SUPREME COURT OF QUEENSLAND

CITATION:	*R v RAI* [2011] QCA 64
PARTIES:	**R** **v** **RAI** (appellant)
FILE NO/S:	CA No 15 of 2010 DC No 412 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	12 April 2011
DELIVERED AT:	Brisbane
HEARING DATE:	25 February 2011
JUDGES:	White JA, Margaret Wilson AJA, Ann Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – where appellant convicted after a three day trial before a jury in the District Court of two counts of rape, two counts of unlawful carnal knowledge and one count of attempting to procure an intellectually impaired person to commit an indecent act – where appellant appeals convictions on the grounds that a miscarriage of justice occurred due to the trial judge's failure to determine whether the appellant was capable of understanding the proceedings in accordance with s 613 of the *Criminal Code* 1899 (Qld) – where evidence the appellant has borderline intellectual functioning and behavioural difficulties – where at times during the proceeding the appellant was represented by his mother who had no legal training – whether a miscarriage of justice occurred CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – where appellant also appeals against his convictions on the ground that a miscarriage of justice occurred due to

inconsistencies in the proceedings – where appellant argues there was an inconsistency between the conduct by his solicitor at the pre-recording of the complainant's evidence and the conduct of the trial before the jury where he was represented by his mother – where "14 solicitors and six barristers" had either withdrawn or been dismissed by the appellant – whether the way the proceedings were conducted on the appellant's behalf led to a miscarriage of justice

Criminal Code 1899 (Qld), s 26, s 613
Evidence Act 1977 (Qld), s 21A

R v Ogawa [2009] QCA 307, followed
R v Presser [1958] VR 45; [1958] VicRp 9, followed

COUNSEL: S J Hamlyn-Harris for the appellant
M J Copley SC for the respondent

SOLICITORS: Fisher Dore Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **WHITE JA**: I have read the reasons for judgment of Ann Lyons J and agree with her Honour that the appeal should be dismissed for the reasons that she gives.

[2] **MARGARET WILSON AJA**: The appeal should be dismissed. I agree with the reasons for judgment of Ann Lyons J.

[3] **ANN LYONS J:** The appellant, Mr RAI is 49 years of age. He has borderline intellectual functioning and behavioural difficulties probably as a result of brain damage which he sustained in an accident when he was 13 years old.

[4] The appellant was charged with a number of sexual offences all of which were alleged to have been committed between 28 January 2003 and 1 May 2004 at Maryborough. The complainant was the appellant's biological daughter, R who was aged between 16 and 17 during that time period. She also has an intellectual impairment.

[5] Prior to his trial "14 solicitors and six barristers"[1] had either withdrawn or been dismissed by the appellant during a three year period. During the trial the appellant's mother, Mrs G, had acted on his behalf.

[6] The appellant faced a nine count indictment. Count 1 was rape or in the alternative count 2 indecent dealing with an intellectually impaired person. Count 3 was rape or in the alternative count 4 of incest. Count 5 was rape or in the alternative count 6 of incest. Count 7 was rape or an alternative count 8 of incest. Count 9 was attempting to procure an intellectually impaired person to commit an indecent act.

[7] The Crown case included evidence from the complainant that the appellant had sexual intercourse with her on a total of six occasions over a two week period when her mother was away. RK, the appellant's wife and the mother of the complainant,

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1 Appeal Record Book p 20 l 49.

gave evidence that her daughter told her on her return home that the appellant had sexually interfered with her. She took her to police who took a record of interview on 3 October 2004. There was also evidence of recorded admissions by the appellant to RK that he had been having intercourse with the complainant. In that recorded conversation the appellant was asked how long he had been having sex with her and he replied: "Not very often at all. Not - I wasn't fucking her every day...".[2] He also said "I said to her, 'Look, I want it to stop'. She was doing things to me, RK. I told her to stop the way she's going on. She's enticing me."[3]

[8] The complainant's evidence was pre-recorded before Dodds DCJ on 22 November 2006 on the basis that she was declared a 'special witness' for the purposes of s 21A of the *Evidence Act* 1977 (Qld).

[9] On 13 January 2010 after a three day trial before a jury in the District Court Maroochydore, the appellant was convicted of two counts of rape, two counts of unlawful carnal knowledge and one count of attempting to procure an intellectually impaired person to commit an indecent act.

Grounds of Appeal

[10] Mr RAI appeals his conviction on two grounds. The first ground is based on a failure to comply with s 613 of the *Criminal Code* 1899 (Qld). The appellant argues that because it appeared uncertain that he was capable of understanding the proceedings at trial "so as to make a proper defence" the learned trial judge was required to empanel a jury to ascertain whether he was capable or not and accordingly the judge's failure to do so gave rise to a miscarriage of justice. The second ground is that a miscarriage of justice arose from the way in which the proceedings were conducted on Mr RAI's behalf. In particular it is argued that there was an inconsistency between the conduct at the pre-recording of the complainant's evidence by his solicitor and the conduct of the trial before the jury where he was represented by his mother, a person without legal training.

