# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v GAW* [2015] QCA 166 |
| PARTIES: | **R**<br>**v**<br>**GAW**<br>(applicant/appellant) |
| FILE NO/S: | CA No 245 of 2014<br>DC No 403 of 2013 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction & Sentence |
| ORIGINATING COURT: | District Court at Beenleigh – Unreported, 20 August 2014 |
| DELIVERED ON: | 11 September 2015 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 6 March 2015 |
| JUDGES: | Margaret McMurdo P and Holmes and Philippides JJA<br>Joint reasons for judgment of Margaret McMurdo P and Holmes JA; separate reasons of Philippides JA dissenting in part |
| ORDERS: | **1. The application to admit further evidence is granted.**<br>**2. The appeal against conviction is dismissed.**<br>**3. The application for leave to appeal against sentence is granted and the appeal against sentence is allowed.**<br>**4. The sentence imposed below is set aside and instead a sentence of three months imprisonment is substituted.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where, after a trial before a jury, the appellant was convicted of one count of indecently dealing with a child under 16 in his care and acquitted of a second count in the same terms – where both counts were alleged to have occurred on the same occasion, a short time apart, and depended entirely on the evidence of the complainant – where the jury was directed to consider each count separately – whether the conviction on the first count was unsafe and unsatisfactory because of the inconsistency with the acquittal on the other count – whether the trial judge erred in failing to give a *Markuleski* direction, having regard to the evidence in the trial<br><br>CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE |

– where, after a trial before a jury, the appellant was convicted of one count of indecently dealing with a child under 16 in his care and was sentenced to imprisonment for 10 months suspended after five months – where the circumstances of the offence were that the appellant, who was the then the complainant's stepfather, asked her to try on a bra and panties set that had been purchased earlier that day, then asked her to lift up her skirt and, when she did so, groped her buttocks with his hand – whether there were exceptional circumstances for the purpose of s 9(4) of the *Penalties and Sentences Act* 1992 (Qld) – whether the sentence was manifestly excessive

*Child Protection (Offender Reporting) Act* 2004 (Qld)
*Criminal Code* (Qld), s 210
*Evidence Act* 1977 (Qld), s 93A
*Penalties and Sentences Act* 1992 (Qld), s 9, s 234
*Penalties and Sentences (Sentence Advisory Council) Amendment Act* 2010 (Qld), s 5
*Sexual Offences (Protection of Children) Amendment Act* 2003, s 15(2), s 28(2)
*Youth Justice and Other Legislation Amendment Act* 2014 (Qld), s 34, s 39

*Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8, cited
*Jones v The Queen* (1997) 191 CLR 439; [1997] HCA 12, cited
*M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited
*MacKenzie v The Queen* (1996) 190 CLR 348; [1996] HCA 35, cited
*R v CBI* [2013] QCA 186, considered
*R v CX* [2006] QCA 409, cited
*R v Ford* [2006] QCA 142, considered
*R v Gallagher; ex parte Attorney-General (Qld)* [1999] 1 Qd R 200; [1997] QCA 467, cited
*R v Gardam; ex parte Attorney-General (Qld)* [1998] QCA 289, cited
*R v GO; ex parte Attorney-General (Qld)* [2004] QCA 453, cited
*R v LA; ex parte Attorney-General (Qld)* [2000] QCA 123, cited
*R v Lynch* [2011] QCA 309, considered
*R v M; ex parte Attorney-General (Qld)* [2000] 2 Qd R 543; [1999] QCA 442, cited
*R v Markuleski* (2001) 52 NSWLR 82; [2001] NSWCCA 290, cited
*R v Mirza; ex parte Attorney-General (Qld)* [2008] QCA 23, cited
*R v Moffat* [2003] QCA 95, cited
*R v Payne; ex parte Attorney-General (Qld)* [1999] QCA 309, cited
*R v Pham* [1996] QCA 3, cited
*R v Quick; ex parte Attorney-General (Qld)* (2006) 166 A Crim R 588; [2006] QCA 477, considered
*R v Ritchie; ex parte Attorney-General (Qld)* [2009] QCA 270, cited

*R v Smillie* (2002) 134 A Crim R 100; [2002] QCA 341, cited
*R v Toottell; ex parte Attorney-General (Qld)* [2012] QCA 273, considered
*R v TZ* (2011) 214 A Crim R 316; [2011] QCA 305, considered

COUNSEL: S J Hamlyn-Harris for the appellant/applicant
D L Meredith for the respondent

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

[1] **MARGARET McMURDO P AND HOLMES JA:** We agree with Philippides JA's reasons for granting the application to admit further evidence and for dismissing the appeal against conviction. Subject to what follows, we also agree with her Honour's reasons for concluding that the sentence of 10 months imprisonment, suspended after five months, with an operational period of three years, was manifestly excessive.

[2] As the sentence was manifestly excessive, it is now necessary to re-sentence the appellant. He was convicted of lifting his 13 year old step-daughter's skirt to see the underpants which she had purchased with him earlier that day. He then grabbed or "groped" one of her "arse cheeks" on the outside of her underpants for a short time. The incident occurred in the family home. The appellant did not follow her when she returned to her bedroom.

[3] It is true that the appellant was a mature man whose inappropriate behaviour towards his young step-daughter was a breach of trust. It is also true that he had a criminal history for driving and property offences. Even so, given the low level of the offending; and that the appellant had no prior or subsequent history of sexual offending; and that this was an isolated incident; it was open to the primary judge to conclude that, under section 9(4) *Penalties and Sentences Act* 1992 (Qld) there were exceptional circumstances. These were the low level of the offending, combined with the absence of prior or subsequent sexual offending and that it was a single episode. It follows that a term of actual imprisonment need not have been imposed.

[4] A sentence in the range of six months imprisonment suspended forthwith with a 12 month operational period would have been appropriate had the appellant been sentenced after his conviction on 20 August 2014. But in sentencing him now, this Court must take into account also the fact that he has served more than three months imprisonment prior to being granted appeal bail on 26 November 2014. This was a harsh penalty for such low level offending. In all these circumstances, we do not consider any further penalty should now be imposed. We would sentence him to three months imprisonment. As he has already served this period of imprisonment, the effect of the sentence is that he is not further punished.

