SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bull* [2012] QCA 74
PARTIES:	**R** **v** **BULL, Bryan Desmond** (appellant/applicant)
FILE NO/S:	CA No 207 of 2011 DC No 125 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	30 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	7 March 2012
JUDGES:	Chesterman and White JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence granted.** **3. Appeal against sentence allowed to the extent of setting aside the sentence imposed in the District Court on 15 July 2011 and substituting a sentence of three years and six months' imprisonment for the count of rape. The date on which the applicant is to be eligible for parole should be fixed at 14 April 2013.** **4. Declaration that two days of pre-sentence custody, 14 and 15 July 2011, is time already served under the sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was convicted following a trial of one count of rape but was acquitted of two counts of rape – where prosecutor misstated evidence and error not corrected by defence counsel or the trial judge – where trial judge did not direct the jury in accordance with *R v Markuleski* – whether verdict unreasonable because of inconsistency with the acquittals CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR

INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was convicted following a trial of one count of rape but was acquitted of two counts of rape – where the appellant sentenced to five years' imprisonment – where no parole eligibility date was set – whether the sentence imposed was manifestly excessive

MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, cited
R v BBE [2006] QCA 532, cited
R v LR [2005] 1 Qd R 435; [2005] QCA 368, cited
R v M [2003] QCA 443, cited
R v MAI [2005] QCA 36, cited
R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 250, cited
R v MBF [2008] QCA 61, cited
R v SBL [2009] QCA 130, cited
R v Smillie (2002) 134 A Crim R 100; [2002] QCA 341, cited

COUNSEL: H C Fong for the appellant/applicant
T A Fuller for the respondent

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

[1] **CHESTERMAN JA**: On 15 July 2011, after a four day trial in the District Court at Ipswich, the appellant was convicted of one count of rape but acquitted of two others. He was sentenced to five years imprisonment. He appeals against the conviction and applies for leave to appeal against the sentence.

[2] The conviction is challenged on three grounds,

(a) that it is unreasonable and inconsistent with the acquittals
(b) that the prosecutor misstated evidence in a critical respect and that the error was not corrected by defence counsel or the trial judge
(c) the trial judge did not direct the jury in accordance with *R v Markuleski* (2001) 52 NSWLR 82 that a doubt entertained about the complainant's evidence on one count was relevant to the overall assessment of her credibility.

[3] The sentence is said to be manifestly excessive given the nature of the offending and sentences imposed in comparable cases.

[4] The appellant met Mrs C, the mother of the complainant ("C"), through an internet dating service some weeks prior to Easter 2007. Mrs C lived in Toowoomba and the appellant in Ipswich. They saw each other for the first time on Good Friday 2007. Mrs C drove to Ipswich for the occasion. The relationship was short lived. It terminated at about the end of July. C was born on 10 October 1994 and was 12 years of age during her mother's involvement with the appellant.

[5] Mrs C and the appellant spent weekends together during the term of the relationship. Mrs C would drive from her home to the appellant's. She left her

children with their father, her estranged husband, in Toowoomba where he also lived. Towards the end of the relationship there were some occasions when she visited the appellant accompanied by one or more of her children. Sometimes she left the children with him.

[6] C gave an account of the offences in a record of interview with investigating police officers on 15 April 2009. She said, in relation to count one:

> " … I was really sick. … [a]nd I couldn't go to school. And um mum had to work for a couple of days. And [the appellant] offered for me to go … and stay at his place for a couple of nights. And I did. … the first time we were watching a movie and he … was sitting on the couch … he had just a robe on. And he then got [INDISTINCT] off and I glanced over and he said … what are you doing? I said nothing … sorry I didn't mean to. And he's … did you like the view? … And he's like here feel this. And he put my hand there. And I … tried to pull away … [a]nd then he said … that feels good doesn't it? And I said … not really … [B]ut … he ended up making me suck his penis and stuff. And he made me do it till he came. And he made it go all in my mouth. And it made me sick and all this gagging and choking and stuff. And … when he come … he made this growling sound. That was the first time it happened … I didn't really want to move or talk or anything. And then I ended up … going to bed, shutting my door and stayed in bed for a couple of hours, just not moving just lying there."