The History of the Proceedings on Indictment

[11] This matter has an extensive history of delay including a significant period of delay on the part of the appellant which needs to be set out in some detail. The relevant history and a summary of the crown case and chronology was prepared by Mr Cummings, and was current as at mid November 2009, it was marked as exhibit A before Robertson DCJ on 15 December 2009 and is as follows:[4]

> "**2. CHRONOLOGY**
>
> 7. 28/1/03 – 01/05/04 period of alleged offences.
> 8. 30/9/04 first disclosures/complaints by R to RK.
> 9. 3/10/04 complaint to police and interview of complainant.
> 10. 8/10/04 accused declines to be formally interviewed and is arrested.
> 11. 15/8/05 accused is committed for trial.
> 12. 12/10/05 accused seen by Dr Alan Keen, clinical psychologist. Report prepared dated 19/10/05.

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2 Appeal Record Book p 524 ll 12-13.
3 Appeal Record Book p 525 ll 7-9.
4 Appeal Record Book pp 568-573.

13. 6/4/06 mentioned before McLaughlan QC DCJ at Maryborough, solicitors for accused withdraw, matter adjourned to allow accused to get new legal representatives.
14. 13/4/06 mention before McLaughlan QC DCJ. at Maryborough. Accused does not have legal advice, adjourned to next sittings to be arraigned no 21/08/06.
15. 15/9/06 mention in District Court at Maroochydore, possible plea, listed for mention on 9/10/06.
16. 10/11/06 mention before Dodds DCJ at Maroochydore, defence counsel seeks leave to withdraw, matter adjourned to 13/11/06.
17. 13/11/06 mention before Dodds DCJ at Maroochydore, accused appears in person. Defence counsel given leave to withdraw. Accused given until 15/11/06 to obtain legal representation. Matter adjourned until 22/11/06.
18. 22/11/06 mention before Dodds DCJ at Maroochydore. Accused arraigned on 9 count indictment and pleads not guilty. Evidence of R and S pre-recorded. Adjourned for mention until 18/1/07.
19. 18/1/07 mention before Robertson DCJ at Maroochydore. Tapes of pre-recorded evidence do not need editing.
20. 5/2/07 mention before Botting DCJ at Maryborough. Accused has new solicitors (Corser, Sheldon and Gordon) matter to proceed as trial No 1 in week commencing 4/6/07.
21. 31/5/07 Registrar of Mental Heath Court advises in writing that report of Dr Keen insufficient to support the accused application for reference to Mental Health Court.
22. 4/6/07 mention before Botting DCJ at Maryborough. Defence advise matter to be referred to the Mental Health Court.
23. 29/8/07 Corser Sheldon and Gordon advise they no longer act for the accused and mental health reference has not been completed.
24. 3/9/07 Matter mentioned before Botting DCJ at Maryborough. The accused was represented by Pearson Law. Accused obtained adjournment so that matter could be referred to Mental Health Court. Adjourned until 18 September 2007.
25. 18/9/07 matter mentioned before Botting DCJ at Hervey Bay. Pearson Law withdraw and matter listed for further mention on 26/9/07.
26. 20/9/07 matter mentioned before Botting DCJ at Hervey Bay. Accused then represented by Ryan and Bosscher. Matter to be referred to Mental Health Court.
27. 21/11/07 matter mentioned before Botting DCJ at Maryborough. Ryan and Bosscher no longer act for accused, no reference to Mental Health Court made. Now represented by Budd and Piper, Solicitors at Tweed Heads. Adjourned to next sittings.
28. 22/1/08 Copy of depositions provided to Budd and Piper.

29. 23-28/1/08 Discussions between prosecution and defence concerning having the accused assessed by practitioner nominated (Dr Hatzipetrau) by them to determine if issues to support a reference to the Mental Health Court.
30. 29/1/08 Bail of varied by adding a condition requiring accused attend upon Dr Hatizpetrau on 15 February 2008 and thereafter as required by him.
31. 15/02/08 Dr Hatizpetrou cancels appointment because of court commitments. Subsequent efforts by him to attend upon the accused at Hervey Bay prove unsuccessful.
32. 7/5/08 Budd and Piper withdraw as solicitors representing accused.
33. 8/5/08
    - 33.1 Accused appears before Botting DCJ at Hervey Bay. The Crown applied to have the matter transferred to Maroochydore so the prosecution might be expedited. The contents of correspondence from Budd and Piper dated 7/5/08 were placed on the record including:
    - 33.1.1 Because of his medical condition the accused does not retain the advice given to him.
    - 33.1.2 It is in the interests of justice that a medical report on his capacity be obtained and is available to the court.
    - 33.1.3 Dr Hatzipetrau had been retained on behalf of the accused.
    - 33.2 The accused put on record he objected to going to see Dr Hatzipetrau because he was a psychologist and not a psychiatrist. He wanted bail condition imposed on 29/1/08 removed so he could go and see a psychiatrist and intended to retain new solicitors.
    - 33.3 Botting DCJ explained the functioning of the Mental Health Court, e.g. to determine if the accused was fit for trial or to stop the prosecution.
    - 33.4 Botting DCJ expressed the view that the 29/1/08 bail condition should vacated [sic] because it no longer served any purpose. Further, his tentative view was that he had no jurisdiction to order the accused to see any practitioner.
    - 33.5 The 29/1/08 bail condition was removed the matter was transferred to the Maroochydore District Court for mention on 30 May 2008.
34. 30/5/08 Matter mentioned in the District Court sitting at Maroochydore. Accused appeared in person and informed court he was seeking a report from Dr Jenkins, a psychiatrist The matter was adjourned until 28 July 2008 so that report could [be] obtained. The report was to focus on the accused's fitness for trial.
35. 28/7/08
    - 35.1 Matter mentioned, report of Dr Jenkins forwarded directly to the District Court. Dr Jenkins opines, among other things.

