SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sant* [2005] QCA 474
PARTIES:	**R** **v** **SANT, Paul Joseph Sydney** (appellant)
FILE NO/S:	CA No 251 of 2005 DC No 92 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	16 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	2 December 2005
JUDGES:	Williams and Jerrard JJA and Chesterman J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. Verdict of guilty of rape set aside and in its place substitute a verdict of guilty of unlawful and indecent assault** **3. Order that on the substituted verdict of guilty of indecent assault the appellant be convicted and sentenced to six months imprisonment** **4. Declare that the time spent in custody between 8 September 2005 and the date of this order be time already served with respect to the sentence imposed by this Court**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL ALLOWED – appellant convicted by a jury of rape – crown case was that the appellant penetrated the complainant's vagina with his finger – conflicting accounts given by the complainant of what she experienced – where the complainant was asleep when the appellant made contact with her vagina – where the complainant made regular use of the term "touched" in her evidence – whether the evidence was sufficient to support a finding beyond reasonable doubt

that actual penetration of the vagina had occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – CIRCUMSTANCES NOT INVOLVING MISCARRIAGE OR IN WHICH MISCARRIAGE NOT SUBSTANTIAL – MISDIRECTION AND NON-DIRECTION – where the jury deliberated on their verdict for over 24 hours – whether the learned trial judge erred in failing to give the jury a direction in accordance with *Black v The Queen* (1993) 179 CLR 44

Criminal Code Act 1899 (Qld), s 349, s 668F(2)

Black v The Queen (1993) 179 CLR 44, considered
R v Harper [2002] QCA 107; CA No 17 of 2002, 19 March 2002, cited
R v Hatch [1999] QCA 495; CA No 320 of 1999, 29 November 1999, cited
R v Hill [1995] QCA 450; CA No 303 of 1995, 5 September 1995, cited
R v J [2002] QCA 048; CA No 3 of 2002, 22 February 2002, cited
R v Keevers; Filewood [2004] QCA 207; CA No 90, 91, 98 and 132 of 2004, 18 June 2004, cited
R v M [1995] QCA 241; CA No 111 of 1995, 26 April 1995, cited
R v Murray [2005] QCA 188; CA No 43 of 2005, 3 June 2005, cited

COUNSEL: S J Hamlyn-Harris for the appellant
M R Byrne for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA:** This is an appeal from a conviction of rape. Section 349 of the *Criminal Code Act* 1899 (Qld) now defines rape as including penetration of the vagina to any extent with any part of the offender's body without the complainant's consent. In this case the prosecution alleged that the appellant inserted his finger, albeit marginally and momentarily, into the complainant's vagina while she was asleep.

[2] At the hearing counsel for the appellant was given leave to substitute four grounds of appeal instead of the grounds which had been drafted by the appellant personally and stated in the Notice of Appeal. The amended grounds of appeal alleged misdirection as to the use the jury could make of the demeanour of a witness, failure to direct on the defence of accident, failure to give a direction in accordance with *Black v The Queen* (1993) 179 CLR 44, and finally:

> "The verdict of guilty was unsafe and unsatisfactory in that the evidence of penetration was not such as to enable a reasonable jury to be satisfied beyond reasonable doubt of the offence of rape."

[3] The critical evidence was that of the complainant. The following is a summary of relevant evidence contained in her evidence in chief.

