SUPREME COURT OF QUEENSLAND

CITATION:	*R v BAV* [2005] QCA 309
PARTIES:	**R** **v** **BAV** (appellant/applicant)
FILE NO/S:	CA No 44 of 2005 DC No 4 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court
DELIVERED ON:	26 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	16 August 2005
JUDGES:	McMurdo P, Keane JA and Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE OR INSUPPORTABLE VERDICT - WHERE APPEAL DISMISSED - where appellant was convicted after trial by jury of three counts of indecent treatment of a child under 16, one count of assault occasioning bodily harm and one count of rape - where appellant appealed against the rape conviction on the basis that the evidence of penetration was equivocal - where the complainant, who was a child at the time of the alleged rape, gave evidence that the appellant had lain on top of her, moved up and down and that she had felt sharp pain inside - where the complainant expressed some doubt as to whether penetration occurred - whether the trial judge gave appropriate directions to the jury as to how to deal with the evidence of penetration - whether it was open to the jury, having regard to the whole of the evidence, to conclude that penetration did occur CRIMINAL LAW - APPEAL AND NEW TRIAL AND

INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - WHERE GROUNDS FOR INTERFERENCE WITH VERDICT - PARTICULAR CASES - WHERE APPEAL DISMISSED - where there was evidence that the complainant who had alleged that she had been raped by the appellant was "high" at the time she made her first complaint about the rape taking place - where there was evidence that the complainant had a history of substance abuse - whether the trial judge should have given a direction of the type described in *Bromley v The Queen* (1986) 161 CLR 315

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - WHERE GROUNDS FOR INTERFERENCE WITH VERDICT - PARTICULAR CASES - WHERE APPEAL DISMISSED - where the appellant submitted that the trial judge had not drawn a sufficient distinction between evidence which corroborated the account of the complainant in relation to the charges of indecent dealing and the account of the complaint in relation to the charge of rape when directing the jury - whether adequate directions were given as to the weight the jury might place on the evidence that corroborated the complainant's account

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - APPLICATIONS TO REDUCE SENTENCE - WHEN REFUSED - PARTICULAR OFFENCES - SEXUAL OFFENCES - where the appellant was sentenced to ten years imprisonment for the offence of rape - where the appellant had a lengthy criminal history that included convictions for offences involving violence - where there was evidence that the appellant had a problem with alcohol - where the victims of the appellant's sexual offences were his own children - whether the sentence imposed on the appellant was manifestly excessive

Bromley v The Queen (1986) 161 CLR 315, distinguished
Chidiac v The Queen (1991) 171 CLR 432, cited
MFA v The Queen [2002] HCA 53; (2002) 213 CLR 606, cited
R v Basic [2000] QCA 155; (2000) 115 A Crim R 456, cited
R v D [2003] QCA 88; CA No 444 of 2002, 4 March 2003, cited
R v Isaacs; ex parte A-G (Qld), unreported, Court of Criminal Appeal, Qld, CA No 292 and CA No 294 of 1989, 15

December 1989, cited
R v Massey [1997] 1 Qd R 404, cited

COUNSEL: P Richards for the appellant/applicant
M J Copley for the respondent

SOLICITORS: No appearance for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with Keane JA's reasons for dismissing the appeal against conviction and refusing the application for leave to appeal against sentence. I wish, however, to make some additional observations about the sentence.

[2] The effective sentence imposed on the applicant for the offences of rape, indecent treatment and assault occasioning bodily harm of his nine and 10 year old daughters was 10 years imprisonment. This results in the offence of rape, for which the 10 year term of imprisonment was imposed, becoming a serious violent offence under Pt 9A *Penalties and Sentences Act* 1992 (Qld) so that the applicant will have to serve eight years imprisonment before becoming eligible for post-prison community based release. The offences were committed in an Indigenous community.

