SUPREME COURT OF QUEENSLAND

CITATION:	*R v G; ex parte A-G (Qld)* [2003] QCA 470
PARTIES:	**R** **v** **G** (appellant/respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 76 of 2003 CA No 91 of 2003 DC No 383 of 2002 DC No 258 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	31 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	17 October 2003
JUDGES:	Davies and Williams JJA and Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In CA No 76 of 2003** **(i) Appeal against conviction dismissed** **(ii) Application for leave to appeal against sentence refused** **In CA No 91 of 2003** **(i) Appeal allowed** **(ii) Add to the sentence of nine years imprisonment for count 3, sexual assault with a circumstance of aggravation, a declaration that the conviction was for a serious violent offence** **(iii) Otherwise all sentences to stand**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – PRESENTATION OF DEFENCE CASE AND CROWN CASE AND REVIEW OF EVIDENCE – PRESENTATION OF DEFENCE CASE – where appellant convicted of a

number of sexual and assault offences – where complainant was his de-facto partner – where appellant and complainant gave different accounts of circumstances of offences – where credibility was critical issue at trial – where appellant's evidence described by learned trial judge as "highly imaginary" in summing-up – whether summing-up was not balanced

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where appellant said that he believed at the time of offences that complainant had been injecting their son with drugs – where learned trial judge excluded video evidence from child – whether appellant was prejudiced by the exclusion of the video

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENCE – where appellant sentenced to nine years imprisonment – where learned sentencing judge took personal circumstances of appellant into account when considering whether to make a serious violent offence declaration – whether serious violent offence declaration should have been made

Penalties and Sentences Act 1992 (Qld), Pt 9A

R v Eastwell [1992] QCA 109; CA No 31 of 1992, 29 April 1992, cited
R v Pettigrew [2001] QCA 468; CA No 145 of 2001, 30 October 2001, cited
R v Sambo [2000] QCA 191; CA No 422 of 1999, 24 May 2000, cited
R v S [1997] QCA 287; CA No 186 of 1997, 25 July 1997, distinguished

COUNSEL: M J Byrne QC for the appellant in CA No 76 of 2003 and the respondent in CA No 91 of 2003
M J Copley for the respondent in CA No 76 of 2003 and the appellant in CA No 91 of 2003

SOLICITORS: Legal Aid Queensland for the appellant in CA No 76 of 2003 and the respondent in CA No 91 of 2003
Director of Public Prosecutions (Queensland) for the respondent in CA No 76 of 2003 and the appellant in CA No 91 of 2003

[1] **DAVIES JA:** I agree with the reasons for judgment of Williams JA and with the orders he proposes.

[2] **WILLIAMS JA:** After a lengthy trial in the District Court, Southport, the appellant was convicted of a number of offences and sentences were imposed; the following are particulars thereof:
Count 1 – Assault occasioning bodily harm – 12 months imprisonment
Count 2 – Deprivation of liberty – 2 years imprisonment
Count 3 – Sexual assault with circumstance of aggravation – 9 years imprisonment
Count 4 – Sexual assault with circumstance of aggravation – 6 years imprisonment
Count 5 – Sexual assault – 6 years imprisonment
Count 6 – Attempted rape – 8 years imprisonment

A declaration was made that the appellant had served 877 days in pre-sentence custody which was to be taken as time already served under the sentences.

[3] The jury acquitted the appellant on count 7 – rape; that verdict was clearly justified and it was not submitted that it was in any way inconsistent with the other verdicts of guilty.

[4] The appellant appeals against the convictions on a number of grounds, and also seeks leave to appeal against the sentences on the basis they are manifestly excessive. The Attorney-General has appealed against the sentences contending they do not adequately reflect the gravity of the offences and that a head sentence of 11 years should have been imposed.