[4] The complainant was residing with her partner, Casey and two children (a boy aged three and a girl aged one) in a house with Casey's brother. On the night in question Casey and his brother invited a few of their mates to the house and had "a few drinks". The complainant went to bed with her son lying beside her and her daughter in a cot mattress on the floor beside the bed. Across the hallway from the bedroom door were doors leading to a toilet and a bathroom. The toilet light was left on so that the complainant could see her two children, if necessary, during the night. She was asleep at about 8.30pm when Casey asked her to drive one of the boys home. She got up and did so; the appellant went with her in the car because he wanted to get some food from the service station. They returned to the house at about 9.00pm; the complainant returned to bed. Casey was already asleep in that bed on the other side of the boy. The complainant's evidence was that she then woke up "around midnight"; she "felt something enter me at - in my vagina". She then said: "I don't know for sure exactly what it is". Her evidence went on: "I'm lying down on my belly and I've just looked over the side and I just saw somebody on the side of the bed. Just - just had their back to me just - yeah. I don't know who it was. I just saw a – a black shirt, black - yep." She saw a person "on the end of my bed". She rolled over and could hear Casey snoring. She covered herself with a blanket, pretended to be asleep, and tried to see who it was. She then saw a head pop up at the end of the bed and a person walk out the door. She said that she identified that person as the appellant. She then woke Casey up and said: "Look, Paul was just in here and . . . and he just touched me." When asked to give the exact words that she used she replied: "Paul just touched me and he touched me in the cunt. He just - you know. Paul has just touched me and I don't like it." When Casey asked her what she was talking about she replied, "He just touched me". Casey then went to another part of the house and spoke to the appellant. The complainant went to Casey's brother and said: "Chris, Paul was just in my room - in our room and he's just put his finger in me. How well do you know this bloke?". The prosecutor then asked her: ". . . did you give the accused . . . any consent to touch you on your vagina" to which she replied "No".

[5] If the evidence had stopped at that it would, in my opinion, have been clearly arguable that a reasonable jury could not have returned a verdict of guilty of rape. There was clear evidence from the complainant that her vagina had been touched, but there was arguably insufficient evidence of penetration to support a conviction of rape. The weight of evidence was to the effect that her vagina had been touched rather than penetrated.

[6] No application was made at the conclusion of the complainant's evidence in chief to have rape taken from the jury, and counsel for the appellant proceeded with cross-examination. Apparently with a view to highlighting inconsistencies in the various statements made by the complainant he put to her, *inter alia*, statements she had made to investigating police officers suggesting that there had been penetration.

[7] The following is a summary of relevant cross-examination.

[8] The complainant agreed that she had been fast asleep when she felt something. She said: "I know I felt something that's not supposed to be going on and I woke up". Then defence counsel said by way of a question: ". . . you told us that something was placed - was inserted into your vagina?", to which she responded "Yes". She agreed it only happened for "a very short time"; she also agreed with the proposition that it was "just in and out like that". Then the complainant said: "I woke up when something touched it. I woke - and it just - it went in and you just - you wake up." Defence counsel then put to her what was in her statement to the police officer: "At about midnight that evening I was awoken with a sensation that something was happening inside my vagina. I knew straight away that something was inside me." She acknowledged she said that to the police. On being asked when did she wake up she replied: "When something's touched me". Her evidence then went on: "Something's touched [me] there and I've just woken up and looked around my shoulder. Looked over my shoulder." It then emerged that she saw somebody right down at the bottom of the bed and agreed that that person could not touch her pelvic area from that position - he was too far away to be able to touch her. Again she said: "I felt something. I've woken up. There's someone on the end of my bed." She agreed she was not conscious of any movement, that is she was not conscious of the person moving from a point where he could touch her to his position at the end of the bed. A little later on she again said: "Anybody touches that, you wake up." Then again she said, "someone touched me and I felt it." The complainant also admitted that her vagina was exposed. She had been wearing a new pair of knickers which were not comfortable. She said that those knickers were giving her a "front wedgie", that is the material of the knickers was "actually between [her] labia". In consequence some time during the night she pulled the crotch of the knickers to one side thus exposing her vagina. The whole of her evidence suggests that her vagina was exposed at the time the incident in question occurred. It was put to her that whatever "was inserted into your vagina . . . only went in on your version, a very small way, didn't it?", to which she responded "Yeah". She agreed that at committal proceedings she had said it went in "about the length of a fingernail". There was then reference to a centimetre or a centimetre and a half, and she agreed that in her second statement to the police she said: "It felt like a finger went in the - to about the first knuckle - maybe a few centimetres". She also agreed that because her knickers were pulled to the side it would not have been necessary to interfere in any way with her clothing in order to touch her vagina. Then in answer to a question suggesting her vagina was touched rather than something was inserted into it she replied: "No, I felt something enter me. I know that - I can feel the difference between entering and touching and this was entering." A little later on she said: "I was asleep. He's entered into me. I wake up". She was then cross-examined about evidence at the committal hearing as to what she said to Casey on waking up; she agreed that then she said: "Paul was just in the room. He just tried to finger me. He just touched me." When it was suggested that was different to her evidence at trial she responded: ". . . is there any difference? Is there any difference to what I'm saying and what's there?" Then a little later on she said: ". . . he's tried to and he failed because I stopped him. He probably wanted to go all the way in and I've woken up." That was then repeated: "Well, he didn't succeed to put it all the way in, did he?" Then she was cross-examined about her evidence at committal as to what she said to Chris. She agreed she there said: "Paul was just in our room and he tried to finger me. What kind of person is Paul?" Again she spoke in terms of the appellant not succeeding and went on: "He's tried to put something in me and