35.1.1 RAI suffers from acquired brain injury:
35.1.2 RAI suffers from chronic epilepsy:
35.1.3 Mr RAI is able to understand that sexual acts with a child are wrong and is able to understand the role of a court and charges of guilt or innocence.
35.1.4 Mr RAI is unable to instruct a solicitor; he becomes easily confused when asked straight forward questions regarding court procedures and is clearly able to function with the direct intervention and support of his mother at all stages.
35.1.5 Mr RAI has clinical evidence of disturbance of memory as a result of his acquired brain injury.
35.1.6 He is unable to instruct a solicitor and requires further assessment by the Mental Health Court.
35.2 In light of Dr Jenkins report DPP to consider referring matter to the Mental Health Court.

36. 21/10/08 Dr Jenkins report is provided by ODPP to the Mental Health Court. The Registrar of the Mental Health Court determines that there is now sufficient material to proceed with Mr RAI's original application.
37. 7/11/08 Mental Health Court makes court examination order requiring the accused to visit Dr Fama and be assessed by him.
38. 20/1/09 Dr Fama sees the accused. However Mrs G (his mother) refuses to let him speak with Dr Fama. Dr Fama reports to Mental Health Court that he [is] accordingly unable to make any assessment.
39. May 09 Matter mentioned in Mental Health Court.
40. July 09 Legal Aid Office of Queensland unable to continue to act for the accused because of threats and abusive language. Matter mentioned in Mental Health Court, Philippides J makes several efforts to explain to the accused and Mrs G that the functions of the Mental Health Court, in particular, that court did not decide guilt or innocence in the event of a factual dispute, but fitness for trial and that was the reason for Dr Fama assessment. Matter adjourned so that accused could consider whether he would comply with the Mental Health Court's order.
41. 22/10/09 Mention before Mental Health Court so court could be advised if accused would comply with its order. Mrs G informed the court that they wanted to go back to the District Court so the criminal charges could be heard. He did not want to go through the mental health system. Philippides J allowed accused to withdraw his application and for the matter to proceed according to law.
42. 28/10/09 Matter mentioned in District Court at Maroochydore. Ross Felmingham from the Legal Aid Office of Queensland on the Sunshine Coast appeared. Trial date set as 11 January 2010. 590AA hearing set down for 1 December 2009 to decide if pretext telephone conversation admissible.

43. 6/11/09 Ross Felmingham, on behalf of the Legal Aid Office, withdraws from the matter.
44. 16/11/09 Matter mentioned in District Court at Maroochydore so Mr RAI can advise of current position. Mrs G wants accused to make an no case application. Matter listed for 2:30pm on 17 November 2009." (*Errors as in original*).

The hearing on 17 November 2009

[12] At the hearing on 17 November 2009, extensive submissions were made by Mrs G, on behalf of her son, in relation to the admissibility of a recorded conversation between the appellant and RK on 7 October 2004. Mrs G also made submissions about the need for a voir dire in relation to the recalling of one of the child witnesses. A voir dire was set down for 1 December 2009.

The hearing on 1 December 2009

[13] On 1 December 2009 an application was made by Mrs G on behalf of her son to recall one of the child witnesses to give the appellant a further opportunity to cross-examine her three years after the evidence was pre-recorded on 22 November 2006. That application was refused as Robertson DCJ did not consider that it was in the interests of justice to make the order.

[14] At the hearing on 1 December 2009 RK was called and was cross-examined extensively by Mrs G. Similarly, evidence was given by witnesses DS and Elissa Sharpe and they were also cross-examined by Mrs G on behalf of her son.

[15] At that hearing his Honour also discussed with both Mrs G and the prosecutor the requirements of s 613 of the *Criminal Code.* His Honour noted that there were only two reports before the court which addressed the issue of fitness for trial. In particular there was the report of Dr Keen of 19 October 2005 and a report of Dr Jenkins dated 23 July 2008. The judge also commented on the fact that there had been a failure by Mr RAI to attend before Dr Fama.