[5] We would make the following orders:

1. The application to admit further evidence is granted.
2. The appeal against conviction is dismissed.
3. The application for leave to appeal against sentence is granted and the appeal against sentence is allowed.
4. The sentence imposed below is set aside and instead a sentence of three months imprisonment is substituted.

[6] **PHILIPPIDES JA: Background** On 20 August 2014, after a trial before a jury, the appellant was convicted of one count of indecently dealing with a child under 16 in his care (count 1) and acquitted of a second count in the same terms (count 2). He was sentenced to imprisonment for 10 months suspended on 20 January 2015, after serving five months, for an operational period of three years. On 26 November 2014, the appellant was granted bail pending the hearing of his appeal.

[7] Both counts 1 and 2, which were alleged to have occurred a short time apart on the same occasion (between 1 and 31 December 2012) depended on the evidence of the complainant.

[8] In his directions to the jury, the trial judge reminded the jury that, in relation to count 1, the prosecution alleged that the appellant, who was then the complainant's stepfather, asked her to try on a bra and panties set, which had been purchased earlier that day, then asked her to lift up her skirts and, when she did so, "grabbed" her buttocks with his hand. I note that while the word "grabbed" is recorded in the transcript, his Honour later in his directions used the word "grope" and that was the word used in sentencing the appellant.[1]

[9] As to count 2, his Honour directed the jury that the prosecution alleged that sometime after count 1, the appellant asked the complainant to show her new bra to him. The complainant went into the bathroom with the appellant where the appellant cupped her breasts on the outside of her bra with his hands and pushed them up, while commenting on the size and shape of her breasts. He also told the complainant that her breasts would impress boys at school.

[10] The amended Notice of Appeal, raised as grounds of appeal that the conviction on count 1 was unsafe and unsatisfactory because of:

(a) the inconsistency between the appellant's conviction on count 1 and his acquittal on count 2;

(b) the failure of the learned trial judge to give a direction in accordance with *R v Markuleski*.[2]

[11] The appellant also sought leave to appeal against sentence on the basis that the sentence was manifestly excessive.

**Summary of the evidence at trial**

[12] The trial was of short duration. There were two witnesses called apart from the complainant. One was LS, a preliminary complaint witness. She knew the complainant through the complainant's grandmother and gave evidence that on New Year's Day 2013 she spoke to the complainant at the grandmother's house and that the complainant told her that the appellant "… had been inappropriate towards her and that he had specifically fondled her breasts on an occasion". The other witness called was a police officer who gave evidence that he recorded the statement of the complainant on 16 January 2013 and that he had asked the complainant's mother for a statement but she had not given one.

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1 It was also a word used by the complainant in her pre-recorded evidence.

2 (2001) 52 NSWLR 82.

*Evidence of the complainant*

[13] The complainant was 13 years of age at the time in question. In her recorded interview with police on 16 January 2013, which was admitted into evidence under s 93A of the *Evidence Act* 1977 (Qld), she gave the following account of the alleged offences (the specific evidence of counts 1 and 2 being italicised):

> "Um we it was before Christmas and we were going Christmas shopping and um that day um we bought a fair few things and he even bought me a new pair of bra and undies but um a fair few actually ones that he liked but I agreed that I liked them as well.
>
> …
>
> But he chose them out um but yeah, when I got home he told me to try them on so I did and then I left them on because I couldn't be bothered to change but I put my clothes back on afterwards and then I walked out and he's like did you try them and I said yes and then he's like show me and then I'm like oh well and then um so he um cause I was actually wearing a skirt.
>
> ...
>
> Um um yeah he lifted up my skirt just to see it and then it was um it was actually the pair of undies he liked because they were a Bonds brand and they were black and white but um it had a really funny pattern on it and then I remember he said at the shops that um these undies are pretty funny because it will cause it curves on like on the arse cheeks kind of like they've got yeah and um *he lifted it up and he made me turn around and then he was like oh yeah I showed you it would do that like oh I told you it would do that and then and then he um he groped my arse* and then and then I walked back and and then I walked back into my room and um I put different pants on so he couldn't just like easily lift up my thing again um I think I put on my black tights after that I'm not exactly sure I don't remember.
>
> …
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> He also made me show him the bra and then so I went to the bathroom and I lifted up my shirt and then um and then he's like oh yeah I knew it would fit and then he was telling me it made my boobs look much bigger and then he was *trying to explain to me how um* how they made them bigger and *he um he touched the cup parts and then pushed them up and as he was explaining how they pushed up and I'm like well I'm not stupid but thanks and then um and then he pulled up the two straps so the bra would come up and then which made my um boobs bust out a bit more* and then he was like see if you had a bra like this um every guy in the school would want you and I'm like yeah I don't want that and then um and then I walked out and then he showed Rodney and Rodney's like oh no man I don't want to look and so and then um and then he was like oh no just look and then he was like well I don't really want to look at that she's only thirteen and then and then um and he just kind of left it and I walked away awkwardly because I felt really awkward and uncomfortable.

> ...
>
> And then I went back to my room and yeah. I just laid on my bed like I usually do just to get my own like space away."

[14] The individual who the complainant referred to as "Rodney" was the boyfriend of M (a daughter of the appellant). He was not called as a witness. The trial judge refused a request by defence counsel to give a *Jones v Dunkel*[3] direction to the jury in relation to the absence of evidence from him.

[15] The complainant admitted in cross-examination that she had told her mother that the allegations she had made against the appellant were a lie. The complainant initially appeared to deny that:

> "… I would suggest to you … that there has not been a sexual assault upon you by [the appellant]?--- I don't agree.
>
> And that you even told your mum – that you spoke to your mum and you even told your mum that you lied that [the appellant] sexual (sic) abused you--- No."