[5] On the hearing of the appeal the appellant was granted leave to add grounds 4 and 5 to those contained in the filed Notice of Appeal. Those additional grounds were in the following terms:

> "4. The learned trial judge failed to adequately deal with fact finding, the defence case and the main arguments of defence counsel.
>
> 5. The learned trial Judge's directions on corroboration failed to inform the jury that there was an alternate cause for the injuries relevant to Count 3".

[6] In oral submissions senior counsel for the appellant said that grounds 1, 4 and 5 could be summarised as being "a complaint that the summing up by the trial Judge was unbalanced against the appellant." He then referred to five particular matters which in his submission established that complaint:

> (1) Comments by the learned trial judge in relation to the evidence given by the appellant;
> (2) Failure to refer in the summing-up to an alternative account for the injuries to the anal area of the complainant;
> (3) Comments with respect to the evidence of the appellant's mother;
> (4) Comments in relation to counsel's addresses;
> (5) No mention by learned trial judge in the summing-up of defence witnesses other than the appellant and his mother.

[7] The appellant and the complainant resided at all material times under the same roof. They had been in a de-facto relationship, but it had broken down and there had been no sexual activity between them for over a year prior to 10 October 2000 when the

offences in question occurred. Both were regular users of illicit drugs, particularly amphetamines. A son of the relationship, aged just under 5 in October 2000, resided with them.

[8] According to the prosecution case the events giving rise to the charges commenced at about 10.30 pm when the appellant retrieved a tape-recorder which he had secreted under the bed in the complainant's bedroom. After listening to its contents he abused the complainant, threw her onto the bed, and punched her in the mouth splitting her lip open. That assault was count 1 on the indictment. It was the appellant's contention that noises on the tape-recorder indicated that a man or men had been in the bed with the complainant that evening.

[9] It is sufficient for present purposes to say that after further verbal arguing the complainant on her evidence fled the house intending to use a public telephone as the appellant had broken the telephone in the house.

[10] The prosecution case was that the appellant followed the complainant in his vehicle and unsuccessfully demanded that she get into it; thereafter the appellant dragged the complainant into the vehicle and drove off. Over a number of hours the allegation was that the appellant prevented the complainant from escaping from the vehicle. That allegation constituted count 2 on the indictment, deprivation of liberty.

[11] The prosecution case was that the appellant stopped the vehicle beside a field of sugar cane, an isolated spot. The complainant tried to run off but was pursued and held. The appellant demanded sex but was refused. On the complainant's evidence she was verbally abused and assaulted by the appellant. Thereafter the appellant put his hand down her tracksuit pants and inserted some of his fingers into her anus; her evidence was that it hurt "like hell". That conduct constituted count 3 on the indictment. The complainant kicked the appellant in the chest to make him desist but he then ripped her underwear off.

[12] According to the complainant's evidence the appellant then tried to force his penis into her mouth – that was count 4. The complainant kept her mouth shut but the appellant's penis touched her lips and teeth.

[13] On the complainant's evidence there were further assaults including the appellant placing his hands around her neck until she almost lost consciousness. She made another attempt to escape but was tackled and put back in the vehicle. The vehicle was then driven to a more isolated spot off the road. There the appellant hit the complainant and forced her into the back seat of the vehicle. After further assaults the appellant told the complainant to remove her pants, which she did. He then again unsuccessfully tried to put his penis into her mouth, and then sat on her face with his backside right on her nose. That was count 5 on the indictment.

[14] The evidence from the complainant was that thereafter she could not recall the precise order of events which took place over a period of some time. Incidents included the appellant attempting to put his penis in her vagina, an attempt to rape her by sodomising her (count 6) and an attempt to put his penis in her mouth. Throughout the whole time the complainant, on her evidence, was vigorously resisting. The jury acquitted the appellant of count 7, rape, which was particularised as the appellant having sexual intercourse with the complainant during that period.

