SUPREME COURT OF QUEENSLAND

CITATION:	*R v EP* [2020] QCA 109
PARTIES:	**R** **v** **EP** (appellant/applicant)
FILE NO/S:	CA No 124 of 2018 DC No 568 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Cairns – Date of Conviction: 5 December 2017 (Fantin DCJ); Date of Sentence 18 April 2018 (Morzone QC DCJ)
DELIVERED ON:	29 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	14 October 2019
JUDGES:	Morrison and Philippides JJA and Buss AJA
ORDERS:	**1. The appeal against conviction is dismissed.** **2. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – GENERAL PRINCIPLES – where the appellant pleaded guilty to four counts of rape and one count of indecent treatment of a child under 16, under 12 and under his care – where the offences involved a five year old female child complainant who was left at her home with the appellant in the early hours of the morning – where the prosecution case was based on, among other evidence, disclosures made by the complainant to her parents and a section 93A recording with Police – where the appellant contended that his pleas of guilty should be set aside due to his lack of understanding of his pleas of guilty – whether the appellant understood the nature of the charges – whether the appellant intended to admit that he was guilty to the charged offences – whether a miscarriage of justice occurred CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to concurrent terms of imprisonment, the most significant being

nine years' imprisonment for count 3 (penile anal rape) – where the applicant submits that he was informed by Legal Aid that the contents of a psychiatric report favoured him more than the case that was put forward by the Crown and that the s 93A interview involved putting words in the complainant's mouth – where the applicant also submits that the cases relied upon by the Crown at sentence were irrelevant because they involved serious rape which did not occur in this case – where the respondent submits that the offending was objectively very serious, the trial judge generously took into account mitigating factors, and the comparable cases indicate that the sentences imposed were open to the trial judge – whether the overall sentence was manifestly excessive in all the circumstances

Liberti v The Queen (1991) 55 A Crim R 120, cited
Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, cited
R v Boag (1994) 73 A Crim R 35, cited
R v D [2003] QCA 88, considered
R v Free; Ex parte Attorney-General (Qld) [2020] QCA 58, cited
R v MBJ [2010] QCA 211, considered
R v Mundraby [2004] QCA 493, cited
R v Murphy [1965] VR 187; [1965] VicRp 26, cited
R v RAC [2008] QCA 185, considered
R v Wade [2012] 2 Qd R 31; [2011] QCA 289, cited

COUNSEL: J Hunter QC, with L Reece, for the appellant (for conviction)
The applicant appeared on his own behalf (for sentence)
D Balic for the respondent

SOLICITORS: Legal Aid Queensland for the appellant (for conviction)
The applicant appeared on his own behalf (for sentence)
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I have read the reasons of Philippides JA and agree with those reasons and the orders her Honour proposes.

[2] **PHILIPPIDES JA:** On 5 December 2017, the appellant was convicted on his own plea of guilty to four counts of rape and one count of indecent treatment of a child under 16, under 12 and under his care and was sentenced on 18 April 2018. The offences involved a five year old female child complainant, whose parents had left with the appellant at their home to look after her while they went out for a period in the early hours of the morning of 16 October 2016. The factual basis of the offences as set out in an agreed statement of facts[1] on which the sentence proceeded was as follows:

> Count 1 – the appellant put his penis in the complainant's mouth, moving it in and out for a short time (oral rape);

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1 AB at 40-41.

Count 2 – the appellant pulled down the complainant's pants and placed his penis on her vagina for an unknown time (indecent treatment);

Count 3 – the appellant put his penis into the complainant's anus, hurting the complainant who told him to stop and he did (penile anal rape);

Count 4 – the appellant penetrated the complainant's vagina with his finger (digital vaginal rape); and

Count 5 – the appellant penetrated the complainant's anus with his finger, she told him to stop, and he did (digital anal rape).

[3] The appellant was sentenced to concurrent terms of imprisonment, the most significant being nine years' imprisonment for count 3. He was also sentenced to five and three years' imprisonment respectively on counts 1 and 5 and two years' imprisonment on count 2. A declaration was made as to 549 days of pre-sentence custody and a parole eligibility date of 16 October 2019 was set.