[16] The complainant gave the following evidence after the trial judge indicated that for the sake of fairness more specific questioning was required:

> "Well it was after – after you had moved out and were living with your grandmother, you had a conversation with your mum over the phone where you admitted that you had lied about [the appellant] sexually abusing you, and you told her that it was not him, that it was Fred?--- It was actually both of them, but I did say that I lied. I only said that because I wanted her – I wanted us to have a relationship again, and I didn't feel that she wanted to have a relationship with me if she thought that he did those things. But because one night I did break down crying and I rang her because I did miss her and I just wanted a relationship with her, but that wasn't the truth that I told her. The truth is what I'm – is my statement."

[17] During the cross-examination of the complainant, it became apparent that the appellant did not dispute that he had sometimes "smacked" the complainant on "the backside" but in a way that was "nothing untoward". The relevant part of the cross-examination was as follows:

> "He would smack you on the backside sometimes?---Yes.
>
> Like a bit of a pat?---Yes.
>
> He did that to your mum?---Yes
>
> He did that to [M], his own daughter---I'm not entirely sure.
>
> There was nothing untoward about him doing that?---Sorry?
>
> …
>
> There was nothing sexual?---Well, it didn't feel that – it didn't feel appropriate and that. Like, it did feel like it was a sexual thing."

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3 (1959) 101 CLR 298.

## Grounds of appeal against conviction

### *Inconsistency of verdicts*

*Applicable principles*

[18] The first ground of appeal raises the issue of whether the verdict on count 1 was unsafe and unsatisfactory on the basis of inconsistency with the acquittal on count 2. The question for determination, bearing in mind the test in *M v The Queen*,[4] is whether, given the jury's verdict of not guilty on count 2, it was open to the jury, on the whole of the evidence, to be satisfied beyond reasonable doubt of the guilt of the appellant on count 1.[5]

[19] The principles concerning inconsistent verdicts are well-established.[6] Where alleged inconsistency arises in the jury verdicts upon different counts affecting an accused, the test is one of "logic and reasonableness"; that is, whether the party alleging inconsistency has satisfied the court that the verdicts cannot stand together because "no reasonable jury, who had applied their mind properly to the facts in the case could have arrived" at them.[7]

[20] However, respect for the jury's function results in a reluctance in appellate courts accepting a submission that verdicts are inconsistent in the relevant sense, so that:[8]

> "... if 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, upon this ground, to substitute its opinion of the facts for one which was open to the jury."

[21] In that regard, "the view may be taken that the jury simply followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt".[9] Alternatively, the appellate court may conclude that the jury took a merciful view of the facts on one count; a function which has always been open to a jury.[10]

[22] It is only where the inconsistency rises to the point that the appellate court considers intervention is necessary to prevent possible injustice that the relevant conviction will be set aside.[11] While it is impossible to state hard and fast rules, the following provide examples of relevant inconsistency;[12] where the different verdicts returned by the jury are an affront to logic and common sense which is unacceptable, and strongly suggests a compromise in the performance of the jury's duty, or which suggests confusion in the minds of the jury, or a misunderstanding of their function, or uncertainty about the legal difference between specific offences, or a lack of clarity in the instruction on the applicable law.

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4 (1994) 181 CLR 487 at 493-494.

5 See *Jones v The Queen* (1997) 191 CLR 439 at 450-452 and at 455 (per Gaudron, McHugh & Gummow JJ).

6 See *MacKenzie v The Queen* (1996) 190 CLR 348 at 366-368 (per Gaudron, Gummow & Kirby JJ).

7 *MacKenzie v The Queen* (1996) 190 CLR 348 at 366 (per Gaudron, Gummow & Kirby JJ) quoting *R v Stone* (unreported, 13 December 1954) per Devlin J.

8 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367 (per Gaudron, Gummow & Kirby JJ) (citations omitted).

9 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367 (per Gaudron, Gummow & Kirby JJ) (citations omitted).

10 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367 per Gaudron, Gummow and Kirby JJ.

11 *MacKenzie v The Queen* (1996) 190 CLR 348 at 368 per Gaudron, Gummow and Kirby JJ.

12 *MacKenzie v The Queen* (1996) 190 CLR 348 at 368 per Gaudron, Gummow and Kirby JJ.

[23] In *R v CX*,[13] Jerrard JA, referring to *Osland v The Queen*,[14] stated:

> "Verdicts of guilty and of acquittal will show the required inconsistency where a verdict of acquittal necessarily demonstrates that the jury did not accept evidence which they had to accept before they could bring in the verdict or verdicts of guilty which they did; or when it follows that when acquitting on a particular count, the jury must have accepted evidence that required them to acquit on a count or counts on which they convicted the defendant."

*The appellant's submissions*

[24] The appellant submitted that the Crown case depended entirely on the complainant's credibility. LS's evidence was relevant only to the jury's assessment of the complainant's credibility. The police officer's evidence that the complainant's mother did not provide a statement simply served to ensure that no adverse inference could be drawn against the complainant from the fact that her mother was not called as a prosecution witness.

[25] The appellant contended that there could be no basis in the present case for a rational explanation for the different verdicts. Reference was made to four aspects of the evidence that required consideration in that regard:

- the evidence of the preliminary complaint witness, LS;
- the fact that Rodney was not called;
- the complainant's statement to her mother that the allegations were a lie; and
- that it was apparent from cross-examination of the complainant that the appellant did not dispute sometimes smacking her on her "backside".

[26] The respondent relied on the affidavit of Ms Kelso which was the subject of an application to admit further evidence. It was said to be relevant in relation to the point of Rodney not being called, as well as going to the ground concerning the failure to give a *Markuleski* direction. The application was not strenuously opposed. I consider that leave ought to be granted, the evidence being relevant.

*The evidence of the preliminary complaint witness*

[27] It was accepted that the jury were appropriately directed that the preliminary complaint evidence could "only be used as it relates to the credibility of the complainant". His Honour directed that:

> "Consistency between the account of the complainant about the alleged offence or offences, and what the complainant said as reported by the witness, LS, is something you may take into account as possibly enhancing the likelihood that the complainant's testimony is true.
>
> In addition you may also take into account any inconsistencies between the account given by the complaint witness, LS, and the account as given by the complainant … in assessing the complainant's credibility."