[16] His Honour then directed that subpoenas be issued to Dr Alan Keen, psychologist, and psychiatrists Dr Scott Jenkins, and Dr Peter Fama to appear and give evidence on 11 January 2010 "with a view to assisting the Court pursuant to s 613 of the *Criminal Code* as to whether the accused is capable of understanding the proceedings at the trial."[5] His Honour also ordered that the Department of Justice pay for the reports. His Honour also ordered that the psychologist and psychiatrists be provided with the taped recordings of the field tape interview between Mr RAI and the police and a copy of the tape recording of the conversation between Mrs RK and the accused on 7 October 2004 as well as a copy of the proceedings in the court on 1 December 2009.

7 December 2009 mention

[17] The matter was listed for a further mention on 7 December 2009 and on that date the prosecutor advised the court that Mrs G had indicated, on behalf of her son, Mr RAI, that they opposed the entire process under s 613. She also indicated that they were not willing to make Mr RAI available to either Dr Keen or Dr Jenkins

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5 Appeal Record Book p 9.

prior to 11 January 2010. This was confirmed before his Honour by Mrs G who stated, "Well, RAI's got a lot of appointments at the moment. He doesn't really agree to go to the doctors before now and the 11th."[6]

15 December 2009 Ruling

[18] The matter was listed for a further mention on 15 December 2009 where his Honour made the following ruling:

> "On the last occasion this matter was before the Court on the 7th December 2009, I ordered that a fitness for trial inquiry be conducted before a jury on the 11th January 2010, pursuant to section 613 of the Criminal Code.
>
> Mr Cummings had arranged for Dr Keen and Dr Jenkins to give evidence before the jury by telephone for that purpose. The defendant was not willing to be examined by either specialist in the interim.
>
> For the purposes of these reasons, I adopt and incorporate the summary of Crown case and chronology prepared by Mr Cummings, and current as at mid-November 2009, which I mark Exhibit A as part of these reasons.
>
> The chronology reveals the difficulties that have been encountered in having the defendant's fitness for trial assessed. The most recent attempt by a reference to the Mental Health Court failed, because the defendant would not speak to Dr [Fama], who had been appointed by the Mental Health Court to assess him.
>
> His fitness for trial may be in issue, because of the contents of two reports that are on the Court file. The first in time is a report under the hand of Dr Alan Keen, a consultant psychologist, dated the 19th of October 2005, which is Exhibit C in the proceedings before Judge Dodds on the 19th of October 2005. This report was prepared at the request of one of the defendant's solicitors. It is clear from its content that it was prepared for a different forensic purpose, but it does shed light on the defendant's fitness for trial at that time.
>
> …
> One of the almost infinite complications that has beset these proceedings is that Dr Keen had also assessed the complainant, the defendant's daughter, earlier that year as part of the process to support the Crown's successful application to have her declared a special witness.
>
> As the chronology will reveal, an attempt by another Judge to compel (as it were) the defendant to be examined by a psychologist by attaching a condition to his bail undertaking also did not work, and the condition was removed later by another Judge.
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> The other report is a report of Dr Scott Jenkins, clinical psychiatrist dated the 23rd of July 2008. I will mark a copy of that report as Exhibit B in these proceedings. This report was obtained at my

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6 Appeal Record Book p 139 ll 31-33.

direction to provide a basis for the ultimate frustrated referral to the Mental Health Court.

I've directed that the matter be re-listed today, because upon reflection I've determined that a section 613 inquiry at this stage will be futile in the absence of up-to-date expert psychological and/or psychiatric evidence about the defendant's fitness for trial.

…

I think it would be inappropriate, for example, to revoke the defendant's bail for the purpose of having him seen by either Dr Keen or Dr Jenkins, and indeed, Mr Cummings has never suggested such a course.

In my view, section 613 and, indeed, section 645 are directed at an inquiry into a defendant's state of mind and fitness for trial at the start or during the trial. Section 613 applies to the 'time he is called upon to plead to the indictment'. He has already pleaded not guilty at a time when he was legally represented. That occurred prior to the pre-recording of the complainant and her sister's evidence before his Honour Judge Dodds, in November 2006.

Mr Cummings asked on the last occasion that the defendant be re-arraigned on the 11th of January 2010, obviously having in mind the need to comply with the section.

As I have noted on the record, the defendant in the proceedings on the 7th – which was a voir dire – seemed to be able to comprehend the issues involved in the trial, although his behaviour is, on occasions, inappropriate and disinhibited. This may be as a result of his acquired brain injury or chronic epilepsy. Without expert assessment, this can not be determined. In the absence of cooperation from him, there will be no expert evidence relevant to a section 613 inquiry before the jury on the 11th of January 2010 and a jury inquiry into his fitness for trial without such evidence will be futile.

I therefore direct that the trial proceed before the jury in the normal way on the 11th of January 2010.

Another of the many unsatisfactory features of the case is that the defendant's mother is now appearing to assist him, with my leave. On the face of it, it may seem bizarre that a defendant with intellectual difficulties is facing trial for serious sexual offences, based on allegations by his daughter, and is assisted only by his mother, the grandmother of the complainant.

As the chronology reveals, the defendant has been represented by a multitude of lawyers, all of whom ultimately are dismissed and/or withdraw because of the perceptions of the defendant and/or his mother.

