SUPREME COURT OF QUEENSLAND

CITATION:	*R v LT* [2006] QCA 534
PARTIES:	**R** **v** **LT** (appellant)
FILE NO/S:	CA No 227 of 2006 DC No 2057 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	12 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	23 November 2006
JUDGES:	McMurdo P, Keane JA and Chesterman J Judgment of the Court
ORDER:	**1. Appeal allowed** **2. Convictions set aside** **3. New trial ordered on all counts**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - PROSECUTION - FILING OF INDICTMENT - QUEENSLAND - appellant convicted upon verdict of jury of five counts of indecent dealing and two counts of rape - appellant sentenced to eight years imprisonment for rape offences and five years imprisonment for indecent dealing offences - trial began in Toowoomba but jury discharged and matter transferred to Brisbane - difference in charges on which appellant was tried in Brisbane compared with those on which appellant's trial in Toowoomba had proceeded - appellant appeals on basis that indictment on which appellant was convicted was only presented after jury had given its verdict - confusion over which indictment the appellant was being tried upon - nature of indictment - procedural irregularity - procedural fairness - whether appellant was convicted according to law - whether trial took place upon an indictment containing charges on which appellant was to be tried *Criminal Code 1899* (Qld), s 560, s 563(1), s 567, s 572, s 592, s 597C, s 604 *Jury Act 1995* (Qld), s 60, s 62

Cth DPP v Fukusato [2002] QCA 20; Appeal No 6456 of 2001, 8 February 2002, cited
De Jesus v The Queen (1986) 61 ALJR 1, cited
Maher v The Queen (1987) 163 CLR 221, followed
R v Cockrell; ex parte Cth DPP [2005] QCA 59; CA No 325 of 2004, 11 March 2005, cited
R v Dexter [2002] QCA 540; CA No 135 of 2001, 10 December 2002, cited
R v Fahey, Solomon and AD [2001] QCA 82; CA Nos 295, 305, 345 of 2000, 9 March 2001, considered
R v Foley [2002] QCA 522; Appeal No 4007 of 2002, 29 November 2002, cited
R v Phillips & Lawrence [1967] Qd R 237, cited
R v Sheehy, unreported, Maryborough Indictment No 129 of 2001, 30 July 2002, cited
R v Webb [1960] Qd R 443, cited
Weiss v The Queen [2005] HCA 81; (2005) 80 ALJR 444, applied

COUNSEL: P J Callaghan SC for the appellant
M J Copley for the respondent

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

[1] **THE COURT:** On 4 August 2006, the appellant was convicted upon the verdict of a jury of five counts of indecent dealing and two counts of rape. He was sentenced to five years imprisonment for the indecent dealing offences, and to eight years imprisonment for the offences of rape. The sentences were to be served concurrently. He has appealed against his convictions.

[2] The principal ground of appeal is that the indictment on which the appellant was convicted was only presented after the jury had given its verdict. There were other grounds of appeal relating to the conduct of the trial by the Crown Prosecutor and the learned trial judge's directions to the jury. Because of the conclusion which the Court has reached in relation to the principal ground of appeal, it is not necessary to set out in detail the other grounds of appeal. It is necessary, however, to set out in some detail the history of the proceedings in order to explain how the principal ground of appeal arises.

The history of proceedings

[3] On 25 July 2006, the appellant was arraigned in Toowoomba pursuant to an indictment signed and presented to the District Court on that date by a Crown Prosecutor ("the Toowoomba indictment"). The Toowoomba indictment contained eight counts: seven counts of indecent dealing between January 1981 and October 1981; and one count of rape in April 1987. It is relevant to note that count 1 was a count of indecent treatment which allegedly occurred at Toowoomba between 5 January and 1 February 1981.

[4] The appellant's trial upon this indictment duly commenced and then proceeded to 31 July before circumstances arose which caused the learned trial judge to declare a

mistrial, to discharge the jury and to order that the matter be transferred to Brisbane where the appellant was "to appear at his trial 10.00 am tomorrow morning 1/8/06". Some days earlier, on 28 July, for some reason which does not appear from the record, the trial judge ordered that the appellant's bail be revoked and that he be remanded in custody.