I've stopped him. I woke up." Finally it should be noted that the complainant agreed that she did not report the matter to the police for about a week.

[9] The complainant's partner, Casey, also gave evidence. He described being woken up about midnight by the complainant who was in a "panicky state". When asked what then happened he replied: ". . . informed me that she'd just been touched on the vagina." When asked if he could remember the exact words he again responded: "she's saying she got touched on the vagina". The learned trial judge then intervened and indicated her exact words were required; to that the witness responded: "Paul was laying at the end of the bed with his finger in me."

[10] Under cross-examination he initially admitted that the first thing the complainant said when she woke up was: "I was touched on the vagina". He then admitted that he told the police the complainant said: "He was laying on the floor just there with his finger in me." He was then cross-examined about the inconsistency - was the offender "at the end of the bed" or "laying on the floor".

[11] Finally, evidence given by Casey's brother, Chris, should be noted. He said that he was woken up by the complainant who said "that she was lying on her - on her belly and she felt something near her bum pushed down towards her pussy and she was too scared to move." Under cross-examination it was put to him that at committal he gave evidence that the complainant's words were: "She said that she felt something near her bum and it pushed down and she's sort of woken up . . ."

[12] It will be immediately obvious that there is a major discrepancy between the evidence of Chris and the evidence of the complainant as to what was said to him. There are also significant discrepancies between the various versions given by Casey in his evidence as to what the complainant said to him, and the evidence of the complainant.

[13] The appellant did not give evidence, but a statement he gave to investigating police officers was put in evidence. The arrangement that night was that he would sleep in the lounge room because he had been drinking. He denied entering the bedroom and specifically denied touching the complainant. In the appellant's statement to police he said that when confronted by Casey shortly after midnight he responded that after he went to bed he developed an upset stomach and went to the toilet where he did a "poo". He said that he did not flush the toilet because it made quite a noise and on a previous occasion the flushing had woken the children. He also said that Casey did not check the toilet after he told him that. He admitted he was wearing black clothing that night.

[14] Casey gave evidence that on being told of that toilet incident he immediately went and examined the bowl and there was nothing in it. The complainant also gave evidence that the toilet had not been flushed otherwise she would have heard it.

[15] That is the sum total of evidence relevant to the charge of rape.

[16] There were essentially two issues at the trial. Was there penetration of the complainant's vagina; if there was then the offence of rape was established, but if not the conduct constituted indecent assault. Secondly, identification; was it the appellant who committed the offence. The issue of identification was not the subject of submissions on the hearing of the appeal. It is sufficient to say that the

summing up on that issue was adequate, and there was clear evidence on which the jury could be satisfied that it was the appellant who at least touched the complainant's vagina. The real focus of submissions on the hearing of the appeal was on the question whether or not the evidence supported the jury's finding that there had been penetration. It is immediately obvious from the foregoing summary of evidence that there were many inconsistencies in the evidence of the complainant, particularly in relation to penetration; she regularly used the word "touched". Her contemporaneous complaints, even leaving aside versions given by Casey and Chris, were varied and inconsistent; again the word "touched" was often used. When pressed whilst in the witness box she appeared to indicate that to her mind there was little or no difference between touching and entering her vagina. Further, her assessment of the physical contact must be considered in the light of the fact that it was momentary and while she was asleep. The physical contact woke her up, but by the time she was conscious enough to appreciate her surroundings the offender was at the foot of the bed and in a position from which he could not reach her pelvic area. It is against the background of matters such as that that the directions given to the jury in the summing up must be considered.