[3] The applicant's counsel, Mr Paul Richards, contends the sentence is manifestly excessive, emphasizing the applicant's alcohol abuse and the notoriety of the social problems in Indigenous communities which are a contributing cause to the abuse of alcohol. The learned primary judge accepted that the applicant's drunken state was an underlying cause of his reprehensible conduct. The applicant's alcohol problem was clearly established on his own evidence at trial. In cross-examination he agreed that at the time of the offences he was an alcoholic who would get drunk four or five times a week and sometimes lost his memory. Whilst his alcohol abuse helps explain how a father might come to so abuse his young daughters, it does not excuse his conduct; nor does it lessen the impact of it on the victims; and nor was there evidence to suggest he had overcome his alcohol addiction so that the prospect of reoffending was lessened. In these circumstances the applicant's alcohol abuse was not a mitigating factor.

[4] The sentence is not manifestly excessive for the following reasons. First, the applicant was a mature man with previous convictions for violence. He used considerable violence on his daughter A, in committing these offences. When she resisted his abuse he threatened to hurt her, her sisters and her mother. In cross-examination he agreed he hit and may have bitten her on the night of the offences. Second, as a father, perpetrating these offences on his young daughters, he grossly breached his parental trust. That breach was particularly serious here: he learned that another person had sexually interfered with his daughters but instead of offering them parental support, comfort and advice, he committed these further serious offences upon them. Third, he showed no insight or remorse into his shameful conduct. He did not have the important mitigating benefit in cases such as this of co-operating with the administration of justice.

[5] The learned primary judge rightly commended the courage of the victims in pressing their complaints. Conduct such as the appellant's towards children and

young people is every bit as abhorrent to Indigenous communities as it is to the wider Queensland community. A salutary deterrent penalty was warranted. The sentence of 10 years imprisonment was entirely appropriate.

[6] **KEANE JA:** On 2 February 2005 the appellant was convicted on three counts of indecent treatment of a child under 16 years of age, one count of assault occasioning bodily harm and one count of rape. The offences were charged to have occurred on 27 November 1997. The complainants were female children, then under 12 years of age. They were the daughters of the appellant.

[7] The appellant was sentenced to 10 years imprisonment for the offence of rape, six years imprisonment on two of the indecent treatment offences and four years imprisonment for the third case of indecent treatment. He was sentenced for two years imprisonment in respect of the charge of assault occasioning bodily harm.

[8] The appeal against conviction relates only to the offence of rape. The appellant's grounds of appeal against his conviction were that:

> "(a) The verdict on the rape charge is unsafe as the evidence of penetration was equivocal.
>
> (b) The Learned Trial Judge erred in refusing the Defence Application to have the count of rape taken from the jury."

[9] In his written submissions in relation to the appeal the appellant, by his counsel, also agitated a number of complaints in relation to the learned trial judge's directions to the jury.

[10] The appellant also seeks leave to appeal against the sentence imposed by the learned trial judge on the ground that it was manifestly excessive in all of the circumstances.

The Crown case

[11] I shall refer to the complainants as P and A. P was the complainant on the first count of indecent treatment. She was born in 1988. She was nine at the time of the offence.

[12] A was the complainant on two counts of indecent treatment, the count of assault occasioning bodily harm, and the count of rape. She was born in 1987, and so was 10 years of age at the time of the offences.

[13] P gave evidence that the appellant lay beside her as she lay on a mattress in the lounge of his home and put his hand down the front of her pants. He put a finger or fingers inside her vagina and moved them in and out while saying to her: "Oh, did [N] do this to you?"

[14] The case in relation to the complainant A was that, on the same evening, the appellant forced her into his bedroom and locked the door. He then threw A onto his bed, lay on top of her and, as he did so, bit her on the cheek.

[15] The appellant then threw A across the room before telling her to rejoin him on the bed. Once she had done so, the appellant inserted a finger or fingers into her vagina and moved them about.

[16] The appellant then rubbed his penis against A as he moved up and down while he lay on top of her. Neither of them had any pants on at this time. The Crown case was that there was penetration of the vagina at this time by the appellant's penis.

[17] The appellant then rolled off of A, took her by the hair and put her head down, requiring her to take his penis in her mouth. When she did so, he moved her head about while his penis was in her mouth.