[5] On 1 August 2006, different counsel appeared for the Crown. The new prosecutor had determined not to proceed on count 1 of the Toowoomba indictment. He had also decided to add, as count 9 to the indictment, a charge of rape at Palm Beach on a date between 1 January and 4 January 1988. With this in mind, the new prosecutor took a copy of the Toowoomba indictment, and caused count 1 to be deleted and count 9 to be handwritten on this copy of the document. The new prosecutor did not sign this document.

[6] On 1 August 2006, proceedings commenced as follows:

> "[PROSECUTOR]: If your Honour pleases, there's an indictment before the Court charging the appellant with six counts of indecent treatment of a child under 16 and under 12 and two counts of rape. If he could be arraigned on that indictment, please, your Honour.
> HER HONOUR: Yes, stand up, please. Arraign the accused. Do you have a spare copy; we just need – thank you. Sorry, my associate was asking whether she needs to use the original rather than a copy and it's fine to use----
> [PROSECUTOR]: No, your Honour, a copy is fine.
> HER HONOUR: ----a copy; have you still got one there, [the Prosecutor], or we've just borrowed yours?
> [PROSECUTOR]: No, I'll get that back through the bailiff, if I could, your Honour.
> HER HONOUR: Yes, arraign the accused."

[7] For reasons which will become apparent, the prosecutor's statement that there was an indictment before the court charging the appellant with two counts of rape was incorrect.

[8] The appellant was not arraigned in respect of count 1 of the Toowoomba indictment, but he was arraigned on count 9. Shortly after the proceedings commenced, but after the arraignment, the new prosecutor sought, and was given, leave to "amend" the indictment to add count 9. At no stage was count 1 actually deleted from the Toowoomba indictment. Nor was count 9 signed by the new prosecutor. This was, as he frankly acknowledged, a matter of oversight on his part.

[9] The new prosecutor also assumed, wrongly it now appears, that the Toowoomba indictment was physically with the court file when the proceedings of 1 August 2006 commenced. It would seem that the Toowoomba indictment arrived in court some time later. According to a note prepared by the associate at the trial judge's request, and attached to her Honour's report, the associate:

> "… was given a copy of the renumbered counts. [The associate] arraigned … from this copy … [it was the trial judge's practice for her] to always arraign from original, so she questioned arraigning from this copy with counts only, but it was agreed in court for [the associate] to arraign from the copy … During the trial [the associate] only had this copy and was not given the Toowoomba indictment …

> [the associate] asked [the prosecutor] and his clerk for the indictment a number of times during adjournments in the trial as … [the associate] needed the indictment to endorse."

On 4 August 2006, after the appellant had been convicted and sentenced, the new Crown Prosecutor informed the court that he was then endorsing the Toowoomba indictment "the Crown will not proceed further on that indictment". The endorsement was made and signed because it was assumed that that indictment had been replaced by the "new" indictment presented on 1 August 2006.

[10] At this point, counsel for the appellant at trial became concerned. The following exchange occurred:

> "[COUNSEL]: Your Honour, might I just see those indictments or that indictment that----
> HER HONOUR: Yes.
> [COUNSEL]: It's different to the indictment that I've been----
> HER HONOUR: Are you talking about the current one or the Toowoomba one?
> [COUNSEL]: The Toowomba one.
> HER HONOUR: Right. Yes.
> [COUNSEL]: I thought the Toowoomba one was amended, that's what I understood but----
> HER HONOUR: Well, let me show you the one that we're now endorsing.
> [COUNSEL]: Okay.
> HER HONOUR: The one – I don't know whether you've----
> [COUNSEL]: I'm aware of that indictment----
> HER HONOUR: Yes.
> [COUNSEL]: ----number 157 of '06----
> HER HONOUR: Yes.
> [COUNSEL]: ----because I was provided with that.
> HER HONOUR: Yes. This----
> [COUNSEL]: I was provided with an indictment by my learned friend that had handwriting at the bottom of it.
> HER HONOUR: Yes. No, we've had a subsequent one. Let me show you. This is the one that my associate is endorsing. Can you give that to [Counsel]?
> [COUNSEL]: I wasn't aware of that----
> HER HONOUR: No.
> [COUNSEL]: ----indictment being presented.
> HER HONOUR: I think that's only come this afternoon. It should have been formally presented in Court.
> [COUNSEL]: Oh.
> [PROSECUTOR]: Your Honour, I think there – my clerk says there are actually three indictments.
> HER HONOUR: Where is the other one?
> [PROSECUTOR]: I don't know what happened in Toowoomba but----
> HER HONOUR: Is that right, [Counsel] – was there more than one?
> [COUNSEL]: Your Honour, I've only been provided with one Toowoomba indictment which is what I went off----
> HER HONOUR: Right. That's fine.

