SUPREME COURT OF QUEENSLAND

CITATION:	*R v Arnold; ex parte A-G (Qld)* [2002] QCA 357
PARTIES:	**THE QUEEN** **v** **ARNOLD, David Lyall** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (applicant) **THE QUEEN** **v** **ARNOLD, David Lyall** (appellant)
FILE NO/S:	CA No 287 of 2001 CA No 293 of 2001 DC No 193 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Sentence appeal by A-G (Qld) Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	17 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2002
JUDGES:	McPherson JA, Mackenzie and Atkinson JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction be dismissed.** **2. The Attorney-General's appeal against sentence be allowed. The sentences imposed below in respect of counts 2, 13 and 15 be set aside and in lieu thereof sentences of 13 years imprisonment be imposed, to be served concurrently. A declaration that the offence is a serious violent offence should be made. Otherwise the sentences below are confirmed.** **3. The applicant's application for leave to appeal against sentence be dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – OBJECTIONS AND POINTS NOT TAKEN AT TRIAL – where at appeal request by

appellant's counsel to adjourn hearing refused – where appellant raised additional matters to those argued by his counsel after the appeal was heard – where appellant argued that his legal representation had been inadequate at trial – s 23 *Criminal Code* – consideration of test in *R v Paddon*

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – whether trial judge failed to direct that each count be considered separately – where jury asked for clarification of the incidents to which particular counts relates – whether this suggests that the jury was aware that each count required separate consideration

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICITON – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION — IMPROPER ADMISSION OR REJECTION OF EVIDENCE - GENERAL PRINCIPLES - whether trial judge failed to direct that the circumstances involving each complaint were to be considered separately and as to admissibility of evidence concerning one complainant in respect of the other where appellant had confessed in a detailed way to the offences against both complainants – where appellant questioned the reliability of the confession of the youngest victim – where youngest complainant too young to give evidence – whether absence of supporting evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICITON – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – PARTICULAR GROUNDS – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – whether no case to answer on counts relating to administration of a "stupefying drug" – whether evidence established that prior to the committing of the offences the appellant blew cannabis smoke into the female complainant's mouth – whether cannabis is a "stupefying" drug

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICITON – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – whether trial judge failed to direct on s 23 *Criminal Code* – where onus on prosecution to establish beyond reasonable doubt that the act of an accused was not an act done independently of the exercise of his will – where medical evidence suggests that the appellant's condition due to voluntary intoxication by drugs – not a case where the issues of insanity and sane automatism are both open – consideration of the element of

"intent"

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – whether jury's verdict unsafe and unsatisfactory – where appeal against conviction dismissed

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – APPLICATION TO INCREASE SENTENCE – OFFENCE AGAINST THE PERSON– where application for leave to appeal against sentence on grounds that it is manifestly excessive – where an Attorney-General's appeal on the grounds that sentence is manifestly inadequate – where there were serious aggravating factors – where general principles derived from the authorities applied - where declaration of a serious violent offence

Criminal Code(Qld) s 23, s 26, s 27, s 28, s 316, s 668E(1A)
Evidence Act 1977 (Qld) s 93A
Penalties and Sentences Act 1992 (Qld) s 161B

Cooper v McKenna; ex parte Cooper [1960] Qd R 406, considered
Falconer v The Queen (1990) 171 CLR 30, considered
Hawkins v the Queen (1994) 179 CLR 500, considered
R v Dugdale CA No 272 of 1991, 13 December 1991, considered
R v Eather; ex parte Attorney-General CA No 476 of 1994, considered
R v Melano; ex parte Attorney-General [1995] 2 Qd R 186, cited
R v Milloy [1993] 1 Qd R 298, considered
R v Murcott and Ah See (1893) 19 VLR 408, distinguished
R v Paddon (1999) 2 Qd R 387, considered
R v Pearce CA No 212 of 1997, 8 August 1997, considered
R v S [1996] QCA 93, CA No 233 of 1994, considered
R v Thornely (1998) 3 VR 888, distinguished

COUNSEL: P Smith for the respondent/appellant
D Meredith for applicant/respondent

SOLICITORS: Russo & Coburn Solicitors for the respondent/appellant
Director of Public Prosecutions (Qld) for the applicant/respondent

[1] **McPHERSON JA:** I agree with the reasons of Mackenzie J in relation to both the appeal against conviction, which should be dismissed, and the application for leave

to appeal against the severity of sentence, which should be refused. Instead, the Attorney-General's appeal against inadequacy of sentence should be allowed, substituting sentences of imprisonment of 13 years on each of counts 2, 13 and 15 to be served concurrently. There should also be a declaration in the terms specified by Mackenzie J.