[17] The learned trial judge told the jury that before they could convict the accused (at that point not differentiating between rape and indecent assault) they had to "find the complainant to be honest, accurate and reliable on the crucial elements of the offence." He then itemised a number of matters that the jury could take into consideration on the issue of credibility of any witness; relevantly he said:

> "Are there inconsistencies or mistakes in the evidence of a witness; if there are, have those been explained; if they have been explained, do you accept the explanation or do you reject it; have different things been said on different occasions; if they have, is there an explanation; if there is, do you accept it or reject it; if different things have been said on different occasions do you regard that matter as significant or not. It is entirely a matter for you."

[18] Subsequently he told the jury that they "must approach the evidence of the complainant with great care and with caution." Immediately thereafter he went on to say that "in cases of this nature it is important to consider whether there is evidence corroborating the evidence of the complainant." That is an issue to which I will return.

[19] The jury was directed, correctly, that "penetration of the vagina of the complainant by a finger without the consent of the complainant . . . would amount to rape." Then the summing up went on:

> "Now, were you not satisfied beyond reasonable doubt that there was penetration of the vagina of the complainant by a thing or a part of the accused's body other than his penis, you would then go on to consider whether the accused was guilty or not guilty of an alternative charge, namely unlawful and indecent assault. If the complainant was touched in the vicinity of her vagina and there was no penetration you would find the accused not guilty of rape and go on to consider whether he is guilty of unlawful and indecent assault."

Right at the end of the summing up the learned trial judge returned to that topic: "Before you can convict him of rape you must be satisfied that he penetrated her vagina. If you are satisfied that it was him, but you are not satisfied that he

penetrated her vagina, consider whether he is guilty or not guilty of indecent assault committed by touching her in the area of the vagina but not penetrating."

[20] Critically, in my view, the learned trial judge did not in the course of the summing up refer to the actual evidence of the complainant on the issue of penetration. He did not remind the jury that the complainant was asleep when physical contact was made with her body, and he did not specifically remind the jury of those many passages in her evidence which supported the conclusion that she was touched without there being penetration. He specifically referred to the fact that her contemporaneous complaints were inconsistent, but he did so when speaking about credibility in general and he did not indicate that such inconsistencies were relevant to the critical issue whether there was penetration or not. This was a case where the jury could have generally accepted the complainant to be an honest, reliable witness but mistaken, perhaps because she had been asleep, as to whether or not there had been actual penetration. The general thrust of the summing up appeared to be that if the jury accepted the complainant generally to be honest and reliable then it followed that rape had been established.

[21] As already noted the learned trial judge directed the jury with respect to corroboration; relevantly, in general, he said:

> "Now, in cases of this nature it is important to consider whether there is evidence corroborating the evidence of the complainant, that is, evidence which confirms, supports or strengthens the evidence of the complainant in that it renders it more probable. It is evidence which confirms in some material particular that the offence took place and that the accused was the man who committed the offence. It is evidence which strengthens the evidence of the complainant by confirming or tending to confirm the accused's involvement in the offence and the offence itself, as stated by the complainant."

[22] On four occasions in that passage the term "offence" was used. The offence with which the appellant was charged was rape, and throughout the summing up the term was generally used in such a way as to suggest that it was referring to the offence of rape. A consequence is that a reasonable jury, hearing the passage just quoted, could conclude that corroboration, if found, would support the offence of rape, as distinct from the alternative charge of indecent assault.

[23] The learned trial judge then went onto say that there were two aspects of the evidence capable of affording corroboration: firstly the complainant's distressed condition when observed by Casey and Chris, and secondly the telling of a lie about his use of the toilet. For the relevant lie to be established the jury had to accept the evidence of Casey that there was nothing in the toilet bowl.

[24] The immediate problem, given the circumstances of this particular case, is that the evidence said to be corroborative equally supports either the offence of rape or that of indecent assault. The jury was certainly entitled to have regard to the evidence said to be capable of corroborating the complainant's evidence in order to be satisfied beyond reasonable doubt that the person who made physical contact with the complainant's exposed vagina was the appellant. To that extent it was capable of supporting her evidence. But it would have been wrong, in my view, for the jury to have reasoned that the existence of such supporting evidence meant that the offence of rape, as distinct from indecent assault, was committed. In the present

case there was a difficulty of inferring from either the complainant's distressed condition or the appellant's lie as to his use of the toilet that some offence other than indecent assault was committed. The vice in the summing up is that a reasonable jury could have taken what was said as suggesting that if there was corroboration of the complainant then the offence of rape was established.