[COUNSEL]: ----and then I had a ----
HER HONOUR: Yes, but that was never formally presented.
[COUNSEL]: Your Honour, I was given a copy.
HER HONOUR: Yes, but that was never formally presented.
[COUNSEL]: I've not seen any other indictment presented.
HER HONOUR: Well, I've just shown it to you.
[COUNSEL]: That's the indictment I just looked at, I think.
HER HONOUR: Yes. That's the one that has been presented.
[COUNSEL]: Yes. Okay.
HER HONOUR: And that's the one that we're endorsing.
[COUNSEL]: Thank you, your Honour.
HER HONOUR: Is that right – so there's no other indictments we need to worry about?
[COUNSEL]: I'm not sure. I don't know how many indictments----
HER HONOUR: What [Counsel] has raised, and it's a fair point [the Prosecutor], is – it was something that has been worrying my associate. There was a handwritten amendment to one that was floating around but was never formally presented. So that's the one that [Counsel], not unreasonably, probably thought had been formally presented. So, if you've got a copy of that everybody, rip it up, it was never formally presented.

The one on which I have [sentenced] is eight counts; five counts of indecent dealing – guilty, five years for each. Count 6 – not guilty. Count 7 and 8 – guilty, eight years.
[COUNSEL]: Can I ask your Honour when that indictment was presented?
HER HONOUR: Well, two minutes ago.
[COUNSEL]: Okay.
HER HONOUR: Formally.
[COUNSEL]: Okay."

[11] Notwithstanding the learned trial judge's comment that the indictment on which the appellant had been convicted had been presented only "two minutes ago", it is clear from her Honour's report to this Court that her Honour understood that the indictment on which the appellant had been convicted was that "presented" in Brisbane on 1 August 2006. A further complication, which should be mentioned here, is that, although the indictment "presented" on 1 August referred to nine counts, the endorsement on it of the not guilty pleas and subsequent verdict and sentence refers to "counts 1 – 8", apparently on the assumption that the Crown was not proceeding on count 1 but a new final count had been added and that the original counts 2 to 8 had been renumbered 1 to 7.

The parties' contentions on appeal

[12] Senior Counsel for the appellant contends that the appellant has not been convicted according to law in that the trial did not take place, as was required, upon an indictment containing the charges on which the appellant was to be tried.

[13] On behalf of the respondent, it was submitted that the appellant was duly arraigned in Toowoomba upon the Toowoomba indictment, that the trial of the appellant duly commenced in Toowoomba on 25 July 2006, and that trial was adjourned to Brisbane and resumed, albeit before a different jury, on 1 August 2006. It was part of the respondent's submission that the arraignment of 1 August 2006 was

unnecessary surplusage, and that the endorsement of the Toowoomba indictment on 4 August 2006 was a nullity (save perhaps in relation to count 1 of the Toowoomba indictment) in respect of which the appellant had not been tried at all. It was conceded that this submission could not accommodate count 9 which had never actually been the subject of indictment at all.

[14] Discussion of these competing arguments must be preceded by reference to the relevant provisions of the *Criminal Code 1899* (Qld) and the *Jury Act 1995* (Qld).

Criminal Code

[15] Section 560 of the *Criminal Code* provides relevantly as follows:

> "(1) **When** a person charged with an indictable offence has been committed for trial and **it is intended to put the person on trial for the offence, the charge is to be reduced to writing in a document which is called an indictment.**
>
> (2) **The indictment is to be signed and presented to the court by** a Crown Law Officer, **a Crown prosecutor** or some other person appointed in that behalf by the Governor in Council.
>
> (3) If a person has been committed for trial for an indictable offence that may be tried in the District Court, a Crown Law Officer or a Crown prosecutor may present the indictment to either the Supreme Court or District Court.
>
> …" (emphasis added)

[16] Section 563(1) of the *Criminal Code* provides relevantly as follows:

> "A Crown Law Officer may inform any court, by writing under the officer's hand, that the Crown will not further proceed upon any indictment, or in relation to any charge contained in any indictment, then pending in the court."