[2] **MACKENZIE J:** The appellant was convicted, in respect of the male complainant, of one offence of rape, two of attempted rape, two of stupefying to commit an indictable offence, one of indecent assault with a circumstance of aggravation, one attempted indecent dealing with a circumstance of aggravation, one assault occasioning bodily harm and two common assaults. In respect of the female complainant he was convicted of two offences of rape, two of stupefying to commit an indictable offence and one indecently dealing with circumstances of aggravation. He was sentenced to 9 years imprisonment for the rapes, 7 years for the offences of stupefying to commit an indictable offence, 4 years for the attempted rapes, the aggravated indecent assault and the aggravated indecently dealing, 2 years for the aggravated attempted indecently dealing, 12 months for the assault occasioning bodily harm and 6 months for the common assault. All of these sentences were to be served concurrently. The learned trial judge was invited by the Crown Prosecutor to make a serious violent offender declaration under s 161B of the *Penalties and Sentences Act* 1992 but declined to do so.

[3] There is an appeal against conviction. Leave was given to amend the notice of appeal by replacing the original ground that the convictions were unsafe and unsatisfactory with the following grounds:

1. Failure to direct the jury that each count was to be considered separately;
2. Failure to direct the jury that the circumstances involving each complainant were to be considered separately;
3. Failure to give directions as to admissibility of evidence of one complainant in respect of the other;
4. Failure to direct on s 23;
5. Failure to uphold a "no case" submission on counts based on s 316;
6. The verdicts were unsafe and unsatisfactory.

There is also an application for leave to appeal against sentence and an appeal by the Attorney-General against the sentence.

[4] The male complainant was only 2 years of age at the time of the offences. The female complainant was 11. The offences occurred in a 3 month period when the children's mother was in and out of a mental health facility as a result of a nervous breakdown after the sudden death of her former husband. The offences were revealed on 21 October 1999 when the appellant told her that he had "abused" the two children. Later that day she and the appellant went to the Adult Mental Health office in the area where they resided where the appellant told a health worker "I'm a paedophile; I've abused the children". The police were called immediately.

[5] Later that day he gave a full detailed confession in respect of each of the offences charged. The male complainant was too young to give an account. However the female complainant gave a statement which corresponded closely to the confession. It was electronically recorded and played to the jury pursuant to s 93A of the *Evidence Act* 1977. At the trial, defence counsel said that her account was "not challenged but not admitted". With respect to the male complainant the issue was

whether the jury was prepared to act on the admissions for reasons relating to the appellant's mental state at the time they were made.

[6] The appellant gave evidence that he was a user of marihuana and amphetamines and had believed, after the news of his partner's former husband's death, that there was a "presence" in the house and that he heard a cacophony of voices. He said it was during this period that he commenced having sexual relations with the female complainant. After his partner came home from hospital he continued to be aware of evil spirits and believed that there were surveillance devices and cameras in the house. There was also an incident where 15 cars followed him at walking pace and he fled to a cemetery where, he said, he met a woman who told him that her husband was in prison for interfering with children. That happened about 2 days before he handed himself in to the police. He said that it was not police whom he spoke to but members of an organisation called "the Powers". His evidence at the trial was to the effect that he no longer believed that what he had previously perceived was true.

[7] He also gave evidence that he did not dispute the female complainant's evidence but that he denied doing anything to the male complainant. He had confessed to "the Powers" because he thought he was going to die. A sample of blood taken after the record of interview revealed that he had 0.01 milligrams per kilogram of methylamphetamine in his blood. According to Dr Hoskins, a government medical officer with expertise in pharmacology, the level would have been between 0.025 milligrams and 0.1 milligrams per kilogram during the course of the interview but he would not have been under the influence of drugs at the time. He saw no objective signs that he was affected on the video of the interview. The appellant said in his record of interview that he had been high on amphetamines, cannabis and alcohol on the occasion he raped the male complainant.