[15] The complainant was medically examined shortly after the events and a number of injuries were noted. There was extensive bruising to the bridge of the nose, right lip, left of the chin, around the neck, multiple bruising to the front and back of the chest, bruising to the inner thighs, a laceration to the forehead, tenderness of the vagina, and pain and severe muscle spasm in the region of the anus. The complainant was admitted to hospital overnight primarily to manage the pain in her rectum. The evidence was that the injuries were consistent with a sustained and frenzied attack over a period of some hours. There was other evidence detailing the complainant's distressed condition shortly after the events in question.

[16] Forensic testing did not detect seminal fluid on swabs taken from the complainant's vagina. The complainant's blood was found on clothing she wore that night. Blood from both the complainant and appellant was detected in blood stains located in the rear of the appellant's vehicle and on clothing taken from the vehicle.

[17] Reference should also be made to another piece of evidence which the prosecution relied on as supporting the complainant's evidence. In the summing-up the learned trial judge indicated that this evidence could corroborate the complainant's account.

[18] The complainant's evidence was that at the first spot where the vehicle stopped and incidents as described occurred, the appellant ripped off her panties. She said that she did not know what happened to them thereafter. It was after that incident that the vehicle drove to the second location.

[19] After complaint was made to the police detectives took a statement from the complainant, searched the appellant's vehicle, and then drove along the route the complainant said had been followed when the offences occurred. As the detectives drove along the road pointed out to them they noted, sitting 20-30 cm off the road, a pair of panties which they seized. Those panties were identified by the complainant as those she had been wearing that night, but more importantly, independent forensic testing determined they were in fact hers; the DNA profile obtained from a stain in the fork of the panties matched the DNA profile of the complainant. The evidence was that the panties had been torn rather than cut. All of that evidence was given greater significance because the appellant's evidence was that the complainant had not been wearing panties on the night in question and that he had no idea how they got where they were found.

[20] Defence counsel cross-examined witnesses establishing that there were no marks on the complainant's thighs consistent with her panties having been torn off. The witnesses all indicated that the panties were rather flimsy and would have torn easily. It appears from a reference made by the learned trial judge in his summing-up that defence counsel in his address suggested that someone may have found the panties, ripped them and left them where they were found by the police.

[21] The appellant gave evidence and called a number of witnesses. The evidence led for the defence contained a great deal of hearsay and much of it related to issues collateral to the charges on the indictment. Some of that evidence was led over objection, but other evidence appears to have been given without objection. It is sufficient for present purposes to say that much of that evidence was said to be relevant to the appellant's state of mind at the time in question. It was said that he believed the complainant was having a sexual affair with one or more men, one being the person who supplied amphetamines to the appellant and complainant.

The other belief said to be relevant was that the complainant had injected their young son with amphetamine some weeks prior to the incidents in question.

[22] The appellant's evidence as to the first event on the night the critical incidents occurred is of some importance for a number of reasons which will become clearer later. The appellant's evidence was that he placed the tape-recorder under the complainant's bed and retired to his room. Later that night he returned to the complainant's bedroom. His evidence-in-chief is as follows:

> "… It must have been sometime after midnight that I woke up, and I heard these sounds coming from R's room. … I got out of bed. I walked through my doorway, across the hallway into the bathroom and I quietly opened the sliding door and I stepped in and the first thing I did was I stepped in and reached for the tape under the bed … I saw, in the silhouette, from the street light coming through the front window, because the doona was tied back, I saw R not right at the head of the bed, she was sort of two-thirds of the way up. She was on all fours, and at the same time as I reached for the tape and I'd looked and I'd seen it and I just sort of went, "Wo, what the fuck's going on?" … As I looked – I saw R – standing up in front of her – he come from a seated position to standing up, and he stood up in front of her. She was on all fours. … She was giving this guy oral sex. There was no doubt in my mind that it was D. … The stature of the man. It was D. He was tall. His head was hunched like that and he sort of looked. It was his stature. It was D. There was no doubt in my mind whatsoever. … There was a chap standing behind her whose frame I didn't know. I mean, I've had a lot to do with D, so I recognised what he looked like, but the other guy I didn't recognise, but he was standing behind her and he had his arm extended in a downward fashion like that, and in silhouette of the light all I could see was from there, back, of his arm – from the wrist back. I couldn't see his hand and his hand appeared to be penetrating her anus. … I jumped up. I said - … "What the fuck's going on?", and she said, "What the fuck are you doing in here, get out." … [She] leapt on me. Just pounced like a tiger. … I ended up on me back in the bathroom, back through the two-way door on my back in the bathroom, with R on top of me, going for it. … I was trying to get R off me because I wanted to get to this pair, and I heard the rush of these chappies fly out the back, out through R's door, and I heard the rear sliding door close, actually. It slammed, it banged".