[17] Section 567 of the *Criminal Code* provides relevantly as follows:

> "(1) Except as otherwise expressly provided, an indictment must charge 1 offence only and not 2 or more offences.
>
> (2) Charges for more than 1 indictable offence may be joined in the same indictment against the same person if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose.
>
> (3) Where more than 1 offence is charged in the same indictment, each offence charged shall be set out in the indictment in a separate paragraph called a ***count*** and the several statements of the offences may be made in the same form as in other cases without any allegation of connection between the offences.
>
> …"

[18] Section 572 of the *Criminal Code* provides relevantly as follows:

> "(1) If, on the trial of a person charged with an indictable offence, there appears to be a variance between the indictment and the evidence, or it appears that any words that ought to have been inserted in the indictment have been

omitted, or any count that ought to have been included in the indictment has been omitted, or that any words that ought to have been omitted have been inserted, **the court may**, if it considers that the variance, omission, or insertion, is not material to the merits of the case, and that the accused person will not be prejudiced thereby in the person's defence on the merits, **order the indictment to be amended**, so far as it is necessary, on such terms (if any) as to postponing the trial, and directing it to be had before the same jury or another jury, **as the court may think reasonable**.

(2) **The indictment is thereupon to be amended in accordance with the order of the court.**

(3) **If the court is satisfied no injustice will be done by amending the indictment, the court may make the order at any time before, or at any stage of, the trial on the indictment, or after verdict**.

(4) When an indictment has been amended, the trial is to proceed, at the appointed time, upon the amended indictment, and the same consequences ensue, in all respects and as to all persons, as if the indictment had been originally in its amended form.

…" (emphasis added)

[19] One may pause here to note that the power conferred on the court by s 572(1) is to order that the **indictment** be amended, that is to say s 572(1) is predicated upon the existence of an indictment signed and presented in accordance with s 560. Furthermore, s 572(2) contemplates that the amendment will thereupon be made to the indictment by the prosecutor; that is to say that the amendment of the indictment is a matter to be effected by the prosecutor. That this is so is hardly surprising: the making of a charge against an accused person is a matter for the prosecutor who brings the charge rather than the court which is to try it. Section 572(4) authorises the trial to proceed upon the indictment so amended.

[20] Section 592 of the *Criminal Code* provides as follows:

"(1) The court to which a person has been committed or remanded for trial on indictment or before which an indictment is presented may, if it thinks fit, adjourn the trial and may remand the accused person accordingly.

(1A) A trial may be adjourned whether or not—

(a) the accused person is present; or

(b) the accused person has been called upon to plead to the indictment; or

(c) a jury has been sworn; or

(d) evidence has been given.

(2) The Crown shall, where it is proposed to make application for an adjournment in the absence of an accused person who is detained in a place of legal detention, notify in writing that accused person—

(a) that the application is to be made and the nature, date, time and place thereof; and

(b) that the accused person may furnish to the court a statement in writing in relation to the application; and

(c) that the accused person may be represented by counsel on the hearing of the application.

(3) For the purposes of this section—

adjourn the trial includes postpone the trial in a case where the accused person has not been called upon to plead to the indictment."

[21] Section 597C of the *Criminal Code* provides relevantly as follows:

"(1) On the presentation of the indictment or at any later time, **the accused person is to be informed in open court of the offence with which he or she is charged, as set forth in the indictment, and** is to be **called upon to plead to the indictment**, and to say whether he or she is guilty or not guilty of the charge.

(2) If the indictment contains more than one count, a plea to any number of counts may, with the consent of the accused person, be taken at one and the same time on the basis that the plea to one count will be treated as a plea to any number of similar counts on the same indictment.

(3) **The trial is deemed to begin and the accused person is deemed to be brought to trial when the person is so called upon**.