[4] The appellant appeals against his convictions on his pleas of guilty on the grounds that:

1. the pleas were not attributable to a genuine consciousness of guilt of the specific offences;
2. the pleas were induced by the conduct of his legal representatives, who failed to explain the charges and evidence and otherwise poorly advised the appellant; and
3. the pleas were entered in circumstances where the only evidence of precisely what offences were committed was that of the five year old complainant and which did not support the charges of oral and penile-anal rape.

[5] Leave to adduce fresh evidence was granted to both parties in respect of the appeal against conviction. For the appellant, this comprised affidavits sworn by him and his current legal representative.

[6] The appellant also appeals against his sentence on the basis that it was manifestly excessive and represented himself on that part of the appeal.

Appeal against conviction

Relevant principles

[7] The relevant principles applicable when a plea is sought to be set aside may be summarised as follows:

1. It is not easy task for an appellant seeking to set aside a plea of guilty. It is, as Muir JA (with whom Margaret Wilson AJA agreed) stated in *R v Wade*,[2] for good reason, that courts "exercise great caution in determining applications to set aside or withdraw guilty pleas". This is because the proper administration of criminal justice depends on the ability of courts to proceed on the basis that a plea of guilty is made in the exercise of the accused's free choice.[3] The Court's caution "bordering on circumspection" as Kirby P put it

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2 [2012] 2 Qd R 31 at [44].

3 *Meissner v The Queen* (1995) 184 CLR 132 at 148 per Deane J.

in *Liberti v The Queen*,[4] in a passage adopted by Jerrard JA in *R v Mundraby*:[5]

> "… rests on the high public interest in the finality of legal proceedings and upon the principle that a plea of guilty by a person in possession of all relevant facts is normally taken to be an admission by that person of the necessary legal ingredients of the offence ..."

2. Accordingly, as stated in *Meissner v The Queen*[6] by Brennan, Toohey and McHugh JJ:

> "A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence."

3. As also observed in *Meissner* by Dawson J,[7] a person may plead guilty upon grounds which extend beyond that person's belief in his guilt, but the entry of a plea of guilty upon such grounds (including to avoid worry, inconvenience, expense, or publicity; to protect others; or in the hope of obtaining a more lenient sentence than if convicted after a plea of not guilty), nevertheless "constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred".

4. Ordinarily, as Dawson J stated, a miscarriage of justice will only be shown "where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence".[8] However, the circumstances capable of amounting to a miscarriage of justice in this context are not to be restricted or circumscribed, although they must be such as to indicate that the plea of guilty was not "really attributable to a genuine consciousness of guilt": *Mundraby*,[9] per McPherson JA citing *R v Murphy*[10] and *R v Boag*.[11]

5. As Muir JA noted in *Wade* at [51], it will normally be impossible to show a miscarriage of justice unless an arguable case or triable issue is also established.[12]

The prosecution evidence

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4 (1991) 55 A Crim R 120 at 122.
5 [2004] QCA 493 at [21].
6 (1995) 184 CLR 132 at 141.
7 (1995) 184 CLR 132 at 157.
8 (1995) 184 CLR 132 at 157.
9 [2004] QCA 493 at [11].
10 [1965] VR 187.
11 (1994) 73 A Crim R 35 at 37.
12 See also *R v DBS* [2020] QCA 1 at [24] per McMurdo JA (with whom Crow J agreed) and *R v Coker* [2013] QCA 315 at [8] per Holmes JA (as her Honour then was, with whom Atkinson J agreed).

[8] The evidence was comprised of disclosures made by the complainant to her parents soon after they returned home, the section 93A recording of the complainant's police interview and the forensic evidence.

Complainant's mother

[9] In the police statement provided by the complainant's mother, she stated that the appellant had visited on 15 October 2016 and that she and her partner consumed alcohol with the appellant. She and her partner left the complainant in the appellant's care in the early hours of 16 October 2016 and, after returning home, she found the complainant awake. She asked her why she was still awake and the complainant said that "Uncle woke me up" and that he "showed me his pee pee". After being questioned as to whether he did anything else, the complainant disclosed that "he put his pee pee on my bum" and that "He put his pee pee on my pee pee".