[23] According to the appellant's evidence a short while thereafter he threw the complainant's clothes out in to the front yard and told her that she could get out. He then left the house. He returned after a period of time and threw more of the complainant's clothes out. According to him R left the house on foot and subsequently he left in the car. He then saw R walking along the road, stopped and some mutual abuse was exchanged. According to the appellant there followed periods when the complainant walked away, the appellant drove up to where she was and said he wanted to talk about their son. At one point the appellant got out of the car and walked with the complainant. Mutual abuse continued. Ultimately according to the appellant he said to her to "hop in the car and we'll go and have a discussion about J". According to his evidence she hopped in the car of her own free will.

[24] According to the appellant's evidence after driving for some distance the complainant opened the door and tried to jump out of the car when it was travelling at 80 or 90 km per hour. At that point the appellant grabbed her by the back of the trackpants and slammed on the brakes. According to the appellant the complainant slammed into the dash and appeared to be unconscious. He then decided to drive to the Ambulance station. On the way the complainant asked him to stop the car as she was going to be sick. She got out of the car, walked a few yards but then just collapsed flat on her face. The appellant then claimed he carried her back into the car. He drove off and the complainant "recovered very quickly". She grabbed the steering wheel and "started screaming and screaming obscenities at me." She grabbed the steering wheel and directed the car to the edge of a nearby weir; that caused the appellant to backhand her and slam on the brakes. Thereafter he drove to another location where they had been on previous occasions. There according to the appellant the parties got into the back seat; his evidence went on: "As I hopped in I shut the door behind me and I looked up and R hit me with three of the best punches, whack whack whack right in the head … It was a battle royal then." According to the appellant the complainant was scratching and biting him.

[25] Then came the following evidence from the appellant:

> "During the fight R actually reached straight up the inside of me shorts that I had on, shorts that were pretty loose fit, and she reached her hand straight up inside of my right – it was the right leg and grabbed me by the testicles. … I thought I was in trouble. … I thought she was going to try and rip them off, to be honest with you. … First I backed off pretty quickly, but she didn't do that and she actually started to fondle them and that was confusing enough in itself because we were having a mad argument and fighting like a pair of maniacs, which I suppose most normal people would think we were at the time, and all of a sudden R's grabbed me by the testicles which was a frightening experience. … R kept caressing them and she just became placid. … She just became – she became placid and all I just – I just sat back and let it happen. … I didn't know how to respond. I mean, I responded as in a positive way, I suppose you could say. … It was something that hadn't happened for some time, and I started to get the beginnings of an erection but I didn't actually get a complete erection. … What happened then was I had reached down. I reached forward and cautiously, cautiously touched R on the thighs. … I give her a rub through her trackpants. … And then she reached with her other hand. She was fiddling with the top of me shorts to undo them and I actually undid them for her, and then I took my shorts – as I removed my shorts, R pulled her track pants down. … I think she took one of her shoes off because she couldn't get her track pants over her shoes. … she let go of my testicles while she took the pants off and then she lent forward and proceeded to give me oral sex. … And she asked me to return the favour. … I had my hand on her vagina. I was playing. I was touching it. … I didn't have my heart in it. She asked me to return the favour so – she asked me to return the favour so I placed my head between R's legs and I proceeded to give her oral sex for a minute, I suppose. It didn't really do much for me. … Well, … R had sat back and lent

> back against the car and she had her hands on the back of me head patting the back of me head, so it must have done something."