As Mr Cummings observed on the last occasion, the complainant and her mother have a real interest in seeing the end of these proceedings, the prolongation of which has undoubtedly caused them stress and anxiety. The defendant's former wife is an important witness for the Crown and I am told that she has cancer. She was

> obviously a very unwell woman at the time she gave evidence on the voir dire on the 7th of December.
>
> Mrs G, despite being a little obsessed about issues that are on the edge of relevance, has shown herself to be able to look after her son's interests and to control him, despite [not] having any legal skills or understanding of forensic techniques such as cross-examination. I have permitted her to be there to assist her son, simply because I formed a view that the Court, in this very difficult situation, was left with very little choice.
>
> I was emboldened somewhat by a comment from Dr Jenkins in his report to the effect that the defendant is only able to function with direct intervention and support of his mother at all stages.
>
> I am conscious that on occasions persons convicted of serious criminal offences, when assessed in custody, have apparently been suffering from psychological impairment that may be relevant to fitness for trial and/or criminal responsibility, and indeed may be relevant to discretionary issues relating to admissibility to evidence.
>
> This has led to an appeal when the Court of Appeal is then in a position to examine such issues, with the benefit of the relevant evidence, provided the defendant has cooperated whilst in custody. *R v Cain* [2009] QCA 365 is a recent example where some of these issues arose after trial.
>
> As I have expressed on a number of occasions, it is intolerable to allow these proceedings to meander as they have done in the past. The interests of justice strongly dictate that the defendant face his trial before a jury. In the absence of his cooperation, his fitness for trial now can not be determined. If he is acquitted, that is an end to the proceedings. If he is convicted and imprisoned, there may be an opportunity for his mental state to be assessed again."

[19] In those circumstances the matter was listed for trial to commence on 11 January 2010. On that date Mr RAI was re-arraigned on all nine counts on the indictment and pleaded not guilty to each count.

[20] In relation to the first ground of appeal the question to be determined is whether the trial judge was correct to proceed as he did or was the trial judge required by s 613 of the Code to empanel a jury for the purpose of determining the question of fitness when Mr RAI was re-arraigned and the trial commenced on 11 January 2010. To answer those questions it is necessary to determine whether it still appeared to be uncertain to the learned trial judge that Mr RAI was capable of understanding the proceedings at the trial so as to be able to make a proper defence.

[21] What evidence was there that there was some uncertainty about Mr RAI's capacity to understand the proceedings and make a proper defence? There are really three categories of evidence in this regard. First the medical information, second Mr Fairlie's comments about Mr RAI to Judge Dodds and third the trial judge's observations about Mr RAI's understanding of court processes on the occasions he had appeared before his Honour.

Report of Dr Alan Keen

[22] The report of clinical psychologist Dr Alan Keen dated 19 October 2005 was based on formal test results. Dr Keen concluded that Mr RAI had poor memory and slow thought. He also had poor concentration as well as sadness and anxiety. His relevant clinical opinion was:[7]

> "On the basis of my clinical interview and psychological test results it appears to me that:
> - Mr RAI's intellectual capacity is about borderline level, however, his condition cannot be considered as mental retardation.
> - He also shows severe problems in his verbal memory and learning.
> - He suffers significant problems in his attention and concentration.
> - His speed of processing is slow.
> - He has problems of moderate severity in his executive functioning.
> - He is epileptic."

[23] Dr Keen concluded that Mr RAI's deficiencies in cognitive capacity were due to a mild brain damage around the age of 13. He also considered that Mr RAI's condition meets criteria of the Diagnosis and Statistical Manual of Mental Disorders (DSM-IV) for diagnosis of a major depressive disorder. Dr Keen also concluded that whilst Mr RAI's intellectual capacity is not at the mentally retarded level it appeared to him that he did not hold sufficient cognitive capacity "to fully understand and speculate on the outcome of his actions and behaviour."[8]

[24] Dr Keen made no specific findings about fitness for trial or his capacity to understand court processes.

Dr Jenkins' Report

[25] Dr Jenkins, a psychiatrist, provided a letter to the District Court Registry at Maroochydore on 24 July 2008 to assist in the referral of the question of Mr RAI's fitness for trial to the Mental Health Court. It was a short one page letter which indicated that Dr Jenkins was aware of the issues of fitness for trial and possible referral to the Mental Health Court without indicating whether he had actually examined Mr RAI or done any formal testing. Dr Jenkins made the following observations:[9]

> "In brief I believe the following information is relevant:
> · Mr RAI suffers from an acquired brain injury;
> · Mr RAI suffers from chronic epilepsy;
> · Mr RAI is able to understand that sexual acts with a child are wrong and is able to understand the role of a Court and charges of guilt or innocence;
> · Mr RAI is unable to instruct a solicitor; he becomes easily confused when asked straight forward questions regarding Court procedures and is clearly only able to function with the direct intervention and support of his mother at all stages;

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7 Appeal Record Book p 381.
8 Appeal Record Book p 382 ll 32-33.
9 Appeal Record Book p 496.