[10] In his statement to the police, her father stated that the complainant had told him: "Uncle showed me his pee pee" and "Uncle tried to put his pee pee on my bum".[13]

Complainant's police interview

[11] The police were called and an s 93A recording of a police interview with the complainant was made. In the interview, the complainant said:[14]

> "Uncle was just showing me the pee pee and then … *put it in my mouth* and him pee pee and then I don't want to do it again… *I don't want to lick it any more again… Cause I had to [unintelligible] lick it*."

[12] The complainant also said that "And then *Uncle then put his pee-pee on my pee pee*"[15] and she then asked to go to the toilet. When she returned the following exchange occurred:[16]

"Officer:	Did it hurt when you go to the toilet?
Complainant:	Yeah my pee-pee hurting … got scratched.
Officer:	Ahh, your pee-pee is hurting cause it got scratched.
Complainant:	Yeah.
Officer:	When did it get scratched?
Complainant:	Because we didn't have, *I did have cocky in my bum*. And then my pee-pee just hurting …
Officer:	So you said you had cocky in your bum
Complainant:	Huh huh
Officer:	And that's why your pee-pee hurts

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13 Police witness statement of CJN at [29], [32] and [50].
14 Transcript p 13-14.
15 Transcript p 14.
16 Transcript p 14-15.

Complainant:	Yeah
Officer:	Yeah so do you know another word for your pee-pee? Or for Uncle's pee-pee?
Complainant:	unum my Uncle pee-pee.
Officer:	Yeah do you call it any other word or just pee-pee
Complainant:	Pee-pee
Officer:	Pee-pee and you just said, you said before cocky?
Complainant:	Huh huh
Officer:	Is cocky different or is it that the same thing.
Complainant:	Cocky. Cock.
Officer:	Yeah cock. Is that the same thing or different?
Complainant:	Ca-kee
Officer:	Yeah
Complainant:	CC That thing (showing motion towards face)
	…
Complainant:	Caa-kee
Officer:	Caa-kee so what's a Caa-kee?
Complainant:	Yeah. I did do it and then the Caa-kee on my bum and it did hurt
Officer:	You had a Caa-kee on your bum?
Complainant:	[unintelligible] get out
Officer:	Yeah So whats a Caa-kee?
Complainant:	Tttt, that thing [unintelligible] cackeee
Officer:	Or Caa-kee … So what is a cackee? What is that, I haven't heard that word before
Complainant:	CC [unintelligible] Caa-kee (motion towards mouth)
	…
Complainant:	And then A Caa-kee on my bum ..."

[13] The officer went through what she understood to be the complainant's evidence in the following exchange:[17]

"Officer:	… you said that Uncle showed you his Pee-pee and then he put his Pee-pee in your mouth and you licked it you didn't like it it was yucky

17 Transcript at p18.

Complainant: Yeah it was like [unintelligible] it did poke my tongue in the pee pee

…

Officer: And then you said that Uncle tried to put his pee-pee in your bum, and it hurt.

Complainant: Yeah

Officer: Yeah. Do you know, did his pee-pee go into your bum?

Complainant: Yeah

Officer: It did

Complainant: Yeah

…

Officer: And what did Uncle do when his pee-pee was in your bum?

Complainant: Cause [unintelligible] to stop him and [unintelligible] did wake up and then I was stop some I said saw somebody in our room."

[14] The officer asked some further questions:[18]

"Officer: No ok when you said he tried to put his pee-pee in your bum what did he do.

Complainant: Um

Officer: What did he do to try and put his Pee-pee in your bum?

Complainant: Because *my Uncle just put it* [unintelligible], my uncle just did Kiss me …

Officer: Yeah he went to kiss you

Complainant: Mhm

…

Officer: And what else did he do? How did he try and put his pee-pee in your bum?