[26] Then, according to the appellant, the complainant grabbed a crowbar which was in the vehicle; "She let fly with a crowbar. She landed me with the crowbar. … The crowbar hit me on the shoulder first, bashed me up and smashed me up the side of the head. … She went to let fly with the crowbar again and I reached out and blocked her like that. I actually hit her in the throat like that and grabbed the bar, and I looked at her. I had the crowbar in me hand and I just looked at her and I thought no, I couldn't do that and just threw it. … Into the front of the car."

[27] Thereafter according to the appellant's evidence there was further abuse and argument; the complainant then began coughing and spluttering into a face washer saying she couldn't breathe. He checked her pulse and gave her CPR. He then drove her to the Ambulance station.

[28] One can readily understand from reading the forgoing summaries of the evidence of the complainant and the appellant that the creditability of each of those witnesses was the critical issue at the trial. Clearly the jury had to accept the complainant's evidence almost in its entirety before they could convict. Further, they had to be satisfied that such evidence established the commission of the offences beyond reasonable doubt. That stage could only be reached if the appellant's evidence was rejected to the extent that it did not even create in the minds of the jury a reasonable doubt about the correctness of the complainant's evidence.

[29] Against that background the learned trial judge had to deal with the issue of credibility and the competing evidence of the complainant and the appellant in the summing up. The first passage made the subject of complaint by counsel for the appellant on the hearing of the appeal was the following:

> "So, your assessment of the accused's account is a matter of some importance. Did he strike you as a credible person? Are you satisfied that what he swore to was possibly truthful? As I said, he doesn't have an onus of proof, but all he needs to do is satisfy – well, all he needs to do is to – is for you to form the impression that what he said was possibly truthful. Because if it is possibly truthful, then the Crown case cannot succeed. Or did you gain an impression that he had scant regard for the truth, telling a highly imaginary tale in many respects and in interspersing his lies with matters of truth to give his story a semblance of credibility."

[30] Particularly given the extracts from the appellant's evidence quoted above I can see nothing wrong with those directions. It was submitted that using expressions such as "a highly imaginary tale" after the jury had been told that the accused's account was a matter "of some importance", meant that the summing up was not balanced. Particularly when that passage in the summing up is read in the context of the summing up as a whole it does not demonstrate that the summing up was not balanced. If the overall "balance" be in favour of the prosecution case, that is largely the consequence of the highly improbable evidence given by the appellant.

[31] Next it was submitted that the summing up was unbalanced (and this also incorporates ground 5) because the learned trial judge failed to draw attention to what was said to be an alternative account of how the injuries to the complainant's

anal area could have been sustained. The learned trial judge instructed the jury that the injuries sustained by the complainant, particularly the muscle spasm to the anal area, was capable of corroborating the complainant's evidence. In specifically dealing with that the learned trial judge did refer to the fact that on all versions of what happened on the night in question there was "a long term battle royal" between the complainant and the appellant. The jury were in effect told that they had to be satisfied that the injuries in question were not caused in the course of that "battle" before they could treat the injuries to the anal area as being potentially corroborative.

[32] It is true that at that point the learned trial judge did not specifically direct the jury's attention to the appellant's evidence of seeing the complainant in bed with two men earlier that evening, and in particular his evidence that the hand of one of those men "appeared to be penetrating her anus". However, later on in the summing up when dealing with matters advanced by defence counsel, the learned trial judge did say: "Well, you will recall it is the accused's allegation that the injury observed by Dr O in the form of spasm and tenderness, and undoubtedly the complaint of pain in the anus of the complainant, is the result of what he claims to have observed in the bedroom; the second person with his fist in the anus of the complainant." The jury were also told on a number of occasions that all the evidence was important, not only the evidence to which specific reference was made in the summing up. Very experienced defence counsel at the trial did not request that the passage in question from the appellant's evidence be specifically read to the jury as a possible alternative explanation for the muscle spasm in the region of the complainant's anus.