…" (emphasis added)

[22] Section 604(1) of the *Criminal Code* provides relevantly as follows:

"Subject to subsection (2), **if the accused person pleads any plea or pleas other than the plea of guilty**, a plea of autrefois acquit or autrefois convict or a plea to the jurisdiction of the court, **the person is by such plea, without any further form, deemed to have demanded that the issues raised by such plea or pleas shall be tried by a jury, and is entitled to have them tried accordingly**." (emphasis added)

[23] One may briefly summarise the effect of these provisions. An accused may be tried only for offences charged in an indictment, being a document signed by the Crown Prosecutor. Section 567 makes express provision for the limited circumstances in which charges for more than one offence may be joined on one indictment. An accused is entitled to have the offences so charged tried by jury upon his plea of not guilty after arraignment by reference to the charges in that document. The trial of those offences commences upon the response of the accused to the arraignment. These provisions simply do not contemplate the possibility of a trial of an accused for an offence which is not contained in an indictment, or for some offences which are contained in an indictment and some which are not.

Jury Act

[24] Section 60 of the *Jury Act* provides as follows:

"(1) **If** a jury cannot agree on a verdict, or **the judge considers there are other proper reasons for discharging the jury**

without giving a verdict, **the judge may discharge the jury** without giving a verdict.

(2) If proceedings before a jury are to be discontinued because the trial is adjourned, the judge may discharge the jury.

(3) A decision of a judge under this section is not subject to appeal." (emphasis added)

[25] Section 62 of the *Jury Act* provides as follows:

"(1) **When a jury is discharged, the judge** may proceed immediately with the selection of a new jury, or **may adjourn the trial.**

(2) If the defendant in a criminal trial is in custody when the jury is discharged, the defendant remains in custody unless granted bail." (emphasis added)

Discussion

[26] It may be noted that, in the provisions to which we have referred, no reference is made to the declaration of a mistrial. No doubt the practice of declaring a mistrial is a handy shorthand description of a judge's conclusion that there "are … proper reasons for discharging the jury" pursuant to s 60(1) of the *Jury Act*. The practice has no statutory sanction however. The relevance of this point for present purposes is that it should not be thought that when a mistrial is "declared", as occurred here, that implies that, in point of law, the proceedings at the adjourned trial are a new trial rather than a continuation of the trial which commenced after the accused's plea of not guilty.[1]

[27] The importance of the provisions of s 560(1) and (2) of the *Criminal Code* is obvious. They contain legislative authority for the executive government of the State to bring serious charges in the Supreme and District Courts against subjects for breaches of State law. The formulation and presentation of such charges is a matter of fundamental importance in the administration of criminal justice. It has been consistently recognised that, as envisaged by Sir Samuel Griffith, those authorised to sign and present indictments – and so to enliven the judicial power to determine criminal guilt and impose punishment – perform functions which include those historically performed by the grand jury.[2]

[28] Of equally fundamental importance is s 597C of the *Criminal Code*. It requires that the accused be informed in open court of the offence with which he or she is charged "as set forth in the indictment". It is only upon being so informed that a subject can be called upon to plead; and upon pleading not guilty, the accused is entitled, by virtue of s 604 of the *Criminal Code*, to be tried by jury in respect of the offences set forth in the indictment **and no others**.

[29] The provisions of the *Criminal Code* and the *Jury Act* to which we have referred are fundamental to the authority of a court to determine the criminal responsibility of a subject. At issue is not merely the question of fairness of process – important as that question is. The anterior question is whether the judicial process has been duly

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1 *R v Sheehy*, unreported judgment of Mullins J, in Maryborough Indictment No 129 of 2001, delivered 30 July 2002, at [10].

2 *R v Webb* [1960] Qd R 443 at 446 – 447; *Cth DPP v Fukusato* [2002] QCA 20 at [96]; *R v Foley* [2002] QCA 522 at [10] – [12]; *R v Dexter* [2002] QCA 540 at [66] – [68], [81].

engaged to put the subject in jeopardy as to his or her liberty.[3] In *Maher v The Queen*, it was said by the High Court:[4]

> "The provisions of the *Jury Act* and of the Code which govern the constitution and authority of the jury as the tribunal of fact in a criminal trial are mandatory, for the entitlement to trial by jury which s 604 of the Code confirms is trial by a jury constituted in accordance with the *Jury Act* and authorized by law to try the issues raised by the plea of not guilty. A failure to comply with those provisions may render a trial a nullity, at least in the sense that the conviction produced cannot withstand an appeal: see *Crane v Public Prosecutor* ([1921] 2 AC 299). In any event it involves such a miscarriage of justice as to require the conviction to be set aside."