Complainant: Because I Got to put him pee pee on my bum and I got to put him my pee pee in my bum

Officer: Yep

Complainant: And then Uncle did put his finger in my pee-pee

Officer: Oh ok so Uncle put his finger in your pee-pee

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18 Transcript at p19.

…

Complainant: … Uncle just put his finger one in my pee-pee …And I did crying and I don't want do it again."

[15] The officer went through what the complainant had said:[19]

"Complainant: And then Uncle put his pee-pee on my bum and it did get hurt

Officer: Yeah

Complainant: Yeah

Officer: So did. I'm trying to get this straight you said he tried to put his pee-pee in your bum but you said no Uncle, stop.. And he stopped.

Complainant: Huh huh

Officer: And then he put his, you said he put one finger in your pee-pee

Complainant: Mhm

Officer: And then he put his pee-pee in your pee-pee

Complainant: yeah, I just did crying. And [unintelligible] I suck it

Officer: Oh ok, so did that happen first, did he put his pee pee in your pee pee And you were crying

Complainant: Huh huh

Officer: And then he told you to suck it.

Complainant: Yeah… *Uncle get it … one finger in my bum* and then say stop

Officer: Yep

Complainant: And I crying and he pee-pee hmmm

Officer: Yeah and then he made you lick his pee-pee

Complainant: Huh huh"

Forensic evidence

[16] A genital examination of the complainant was conducted which revealed a small 1 mm linear scratch abrasion in the fold of the left labia minor, together with blood stains. Forensic swabs were taken which revealed:

(a) sperm consistent with that of the appellant was located on the complainant's vulva and in her rectum; and

(b) the appellant's sperm was also located on the inside front and back of her underpants and on the inside and outside of her shorts.

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19 Transcript at p 20.

The appellant's evidence

[17] The appellant did not participate in an interview with police. He denied any memory of the offending in his interviews with the writers of a pre-sentence report that was prepared for the sentencing proceedings and with Dr Anuka Gupta, who prepared a psychiatric assessment pursuant to an order by the Court.

The appellant's affidavit evidence concerning his pleas

[18] In his affidavit, the appellant deposed to having been represented by the Aboriginal and Torres Strait Islander Legal Service (ATSILS) and having a video link meeting with his solicitor. He recalled only that the solicitor stated that she had listened to the s 93A interview tape and that the complainant was difficult to hear and understand and that he should take the matter to court to get an "Indecent treatment charge".[20]

[19] He subsequently spoke to his solicitor again who told him that an email about DNA evidence had been received and that his DNA had been found in the complainant's vaginal area. No mention was made about DNA being found in the anus area.[21] The solicitor told him that he was charged with four counts of rape (but did not say how the rapes were alleged to have occurred) and one count of indecent treatment of a child under 16, under 12, lineal descendant and that the matter was going to committal and he should plead not guilty in order to try and get a charge of indecent treatment.[22] He pleaded not guilty at the committal.

[20] His matter was then handed over to another solicitor who read him portions of the complainant's statement and the statements of her parents. He was also advised that the DNA material was located between the vaginal and anus area on the complainant and that a vaginal swab showed his DNA.[23] Again no mention was made that there had been an anal swab. The solicitor said that he had watched the s 93A interview but could not understand it and that he should go to trial and get an indecent treatment charge. The appellant indicated that he wanted to plead not guilty.[24]

[21] In November 2017, the appellant had a telephone link-up with a barrister who advised that he had gone over the brief of evidence. The appellant deposed that:[25]

> "He said that there was DNA evidence in the anus of the complainant and that there was penetration of the anus. That was the first that I had heard that there was an allegation that I had penetrated the anus of the complainant, and it shocked me. I asked him to read the evidence again. He said that the complainant clearly says that I penetrated her anus. I said that was different to what I had previously been told."