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13 [2006] QCA 409 at [33].

14 (1998) 197 CLR 316 at 356-357 per McHugh J.

[28] The appellant submitted that it was significant that the evidence of LS of the "preliminary complaint" supported the complainant's evidence on count 2, on which the appellant was acquitted but not her evidence on count 1. In those circumstances, the appellant argued that the preliminary complaint evidence could not rationally explain the different verdicts. That contention may be accepted, although (for the reasons stated below) I do not accept the contrary submission advanced, that that evidence supports the conclusion that there was no rational explanation for the different verdicts.

*The failure to call Rodney as a witness*

[29] The appellant further submitted that the Crown's failure to call Rodney as a witness did not provide a proper basis for reconciling the verdicts. It was contended that, if the fact that Rodney was not called either caused or contributed to the jury having a reasonable doubt about count 2, that could only have been because it affected the complainant's credibility. Therefore, as a matter of logic and common sense, if the jury were sufficiently concerned about the complainant's credibility so as to have a reasonable doubt about count 2, they should also have had a reasonable doubt about count 1.

[30] It is not apparent what relevant evidence could have been given by Rodney, since it was not the Crown case that he witnessed the alleged acts constituting count 2. Unsurprisingly, the trial judge refused to give a *Jones v Dunkel* ruling. The respondent's contention that the failure to call Rodney may have affected the jury's verdict on count 2 because, impermissibly, they may have considered he could give relevant evidence should be dismissed. I accept the appellant's argument that the failure to call Rodney may be discounted as an explanation for the different verdicts.

*The complainant told her mother that the allegations were a lie*

[31] The appellant accepted that it was a matter for the jury what they made of the evidence that the complainant told her mother that her allegations concerning the appellant were a lie. However, the appellant argued that that evidence had the potential to cause the jury to question the complainant's credibility. It was contended that if that aspect of the evidence caused or contributed to the jury having a reasonable doubt about count 2, they should also have had a reasonable doubt about count 1. It may be accepted that that aspect of the evidence does not provide a rational basis for distinguishing between the two counts.

*That it was apparent from cross-examination of the complainant that appellant did not dispute smacking her on her "backside"*

[32] The appellant submitted that the cross-examination of the complainant, which indicated the appellant did not dispute smacking the complainant in an innocent way, also did not provide a point of distinction. That aspect of the evidence did not lend support to the complainant's allegations on count 1. The appellant did not admit to any indecent or inappropriate treatment of the complainant. Through his counsel, he specifically disputed the alleged incidents on which count 1 and count 2 were based and the alleged events surrounding them. Furthermore, both counts 1 and 2 depended entirely on an acceptance of the complainant's account of events. A reasonable doubt about her evidence on count 2 should rationally have resulted in the jury having a reasonable doubt about count 1.

[33] I agree with the appellant's submission that, in the present case, it was not open to the jury to find the complainant's evidence per se in relation to count 1 more cogent than the evidence on count 2. Nor was this a case where the different verdicts might be explicable on the basis that the complainant's evidence was supported in respect of some counts, but not others, by admissions by the accused whether express or implied.[15]

*Compromise verdict?*

[34] The appellant submitted that the length of the jury's deliberations lent support to the conclusion that the different verdicts may have been a compromise because the jury could not genuinely agree. It was pointed out that the jury retired to consider their verdicts at 1.00 pm on 19 August 2014 but, in spite of the shortness of the evidence, their verdicts were not delivered until 6.00 pm on the following day.

[35] In its submissions, the respondent referred to evidence of discreditable conduct given by the complainant, which related to the appellant touching her on the buttocks and in the vicinity of the genitals when she walked past him, which it was said was able to be viewed as background to the allegations in count 1. (The complainant gave no such evidence in relation to touching on the breasts.) It was argued that, although intent was not an element of the offence of indecent treatment, that an alleged offender intended a touching to be indecent was not irrelevant to the deliberations of a jury. They had to be satisfied beyond reasonable doubt that the touching alleged was indecent. It was submitted that, if the alleged previous behaviour was accepted by the jury beyond reasonable doubt, it could be considered in determining whether the behaviour in count 1 occurred and whether it was indecent. As to that submission it is difficult to see that much store would have been placed on the evidence given by the complainant which was more to the effect that the appellant had a habit of putting his hand out as they passed each other, so that he touched her at the lower body level. It was not contended that there was any prior conduct amounting to indecent treatment or even an attempt.

[36] Nor do I consider that the submission as to compromise verdicts should be accepted. There was, in my view, a logical basis on which a jury could have reached the verdicts in this case; that is the jury were not satisfied beyond reasonable doubt that the act alleged as the basis of count 2 was indecent. The complainant's evidence was that, in respect of count 2, the appellant's acts of touching the cup parts of the bra and pushing up the straps occurred in the context of his "explaining" the effect the bra had, although she expressed scepticism as to that being his purpose. Nevertheless, that evidence remained relevant for the jury's consideration in determining whether they accepted beyond reasonable doubt that the appellant's conduct had the requisite quality of being "indecent". In my view, the different verdicts should be taken as revealing only that, as they were directed, the jury considered each count separately and whether the Crown had proved the elements required for a conviction on each count. The jury were not so satisfied on count 2.

***The failure to give a Markuleski direction***

[37] The appellant argued that this was a case that called for a *Markuleski* direction, that is, a direction to the effect that a reasonable doubt about the complainant's evidence on one count ought to be taken into account in assessing her evidence on the other count.

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15 See *R v Smillie* (2002) 134 A Crim R 100 at 106-107; [2002] QCA 341 at [28] (per Holmes J).