[18] The precise dating of the events the subject of the charge was possible because on the following day, A was taken to a doctor and then to a hospital because of the bite mark and bruise on her cheek. The doctor's evidence established the date of A's visit to the hospital.

The evidence

[19] P and A gave evidence, as did their sister, S.

[20] P gave evidence that on the previous evening, N, apparently their mother's then boyfriend, surreptitiously tried to interfere with her. The next morning P told A, and A told their mother. The appellant was also told. It seems that it was as a result of this that the appellant and N had a fight. They then began drinking together. The complainants were sent to the appellant's home to stay on the night in question.

[21] P said that, as she was lying on a mattress watching television with a blanket pulled over her, the accused lay down beside her and got under the blanket. He put his hand down her pants and pushed his finger in and out of her vagina and said: "Did [N] do this to you?". She cried and asked him to stop, but he would not.

[22] At this time A and S were sitting on a couch in the lounge room. A gave evidence of hearing P say words like "Stop. It hurts". She did not see anything, but she said that she heard the appellant say to P: "Is this what [N] tried to do to you?". She said that, after this incident had occurred, the appellant told them to go to bed.

[23] Both P and A said that, after they had been told to go to bed and while they were on their way to their bedroom, the appellant grabbed A and forced her into his bedroom and locked the door. A's evidence was that it was then that the matters the subject of her complaints occurred. I will return to consider this evidence in more detail when addressing the appellant's contention that the verdict on the rape charge was unreasonable.

[24] Eventually, the complainants' brother arrived. A ran out of the bedroom and got behind her brother. Later, a car came along and the complainants left their father's flat.

[25] The first complaint of rape made by A was to her cousin L in 2001. P and A complained to the police on 13 November 2003.

[26] The appellant gave evidence. He said he recalled an occasion when A arrived home unexpectedly. He was upset and hit her with the back of his hand and sent her to her room. He said that she went to her room and that he later slept beside her but did not interfere with her. He said that P and S did not sleep at his house that night. The next day he apologized to A for hitting her and sent her to her aunty's. According to the appellant the fight with N occurred a week later. The appellant could not recall a visit by A's brother on the night he hit her.

The evidence of rape

[27] In relation to the charge of rape, A's evidence was that after she was bitten, she was thrown against the wall and fell to the floor. She was told to get back onto the bed. When she initially refused, he said. "If you don't get on the bed, I'll kill you, your sisters". She got onto the bed and her pants were removed. The accused lay on top of her with his pants down. A could feel his penis on her. He lay on her and moved up and down. In her evidence-in-chief, she said:

> "… he laid me on my back and then he jumped on top of me and I think he had his shorts off because I could feel his penis rubbing against me.
> Sorry, feel his penis rubbing against you?-- Yeah.
> What was he doing with his body?-- Huh?
> What was his body doing?-- He was moving up and down on me and all I felt is, I felt this pain down where my vagina part and-----
> Can you tell us a bit more detail whereabouts that pain was?-- Inside.
> How would you describe the pain that you felt?-- It was really painful and - I can't say.
> How did that pain compare to when he had his finger in your vagina?-- Can you say that again?
> You said - how did the pain you have just been speaking about compare with when he had his finger in your vagina? Did it feel the same or different or how did it feel?-- It felt like a real sharp pain.
> How long did that pain go on for?-- Don't know. I was just - I was just crying and just wanted to get out of there and-----
> Well, just slow you down. After you felt this pain, what was he doing?-- He was moving up and down on me.
> Where was, say, his hips area in relation to your hips area?-- Can you repeat that again?
> When this was occurring or happening, where were your hips compared - or in relation to where his hips were?-- His whole body was covering, like, my face.
> Where was his head? -- It was over mine.
> Over yours?-- Yeah.
> And where were his feet?-- Just under mine or over mine.
> Sorry, did you say just under mine or just over mine?-- Yeah.
> All right. How long did that go on for?-- It seemed like for a long time.
> How did it come to an end? How did it stop?-- I don't know. He was - was on his back. I don't know how.
> Did you say the next thing you knew he was on his back?-- Yeah.
> Where was he on his back?-- He was on the bed and I was like - I was laying on his leg.
> Sorry, can you just say that again? I didn't-----?-- I was - like, when he was on his back, I was - my head was like where his leg, thighs.
> Right?-- And I felt his hand on my head and then he was rubbing my face against his penis."