[25] In the circumstances it is not necessary to give further consideration to whether or not there was in this case such a lie told by the appellant as to be capable of corroborating the complainant's evidence. That matter was not the subject of submissions on the hearing of the appeal and it need not be addressed further.

[26] The jury retired to consider their verdict at 1.02pm on 7 September 2005. At about 6.00pm that day a note was handed to the learned trial judge from the jury requesting re-directions. In that note the jury said they had "been in deliberations since 2.30pm, we are unable to come to a decision . . . " The general request was that the complainant's evidence be read to the jury again and specific questions relating to the point in time at which the complainant was able to identify the appellant as being the person in the room, and as to the sighting of the shadow at the end of the bed, were also raised. In response the learned trial judge read from the complainant's evidence what he and counsel had determined were "the relevant portions". That prompted one juror to specifically ask of the judge whether the whole of the complainant's transcript had been read to them. The response from the judge was that only those parts the jury had asked for had been read. That must raise some concern because the jury by their note had asked for all of the complainant's evidence to be read. During those re-directions the learned trial judge also read to the jury some passages from the evidence dealing with a "shadow at the base of the bed". The jury retired again shortly after 6.30pm.

[27] Then at 3.20pm the following day a further request was made by the jury for re-directions. They requested sections of the transcript be read over dealing with the appellant being confronted by Casey in the kitchen, the section referring to the wearing and placement of the complainant's underwear, and the section referring to the complainant's contact with the appellant's partner before contacting the police. In addition there was appended to that note the following question: "Is accidental penetration defined as rape?"

[28] In the consequent re-directions the learned trial judge said: "Well, accidental penetration, whatever that might be, is not an issue in this case . . . and you should put it out of your minds." Then his Honour went onto read the passages of evidence requested by the jury. The learned trial judge did nothing more than read those passages; no further comment or direction was given.

[29] The verdict of guilty of rape was returned about 20 minutes after those re-directions were given.

[30] In my view there is no substance in the first ground of appeal, namely that there was a misdirection as to the use the jury could make of the demeanour of a witness. It is not necessary to set out the relevant parts of the summing up in detail. When considering the issue of credibility the learned trial judge told the jury they could consider demeanour but then observed that "there are limits as to the use of demeanour as a guide to credibility". Subsequently he told them that they should use demeanour "with caution" and went onto say that it was "difficult for ordinary

people . . . to make effective use of demeanour." He suggested that a consideration of "verbal content" provided "the most reliable indicator" of credibility. It has always been recognised that the initial tribunal of fact has a marked advantage in determining credibility because that tribunal has the opportunity of seeing and hearing a witness give evidence. Demeanour can be a significant factor in determining credibility. In individual cases it may well be appropriate for a trial judge to give a jury some warning as to the limits which may be made of an evaluation of demeanour, but in my view this is an area that is best left to the common sense of jurors. More often than not attempts to define the use which can be made of demeanour will create more problems than it solves. However, in the circumstances of this case I am not persuaded that the remarks made by the learned trial judge were such as to occasion a miscarriage of justice.

[31] The third ground of appeal, namely the failure to give a *Black* direction, can be readily disposed of. At no stage did the jury indicate to the learned trial judge that they were deadlocked, although they were deliberating on their verdict for well over 24 hours. Whether or not a *Black* direction should be given is a matter peculiarly within the discretion of the trial judge. When a jury has been deliberating for a long time, particularly where the evidence is in short compass, it is often appropriate to remind members of the jury that they should be true to their oaths and should not succumb to pressure to return a unanimous verdict of guilty or not guilty. In the circumstances of this case I am not persuaded that there was any error on the part of the learned trial judge in not giving a *Black* direction.