[22] The appellant deposed to being told by his barrister that he had listened to the complainant's statement and that he could not really hear or understand her but that,

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20 Affidavit of EP, filed 20 August 2019 at [12].
21 Appellant's Affidavit at [17]-[18].
22 Appellant's Affidavit at [19].
23 Appellant's affidavit at [31].
24 Appellant's Affidavit at [31]-[32].
25 Appellant's Affidavit at [35].

because he had been charged with rape, the jury would understand that rape of the anus was what the complainant was talking about. The barrister asked the appellant how he wanted to plead and explained that the likely sentence if the appellant was found guilty was 14 years. The appellant asked him what he should do and the barrister replied that the appellant was an adult and that he had to decide. The appellant did not want to plead guilty and said that he did not remember the incident.[26] The appellant stated that, on the basis of what he was told, he said he would plead not guilty. The barrister said he would try and negotiate a sentence under eight years.

[23] The appellant deposed that he was taken to the Cairns Watch House for arraignment and was told by his barrister that the DPP had rejected the deal and were seeking a sentence of 14 years or more. He was told to plead guilty to all the charges. The appellant deposed that he was never shown or read an indictment or a schedule of facts and that he did not sign instructions to plead guilty or a schedule of facts. The appellant deposed that even though he did not want to plead guilty, he felt that he had no real choice but to do so. The appellant deposed that when he heard the statement of facts being read out, he wanted to change his plea, but thought the judge would get angry with him.

[24] On the morning of his sentence, the appellant spoke to his barrister and told him he did not want him to represent him anymore and that he wanted to plead not guilty, but was told that it was too late. The barrister discussed a psychological report that had been obtained and the sentence submissions. The appellant deposed that he wanted to change his plea when he heard the facts being read out in court but was scared the judge would get angry.

Conviction appeal

Appellant's submissions

[25] On behalf of the appellant, it was submitted that the appellant's affidavit indicated that he was influenced to plead guilty by several factors which did not involve a consciousness of guilt. The appellant was poorly advised by his counsel, did not understand the charges and was never taken through the schedule of facts prior to entering his pleas on 5 December 2017. The appellant deposed to not having signed any written instructions[27] and that when he indicated that he wanted to change his plea and sack his counsel on the morning of his sentencing on 18 April 2018, he was told he could not.[28]

[26] It was accepted that in relation to the conduct by the appellant's former legal representatives, the critical question was whether the outcome involved a miscarriage of justice.[29] It was submitted that, typically, this required that an arguable case or triable issue to be established on the evidence.[30]

[27] The appellant argued that the s 93A recording was very difficult to understand and that there was significant confusion as to what the complainant was saying that the

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26 Appellant's Affidavit at [37].

27 The appellant's former solicitors advised that the appellant's file was not able to be located as it was misplaced: Affidavit of Axel Beard, exhibit AJNB-10.

28 Appellant's Affidavit at [43], [50] and [51].

29 *Nudd v The Queen* (2006) 80 ALJR 614 at 623 per Gummow and Hayne JJ.

30 *R v Wade* [2012] 2 Qd R 31 at [51] per Muir JA.

appellant tried to do and what he in fact did. Much of the evidence of the complainant is unintelligible and/or contaminated by the mode of questioning. There were a number of leading questions, one of which it was said introduced for the first time the concept of the appellant putting his penis in the child's anus. Counsel pointed to an error in the transcript where at one stage the complainant could also be heard to say (after being asked about the oral rape) "It didn't go in my mouth" which was not transcribed. She then agreed when it was put to her that the appellant made her lick his 'pee-pee', which would be consistent with an offence of indecent treatment, but not rape.

[28] In the appellant's written submissions, it was accepted that the complainant "quite clearly" complained of the counts involving the appellant putting his pee pee on her pee pee and putting his finger in her pee pee and bum,[31] these relating to counts 2 and 4. However, it was argued that the complainant's evidence was confusing and inconsistent on the acts alleged in counts 1 and 3. It was those counts and primarily count 3 that was the focus of the submissions on behalf of the appellant that the appellant did not have an understanding of what was alleged against him when he entered his pleas and did not intend to make admissions by his pleas. In relation to those counts, it was also submitted that the state of the evidence was such as to create an arguable case that a jury could not be satisfied beyond reasonable doubt as to the appellant's guilt. In addition, there was also the clear possibility that count 5 was duplicitous with count 3 and that the only penetration of the anus was digital. Further, the presence of the appellant's sperm in the complainant child's rectum, while capable of supporting an inference of penile penetration, was also consistent with another inference, being that the appellant had semen on his fingers when he digitally penetrated her anus.