[7] She went on:

> "[H]e was … holding my hand making me rub his penis and play with it … And then he … pulled my head down and started making me … sucking it. … [A]fterwards … he said don't tell anyone this is our little secret … He said a couple of things … and then he pushed my head back down and stuff. … he was pushing my head down further and [I] felt like I was choking. And [I] was sick and couldn't breathe properly. And then he started to growl and I was pretty freaked out. And then he's pushing my head down faster and faster. And then he ended up coming and it went all through my mouth and down my throat. And I … felt like I was going to throw up. And then I went and chucked it all up in the sink in the kitchen."

[8] C then said this about the conduct charge of count two:

> "[T]here was another occasion where me and my sister were there. And we were downstairs in his spa. … [M]y sister [T] she went upstairs to go and have a shower after going in the spa. And he slowly started to run his hand up my leg. And I tried to push it away but he kept doing it. And he slowly pulled across my underwear or my togs and put his fingers inside me. And I told him to stop … he said no, no, no, no, no it feels good doesn't it? It feels good. … [H]e kept doing it and stuff. And then he … pulled my hand over to his penis and told me to start playing with it. And he said the quicker you get me over and done with the quicker you'll be done. And … I didn't know what to do. I was scared and so I just did it because I wanted him to stop it.

[9] C expanded her account. She said:

> "[T]here was one night when me and my sister went down to stay at his house. I didn't want her going down by herself so [I] went down as well. … [S]he got out of the spa … to go and have a shower. And he started to [rub] … his hand up my leg and I pushed it away. And he pushed, and then he started doing it again. And I pushed away again. And then he started doing it a third time. He said … don't you enjoy it? … I just shook my head … and he kept doing it. … [A]nd then he started pulling my underwear across. And I moved over a little bit. And he said … don't be scared just … let it happen. I'm just trying to help you out just so you know … what to do when you're older. … Then he started … putting his fingers inside of me and in and out and stuff. And then he got …. his other hand and pulled it across to his penis. And he said you want it to stop the quicker you play with me the quicker you fix me up … the quicker this will all be over. And I didn't end up finishing … because … we heard someone coming down the stairs …".

[10] C's description of the offence charged as count three was that she:

> "… [W]as sleeping in the double bed and I woke up … he had his fingers inside me again. … [H]e was sitting on the edge of his bed with his hand underneath the blanket playing with me. … And when … I woke up he … pulled his hand out. [I] can't remember. I was half asleep at the time."

[11] Mrs C said that on occasions when she had had intercourse with the appellant he would emit a "strange wolf like howl" at the moment of climax. Mrs C and the appellant engaged in intercourse on three or four occasions, all at the appellant's house and never when her children were present so C could not have heard his orgastic cry. She denied ever discussing the topic of physical intimacy with any of her children.

[12] Evidence of preliminary complaint was led from Mrs C; a psychologist from whom C sought assistance to cope with the strains of her parents' divorce and her mother's sudden changes of partner and address; two of C's friends and her mother's partner who succeeded the appellant. With the exception of the complaint to Mrs C, none was detailed. They were generalised accounts of sexual abuse.

[13] There was inconsistency or confusion in C's evidence as to the time of the offences. She told the psychologist they occurred when she was 11 which would have put them in the year 2006. She told the police at interview that they occurred in about September 2007, about three months after her mother's relationship with the appellant had come to an end. She corrected the date when giving pre-recorded evidence for the trial and said the offences occurred in June or July 2007. These discrepancies were much commented on in evidence and address. The jury could not have been ignorant of them or the defence contention that they cast considerable doubt on the accuracy of C's evidence.

Inconsistency of verdicts

[14] Gaudron, Gummow and Kirby JJ said in *MacKenzie v The Queen* (1996) 190 CLR 348 (at 367):

> "… [I]f there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed

> their functions as required, that conclusion will generally be accepted. If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court … to substitute its opinion of the facts for one which was open to the jury." (Citations omitted.)

[15] In *R v Smillie* (2002) 134 A Crim R 100 Holmes J (as her Honour then was) identified a number of factors which might reasonably and logically explain different verdicts. Among the factors was a difference in quality in the evidence which may in respect to some counts show a faulty recollection but a greater particularity of detail in support of other counts. Another factor is contradictory evidence or the lack of corroborative evidence where that might be expected from a complainant's account. A third factor is the existence of corroboration on some counts but not others.

[16] The acquittals and the conviction are reconcilable on the basis of differences in the quality of the evidence led with respect to each count.