[38] In *R v Ford*,[16] Keane JA (with whom Jerrard JA and Douglas J agreed) made the following observations as to the risk of unfairness that a *Markuleski* direction addresses:

> "As the reasons of Spigelman CJ in *R v Markuleski* show, the particular risk of unfairness, which needs to be addressed by the giving of a direction (which I shall refer to for convenience as a *Markuleski* direction) that any doubt which a jury 'may form with respect to one aspect of a complainant's evidence, ought be considered by them when assessing the overall credibility of the complainant and, therefore, when deciding whether or not there was a reasonable doubt about the complainant's evidence with respect to other counts', is a risk which arises especially in sexual assault cases (albeit not peculiarly in such cases) with multiple counts involving a single complainant and a single accused where a jury's finding of not guilty on one or more counts is apt logically to damage the credibility of the complainant on other counts because there is '[i]mplicit in the … acquittal … a rejection of the complainant's account of the events which were said to give rise to [the] count' on which the accused is convicted. This risk is apt to arise because, in such cases, '[t]here is nothing in the complainant's evidence or the surrounding circumstances which gives any ground for supposing that [the complainant's] evidence was more reliable in relation to [the counts on which the accused was convicted] than it was in relation to [the counts on which the accused was acquitted]'. In summary, the risk of unfairness which creates the occasion for the giving of the direction is the risk that the accused will be denied the chance of acquittal on all counts if, given the state of the evidence, such a result ought reasonably to follow if the jury were to reject as unreliable any part of the complainant's account of what occurred.
>
> It is the risk of this particular kind of unfairness to the accused which requires a trial judge to refer 'to the effect upon the assessment of the credibility of the complainant if the jury finds itself unable to accept the complainant's evidence with respect to any count.' The purpose of such a reference is to ensure fairness to the accused 'in a word against word case' by supplementing the traditional direction that the jury should consider the evidence, as well as the question of guilt, separately in relation to each count."

[39] However, as Keane JA went on to explain, a *Markuleski* direction is not always necessary.[17] In this case, draft directions which did not include a *Markuleski* direction were provided to counsel. Defence counsel was given the opportunity but did not seek such a direction but rather a *Jones v Dunkel* direction was raised. The respondent argued there was good reason for such an approach; the defence case sought to emphasise that the entirety of the complainant's evidence was a concoction (rather than differentiating between the two counts on that score) and that it should be rejected on both counts. It was submitted that the complainant appeared to give her evidence confidently in relation to both incidents and that, faced with that situation, defence counsel may have wished to direct the jury's attention to the absence of support from anyone for the complainant's evidence and the suggested motives for making up false accusations. It was apparent from the trial judge's summing up that defence counsel addressed on both issues but concentrated on the motives to lie.

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16 [2006] QCA 142 at [124]-[125].

17 See *R v Ford* [2006] QCA 142 at [126].

[40] As already stated, there were, in the present case, aspects of the evidence concerning the need to establish the matter of "indecency" which could logically have led the jury to acquit on count 2, without that acquittal necessarily implying a conclusion detrimental to the credibility or reliability of the complainant's evidence on count 1. Furthermore, the trial judge directed the jury that they "must consider each charge separately" and that their "verdicts need not be the same". In those circumstances, and given that defence counsel chose not to ask for a *Markuleski* direction, I do not consider that the failure to give such a direction resulted in a miscarriage of justice.

**Application for leave to appeal against sentence**

[41] The appellant was sentenced to 10 months imprisonment suspended after five months for an operational period of three years. The appellant submitted that the sentence imposed was manifestly excessive and contended that the sentence that should have been imposed was one of six months imprisonment wholly suspended. Implicit in the submission is that the sentence was manifestly excessive both in respect of the head sentence imposed and in relation to the custodial component, that is, that there was a mistaken assessment as to exceptional circumstances. In advancing those submissions it was argued that ultimately, the appellant was convicted of an offence of indecent dealing very much at the lower end of the scale of seriousness of offences of that kind. The following features were pointed to as putting the present case in the category of being exceptional; there was a single offence of short duration which involved touching only on the buttocks and only on the outside of the complainant's underwear.

[42] It is to be observed that the evidence of the complainant as to the nature of the appellant's conduct was that he "groped [her] arse." When asked to explain what she meant, she said "just like just grope my like one of my arse cheeks or whatever and then um it wasn't hard but it was kind of groped kind of feel a little bit kind of like I don't know how to explain it".

***Sentencing remarks***

[43] The sentencing judge noted that the appellant was 42 years of age at the time of the offence and 43 at the time of sentencing. He had a prior criminal history but with no convictions for sexual or violent offences. It comprised offending which included a conviction in 1999 for dangerous operation of motor vehicle for which he was fined and a conviction for arson for which he was sentenced to four years imprisonment, with a concurrent two year sentence for another property offence, both offences being committed in January 1999.

[44] In imposing sentence, the trial judge observed that the offence of which the appellant was convicted was the less serious of the two charged offences. His Honour observed it was "at the lower end of the scale of seriousness". He described it as "the groping" by the appellant of the then 13 year old complainant "on her buttocks on the outside of her underwear but by lifting up her skirt".

[45] His Honour noted that the present offence occurred in the context of a care relationship, the complainant being the appellant's stepdaughter, and that the offence occurred in the family home. His Honour observed that the breach of the trust relationship between stepfather and stepdaughter had contributed to the breakdown in the relationship between the complainant and her mother. The complainant had suffered psychological damage as a result of the appellant's offending. The complainant's grandmother had become involved in her care and it seemed that there had been some improvement in the complainant's situation since July 2014.

[46] His Honour noted that the appellant had himself grown up in a dysfunctional household. His mother gave birth to him when only 15 years of age and he had several siblings to various stepparents. He repeatedly moved school as a child and it seemed that except for a period when self-employed, he had been on a disability support pension for most of his adult life.

[47] His Honour considered that, having regard to the decisions placed before him, a range of nine to 12 months was indicated in the present case. His Honour referred to s 9(5) of the *Penalties and Sentences Act* 1992 (Qld) (the PSA) as indicating "clearly that unless there are exceptional circumstances, there must be a sentence that involves a term of actual custody". His Honour had regard to the need for general and personal deterrence and commented favourably on the appellant's efforts towards rehabilitation. His Honour also noted that the appellant would be placed on the Sexual Offenders Register which imposed onerous obligations over a prolonged period.