[33] The next passage objected to was that wherein the learned trial judge dealt briefly with evidence given by the appellant's mother. He said:

> "You will recall counsel's arguments concerning Mrs G, the accused's mother. That's a matter for you how reliable you found her evidence. And how much it is tainted by her love for her son or by discussions with him."

[34] The mother's evidence was of peripheral relevance. Of course, she could not give any evidence of what transpired after the complainant and the appellant left the house on the evening in question. That passage does not evidence any imbalance.

[35] The submission was also made that the summing up lacked balance because the learned trial judge failed to give any direction with respect to any of the defence witnesses apart from the appellant and that brief reference to the evidence of his mother. I have grave difficulty in seeing that the other evidence called as part of the defence case was admissible, let alone of relevance to the critical issues for the jury's determination. But the learned trial judge did say:

> "I haven't consented (sic) or discussed all the evidence that you have heard. Obviously, that can't be done. That does not mean that what I have omitted, is not important. All evidence is important if you find it so. And it is your view of the evidence that is paramount."

[36] There was adequate reference in the summing up to the defence evidence.

[37] The final objection to the summing up related to the following passage:

> "Now, I don't propose to canvass the arguments of counsel. They were lengthy and diffuse and are fresh in your minds. If I start dealing with any of those arguments you may tend to focus on the ones I deal with and not others, and, frankly, I can't recall anything of those arguments in their entirety. But I should tell you that the arguments are not evidence. Those submissions put to you are simply arguments that you may accept or reject as you see fit."

[38] That is not the best way of directing a jury with respect to the relevance of counsel's addresses but in the circumstances of this case it does not amount to a misdirection. One can gauge from the earlier reference to counsel's explanation in addresses as to how the panties came to be on the roadside that it would have been virtually an impossible task for the trial judge to recount all defence arguments to the jury in the course of the summing up. In fact in the course of summing up there was frequent reference to matters raised by defence counsel in the course of the trial.

[39] The appellant was represented by very experienced defence counsel at trial and, as is evident from cross-examination of prosecution witnesses, no stone was left unturned in an endeavour to destroy the prosecution case. One can readily infer from what was said in the summing up that defence counsel explored all possible matters of assistance to the appellant. In the circumstances what was said with respect to counsel addresses in the summing up did not constitute a misdirection.

[40] It is already mentioned the defence case was that the appellant's conduct on the night in question had to be viewed in the light of his belief that the complainant had injected (or allowed a third person to inject) their son J with amphetamine. That matter was raised by the appellant with investigating police officers, and a police officer interviewed J on video in the presence of a child welfare officer. At trial the defence sought to lead evidence from J, either by his giving oral evidence before the jury or through the admission of the video interview pursuant to s 93A of the *Evidence Act* 1977. When that issue was raised in the course of the trial the learned trial judge ruled that the issue was collateral. He then went on to say that to avoid possible injustice he would allow evidence from the doctors that the injury to the child's foot was consistent with being a needlestick injury. He then also indicated that on the same basis he would admit the boy's evidence if he was satisfied it was admissible to pursuant to s 93A. Having viewed and listened to the video tape the learned judge recorded that he had "doubts as to his understanding of many of the questions put to him"; he referred to the boy giving "inconsistent answers towards the end of interview on the central question on whether he had needles put into his arm or foot." That led the learned trial judge to conclude: "I am not satisfied, pursuant to s 98 of the *Evidence Act*, that the child . . . has the ability to give reliable evidence". He therefore excluded the evidence from the child.