[8] The defence case essentially was that the appellant was of unsound mind at the time of the offences and at the time he confessed. The matter had been referred to the Mental Health Tribunal which decided that the appellant was fit for trial but that the facts with respect to each of the offences were so in dispute that it would be unsafe to determine his mental state at the relevant times. At the trial none of the medical witnesses supported the appellant's claim that he was of unsound mind within the meaning of s 27 of the Code. Instead, reliance was placed by the defence on the appellant's evidence as to his state of mind, evidence from the children's mother who gave evidence for the Crown and evidence for the defence from his mother, sister and a woman who had been in a relationship with him until about December 1998 and had been visited by him in July 1999, at about the time the indictment alleged that the offences were being committed. This evidence will be reviewed in more detail later, when necessary, in relation to specific grounds.

Additional matters raised after hearing of appeal

[9] The appellant was represented by counsel at the appeal but was present in court himself. The reason for this unusual course was that the appeal had been listed to be heard on a date some months earlier, but had been unable to proceed because of difficulties with representation. The appellant had been represented at trial by a firm of solicitors and counsel who are not those appearing in the appeal. The problem which caused the adjournment of the appeal was that there was some confusion whether a second firm had been retained under a grant of legal aid. The

matter was mentioned about a week later and that firm was released from any obligations with regard to the matter. A third firm was subsequently retained and briefed counsel at the hearing.

[10] At the mention hearing on 14 March 2002 the President told the appellant that the matter would proceed when next listed. If he was not represented he would have to represent himself. If any allegations were being made about his legal representation at trial or it was intended to seek leave to lead new evidence those matters had to be presented in affidavit form. When the appeal came on for hearing the following occurred:

> "MR SMITH: Your Honour, my client has specifically instructed me to seek an adjournment of the appeal. I can't advance any proper grounds to support such an application, and he has instructed me that if you refuse the adjournment application that I'm retained to argue the matter on the grounds presently contained in my outline.
>
> McPHERSON JA: The appeal has, I think, been before the Court on at least one prior occasion and we would need some compelling reason for granting an adjournment on this occasion.
>
> MR SMITH: Yes
>
> McPHERSON JA: I gather that you can't advance either a compelling or any reason.
>
> MR SMITH: No, I can't."

The application for an adjournment was refused and the hearing proceeded immediately.

[11] Some time after the appeal was argued, the court was advised that the appellant wished to raise issues additional to those argued by his counsel. Through the registry the appellant was given liberty to send further submissions in writing. The submissions eventually arrived after a deadline, which was extended at the request of the appellant, had been set. The additional material consists of submissions in writing by the appellant, with voluminous annexures of documents, and statutory declarations by one Ian Bruce Bell and by the mother of the victims. The mother is still emotionally involved with the accused. Mr Bell asserts that he is a mature age law student who holds a power of attorney from the appellant, has voluntarily assisted many people whose situations bespeak of injustice, and has rendered assistance to him in connection with the case.

[12] With regard to the conduct of the appeal itself, the appellant complains that he instructed his solicitor to seek an adjournment on grounds supplied by Mr Bell, but those grounds had not been advanced. Amongst the documents annexed to the submissions is a response by the principal of the firm of solicitors acting in the appeal to the Manager of the Client Relations Centre of the Queensland Law Society, with whom the appellant had corresponded. In it the grounds provided by Mr Bell for seeking an adjournment are stated to be, firstly, that the firm had only been briefed recently and had had insufficient time to prepare. The factual content of that ground was in fact incorrect because the firm had been briefed over 5 weeks before the appeal, and in the opinion of the experienced solicitor had had ample

time to prepare. The second concerned the need to obtain a report from a further psychiatrist. There are some issues concerning matters peripheral to that which are of no importance for the purpose of assessing the grounds put forward as the basis for an application for an adjournment. Having regard to the history of the matter it is plain beyond argument that the grounds for seeking an adjournment which were not pursued by counsel had no prospect of succeeding. Counsel was not wrong not to advance them.

[13] The purpose sought to be served by gaining an adjournment was to seek to argue principally, but not solely, that legal representation had been inadequate at the trial. The principal concern was that a theory that a reaction to medication may have caused the appellant to act independently of the exercise of his will, bringing into play the "defence" of automatism under s 23 of the *Criminal Code*, had not been developed.