[28] In cross-examination the following exchange occurred:

> " … Okay. Now, is this correct? Your father was on top of you going up and down, you felt a sharp pain, you didn't know then but

> you think your father put his penis inside you, you didn't know what sex was because you were only 10, so you were very scared and afraid but you think he was having sex with you?-- Yeah.
> Okay. So you're not hundred per cent sure, are you?-- No. That's it.
> Because when he was going up and down on you, could it be that the sharp pain that you felt was pressure against the area of your vagina from some part of his body?-- Might have been. Don't know.
> Might have been, okay. Just so that we know we're talking about the same thing, what I'm suggesting is that it could have been something pressing against your vagina rather than something actually going inside your vagina. Do you accept that's possible?-- No, 'cause I - like, I felt pain, sort of like inside.
> Yeah. You'd already had probably a finger put inside you before that hadn't you?-- Yeah.
> Okay, and that had caused some pain as well, hadn't it?-- Yeah.
> Did it cause any injury? You know, did you see some blood there later on?-- Yeah.
> Okay. So, before your father got on top of you, he'd already hurt you and caused you pain with a finger, hadn't he?-- Yes.
> So there was already a bit of pain?-- Yeah.
> And maybe some - some bleeding or tearing, is that possible?-- Yeah.
> Because what I'm wondering is if you were already a bit sore around your vagina, if his penis or any part of his body was pressing down on the area of your vagina, that might have caused you some pain even though there was nothing actually going into your vagina; what do you say about that? Do you say that's a reasonable possibility or do you say it's not possible?-- Might have been possible.
> Okay. Or perhaps is this possible, that he stuck a finger in again the second time?-- No.
> Sorry? Could you just answer?-- I don't - no. I don't know."

The appeal

[29] At trial, counsel for the appellant had submitted that the appellant had no case to answer in relation to the rape count on the footing that "the jury couldn't be more certain of penetration than the complainant is herself, and, at the end of the day, she was uncertain that there had been penetration".

[30] The learned trial judge rejected that submission on the grounds that it was a matter for the jury to determine whether they were satisfied beyond reasonable doubt that penetration occurred. It is contended that his Honour erred in that regard, but it is not necessary for the purposes of the appeal to determine whether the learned trial judge erred. The real issue is whether the verdict was unreasonable in that the jury could not have been satisfied beyond reasonable doubt that penile penetration had occurred.

[31] The test which this Court must apply in relation to that issue is whether, having regard to the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that there had been penetration of the complainant's vagina by the appellant's penis.[1] In my opinion, that conclusion was open to the jury.

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[1] See *MFA v The Queen* [2002] HCA 53 at [25], [59] - [61]; (2002) 213 CLR 606 at 614 - 615, 624.

[32] The substance of the appellant's contention is that, because of the concession made by the complainant in cross-examination that it was "possible" that "nothing was actually going into her vagina", the jury could not have rejected beyond reasonable doubt that hypothesis that the complainant's pain was due to external pressure on the vagina. In my opinion, the jury may reasonably have taken the view that the complainant's concession was made on the footing that, because of her age, she was entirely sexually inexperienced at the time these events took place. The jury may well have taken the view that the complainant's willingness to make the concession as to "possibility" was a demonstration of frankness on her part, because she could not categorically deny the existence of the possibility put to her, but that this was not inconsistent with the conclusion that no hypothesis, other than penile penetration, afforded an objectively satisfactory explanation of the facts which she was able to give evidence about.

[33] In this regard, the complainant's evidence was unequivocal on the point that the pain she felt was "inside". The complainant's evidence of the appellant's body moving up and down on top of her makes it objectively unlikely that he penetrated her again with a finger. She also expressly denied that possibility. An act of digital penetration was excluded by her evidence as a cause of her pain.