[29] The appellant made the following additional assertions in his written submissions as to sentence which also touch on the conviction appeal. In support of his sentence application, the appellant submitted that he had felt "under duress or coerced" to plead guilty to all of the offences because his barrister had told him "false information regarding evidence", including that the appellant's DNA had been found in the complainant's rectum. The appellant submitted that he did not know what that meant at the time. The appellant also submitted that his barrister "confused" the judge during his arraignment, put him in an awkward position regarding his psychiatric report without instructions to do so, was generally incompetent and went "against" him in submissions. He also complained that transcripts of his trial were revised and that words were put in the complainant's mouth in the s 93A statement. The appellant also submitted that Legal Aid informed him about the medical evidence. He submitted that that medical evidence, in conjunction with where his DNA was found on the complainant, did not suggest penetration. For example, the 1 mm scratch on the fold of the left labia minor could have been caused by the scratching of a fingernail which could have been caused by the complainant herself. While DNA was located on the complainant's vulva, rectum, underpants and shorts, Legal Aid did not provide the appellant with any other DNA evidence about DNA located in other locations on the complainant.

Consideration

[30] As the appellant's file was not able to be located by his previous solicitors, the appellant's evidence that he did not sign written instructions or a copy of the

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31 Appellant's outline at [34].

statement of facts is not contradicted. However, the lack of written instructions or a signed statement of facts does not conclude the question as to the appellant's understanding as to the nature of the charges to which he pleaded guilty.

[31] By his own affidavit evidence, the appellant was told by his initial solicitor that four rape counts and one indecent treatment charge were alleged against him. At that stage, it appears he was not provided with details of how the rapes were alleged to have occurred. The appellant accepted, however, that the solicitor who subsequently took over his case did read to him portions of the complainant's statements and those of her parents. There is no reason to doubt that the portions of the complainant's evidence read to him did include those portions constituting the counts alleged against him. That is, that the appellant showed the complainant his pee pee and "put it in [her] mouth" (which constituted count 1), that the appellant "put his pee pee on [her] pee pee" (which constituted count 2), that she "did have cocky in [her] bum" (which constituted count 3), that he put his "finger in [her] pee pee" (which constituted count 4) and that he put "one finger in [her] bum" (which constituted count 5).

[32] While the appellant accepted that his first solicitor told him about DNA evidence, no mention was made of an anal swab by his solicitors. However, the appellant was specifically made aware by his barrister in December 2017 that DNA evidence was found in the complainant's anus and told that one of the counts of rape comprised an allegation that he had penetrated the complainant's anus. This was different from what the appellant stated he had previously been told and that it so shocked the appellant that he asked his barrister to read the evidence again. In response, he was told by his barrister that the complainant "clearly says" that he penetrated her anus. The appellant was moreover advised by his barrister that, notwithstanding the difficulties with the complainant's statement, a jury would understand "that rape of the anus was what the complainant was talking about".[32] By his own evidence, the appellant was appraised that anal rape was clearly alleged by the complainant and was supported by DNA evidence found in the complainant's anus. In those circumstances, it was abundantly apparent that the barrister had communicated that a count of penile anal rape was charged.

[33] In addition to advising the appellant of the DNA evidence that supported the complainant's clear allegation of anal rape, the appellant's barrister gave advice to the appellant of the likely sentence of 14 years upon his being found guilty. The barrister declined to advise him what to do when asked, stating that the appellant was an adult and that he had to decide. The appellant had no memory of the incident and it was on the basis of what he had been told that he decided to plead guilty. In the circumstances, it cannot be concluded that after speaking to his barrister on 5 December 2017, when the appellant entered his pleas and the schedule of facts was tendered, the appellant did not have an understanding of the nature of the charges against him, including the most serious charge of penile anal rape. Nor did the appellant depose in his affidavit to a lack of understanding of any of the charges when he entered pleas of guilty. Indeed, his affidavit was silent on the matter.

