Ordinance* 1967

144 [1999] 107 A Crim R 88; [1999] NSWCCA 182.
145 With whom Grove and Barr JJ concurred.
146 *Pritchard* at [52]-[53].

> (ACT)); *Byrne v Garrisson* [1965] VR 523. In *Byrne's* case a company director was held to remain liable for a breach of a section of the *Companies Act* (Vic) notwithstanding the repeal of the section. It also considered the provisions of s 7 of the *Acts Interpretation Act* 1958 (Vic). True it was a case specifically concerning liability for breach, rather than in terms a liability for punishment for breach of a repealed section but I do not consider, having regard to the provisions of s 30 of the New South Wales Act, that this is a point of material difference. In *Samuels v Songaila* (1977) 16 SASR 397 liability to a specified penalty was held to be preserved notwithstanding its repeal and substitution by a different penalty. Generally speaking it would seem that, absent an express statutory provision, see for example s 75 of the *Defence Force Discipline Act* 1982 (permitting a conviction without punishment), ordinarily preservation of an offence preserves the punishment for it."

[185] Abadee J then dealt with and rejected a submission that there should be no penalty because of s 55, and continued:[147]

> "[55] To sum up the situation it would seem to me that the provisions of s 30 of the Act apply to the instant case, and not the provisions of s 55: see *Beserick* (1993) 30 NSWLR 510; 66 A Crim R 419. In that case as Hunt CJ at CL noted that s 81 (an offence involving indecent assault upon a male) was in force at the time of the offence but that the section had been repealed (at the same time as the repeal of the offence of buggery) in 1984. His Honour said (at 535; 442):
>
> > "That section was repealed in 1984, but a charge pursuant to it is still permitted by s 30 of the *Interpretation Act* 1987 (NSW)".
>
> [56] His Honour did not suggest that there could still be a charge, a conviction for the charge, but that no sentence could or should be imposed by reason of s 55 or for any other reason. Such a result would be surprising. It would offer little comfort to the victim, nor any corresponding benefit to the public to have such a serious conviction found, indeed, even the subject of a plea, but without punishment for it. In my view if there is no impediment to the continued prosecution of buggery offences committed prior to 1984, it follows that then there is no restriction on the court's power to impose punishment on conviction, for such an offence."

[186] True it is that there was no analogue of s 11 in New South Wales, but it seems to me that the reasoning in *Pritchard* is still persuasive.

[187] It must be borne in mind that s 20 of the *Acts Interpretation Act* applies to where an Act is amended as well as when it is repealed. Therefore, in my view, the effect of

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147 *Pritchard* at [55]-[56].

s 20 of the *Acts Interpretation Act* in this case was to preserve the offence and preserve the penalty, notwithstanding the repeal of s 208 of the *Criminal Code* in 2016 and notwithstanding the amendment to s 229B in 2016.

[188] That being so if there was to be a direction to the jury as to the 2016 amendments, it would have had to be that they had no effect on the offence or the penalty. There was, in my view, no requirement to do so, as such a direction would have been apt to confuse and potentially cause the trial to miscarry.

[189] Further, with the offences preserved, as well as the penalty for each, there was no issue as to the evidence of the offences themselves, or the uncharged acts even where they continued after K turned 18. None of those acts occurred after the 2016 amendments. This was not a case where there could have been a challenge to the admissibility of that evidence based on the 2016 amendments. Nor is it a case where there could have been an argument that there was an abuse of process based on the 2016 amendments.

[190] For the reasons expressed above ground 3 lacks merit and there was no miscarriage of justice.

Disposition

[191] For the reasons I have expressed above, the appeal should be dismissed.

[192] **PHILIPPIDES JA:** I agree that the appeal should be dismissed for the reasons given by Morrison JA.

[193] **BODDICE J:** I agree with the reasons and proposed order of Morrison JA.