> · Mr RAI has clinical evidence of disturbance of memory as a result of his acquired brain injury.
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> I believe that there is sufficient evidence for referral to the Mental Health Court. This gentleman, as a result of his acquired brain injury, is unable to instruct a solicitor and requires further assessment by the Mental Heath Court as to whether he is of sound mind."

[26] Similarly Dr Jenkins made no specific findings based on his examination but rather indicates that there were several issues of concern.

Should the jury have been empanelled to determine whether Mr RAI was capable?

[27] The essential argument for the appellant is that the trial judge erred in failing to empanel a jury to decide the question of Mr RAI's fitness to be tried or in failing to require the jury to consider whether Mr RAI was of unsound mind. The issue is really whether a real question arose as to Mr RAI's capability to understand the proceedings and trial and to make a proper defence. Was s 613(1) actually engaged?

[28] Section 613 of the *Criminal Code* provides:

> "**613 Want of understanding of accused person**
>
> (1) If, when the accused person is called upon to plead to the indictment, it appears to be uncertain, for any reason, whether the person is capable of understanding the proceedings at the trial, so as to be able to make a proper defence, a jury of 12 persons, to be chosen from the panel of jurors, are to be empanelled forthwith, who are to be sworn to find whether the person is so capable or no.
>
> (2) If the jury find that the accused person is capable of understanding the proceedings, the trial is to proceed as in other cases.
>
> (3) If the jury find that the person is not so capable they are to say whether the person is so found by them for the reason that the accused person is of unsound mind or for some other reason which they shall specify, and the finding is to be recorded, and the court may order the accused person to be discharged, or may order the person to be kept in custody in such place and in such manner as the court thinks fit, until the person can be dealt with according to law.
>
> (4) A person so found to be incapable of understanding the proceedings at the trial may be again indicted and tried for the offence."

[29] It is clear that when the appellant was initially called upon to plead on 22 November 2006 Judge Dodds was aware that there were some issues in relation to Mr RAI's ability to give instructions to his solicitors. His solicitor, Mr Fairlie, told the court the following:[10]

> "and I've had some experience with dealing with him a couple of times in the last week, and also in the room here this morning, your Honour, and I am very concerned as to his state of mental health, and

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[10] Appeal Record Book p 404 ll 22-36.

> I notice that – now, as I understood it, the Legal Aid Office were going to arrange for him to be referred to the Mental Health Court, but, in fact, no one has got an actual psychiatric report. …And it's been through solicitor after solicitor, all of whom have withdrawn from the matter, saying they can't get lucid instructions, your Honour. You have to tell him to shut up, and then talk to his mother about it, because he just doesn't grasp it at all."

[30] Mr Fairlie also indicated that his client had advised him that they had consensual sex more than once in the main bedroom and then said:[11]

> "The point is that he has a huge difficulty in grasping that that makes him guilty of incest. In fact, it's only this morning that I've actually managed to persuade him that that is incest."

[31] Mr Fairlie continued:[12]

> "But I thought I should tell your Honour the position up front, because this is why it's gone from one solicitor to another, because all that's happened, is, when they get an outburst like I got in the room before, your Honour, they just simply withdraw from the matter, and say that he won't take their advices."

[32] It would seem, however, that on 22 November 2006 Judge Dodds accepted that Mr RAI was in fact fit to plead. Mr RAI formally pleaded "not guilty". There was also evidence that he understood the nature of the charge, given Mr Fairlie's statement that he had that morning been able to make him understand what a charge of incest involved. It was also clear that not only did Mr RAI understand the charge, but that he was clearly disputing such a charge as he had in fact given Mr Fairlie instructions about questions which were to be put to the witnesses.

The relevant authorities

[33] It is important to remember at the outset that there is a presumption of sanity and of capacity for a matter.[13] Section 26 of the *Criminal Code* states:

> **"26 Presumption of sanity**
> Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."

[34] It must be determined whether when Mr RAI was re-arraigned and the trial commenced on 11 January 2010 the trial judge was satisfied that he was both fit to plead and to stand trial. In the 2009 decision of *R v Ogawa*[14] this Court examined the relevant law in relation to fitness to be tried. Justice Keane considered that the real issue in examining s 613 is whether there is any basis for the suggestion that the appellant was not of sound mind.

[35] In that case his Honour held:

> "[108] The present case is not analogous to *Kesavarajah*, where it was held that the trial judge ought to have directed an inquiry as to

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11 Appeal Record Book p 428 ll 10-14.
12 Appeal Record Book p 428 ll 33-38.
13 Section 7(a) *Guardianship and Administration Act* 2000 (Qld).
14 [2009] QCA 307.