[34] The appellant was present when the statement of facts were read out in court on 18 April 2018 on his being sentenced and he deposed that when he heard them he wanted to change his plea but thought that judge would be angry. However, the

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32 Appellant's affidavit at [36].

appellant again did not depose to a previous lack of understanding of the nature of the charges when the pleas were entered. Nor did he deny that having subsequently told Dr Gupta, who completed a psychiatric report, that listening to his barrister and the DNA evidence made him realise that he did do it and that he felt guilty and disgusted with himself,[33] which, although after the arraignment, was consistent with being cognisant of the nature of the offences and voluntarily entering pleas.

[35] The appellant has not demonstrated that he did not understand the nature of the charges or that he did not intend to admit he was guilty of the charged offences. That is sufficient to establish that there has been no miscarriage of justice. It is not necessary to consider the arguments that there were arguable cases in relation to counts 1 and 3. But it may be observed that the complainant repeatedly made comments that referred to oral penetration and that her statements both that the appellant's "pee pee was on her bum" and also "in her bum" were clearly distinct allegations, which were also repeatedly made.

Appeal against sentence

Appellant's submissions on sentence

[36] The appellant submitted that the overall sentence imposed was manifestly excessive in all the circumstances. The appellant submitted that he was informed by Legal Aid that the contents of the psychiatric report favoured him more than the case put forward by the Crown, and that the s 93A statement tendered at trial involved putting words in the complainant's mouth by the police officer.

[37] The appellant argued that the cases relied upon by the Crown[34] in relation to sentencing were not relevant because they involved serious rape, which had not occurred in his case. The seriousness of offending considered in those cases was not comparable to this case, as "no actual rape took place", indicated by the lack of injury, tears or trauma to the anal or vaginal area.[35] In these circumstances, the appellant submitted that he should have been sentenced to two years for indecent assault, not nine years for rape (count 3).

Respondent's submissions on sentence

[38] The respondent argued that the sentencing judge took into account all matters of aggravation and mitigation – the complainant was almost six years old at the time of the offence while the appellant was 30 years' old, with an irrelevant criminal history. The sentencing judge was correct in not considering the appellant's intoxication as a factor in mitigation in relation to the appellant's failure to recall the offending conduct. Further, contrary to the appellant's contention regarding confusion caused by the psychiatric report, it was clearly of some use in the proceedings. As to the appellant's view that there was no evidence of rape, the DNA report clearly showed the presence of his DNA and/or spermatozoa located on and inside the complainant.

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33 AB2 at 25.39-41.

34 *R v D* [2003] QCA 88; *R v MBJ* [2010] QCA 211; *R v RAC* [2008] QCA 185; *R v KAJ; Ex parte Attorney-General (Qld)* [2013] QCA 118.

35 Appellant's outline at p 5.

[39] The offending was objectively very serious and the trial judge in fact generously took account of the appellant's mitigating factors such that the sentence was comparatively moderate in all the circumstances.

[40] The respondent submitted that with regards to comparable authorities, while *R v MBJ*[36] concerned objectively more serious offending, MBJ was sentenced to 13 years' with a requirement that he serve 80 per cent before becoming eligible for parole, indicating that the appellant received a comparatively lenient sentence in this matter.

[41] In *R v D*,[37] the defendant was sentenced to 10 years' imprisonment for conduct involving the taking of a five year old child who lived nearby and the digital penetration of her vagina. The defendant's plea was late and he had a significant criminal history. In contrast, the present case was one where the appellant was entrusted with the child, and pleaded guilty to more than one form of molestation, including to penetration of the mouth and anus. *R v D* also demonstrated that the sentence imposed on the appellant was in fact generous.