[34] Further, the evidence of the complainant A was that the appellant had already penetrated her digitally. Clearly, she was aware of the pain associated with penetration. She was sure that, on the occasion of the alleged rape, the pain was "inside" and was sharp pain. It was open to the jury to conclude that, objectively speaking, external pressure was not a rational explanation of the complainant's evidence of what she felt, having regard also to the evidence that the appellant had placed his body on top of hers and was moving up and down.

[35] The consideration that the jury had the advantage of seeing and hearing A give evidence, and performed its function within the atmosphere of the trial, imposes "restraints upon the exercise of the appellate court's power to pronounce that a verdict is unsafe".[2] More precisely, this consideration limits the ability of this Court to conclude in this case that it was not open to the jury to reach its verdict on the basis of the view that the complainant's evidence of the pain she actually experienced, and the circumstances in which she experienced it, were a reliable guide to what happened, and that this view was unaffected by the complainant's concession as to the limits of her subjective appreciation of what had occurred.

[36] The jury were clearly instructed that they had to be satisfied that penile penetration occurred before they could convict of rape. Importantly, a verdict of indecent dealing was left to the jury as an alternative to rape. The jury were not confronted by a decision between rape or nothing. There was no risk of the jury convicting on rape to ensure the appellant would not escape punishment. The jury was satisfied that what the appellant had done amounted to rape involving penile penetration. In my view, this Court cannot conclude that it was not open to the jury, on the whole of the evidence, to conclude beyond reasonable doubt that some degree of penile penetration occurred.

[37] The first of the appellant's complaints as to the learned trial judge's directions to the jury was that the learned trial judge should have given a direction that, on the

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[2] *Chidiac v The Queen* (1991) 171 CLR 432 at 443. See also *M v The Queen* (1994) 181 CLR 487 at 493, 502.

evidence referred to above, there was "at least the equal probability that there had not been penile penetration" and that the jury "could not be satisfied beyond reasonable doubt that there had been". For the reasons I have already given, I consider that his Honour would have been wrong to direct the jury in this way.

[38] Next, it is said that the learned trial judge erred "in failing to place due emphasis on the effect upon the complainant of the sniffing of paint, petrol and other substances". The appellant says that such a direction was necessary because of evidence that the complainant A was "high" when she made her complaint to her cousin L in 2001. It is said that it is "of considerable significance" that the complainant was said to be "high" when she made that complaint. It is not apparent to me that any significance, so far as the reliability of the complainant's evidence at trial is concerned, could be attached to the circumstance that the complainant was "high" at the time of making a complaint to her cousin L in 2001.

[39] At trial, the appellant's counsel had sought a "Bromley direction"[3] or "something of that species" in relation to the complainants because they had admitted that, subsequent to the commission of the offences but prior to their complaints, they had engaged in substance abuse which gave them memory problems. Such a direction would probably have involved some comment about the dangers of convicting on the uncorroborated evidence of the complainants. The learned trial judge reminded the jury of the complainants' substance abuse and asked the jury to bear it in mind when considering the evidence that had been given. No further direction was sought.

[40] In any event, there was no evidence that the complainant suffered from any mental illness or disability at the time of the alleged offences or at the time of trial or, for that matter, at any other time. That immediately distinguishes this case from a case like *Bromley v The Queen* where the critical evidence against the accused was the evidence of a schizophrenic.[4] The complaint to the complainant's cousin L was not the complaint which resulted in charges being laid against the appellant by the police. Insofar as the effects which substance abuse may have had on the reliability of the complainants as witnesses, the jury did not require instruction from the learned trial judge.