[41] That ruling is challenged on appeal. In support of that submission reliance was placed on statements found in *R v Pettigrew* [2001] QCA 468.

[42] As already noted evidence was given by the appellant as to what the boy allegedly said to him, as to what the appellant saw of injury, and medical evidence was led that the injury was consistent with a needlestick injury. Even without the direct evidence from the boy there was a considerable body of evidence before the jury to the effect that the appellant believed at material times that the complainant had been involved in injecting the boy with amphetamine.

[43] In the course of the summing up the learned trial judge dealt fairly extensively with this matter. He said that the boy's statement "reaches you through the perceptions, interpretations and recollections of his father or Constable Rd, not through the recollections necessarily of J." He pointed out that when making the statements in question the boy was not under oath to speak the truth. He then in essence told the jury that because of the boy's age he could not be examined to ascertain the truth or reliability of what he has said then comes this passage:

> "That evidence is lead (sic) by the defence to explain the state of mind of G at relevant dates and, to some extent, it may go to the credit of R in that she has denied being present at any stage when J was injected.
>
> We simply are not in possession of sufficient material on that topic to enable any firm conclusion to be drawn as to whether or not the child was injured in that way. However, there can be no doubt if you accept the accused's account as possibly true that he believed that needles had been stuck into his son. And there can be no doubt that G believed that someone was in R's bedroom, if you accept his account. Whether such belief was the result of paranoia or delusion, resulting from drug use, is a matter that, no doubt, you will consider. However, those beliefs, you might think, might have an affect (sic) upon a person's behaviour to a significant extent."

[44] I have already said that in my view the issue whether or not the boy had been injected was collateral to the issues raised by the indictment. I have grave doubts as to whether any proper basis was established for the admissibility of evidence as to the appellant's belief in that regard. However, the jury was appraised of a body of evidence as to the appellant's belief and there is no doubt they would have had regard to that in considering their verdict. Seeing the video of the interview with the boy would not have added any weight to the relevance of the issue.

[45] In my view the learned trial judge rejected the video evidence on a proper basis, and the appellant was in no way prejudiced by that ruling.

[46] The appellant's outline also raised some additional matters which, though not the subject of oral submission, were not abandoned. It was said that the defence was disadvantaged because of the failure to subject a towelette, which was in the complainant's possession on the night in question, to scientific testing. The learned trial judge in his summing up was critical of the scientist for not carrying out such a test. He said that it revealed "serious shortcomings in the way in which he approached his task". The learned trial judge told the jury that the towelette, on a defence case, may have been expected to contain traces of DNA material from the complainant and on the accused's account, from a number of other persons. The defence point was that the towelette may have confirmed that the complainant had sex with a man earlier on the night as deposed to by the appellant. Leaving aside the question whether or not that was essentially a collateral issue, it cannot be said that the appellant was denied a fair trial because of the failure to carry out that testing.

[47] A similar complaint was made to the effect that the police did not take fingernail clippings from the appellant which could then have been subjected to scientific

testing. The point taken in the outline is that such testing may have shown no traces of faeces or other biological material consistent with those fingers having been put into the complainant's anus. The absence of such material would not have affected the case one way or the other. The presence of such material would have implicated the appellant. In other words a positive finding could only have had adverse consequences for the appellant. There is nothing in this ground.

[48] I can see nothing in the record which establishes that the appellant did not have a fair trial or that the verdicts were unsafe and unsatisfactorily. The appeal against conviction must fail.

[49] I turn now to consider the question of sentence.

[50] The learned trial judge in his sentencing remarks referred to the fact that the attack involved "almost continual violence" and extended over "a period of at least four hours". He made the observation that the "offences were prompted not by sexual arousal or desire but by contempt for her and a desire to punish." He then noted, correctly, that the offences were aggravated because they were committed whilst the appellant was "subject to a Domestic Violence Order made in favour of the complainant". He then noted that the complainant was "severely injured" and that she was "damaged physically and psychologically as a direct result of your offences."