[17] Mrs C provided some corroboration for C's evidence in relation to count one. She confirmed that there was an occasion when C "was very unwell" and the appellant "actually offered to look after her" so that Mrs C could go to work. She left C with the appellant at his house for a day or two.

[18] The evidence of C and her mother as to the appellant's noisy ejaculation is the subject of the second ground of appeal, but for present purposes, it is enough to note that it provides a degree of corroboration for count one because if the jury accepted Mrs C's evidence that C did not learn of the appellant's propensity from her, and was not present when they were intimate, C's evidence of the appellant's growling is cogent evidence that she was present when the appellant experienced orgasm.

[19] The evidence of preliminary complaint was also stronger with respect to count one than the other counts. C complained to her mother of the appellant's misbehaviour in October or November of 2007. She told her that the appellant had been keeping in contact by email despite the fact that Mrs C and the appellant had terminated the relationship and Mrs C had moved to Kingaroy with a new partner. C was upset and said that the appellant "had done some really horrible things"; he had forced her "to … suck his penis until he ejaculated". C mentioned that the episode was "really scary because when he ejaculated he … did this … wolf howl …".

[20] C, on that occasion, did not tell her mother of the appellant's misconduct in the spa or when she was asleep in her bed. She mentioned these episodes a month or two later. Her description of them, as recalled by Mrs C, was very brief. The depiction of count three was different to what C said in her record of interview. Her mother's evidence was that C told her she had been asleep "and she woke up to find him standing naked near the bed … and when he saw that she was awake he disappeared."

[21] By contrast there is no evidence corroborating counts two or three, and some evidence casting doubt on their occurrence. The sister, who was said by C, to be present in the spa just prior to the offence had a memory of being with C at the appellant's house "when mum was busy or something with the boys up at home", but she had no recollection of ever being in the spa, and did not think "it happened". When cross-examined T said that there was only one occasion when she and C were

together at the appellant's house, and she was adamant that, on that occasion, she did not go into the spa. She thought that C and the appellant did not go into the spa either. Mrs C could not remember any occasion when C and her sister ("T") were alone at the appellant's house.

[22] C herself said about the occasion, the subject of count two, that her memory was "just vague" and that she was "trying to put [it] back together."

[23] C's recollection of count three was, as she admitted, imperfect. She said that she woke up because she felt uncomfortable. When asked what next happened she said:

> "I don't know. I think he left. I don't know."

[24] When asked what happened when she first woke up she repeated:

> "I don't know. I jumped back in the bed. That's when he put his arm out … I could see him sitting there on the bed his arm under the blanket. Think he was sitting there naked. I don't know. I just can't remember much about it at all."

[25] There was no such impairment of memory for the events which constituted count one.

[26] There is thus a discernible difference in the quality of the evidence led in support of the three counts. C gave a detailed and coherent description of count one. Her mother corroborated the occasion which C also identified. The first complaint made by C to her mother was, though succinct, consistent with the fuller, later, version and contained the compelling detail of the appellant's orgasm. C did not include counts two or three in her initial complaint of sexual impropriety by the appellant. As well, the jury may have been encouraged to doubt the occurrence of count 2 by the mother's inability to remember any occasion when the two girls were alone with the appellant, and by the sister's belief that on the one occasion she was with the appellant and C they did not get into the spa. There is, as well, C's own admission that her memory of the event was vague. The evidence with respect to count three had the drawbacks that her memory of it was unclear and what C told her mother about it differed from what C told police.

[27] The fact that the jury entertained doubt with respect to those counts does not mean that the acceptance of her evidence on count one was illogical or unreasonable. As Applegarth J noted in a judgment, with which Margaret Wilson J and I agreed, *R v SBL* [2009] QCA 130 at [32]:

> "A jury's verdicts of acquittal on some counts do not amount to a positive finding by the jury that the events as recounted by the complainant did not occur. They show no more than that the jury was not satisfied to the requisite standard that the acts alleged in those counts occurred or occurred at the times or in the circumstances particularised in them." (Citation omitted.)

[28] The challenge to conviction on the ground that it is unreasonable because inconsistent with the acquittals had not been made out. The different verdicts are explicable on the basis of the differences in the quality of the evidence led in respect of each.