[30] In the present case, the document on which the trial proceeded on 1 August 2006 did not comply with s 560(1) of the *Criminal Code*. It contained count 9, a count of rape, which had not been signed by a person authorised to prosecute that charge. The appellant was not arraigned in accordance with s 597C because, so far as count 9 was concerned, it was not "set forth in the indictment". The amendment of the Toowoomba indictment was not, and has never been, duly made to include count 9. Further, the proceedings in Brisbane made no reference to count 1 of the Toowoomba indictment, although that charge was still pending against the appellant to the extent that the respondent relies upon the Toowoomba indictment as the source of legal authority for the proceedings which commenced in Brisbane on 1 August 2006. It is on these grounds that the appellant contends that the trial was so flawed from the outset that it should be regarded as a nullity in the sense that "the conviction produced cannot withstand an appeal".

[31] The respondent, while acknowledging that the conviction upon count 9 has its own particular infirmity, seeks to quarantine that infirmity in order to sustain the convictions on the other counts. In that regard, the respondent submits that the arraignment and plea on 1 August 2006 were an "unnecessary piece of theatre" because the appellant had been duly arraigned on 25 July 2006 and the trial had duly commenced on the charges in the Toowoomba indictment. The respondent's argument does not readily accommodate the circumstance that count 1 was not pursued at all on 1 August and thereafter, and what were counts 2 to 8 on the Toowoomba indictment were apparently pursued as counts 1 to 7 in the Brisbane trial together with a new count of rape which was not on the Toowoomba indictment at all. Once again, the respondent relies on the argument *falsa demonstratio non nocet* (false description does not vitiate).

[32] The respondent is driven to acknowledge that the charge in count 1 of the Toowoomba indictment remained pending against the appellant until the *nolle prosequi* endorsement of 4 August, when the new prosecutor indicated that the Crown would no longer pursue the charges in that indictment. This circumstance, and the further circumstance that, on 4 August, the prosecutor indicated that the Crown would not pursue the charges in the very indictment on which the Crown now says the appellant was serendipitously convicted, only give rise to an uneasy sense that one is reading one of the darker episodes from a novel by Franz Kafka.

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3 *R v Cockrell; ex parte Cth DPP* [2005] QCA 59.

4 (1987) 163 CLR 221 at 233 (citation footnoted in original).

[33] It may, nevertheless, be acknowledged that there is force in the respondent's argument that the arraignment of 1 August 2006 was unnecessary, in that the trial, at least on counts 2 to 7 on the Toowoomba indictment, was a continuation of the trial which duly commenced on 25 July 2006.[5] A second arraignment is, however, inconsistent with the notion that the proceedings in Brisbane on 1 August were the resumption of an adjourned trial, though one before a different jury. The fact that the appellant was arraigned, on a different set of charges, is objectively a powerful indication that a new trial had begun on a fresh indictment though one that did not meet the statutory criteria. It is no light thing to arraign an accused. It is a legal solemnity given significance by s 597C. When undertaken it has the effect described in that section of the Code. Insofar as s 604 entitled the appellant to be tried in respect of the offences charged against him in the indictment by reference to which he had been arraigned, **and no others**, the respondent's argument is not persuasive. But, even if the respondent's argument on the effect of the further arraignment is accepted, it does not follow that the fundamental irregularity of the trial can be quarantined in the way the respondent suggests. The respondent also accepts that the conviction on count 9 can be sustained only if this Court were to give leave for the indictment to be amended now to add count 9. In our view, leave should not be granted.

[34] In *R v Fahey, Solomon and AD*,[6] Thomas JA, with whom McMurdo P and Mullins J agreed, reviewed the authorities bearing upon the power of the court to amend an indictment after verdict. The focus of the discussion by Thomas JA was upon whether procedural irregularities in the language of, or joinder of charges on, an indictment prejudiced the accused's prospects of acquittal. His Honour did recognise, however, that procedural irregularities may give rise to questions as to whether the trial court was duly constituted at all. Thomas JA said:[7]

> "The effect of procedural irregularities upon subsequent convictions was considered by this court in *R v M* ((1996) 1 Qd R 532, 533-535, 540-542). After reviewing some of the cases the following observations were made:
>
> > 'In each case it is necessary to examine the substance and effect of the procedural breach. If there is a defect in the constitution of the court, the authorities suggest that the conviction will be set aside whether it might be thought to have affected the result or not. This is to be distinguished from procedural errors in the course of a trial by a duly constituted court. In such cases one examines whether the error might have affected the determinative process or the opportunity of acquittal for the accused, or even more generally if it might have affected the quality of the trial. The perception of such potential effects may suggest a miscarriage of justice in which case it will lead to the setting aside of the conviction. In this respect the effect of such a procedural error may not be very dissimilar to other errors committed in the course of a trial such as errors in the

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5 *R v Sheehy*, unreported judgment of Mullins J, in Maryborough Indictment No 129 of 2001, delivered 30 July 2002, at [10].