[41] The appellant also complains that the learned trial judge failed to draw a distinction for the jury between evidence which corroborated the account of complainant A in relation to the appellant's indecent dealing (such as the evidence of P and S) and evidence which might corroborate penile penetration. The direction of which the appellant complains involved a reminder to the jury that P and A both agreed that, before they complained to the police in November 2003, they had talked to each other about their recollection of what had occurred back in 1997. His Honour reminded the jury of "the defence counsel suggestion that the girls may have contaminated each other's recollection by their discussions. So what you may be hearing from them is not their accurate recollection but a contaminated version from the other girl." His Honour then went on:

> "I am asked to also remind you - not so much remind you but put the matter to you in these terms: that if you accept the evidence of [P] and [S] regarding [A] being in the father's bedroom, the accused

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3 From *Bromley v The Queen* (1986) 161 CLR 315.

4 (1986) 161 CLR 315 at 317 - 319.

> man's bedroom and the door locked and then hearing her crying and trying to get in, then that evidence supports or corroborates the evidence of [A] to a degree, as does the evidence of the mark on the face, if you accept it was a bite mark. Because ordinarily you would not expect a bite, as I said to you earlier, as a reaction to a child being out late, but is consistent with what a person may do when in some sort of sexual heat. They may bite the other person; and I'm asked to also put the matter to you this way: that [A']s evidence of what she recalls or what she said she recalled occurring when her father was lying behind [P] under - or at least with a sheet or blanket over [P's] hips, when she said she heard [P] say, 'Don't Dad.', and she also said in cross-examination she heard her father say something like, 'Is this what [N] did to you?' But if you accept that evidence of [A's], then that confirms or corroborates, to a degree, the evidence of [P] of what she says happened to her."

[42] The learned trial judge's direction that the evidence of P and S supported or corroborated the evidence of A "to a degree" was correct.[5] In any event, having regard to the evidence of A in relation to the acts of penetration, including A's concession which formed the basis for the appellant's principal ground of appeal, it is inconceivable that the appellant could have been adversely affected in his prospects of acquittal by the terms of this direction. The jury were well aware that neither P nor S gave any evidence of what transpired behind the closed door of the bedroom. It is significant in this regard that the appellant's counsel at trial did not seek any redirection.

[43] In my opinion, the appeal against conviction should be dismissed.

Sentence

[44] The appellant was born on 9 May 1964. He was 33 years of age at the date on which the offences occurred, and 40 years of age at the date of sentence.

[45] The appellant has a lengthy criminal history. He was convicted of unlawful wounding in 1994 and sentenced to six months imprisonment and three years probation. He had also previously been convicted on multiple occasions of offences involving assault, unlawful damage, breach of domestic violence orders and the obstruction of police officers.

[46] The learned sentencing judge was satisfied that these offences occurred because the appellant was intoxicated at the time. The learned sentencing judge was satisfied that the appellant has had, for some years, an alcohol problem.

[47] As a result of the offences committed by the appellant the complainants were not only physically and sexually abused but also had their trust, which they were entitled to have in their father, comprehensively violated. The trial judge, who watched the complainants give evidence, was satisfied that "they are still troubled by what occurred to them".

[48] The learned sentencing judge approached the matter of sentence on the footing that "clear disapproval needs to signified" of the appellant's conduct.

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5 *R v Massey* [1997] 1 Qd R 404 at 406 - 410; *R v M* [1995] 1 Qd R 213 at 219 - 222.

[49] Reference to the authorities gives no reason to think that the sentence of 10 years imprisonment was not within the boundaries of a sound exercise of discretion[6] especially when regard is had to the fact that the appellant was the father of the complainant child. There was no relevant mitigating factor such as a plea of guilty to be taken into account.

[50] In my view, it cannot be said that the sentences were manifestly excessive.

[51] I would dismiss the application for leave to appeal against sentence.

[52] **WILSON J:** For the reasons given by Keane JA the appeal against conviction and the application for leave to appeal against sentence should be dismissed.

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[6] *R v Basic* [2000] QCA 155 at [17] - [27]; (2000) 115 A Crim R 456 at 458 - 460. See also *R v Isaacs; ex parte A-G (Qld)*, unreported, Court of Criminal Appeal, Qld, CA No 292 and CA No 294 of 1989, 15 December 1989; *R v D* [2003] QCA 88; CA No 444 of 2002, 4 March 2003.