Misstatement of evidence

[29] The second ground of appeal is advanced as a separate ground, but overlaps with ground one and is said to support the argument that the conviction was unreasonable. The appellant's written submission was that the conviction was:

> "… [U]nsafe and unreasonable because the trial prosecutor misstated the complainant's evidence on a material issue in that he wrongly asserted there was a unique consistency in the complainant's evidence that the appellant had made a "wolf-like howling noise" at the time of … ejaculation. … This, the trial prosecutor maintained was confirmed as a factual consistency in the evidence by the complainant's mother …".

[30] The appellant points out that C did not describe the appellant's vocal utterance at the critical moment as "howling" or a "howl". She said it was a "growling sound" which was "deep" in tone, and which she found "creepy" and made her "freak out". Mrs C described the noise by which the appellant expressed satisfaction as "a wolf like howl". When she recounted the complaint made to her by C she said that C told her the appellant "did this really wolf howl type thing" when he ejaculated.

[31] In his opening address the prosecutor said:

> "[The appellant] then pushed [C's] head onto his penis and forced her to engage in oral sex. You'll hear that that went … until the point that [the appellant] ejaculated … You'll hear very importantly that … at the point of ejaculation or coming up to the climax [the appellant] howled or growled like a wolf …".

[32] In his closing address when urging the jury to accept C as a witness of truth the prosecutor said:

> "And the biggest consideration for you all [is] his wolf like howling noise when he ejaculated or climaxed. … So, the only way … that [C] would have known about this is if he did it in her presence. And the only time he did it in her presence … was when he raped her in count 1, and he howled when he ejaculated."

[33] The argument was that the fact that appellant howled or growled at the moment of climax was a characteristic unique to him and C's account of it added verisimilitude to her evidence in support of count one. That C described a similar occurrence to that which her mother observed does tend to support her evidence that she witnessed the appellant at the moment of orgasm. The only other explanation was that her mother had mentioned the circumstance to her, or she had been in the house and heard the noises of passion when her mother and the appellant were together. C and her mother each denied both possibilities. That left as the only source of C's knowledge her own presence with the appellant. The prosecutor, and the appellant, rightly regarded the evidence as cogent and probative of the appellant's guilt on count one.

[34] The prosecutor was said to have misstated the evidence giving it a significance and importance it did not in fact have. The two sounds are said to be different so that C's description of the appellant's conduct was not necessarily consistent with her mother's description of his conduct at the moment of climax. The appellant contended that the only point of distinction between the quality of the evidence in support of count one and that in support of the other counts was the evidence from C and her mother as to the noise made by the appellant at climax. If the noises were different the evidence lost significance. If that evidentiary support did not exist for count one the evidence for the three counts was the same in quality and the jury could not, consistently and reasonably, have convicted on one count and acquitted on the other.

[35] The argument should be rejected for a number of reasons. The first is that the evidence of the howling (or growling) when the offence of count one was committed was not the only point of distinction between counts. The others have been mentioned and, by themselves, are sufficient to explain the differences in verdict. Secondly, the appellant exaggerates the extent to which the prosecutor misstated the evidence. Thirdly, in context any error in the address of the prosecutor was unlikely to have any significance on the verdicts. The points will be addressed in turn.

[36] C described the noise in her interview with police as a deep growl which she found disturbing. Her mother recollected that when the complaint was made to her C described the noise as a howl. "Howl" and "growl" no doubt connote different noises but what is in issue is the word chosen by the witnesses to describe their subjective perception of the sound. Two or more people who together hear the same sound may well choose different words to describe it. There is, in context, little significance in the different adjectives. What is significant is that both C and her mother described the appellant as emitting an unusual noise at the moment of orgasm. That was a striking feature which strongly corroborated C's evidence.

[37] The prosecutor did not, in my opinion, materially misstate the evidence.

[38] The next point is that any misstatement does not appear to have had any significance. The prosecutor addressed first. Defence counsel who followed had the opportunity to make any corrections to factual inaccuracies in the prosecutor's address. He did not take issue with that part of the prosecutor's address. Indeed he did not mention this point at all. Nor did defence counsel ask the judge to make the correction in his summing up. That, I think, indicates clearly that there was no misstatement or that any misstatement was immaterial.