6 [2001] QCA 82 at [13] – [27].

7 [2001] QCA 82 at [22] – [23] (citation footnoted in original).

> summing up. The appeal court examines closely the effect of the particular error on the trial as a whole.' (Ibid p 541).
>
> In the present case, as in *M*, it is quite plain that the applicant incurred no disadvantage whatever from the occurrence of the error. No miscarriage of justice can be perceived. Cases in which courts have had to consider whether a badly drawn indictment is capable of amendment are by no means uncommon. Decisions in different jurisdictions may turn upon the particular words of the legislation dealing with the power of amendment."

[35] The present case is not one where the errors of 1 August 2006 are inconsequential, either in terms of the proper constitution of the court, or in terms of possible prejudice to the appellant. As to the former, this was not a case of a "badly drawn indictment", or even of the improper joinder of several counts in one indictment contrary to s 567(2) of the *Criminal Code*.[8] At the very least, it must be acknowledged that the processes of trial were not lawfully engaged at all in relation to count 9. There were errors which, to adopt the words of the High Court in *Weiss v The Queen*,[9] were "such a serious breach of the presuppositions of the trial as to deny the application of the common form criminal appeal provision with its proviso". For these reasons, this Court should refuse leave to amend the Toowoomba indictment to add count 9.

[36] If the consequences of the irregularities of 1 August 2006 are considered only in terms of procedural fairness to the appellant, the effect of these irregularities cannot be quarantined to count 9 as the respondent contends. Count 9 was a charge of rape against the appellant. Such a charge had not previously been brought against him. As Gibbs CJ said in *De Jesus v The Queen*:[10] "Sexual cases … are peculiarly likely to arouse prejudice … " That is especially so where, as here, the appellant is said to have committed serious sexual offences, including rape, against his vulnerable infant daughter: the offending was alleged to have commenced when she was seven years old. Courts must be especially astute to ensure procedural fairness in such cases.

[37] While it may be the case that the evidence which was relied upon as the foundation for count 9 might have been led against the apellant as evidence of "uncharged acts" bearing upon his guilt of the other offences, if the evidence relating to count 9 was sufficiently specific to sustain the charge of rape of which the appellant was convicted on this count, one is left to wonder how it could be thought that the evidence relating to that charge could have been led as evidence of "uncharged acts". In any event, it is simply impossible to say that the appellant was not prejudiced in respect of the other sexual offences with which he had been duly charged in the Toowoomba indictment by the bringing against him of a second charge of rape which was not lawfully before the court.

[38] The Court is, therefore, driven to conclude that the consequences of the procedural errors in relation to count 9 cannot be quarantined to the conviction on that count. The Court cannot be satisfied that the appellant's prospects of acquittal on the other

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8 Cf *R v Phillips & Lawrence* [1967] Qd R 237 at 277 – 279.

9 [2005] HCA 81; (2005) 80 ALJR 444 at 455 [46].

10 (1986) 61 ALJR 1 at 3. See also *R v B* [1989] 2 Qd R 343 at 350.

counts were not prejudiced by the irregular presence in the trial of the charge in count 9. Nor are we in a position to apply the proviso in s 668E(1A) of the *Criminal Code*.

Conclusion and orders

[39] For these reasons, we conclude that the convictions on all counts must be set aside, and that there should be a new trial on all counts. The trial should proceed before a different judge. Things were said in the course of the trial that may well give rise to a suspicion that the trial judge had developed an antipathy towards the appellant and those members of his family who had testified on his behalf. To ensure that justice is seen to be done, a third trial should be presided over by a different judge.

[40] The Court orders:

1. Appeal allowed.
2. Convictions set aside.
3. There be a new trial on all counts.