[51] There was then reference to the appellant's extensive criminal history; it contains convictions for a total of 44 indictable offences and 47 simple offences. Most were for offences of dishonesty.

[52] After referring to the appellant's drug addiction the learned trial judge noted that during his time in custody awaiting trial (877 days – this was a re-trial after a jury disagreement) the appellant had conquered his drug addiction leading the learned trial judge to think that the prospects of rehabilitation were not hopeless. He went on: "For that reason I have concluded finally that it is not appropriate to declare that you are a serious violent offender. That declaration would seriously harm your rehabilitation prospects." It is significant to note that the learned trial judge used the term "offender" rather than "offence" the term used in Part 9A of the *Penalties and Sentences Act* 1992.

[53] The learned sentencing judge then referred to other matters which in his view were favourable to the appellant. He referred to the fact that the appellant would have "lost the company of your son to whom you are devoted, and will be deprived of his companionship for a long time", to the appellant's efforts towards rehabilitation, and to the fact that he delivered the complainant to an Ambulance station after the events so that she could receive some attention.

[54] Taking those matters into account the learned sentencing judge imposed specific sentences for the offences. On count 3 (the sexual assault with the circumstance of aggravation being the insertion of fingers into the anus) he imposed a penalty of 10 years. Subsequently counsel for the prosecution referred the sentencing judge to the fact that such a sentence automatically carried the consequence of a serious violent offence declaration and the judge had earlier said he would not make such a declaration. That led the sentencing judge to say: " Well, I have declared from my reasons and that is contrary to those reasons. I will amend that to nine years' imprisonment."

[55] It is the contention of counsel for the Attorney-General on the appeal against sentence that the appropriate range for the head sentence was 10 to 12 years, a sentence which would automatically carry a declaration. Counsel relied on authorities such as *Eastwell* CA No 31 of 1992, *S* CA No 186 of 1997 and *Sambo* [2000] QCA 191 in support of that range. The sentence in *S* was 10 years where there was rape and sodomy of an estranged girlfriend with ill-treatment lasting over a five to seven hour period. But there a weapon was involved. In *Sambo* a sentence of nine years with a declaration was imposed for the rape of the accused's wife.

[56] The submission on behalf of the appellant is that a nine year sentence, even without a declaration, was manifestly excessive. Reliance was placed in particular on the fact that there was no rape. Counsel also submitted that the drug addiction of the respondent was a centrally relevant feature which explained much of what happened.

[57] It is unfortunate that the learned sentencing judge made the error which he did. There was in all circumstances a miscarriage of the sentencing discretion which must result in the sentence imposed with respect to count 3 being set aside. It was highly improper to amend the sentence initially imposed on the basis it was inappropriate because it carried with it an automatic declaration. It falls for this court to re-sentence the appellant.

[58] Given the authorities to which reference has been made I am of the view that the range in all the circumstances would be nine to ten years. There was serious violence involved over a lengthy period of time, but no rape. Given the fact that the offences were committed in breach of a Domestic Violence Order I am satisfied that, notwithstanding the background of drug addiction, the appropriate sentence for count 3 was nine years imprisonment with a declaration that it was for a serious violent offence. That is the sentence which should be substituted for that imposed at first instance.

[59] The orders of the court should be:

Appeal No 76 of 2003
(i) Appeal against conviction dismissed;

(ii) Application for leave to appeal against sentence refused.

Appeal No 91 of 2003

(i) Appeal allowed;

(ii) Add to the sentence of nine years imprisonment for count 3, sexual assault with a circumstance of aggravation, a declaration that the conviction was for a serious violent offence;

(iii) Otherwise all sentences to stand.

[60] **WILSON J:** I agree with the reasons for judgment of Williams JA and with the orders he proposes.