[42] In *R v RAC*,[38] an ultimate sentence of eight years' imprisonment was imposed with a serious violent offence declaration being made, for offending that was more protracted. However, in that case, the conviction arose from confessions made by the defendant, with no criminal history, who entered a guilty plea on an *ex officio* indictment and was required to serve six years and five months before being eligible for parole. In this case, the appellant only has to serve three years before becoming eligible for parole.

Sentencing remarks

[43] After setting out the particulars of the applicant's offending conduct, the sentencing judge referred to the applicant's intoxication but noted that it was not an excuse and would not be taken into account as a mitigating factor.[39] The sentencing judge noted that the appellant was in a position of trust in relation to the complainant and the offences occurred in circumstances of secrecy where the appellant tried to conceal them from the complainant's younger brother who was also present in the house.[40] The offences also involved a degree of manipulation of the complainant by the appellant requesting her not to tell anyone about the offences.

[44] The offending was objectively serious, involving three different types of rape and while occurring during only one event, involved a significant degree of emotional and physical overbearing on a very young complainant.[41] This type of offending often causes long lasting psychological injuries and the offending clearly had emotional consequences on the complainant.

[45] The sentencing judge referred to various mitigating factors, including the applicant's background and that he suffered physical abuse while young, including by his father and stepmother. He associated himself with people who used drugs and involved themselves in crime. He had an irrelevant criminal history and had

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36 [2010] QCA 211.
37 [2003] QCA 88.
38 [2008] QCA 185.
39 AB2 at 33.
40 AB2 at 33.
41 AB2 at 33.

good promise, through commencing various educational courses. The main explanation of the offending was a drug habit, involving methylamphetamine. Based on the medical reports, his risk of reoffending was below average. The sentencing judge accepted the applicant's evident remorse, together with the timing of his plea.

[46] The comparable cases demonstrated a range of between eight and 10 years as an overall sentence. The sentencing judge considered that the applicant's overall criminality should be reflected in the most serious count, being count 3. The sentencing judge declined to make a serious violent offence declaration because while serious, his offending was not beyond the norm of this type of offending conduct.

Consideration

[47] I accept the respondent's submission that *R v MBJ*[42] concerned objectively more serious offending, as the child in that case was younger (three years old) and his nephew, and sustained more serious injuries following an anal rape. Indeed, the sentence imposed in that case was clearly correctly higher, with a sentence of 13 years being imposed, together with a serious violent offence declaration being made.

[48] In relation to *R v D*,[43] I also accept the respondent's submission that this case does not assist the appellant and indicates that the sentence imposed was comparatively generous, given the sentence imposed in *R v D* was 10 years (reduced on appeal from 12 years imposed at first instance) for slightly less serious offending of only digital penetration of the vagina, whereas the rape the subject of this case had multiple components. As was stated recently by this Court in *R v Free; Ex parte Attorney-General (Qld)*,[44] the offending in *R v D* was brief and "could more readily be described as opportunistic, than predatory and premeditated", and would have involved the making of a serious violent offence declaration, whereas no such declaration was made in this case.

[49] Further, in *R v D*, the complainant was a child who lived nearby, while in this matter, the appellant was entrusted with the care of the complainant.

[50] In *R v RAC*,[45] while a lesser head sentence was imposed of eight years for more protracted offending, a serious violent offence declaration was made, meaning that the defendant in that matter would have been required to serve 80 per cent of his sentence, which is not the case in this matter. Further, in that case, the extent of the convictions were based upon confessional material which enabled a plea on an *ex officio* indictment.

[51] Accordingly, in my view, the appellant has failed to demonstrate any basis for interference with the sentence imposed by the sentencing judge, which was within the range of an appropriate sentencing discretion, given the objective seriousness of the offending against a very young complainant and the need for community protection and deterrence for offences of this nature.

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42 [2010] QCA 211.
43 [2003] QCA 88.
44 [2020] QCA 58.
45 [2008] QCA 185.

[52] I would accordingly refuse the application for leave to appeal against sentence.

Orders

[53] The orders I would make are:

1. The appeal against conviction is dismissed.
2. The application for leave to appeal against sentence is refused.

[54] **BUSS AJA:** I agree with Philippides JA.