> the accused's fitness. In *Kesavarajah* the trial court was faced with competing evidence as to the accused's fitness to plead; that is, the fact that there was competing evidence gave rise to 'a real question'. That was not the case here. Indeed on the evidence which had been adduced at pre-trial hearings instigated by the appellant, the learned trial judge had formed views distinctly adverse to the appellant. His Honour had come to the firm view that the appellant was a humbug feigning an incapacity to represent herself. That view was well open to his Honour.
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> [109] His Honour had the benefit of having seen and heard the appellant conduct her applications over many days. She conducted lengthy cross-examinations of medical witnesses with competence and energy inconsistent with a debilitating mental illness. The expert medical evidence was all one way to the effect that the appellant suffers from no mental illness which would impair her participation in the trial process in accordance with the criteria set out in *R v Presser*. These criteria concern her ability to understand the nature of the charges against her, to plead to the charge and to exercise the right to challenge, to understand the nature of the proceedings (namely that it is an enquiry as to whether the appellant committed the offences charged), to follow the course of proceedings, to understand the substantial effect of any evidence that may be given in support of the prosecution and to make a defence or answer the charge. The approach in *Presser* has been consistently applied.
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> …
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> [111] It may be acknowledged that the language of s 613(1) of the *Queensland Code* is broad and that, in the light of the historical considerations to which I have referred, it should not be read down. Read in conjunction with s 20B(3) of the *Crimes Act* in the context of Commonwealth offences, it provides: 'If … it appears to be uncertain, for any reason …' the defendant is unfit to be tried, a jury is to be empanelled to determine that question. Once the Court becomes aware of 'any reason' whereby 'it appears to be uncertain' that a defendant 'is capable of understanding the proceedings at the trial' (for State offences), or 'is [fit] to be tried' (for Commonwealth offences), the trial judge should determine the threshold question as to whether there is 'a real question' as to whether it appears to be uncertain that the defendant is either capable of understanding the proceedings at trial, or fit to be tried, as the case may be."

[36] It is clear that it is for the trial judge to determine the threshold question as to whether there is a real question as to whether it appears to be uncertain that the defendant is either capable of understanding the proceedings at trial or is fit to be tried. In my view what his Honour stated on 15 December 2009 was that there was no real question that there was uncertainty about his capacity to stand trial. His Honour determined that threshold question in favour of a conclusion that the trial should proceed. In essence there was at that stage no competing evidence which gave rise to 'a real question' to satisfy the test posed by Keane JA in *Ogawa.*

[37] In this case the learned trial judge had seen Mr RAI on a number of occasions and particularly had seen him in interactions with his mother. Of particular significance

was the lengthy cross-examination of a number of witnesses on 1 December 2009. A perusal of the transcript of that date clearly indicates that Mr RAI was closely involved in instructing his mother on that occasion. There are numerous instances in the transcript where it is clear that Mr RAI is querying particular issues. On one occasion he queried whether a child witness was still a child and on another occasion he was able to name other witnesses he was asking questions about. It is readily apparent from a reading of the transcript that Mr RAI was clearly following the exchanges which were going on in the Court. It is also clear that he is giving very firm instructions to his mother on a number of occasions. On 1 December 2009 his Honour stated:[15]

> "…from what I've seen today, obviously, your son's got difficulties. But from what I've seen today, he's able to give you instructions as to what he says occurred and that's a critical issue."

[38] I consider that the ruling of 15 December 2009 made it clear that the trial judge was satisfied that any uncertainty about Mr RAI's understanding of the charges against him had been resolved on the basis of the evidence as it stood at that point in time. The learned trial judge had in fact specifically stated that in his view Mr RAI understood the issues involved in the trial. There was in fact no persuasive evidence to the contrary. Clearly Judge Dodds had accepted his plea.

[39] Furthermore as Mr RAI had essentially refused to undertake any examinations there was no evidence before the learned judge that he would not be able to understand the proceedings or the nature of the trial. His Honour had in fact said as much on 17 November 2009 when he stated that there was an "absence of any evidence" about his lack of understanding and capacity.[16] He also said at that hearing:[17]

> "But just reading it, he seemed to be answering responsibly – in other words he was answering questions and proposition (sic) that were being put to him in a way that seemed to denote that he understood."

[40] At that hearing his Honour also indicated that the material that was currently before him was inadequate when he said that "it's very difficult for me to **have regard to any evidence** from a professional person about his **lack of understanding**."[18]

[41] There is no evidence Dr Jenkins ever saw Mr RAI. Neither does he state the basis upon which his conclusions were drawn. Whilst I note that Dr Jenkins states that there is information that Mr RAI was unable to instruct Counsel he does not state the basis for that information and whether it is his view. He is simply swearing the ultimate issue.

[42] Furthermore it was clear that Mr RAI was in fact giving instructions to his mother. Dr Jenkins considered she played a pivotal role in his functioning as he stated that Mr RAI "is clearly only able to function with the direct intervention and support of his mother at all stages". Whilst Dr Keen had provided a report it was provided for a totally different forensic purpose and was over four years old.

[43] His Honour was therefore adopting the only appropriate course available which was to allow the matter to proceed to trial and to keep a watching brief to see whether

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15 Appeal Record Book p 123 l 29-32.
16 Appeal Record Book p 21 ll 46-50.
17 Appeal Record Book p 22 ll 8-11.
18 Appeal Record Book p 22 ll 18-20.

any evidence about his inability to take part in the trial was revealed during the course of the trial. Considered objectively there was no clear evidence before the trial judge at that point that he was not able to understand the nature of the proceedings.