[39] The summing up contains only one brief reference to this aspect of the evidence. It occurred when the trial judge was summarising the prosecutor's arguments that the jury should accept C as a reliable witness. His Honour said:

> "The Prosecution's argument is that although the complainant made some mistakes … in her evidence about how old she was at the time … when things happened, … and although there are some recounts of what she told other people, she was generally consistent in what she said that [the appellant] did to her, and so you would find him guilty; and the clincher … the Prosecutor, said (sic) was that you would accept the girl's evidence because how would she know about the howling?"

[40] There was no request for any redirections on this point. The prosecutor and defence counsel would appear to have thought, correctly, that there was no difference in the sound being described by the two witnesses despite the different term chosen to explain it. If there was thought to be a difference it was clearly of such insignificance as not to warrant attention or correction.

[41] Ground two is without substance.

Inadequate *Markuleski* direction

[42] The trial judge's charge to the jury relevant to this point was:

> "In this case credibility is a big issue. Remember that a person may be honest but have a poor memory, or may be affected by nerves

> when giving evidence in court and that can sometimes affect the way in which people's evidence is given, but they could in the end be honest. On the other hand, people can lie. People probably lie in court every day.
>
> …
>
> So because there are separate charges … it is necessary for you to evaluate the evidence that relates to each of the charges quite separately. You then decide whether, in respect of count 1, you are satisfied beyond reasonable doubt that the defendant is guilty.
>
> The evidence in relation to the three counts is different, so naturally your verdicts in relation to each of the three charges does not have to be the same.
>
> If you have a reasonable doubt about the truthfulness or reliability of [C's] evidence … in respect of, say, count 1, then you would return a verdict of not guilty on count 1. That is if you have a reasonable doubt.
>
> If you have no reasonable doubt about count 1 you would return a verdict of guilty, but if you have a reasonable doubt about, say, count 1, then you would take into account, in relation to count 2, why it is that you have that reasonable doubt about count 1 and whether that impacts upon your assessment of the complainant girl's evidence about count 2, and similarly about count 3."

[43] The appellant complains that the directions were inadequate. He said that his Honour should have given a warning in accordance with the Benchbook:

> "If you have a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to one or more counts, whether by reference to her demeanour or for any other reasons, that *must* be taken into account in assessing the truthfulness or reliability of her evidence generally."

which appears to come from Keane JA's formulation in *R v LR* [2005] 1 Qd R 435 at 454.

[44] The essence of the model direction does appear in the trial judge's charge. The point is made with adequate clarity that the prosecution depended upon C's credibility, and the reliability of her testimony, and that if the jury doubted it with respect to one or more counts the reasons for their doubt had to be considered when deliberating on the other counts. That admonition appears in what the jury was told.

[45] There is no substance in ground three. None of the challenges to the conviction has been made out. The appeal against it should be dismissed.

Application for leave to appeal against sentence

[46] The applicant was 45 years of age when the offence was committed and 49 when sentenced. He was a disability pensioner without criminal history. The prosecutor submitted that a term of three years imprisonment was appropriate and that the offence did not warrant a term of more than four years. The trial judge sent the applicant to prison for five years. He declined to set a parole eligibility date and back dated the sentence by one day to take account of pre-sentence custody. There was no power to make the last mentioned order.

[47] His Honour noted the serious emotional impact the offence had upon C and her mother. He described the rape, correctly, as opportunistic and noted that the applicant had taken advantage of the child for his own sexual gratification. He had misused his position of the child's temporary guardian in the absence of her mother. The matter went to trial indicating a lack of remorse. There was a substantial age difference between C and the applicant.

[48] The applicant's counsel submits that the appropriate range of penalty was between three and three and a half years, which is close to the prosecutor's submission at trial. Counsel for the respondent argues that the appropriate range is between three and five years, and the sentence though substantial is just within range.

[49] The respondent emphasised C's age, 12 at the time of the offence, and that the applicant took advantage of her situation. She was vulnerable having no father of her own by reason of her parents' separation. The offence occurred when C was ill and her mother was unable to care for her by reason of her work commitments. Having initially offered assistance the applicant cruelly "took advantage of [the child] … for his own sexual gratification". Although there was no violence involved there was a degree of force. The applicant ignored and overwhelmed C's reluctance to take part in the activity and the applicant pushed her head onto his penis.

[50] These are valid points. The offending is rightly regarded as serious but comparison with other like cases indicate that the sentence is excessive.