***The relevant provisions of the Penalties and Sentences Act* 1992 (Qld)**

[48] Although his Honour referred to s 9(5) of the PSA as applicable, his Honour's reference was to a superseded version of s 9 of the PSA which relevantly provided as follows:

> "(2) In sentencing an offender, a court must have regard to—
>
> (a) principles that—
>
> (i) a sentence of imprisonment should only be imposed as a last resort; and
>
> (ii) a sentence that allows the offender to stay in the community is preferable; and
>
> (b) the maximum and any minimum penalty prescribed for the offence; and
>
> …
>
> (5) Also, in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years—
>
> (a) the principles mentioned in subsection (2)(a) do not apply; and
>
> (b) the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.
>
> (5A) For subsection (5)(b), in deciding whether there are exceptional circumstances, a court may have regard to the closeness in age between the offender and the child."

[49] In 2014, s 9 of the PSA was amended by deleting these provisions and in respect of s 9(5) replacing it with a new provision, which following renumbering, became s 9(4). Section 9(5A) was also amended to reflect the renumbering. His Honour was not informed of those amendments (nor were they mentioned before this court). The amendments to s 9 of the PSA were effected by the s 34 of the *Youth Justice and Other Legislation Amendment Act* 2014 (Qld), which also provided, by s 39, for the insertion of s 234 into the PSA. Section 234 of the PSA in turn has the effect that the new sentencing guidelines apply to an offender convicted after the commencement date of s 234, notwithstanding that prior to that date either or both of the following happened, namely:

"(a) the commission of the offence the subject of the conviction;

(b) the start of the proceeding for the offence."

[50] The commencement date of s 234 of the PSA was 28 March 2014[18] and thus before the appellant's conviction. Accordingly, it was the new s 9(4) and s 9(5) of the PSA which applied. The new provisions preserve the effect and mirror the wording of the previous s 9(5) and s 9(5A)[19] and provide:

"(4) In sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years, the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.

(5) For subsection (4), in deciding whether there are exceptional circumstances, a court may have regard to the closeness in age between the offender and the child."

[51] While the sentencing judge erred in referring to the previous s 9(5), I do not consider that resulted in material error. The sentencing judge was not mistaken as to the substance of the relevant provision that in sentencing the appellant the sentencing guidelines required an actual term of imprisonment to be served, unless there were exceptional circumstances.

[52] Also relevant, in terms of s 9(4) of the PSA, is s 9(6) which provides:

"In sentencing an offender to whom subsection (4) applies, the court must have regard primarily to—

(a) the effect of the offence on the child; and

(b) the age of the child; and

(c) the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another; and

(d) the need to protect the child, or other children, from the risk of the offender reoffending; and

(e) the need to deter similar behaviour by other offenders to protect children; and

(f) the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community; and

(g) the offender's antecedents, age and character; and

(h) any remorse or lack of remorse of the offender; and

(i) any medical, psychiatric, prison or other relevant report relating to the offender; and

(j) anything else about the safety of children under 16 the sentencing court considers relevant."

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18 See Queensland Government Gazette No 67, 4 April 2014, p 385.

19 The term "actual term of imprisonment" for the purpose of s 9(4) (as was the case in respect of the superseded s 9(5)) is defined as a term of imprisonment served wholly or partly in a corrective services facility: s 9(13).

***The meaning of exceptional circumstances***

[53] In *R v Gallagher; ex parte Attorney-General (Qld)*,[20] and other subsequent cases, the Court of Appeal has referred to the principle stated in *R v Pham*[21] that "other than in exceptional circumstances, those who indecently assault or otherwise deal with children should be sent to gaol". In *R v Quick; ex parte Attorney-General (Qld)*,[22] de Jersey CJ, referring to the principle in *Pham*, said that "whether the aggregation of … features warrants the conclusion the offender should be spared imprisonment, is a matter for careful assessment". That case concerned two counts of indecent treatment of a child under 16 years. The majority considered that the offender's circumstances, which included having entered a plea to an ex officio indictment, lack of prior criminal history, remorse, public embarrassment, seeking counselling and the unlikelihood of reoffending, did not place the case in the exceptional or unusual category, when regard was had to the gravity of the offending which involved his driving the 14 year old complainant to an isolated location where he caressed her and sucked her breasts (count 1) and video recorded the conduct (count 2).[23]

[54] The sentencing principle discussed in those cases formed the basis for s 9(5)(b) of the PSA[24] (which as mentioned was superseded by s 9(4) of the PSA). The meaning of the term "exceptional circumstances" after the introduction of s 9(5)(b) was considered by this Court in *R v Tootell; ex parte Attorney-General (Qld)*.[25] The Court noted that the PSA does not attempt to define what amounts to "exceptional circumstances" and that the expression is to be read in its statutory context. It was observed that the intent of the provision was to make it the usual case that those who commit sexual offences against children will serve actual imprisonment. And, while that intent was not to be subverted by, for example, an over-readiness to regard as exceptional any circumstance peculiar to an offender's case, it was not the case that "a combination of circumstances which would not individually be unusual can never be judged extraordinary".[26] In that regard, the Court reiterated de Jersey CJ's statement in *Quick* that careful assessment was called for in determining whether "the aggregation of such features warrants the conclusion the offender should be spared imprisonment".[27] After reviewing authorities on the meaning of "exceptional circumstances", the Court stated:[28]

> "What emerges, then, is there is no one clear prescription for what circumstances are capable of being regarded as exceptional. Consideration must be given not only to the unusualness of individual factors but to their weight; and factors which taken alone may not be out of the ordinary may in combination constitute an exceptional case.
>
> … the court, in the sentencing process, must consider whether there are exceptional circumstances which, in the light of all the other aspects of the case including those described in s 9(6), warrant the imposition of a sentence which does not involve actual custody. The mitigating circumstances must be considered against a background of

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20 [1999] 1 Qd R 200. See also *R v LA; ex parte Attorney-General (Qld)* [2000] QCA 123; *R v M; ex parte Attorney-General (Qld)* [2000] 2 Qd R 543.