[44] His Honour's ruling on 15 December 2010 was in essence a continuation of the approach he had already foreshadowed on 17 November 2009 when his Honour said:[19]

> "I'm not going to second guess – I'm not a psychiatrist, I'm not a psychologist. As long as I'm satisfied that he's getting a fair trial, the trial will continue."

[45] Clearly, his Honour was aware of Mr RAI's behavioural issues. Those behavioural issues however are totally separate from the question as to whether he had an understanding of the proceedings. Mr Fairlie's observations to Judge Dodds on 22 November 2006 were in essence about behavioural issues.

[46] Although Mr RAI had already been arraigned, he was called on again at the commencement of the trial on 11 January 2010. His Honour obviously took that course to assure himself that Mr RAI understood the charges and his pleas in relation to them. There is nothing in the transcript which gives rise to concerns about Mr RAI's understanding of the charges.

[47] In my view, a reading of the transcript of the trial as a whole similarly does not reveal anything to indicate that Mr RAI was not able to understand the nature of the evidence against him, give instructions about his response to the charges and have his version of events put to the witnesses. At the close of the prosecution case, Mr RAI made it very clear that he did not wish to give evidence. The transcript indicates that they were his very clear instructions.

[48] Mr RAI was not represented by counsel. Numerous legal representatives had in fact withdrawn over the three year period that the matter had taken to come to trial. It would seem that Mr RAI's abusive behaviour towards those representatives was the major reason which prompted that course of action. Even Mr RAI's mother had difficulty controlling his behaviour. However there is simply no indication that she did not understand what he wanted her to do in relation to the presentation of his case. A significant number of Mr RAI's statements to his mother during the trial are recorded in the transcript. He clearly put his instructions and she followed his wishes. Whilst Mr RAI had none of the safeguards which come with having a competent counsel engaged on one's behalf there is no doubt that his mother capably conducted a defence on his behalf.

[49] In *R v Presser*[20] Smith J stated that where an accused person has counsel he needs to be able to make his defence or answer the charge:

> "through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must … have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel."

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19 Appeal Record Book p 37 ll 19-22.

20 [1958] VR 45 at [48].

[50] In my view, when Mr RAI was able to provide instructions to Mr Fairlie to cross-examine the witnesses at the pre-recording session in November 2006, Mr Fairlie acted for him and put those instructions. It is clear that inconsistencies were able to be put to the witnesses based on instructions Mr RAI had given to Mr Fairlie. At that point it would seem that Mr RAI was not disputing the fact that the offences had taken place but rather was arguing that the complainant had consented. Obviously the recorded conversation with RK had indicated as much.

[51] At the voir dire, and at the trial, Mr RAI had given instructions to his mother about disputing the dates the offences were alleged to have occurred. In particular, he gave instructions about a particular date being incorrect because there was a reference of him coming into the room to turn down the stereo when his instructions were the stereo had been purchased later than the time the offence was alleged to have occurred. Similarly, he gave instructions about dates when he says that he was not in Maryborough and instructions were given about the complainant having a mobile phone at a particular point in time. It is clear that his version of events was put to the various witnesses. It was not totally clear that Mr RAI was disputing that the offences ever occurred but he was clearly disputing the dates and times of the offences.

[52] In my view, despite the fact that he was not represented by counsel, there is no doubt that Mr RAI knew what he wanted to rely on and he communicated his version of the facts to his mother. Mrs G then made sure the witnesses were questioned in accordance with those instructions. Mr RAI and his mother were not, of course, conversant with court procedure, but the learned trial judge patiently and consistently gave appropriate guidance at crucial times. On 17 November 2009 he had explained a number of procedural matters to Mrs G as well as the purpose of cross examination. His Honour had also indicated "I will ensure, as far as is humanly possible, that the process is fair to him…".[21]

[53] I do not consider that the first ground of appeal has been made out. At the commencement of the trial there was no persuasive evidence before the trial judge that Mr RAI was not fit to take part in his trial. There was no "uncertainty" at that point in time because there was no evidence to displace the trial judge's view that he was capable of understanding the proceedings. Similarly, no evidence emerged during the trial such that it made it "uncertain" that he was capable of understanding the proceedings. It cannot be the case that s 613 must be engaged whenever there is any level of intellectual impairment. Furthermore, the section cannot be automatically engaged and remain engaged when the accused wilfully refuses to submit to an examination to clarify the issue.

[54] Neither do I consider that the second ground of appeal has been made out. It is argued that a miscarriage of justice arose because there was an inconsistency in the way in which his trial was conducted at the pre-recording of the evidence and at trial. As I have outlined above, however, it was clear that at the pre-record hearing Mr RAI was disputing consent and at the trial he was disputing the time and dates of the alleged offences. I do not consider that difference in approach necessarily amounts to an inconsistency.

[55] The appeal should be dismissed.

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[21] Appeal Record Book p 36 ll 9-10.