[51] *R v M* [2003] QCA 443 was a case in which the offender was probably in his thirties. He was convicted of one count of raping his six year old son and two counts of indecently treating him. He and the child's mother had married in 1990 and separated 10 years later. About a year after the separation the boy was left with the father overnight while the mother attended a wedding. The rape was committed, as here, by penile penetration of the child's mouth into which he ejaculated. The indecent treatment consisted of the father sucking the boy's penis and rubbing his penis on the boy's back and rubbing semen on his back. He was sentenced to three years imprisonment for the rape and two years for each of the counts of indecent treatment. The episodes appeared to have been quite protracted and involved a degree of violence from which the child tried to escape unsuccessfully.

[52] An application for leave to appeal against sentence was refused. The sentence of three years was described as lenient. The case is more serious than the present in that the breach of trust was greater. The victim was M's own son who was considerably younger than C. M went to trial. Although the relevant comparison is with the sentence for rape there was greater overall criminality in M's behaviour.

[53] In *R v BBE* [2006] QCA 532 an intellectually impaired 21 year old man pleaded guilty to twice raping his five year old niece. On the first occasion he inserted his fingers into the child's vagina and left them there for about 20 seconds penetrating to a depth of about 2 cms. He told police that when he realised what he had done he stopped. On the second occasion he sat the girl on his knee, opened her legs, pushed aside her pants and licked and sucked her vagina. He was sentenced to four years imprisonment reduced on appeal to three.

[54] In *R v MAI* [2005] QCA 36 the offender was a 53 year old man who indecently dealt with his 15 year old daughter who was described as "a troubled and vulnerable

young person". She went to live with her father after an unsatisfactory and disturbed childhood and adolescence. The three offences were a single incident in which the father exposed his erect penis to his daughter, took her to his bedroom, lay her on the bed, rubbed her vagina outside her pants, removed her underwear, committed oral sex penetrating with his tongue and then inserting his fingers three or four times. She complained immediately to police but he denied the offences and went to trial. He was sentenced to three years imprisonment which was not disturbed on appeal. the Court emphasised the "special position of trust between father and daughter", his mature age and his misuse of his relationship vis-à-vis his vulnerable daughter.

[55] *R v MBF* [2008] QCA 61 was a case in which the Court refused to extend time to appeal against sentence because although severe, it would not be disturbed had an appeal been instituted. The offender pleaded guilty to one count of rape and one of indecent treatment. He was 28 years of age and, when the offences were committed, grossly intoxicated by alcohol and cannabis. The victim was his 13 year old niece. The offending involved a breach of his avuncular relationship and the offence was described as brazen "occurring at a time when the applicant and others, including the complainant [was] sleeping over at a friend's place". The niece went to sleep in the top bunk of a bed and woke to find the applicant sitting on the bed. She went back to sleep and when she next awoke the offender was lying next to her, his hand inside her pyjama pants and his finger inside her vagina. He also touched her on the breasts. The child repeatedly asked her uncle to stop but he continued despite her crying. He was sentenced to 12 months imprisonment for the indecent treatment and three years for the rape to be suspended after 12 months.

[56] Discerning gradations in depravity is a difficult if not impossible task, as is determining a precise level of punishment for each grade. The cases can be no more than indications of available ranges for roughly comparable offending. The closest comparisons are *M* and *MBF*. *M* was a worse case than this because of the familial relationship and the very young age of the boy. The sentence of three years was said to be too low. *MBF* is perhaps comparable though the activity was different. The sentence of three years was ameliorated by an early suspension but the offender pleaded guilty. From this analysis I consider the appropriate sentence for this particular offence was between three and four years. Given the prosecutor's similar submission at trial a sentence of three and a half years should have been imposed.

[57] I would order that the applicant have leave to appeal against sentence, and that the appeal be allowed. The sentence imposed in the District Court on 15 July 2011 should be set aside and instead the applicant should be sentenced to a term of three years and six months' imprisonment for the count of rape. The date on which the applicant is to be eligible for parole should be fixed at 14 April 2013, 21 months after conviction, being the half way point of the sentence. There should be a declaration that two days of pre-sentence custody, 14 and 15 July 2011, is time already served under the sentence.

[58] **WHITE JA:** I have read the reasons for judgment of Chesterman JA and agree with his Honour's reasons and the orders which his Honour proposes.

[59] **DAUBNEY J:** I respectfully agree with the reasons for judgment of Chesterman JA and with the orders proposed by his Honour.