[32] The second ground of appeal, namely the failure to direct on the defence of accident, is largely subsumed in the fourth ground that the verdict was unsafe and unsatisfactory. What the learned trial judge told the jury in the re-direction after the issue was raised was correct. But is seems to me that in asking that question some members of the jury were concerned in some way about the issue of penetration. They may have had some difficulty articulating the precise point that was troubling them. Particularly given the absence in the body of the summing up of any review of the evidence relevant to penetration, that question should have prompted the learned trial judge to remind the jury of what had to be proved in order to establish penetration and to again remind them of the inconsistencies in the complainant's evidence and of the possible significance of her regular use of the term "touched".

[33] As already noted there was ample evidence on which the jury could have been satisfied that the appellant made contact with the complainant's exposed vagina while she was asleep. That clearly constituted an indecent assault. But given the conflicting contemporaneous accounts given by the complainant of what she experienced, particularly bearing in mind that she was asleep when the contact was made, and given her regular use in evidence of the term "touched", the evidence was not sufficient in my view, to support a finding beyond reasonable doubt that actual penetration of the vagina had occurred. The regular use by the complainant in her evidence of the terms "touched" or "touching" to describe the contact, and her intimation under cross-examination that to her mind there was no real difference between touching and penetration confirm that conclusion.

[34] It follows that the conviction for rape should be set aside. Section 668F(2) of the *Criminal Code* 1899 (Qld) provides that where an appellant has been convicted of an offence, and the jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury they must have been satisfied of

acts which proved the appellant guilty of that other offence, this Court may instead of allowing the appeal substitute for the verdict found by the jury a verdict of guilty of that other offence. In my view the evidence clearly supported the conclusion that the appellant committed the offence of indecent assault and the jury must have been satisfied of facts which proved him guilty of that offence. It follows that this is an appropriate case in which this Court should exercise its power under s 668F(2) and substitute for the verdict of guilty of rape, a verdict of guilty of indecent assault. It then becomes necessary for this Court to impose sentence in substitution for the sentence imposed at the trial.

[35] The appellant is aged 24. At the time of the offence he was employed as a meat worker, but apparently he had also qualified as a chef and had worked in that capacity in the past. He has a minor criminal history, but has not previously been sentenced to a term of imprisonment. At the time of the offence he was in a *de facto* relationship; there is a child of that relationship aged about two years. At the time of sentence the relationship had broken down to an extent, primarily because of the commission of the offence in question.

[36] There was no actual violence associated with the commission of the offence. As the learned sentencing judge said the incident was an opportunistic exploitation of a sleeping woman. There was an abuse of trust involved which resulted in the complainant being considerably distressed. The learned sentencing judge considered there was a lack of remorse; that was largely based on the fact that the appellant went to trial. There appears to have been no offer to plead to the indecent assault charge; the defence was essentially that the appellant did not touch the complainant at all.

[37] The offence of indecent assault covers a wide variety of physical contact between victim and offender. The sentence will vary greatly because of that, and critical considerations will be the age of the victim and the nature and extent of the physical contact. Male to female genital contact without penetration, where a vulnerable girl is the victim, will understandably call for a much higher penalty than a momentary indecent touching of an adult female.

[38] This Court has had to review sentences for the offence of indecent assault in many cases. A review of this Court's views expressed in *M* [1995] QCA 241, *Hill* [1995] QCA 450, *Hatch* [1999] QCA 495, *J* [2002] QCA 48, *Harper* [2002] QCA 107, *Keevers & Filewood* [2004] QCA 207 and *Murray* [2005] QCA 188 would support a sentence of six months' imprisonment given the circumstances of this case. That is the sentence which should be imposed.

[39] The orders of the Court should therefore be:

(i) appeal allowed;

(ii) verdict of guilty of rape should be set aside and in its place there should be substituted a verdict of guilty of unlawful and indecent assault;

(iii) order that on the substituted verdict of guilty of indecent assault the appellant be convicted and sentenced to six months' imprisonment;

(iv) declare that the time spent in custody between 8 September 2005 and the date of this order be time already served with respect to the sentence imposed by this Court.

[40] **JERRARD JA**: In this appeal I have read the reasons for judgment of Williams JA and the orders proposed by His Honour, and respectfully agree with those reasons and orders.

[41] **CHESTERMAN J**: I agree with Williams JA.