21 [1996] QCA 3 at 3.

22 (2006) 166 A Crim R 588 at 590 [8].

23 Per de Jersey CJ at [6], [7], [14] and Chesterman J at [36], [37].

24 See *Explanatory Notes to Penalties and Sentences (Sentencing Advisory Council) Amendment Bill* 2010 at 5.

25 [2012] QCA 273.

26 At [19].

27 At [19].

28 At [24]-[25].

> matters such as the egregiousness of the offending and the need for deterrence in determining whether they can be said to amount to exceptional circumstances of that kind."

**Did the sentencing discretion miscarry?**

[55] The following cases were placed before the sentencing judge by way of comparatives by the Crown: *R v Moffat*,[29] *R v Lynch*[30] and *R v CBI*.[31] Defence counsel referred to *R v TZ*.[32] Before this Court, counsel for the appellant relied on the following cases which all involved Attorney-General appeals against sentences for indecent dealing that did not include actual imprisonment: *R v Gallagher; ex parte Attorney-General (Qld)*;[33] *R v Gardam; ex parte Attorney-General (Qld)*,[34] *R v Payne; ex parte Attorney-General (Qld)*;[35] *R v LA; ex parte Attorney-General (Qld)*;[36] *R v GO; ex parte Attorney-General (Qld)*;[37] and *R v Mirza; ex parte Attorney-General (Qld)*.[38] Reference was also made to *R v Ritchie; ex parte Attorney-General (Qld)*.[39] On behalf of the respondent particular reference was made to *Moffat*, *Lynch* and *CBI* as supporting the sentence imposed.

[56] In considering the cases cited, it must be borne in mind that in 2003 the maximum penalties for offending under s 210 of the *Criminal Code* were increased substantially (to 14 years for indecent treatment of a child under 16 and 20 years where a circumstance of aggravation was present).[40] At the same time the PSA was amended by providing that the sentencing principle that a sentence of imprisonment was only imposed as a last resort did not apply to sexual offences against a child under 16.[41] Given those amendments and the insertion of s 9(5)(b) in 2010 specifying that an actual term of imprisonment "must" be imposed unless exceptional circumstances existed,[42] I do not consider that much assistance can be derived from authorities which pre-date those amendments. As was observed in *CBI*:[43]

> "Those changes in the sentencing regime … especially the substantial increase in the maximum penalty, are significant. It is to be expected that they would produce a general increase in the severity of sentences, rendering the earlier cases of little utility as comparable sentencing decisions."

[57] The decisions of *TZ*, *Lynch*, *Tootell* and *CBI* do involve sentences imposed after the 2010 amendments to the PSA. However, each concerns more serious offending than in the present case. *Tootell*, *CBI* and *TZ* involved multiple counts of offending. *Lynch* involved a single count but much graver offending. None of these authorities provide support for the sentence imposed on the appellant. Rather, they point to the sentence imposed being manifestly excessive.

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29 [2003] QCA 95.
30 [2011] QCA 309.
31 [2013] QCA 186.
32 [2011] QCA 305.
33 [1997] QCA 467.
34 [1998] QCA 289.
35 [1999] QCA 309.
36 [2000] QCA 123.
37 [2004] QCA 453.
38 [2008] QCA 23.
39 [2009] QCA 270.
40 See the *Sexual Offences (Protection of Children) Amendment Act* 2003, s 15(2).
41 See the *Sexual Offences (Protection of Children) Amendment Act* 2003, s 28(2).
42 See s 5 of the *Penalties and Sentences (Sentence Advisory Council) Amendment Act* 2010, which commenced on 26 November 2010.
43 [2013] QCA 186 at [19] per Fraser JA (with whom Gotterson JA and Mullins J agreed).

[58] In *Tootell* pleas were entered to three counts of indecent dealing with a child under 16 (each count involving the aggravating circumstances that the child was under 12 and also in the offender's care). The 24 year old offender was in charge of young children at a child care centre. The two complainants were each aged three. In relation to one complainant, on two separate occasions, when the offender was reading a book to the child and she was seated on his lap, he rubbed her upper thigh and groin area; on the second occasion, he also rubbed her vaginal area outside her underpants, ejaculating shortly after. The remaining offence occurred when, sitting on the floor with another child, he rubbed that child's upper thigh, groin and vaginal area outside her pants, again ejaculating. On appeal, sentences of two months imprisonment followed by 12 months' probation (on count 1) and 14 months imprisonment to be suspended after two months, operational for 20 months (on counts 2 and 3) were imposed. The offender had no criminal history and suffered from epilepsy and intellectual impairment, his functioning being in the borderline impaired range. He had little social interaction with peers and had undertaken counselling. He experienced an adjustment disorder reflective of his grief and regret for his behaviour, and was unlikely to be a risk to the community in the future. In imposing the sentences, the Court observed:[44]

> "The combination of factors identified, including the difficulties the respondent experienced in intellectual and social functioning and the fact that the case against him was founded on his confession, were powerful mitigating circumstances. They were circumstances which might, in other contexts of offending, properly have been regarded as so exceptional as to warrant a non-custodial sentence. Had this case involved, perhaps, a single offence, or occurred in a setting other than a child care centre, the result reached here might well have been available.
>
> But we have concluded differently in the circumstances of this particular case, where there were three distinct offences on three separate occasions against two children, and where the respondent was in a special position of responsibility for children all the more vulnerable because they were not of an age to make effective complaint. Against that background, it was not open to his Honour to regard the mitigating circumstances as so exceptional as not to require custodial imprisonment. The appeal must be allowed." (citations omitted)

[59] It is immediately apparent that, while pleas were entered and there were weighty matters of mitigation, *Tootell* involved significantly more serious offending on multiple occasions and against two much younger children. It is not in that regard particularly pertinent as a comparative.

[60] *CBI* was sentenced after a trial for two offences of indecent dealing with a child under the age of 12 years. The offender, who was 66-67 at the time and with no criminal history, was in the position of "grandfather". While there was no allegation of being in care, it was an aggravating circumstance that the child was under 12. The eight year old complainant went to the bedroom of the offender, who manipulated her to go under the bed covers, lay on top of her and in the course of tickling her "scrunched" her in the genital area on her clothes, which the complainant described as "partly painful" although "she was also laughing at times".[45] The offender stopped when the child's sister entered the room and attempted to pull the offender off her. The second

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44 [2012] QCA 273 at [26]-[27].

45 [2013] QCA 186 at [3].

offence occurred when the child had been left alone with the offender. He took her to a vehicle where he laid her down, pulled down her underwear, touched her in the genital area, as before, but this time directly touching the skin. The sentences of 12 months for the first offence and 18 months for the second with parole eligibility after nine months were not disturbed on appeal. Given that the convictions after trial involved multiple offences and of a much more serious nature, *CBI* does not provide support for the sentence imposed on the appellant.

[61] *TZ* concerned charges of three counts of indecent treatment of a child under 12 and one count of indecent treatment of a child under 16. He was convicted after a trial on two counts and sentenced to three months imprisonment followed by probation for 18 months. He had no criminal history. The offending concerned the touching of the complainant on the vagina outside her underwear. An appeal against conviction was dismissed. There was no application to appeal against the sentences imposed by the sentencing judge. The offending in that case, involving two convictions after trial, was more serious than that in the present case.

[62] In *Lynch*, a sentence of nine months imprisonment suspended after three months and operational for three years was imposed on appeal in respect of one count of indecent treatment of a 14 year old girl. The complainant was persuaded by the applicant to accept a lift from him after she had missed the bus. The complainant asked to be taken to the train station, which the applicant refused to do, instead taking her to the Transit Centre car park. As they stopped, the applicant grabbed the complainant's breast forcefully, and when she pushed him away, grabbed her shirt at the stomach area and then her arm. The complainant managed to get out of the car, with the applicant pulling at her shorts as she did so. At the time of the offending the applicant, who had no criminal history and a good work history, was aged 48 and married with five children. He entered a timely plea, showed remorse, suffered public shaming and was willing to undergo counselling. *Lynch* attracted the same sentence as that imposed on the appellant. While the offender in that case had the benefit of a plea and was not in a position of care, there were particularly concerning features including his predatory and opportunistic conduct in that case which made the offending there considerably more serious. The appellant induced the complainant to enter his vehicle and used a degree of force both in the touching the complainant and in grabbing at her as she left the vehicle.

[63] Sexual offending against a child is a serious offence requiring an appropriately deterrent sentence as reflected by s 9(4) of the PSA. Further, there was an aggravating feature in the present case of the complainant being in the appellant's care. No victim impact statement from the complainant was tendered. However, the complainant's evidence at trial was that she left the family home to live with her grandmother due in part to the sexual offence committed in late 2012. In 2013, her school attendance, which had been very good during 2012, deteriorated.[46] A statement by her grandmother tendered at the sentence hearing stated that when the complainant came to live with her, she had significant behavioural and body image problems and had been placed on Zoloft, having been diagnosed with depression. During 2014, and especially in the period from July 2014, her situation had improved significantly. Fortunately, notwithstanding the offence committed against her, it appears that the complainant has been able to progress in her studies and is generally doing well.

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46 AB 43-44.

[64] The nature of the touching by the appellant, which constituted the indecent treatment, was at the lower end of the scale of offending for that type of offence. It involved a brief single occasion of touching confined to the buttock area and on the outside of the complainant's underwear. That the conduct in question was of such a low order moderated the severity of the sentence required to reflect considerations of general deterrence and denunciation. Nor did personal deterrence feature largely in the circumstances of this case, given the appellant's stated remorse, his lack of previous sexual convictions and the positive steps taken by the appellant towards rehabilitation. Those matters diminish the likelihood of reoffending.

[65] When the circumstances stated above and the authorities to which reference has been made are considered, it is apparent that the sentence imposed on the appellant of 10 months suspended after five months was manifestly excessive. The sentencing discretion must be exercised afresh, taking into account the matters s 9(6) of the PSA identifies as those that the Court must primarily have regard to in imposing sentence. It is also relevant that the appellant has served a period of some three months in custody prior to his release on appeal bail. In my view, a sentence of six months imprisonment by way of head sentence appropriately reflects considerations of general deterrence and denunciation, bearing in mind the aggravating feature of the case but also that the touching constituting indecent treatment was at the lower end of the scale of seriousness.

[66] It may well be that indecent dealing of an exceptionally low level in the circumstances of another case points to it being able to be categorised as exceptional. However, I do not consider that the mere circumstance that the touching was of a low order of offending, warrants that conclusion in this case, given the additional combination of circumstances also present. The offence was committed by a man of mature years, who had previously served a custodial sentence (although not for sexual offending) and could not claim the benefit of past good character. Moreover, the appellant took advantage of his position of trust towards his stepdaughter, the offending occurred in the family home where the complainant was entitled to feel safe and which, in the aftermath of the offending, the complainant left. Nevertheless, given the period of custody the appellant has already served and that he has been on appeal bail for some time (with no evidence to suggest that confidence in the appellant's continued rehabilitation is not justified) no further period of actual custody should be imposed. The appellant will, of course, be obliged to adhere to the strict reporting requirements which are imposed under the *Child Protection (Offender Reporting) Act* 2004 (Qld) for a five year period. I would impose a sentence of six months imprisonment, with no further custodial component beyond that already served, operational for a period of 12 months from 20 August 2014.

**Orders**

[67] The following orders should be made:

1. The application to admit further evidence is allowed.

2. The appeal against conviction is dismissed.

3. The application for leave to appeal against sentence is allowed.

4. The sentence of 10 months suspended after five months for an operational period of three years is varied to the extent of imposing a sentence of six months imprisonment suspended forthwith and operational for a period of 12 months.