[14] The theory is explained in Mr Bell's statutory declaration and to some extent in the material annexed to the appellant's further submissions. Much of Mr Bell's statutory declaration is argumentative in form and expresses opinions on medical subjects without any reason to suppose that he has any requisite expert qualifications in that regard. Leaving that aside, the underlying argument is that the defence failed to raise the issue of the possible consequences of Prozac being prescribed in a case of a person who had been medicating with Lithium but had ceased doing so shortly before taking Prozac.

[15] It is not accurate to imply that the subject was not raised. There is a relatively lengthy passage of cross-examination of Dr Hoskins where in effect he says that a manic attack may be precipitated in some people who have been using Lithium but have ceased to do so. As will appear later, the issue of whether the appellant was really suffering from bipolar disorder and lacked one or more of the capacities referred to in s 27 of the *Code* was a major issue at trial. The medical evidence relating to the issue is summarised in paras [52] to [54].

[16] The material annexed to Mr Bell's statutory declaration refers to various medical practitioners and legal practitioners, some of whom are overseas, who may have been able to assist by providing evidence concerning drug interactions. However, the information is lacking in specifics as to what the evidence may have been except that it would concern aberrant behaviour due to drug induced psychoses. The complaint really is that, having been given the names of these people, the defence representatives failed to contact them before trial notwithstanding a direct instruction given by Mr Bell to do so. In relation to the attempt to equate drug induced psychosis to automatism under s 23 of the *Code*, amongst the material relied on is a limited newspaper report of a case of *Hawkins*. On the face of it, that case does not support the proposition. Non-insane automatism would entitle the person to be acquitted. Mr Hawkins was not acquitted but pleaded guilty to manslaughter on the grounds of diminished responsibility, which necessarily implies a mental illness causing substantial deprivation of one of the relevant capacities.

[17] To obtain a new trial on the ground that the appellant has been inadequately represented at trial it must be shown that the legal representatives were "flagrantly incompetent" (*R v Paddon* (1999) 2 Qd R 387). *Paddon* establishes that the court will not lightly infer that counsel's conduct of a trial, even if a verdict adverse to the

appellant has occurred, was incompetent. Unless the inference is the only one available and is compelled by the circumstances, it should not be drawn. To argue that a new trial should be granted merely because other experts might, if approached, be able to give evidence on issues relating to relevant drug reactions misconceives what is necessary at appellate level. It is incumbent on an appellant who wishes to establish that a defence might have been available but for the default of legal representatives to provide sufficiently cogent evidence supporting the availability of the defence at the least.

[18] The basic problem with the appellant's present argument that the theory that he wished to put before the jury was misunderstood by his counsel and the court is that there was at the trial and still is no evidence supporting the notion that Prozac causes automatism entitling him to acquittal under s 23. The evidence at trial was that in cases where Prozac may have had an adverse effect it causes a condition which is to be dealt with within the confines of s 27 and s 28. The learned trial judge summarised accurately the evidence of Dr Hoskins concerning the consequences of a person with bipolar disorder ceasing to take Lithium and commencing to take Prozac. It cannot be ignored that there is also overwhelming evidence that the appellant was using excessive amounts of cannabis and amphetamines concurrently and significant evidence concerning the potential for excessive use of amphetamines to cause psychosis. The proper conclusion is that the generalised assertions in Mr Bell's statutory declaration and the appellant's submissions are wholly inadequate to provide a basis for holding that the test in *R v Paddon* has been satisfied.

[19] Another issue raised with respect to the evidence of Dr Hoskins is that, when the jury returned to court following an adjournment after his evidence has concluded, the learned trial judge was told that the jury had indicated that they had had some difficulty hearing some of the "medical type evidence" because the witness was not speaking loudly enough. It is essential that a jury be able to hear the evidence. However, complaints of this kind and requests for witnesses to speak more loudly are not infrequent. Such a complaint does not necessarily imply that material parts of the evidence were not heard at all by the jury. The jury's communication is not inconsistent with, as it says, having difficulty in hearing but does not say that material parts of the evidence were not heard. As already mentioned, the evidence was accurately summarised in the summing-up. It is not, standing alone, of sufficient cogency to entitle the appellant to a new trial.

[20] The statutory declaration from the mother of the complainant children adds nothing to the substance of the evidence given at trial concerning the appellant's mental state. The competing evidence (referred to in para [29]) concerning the common assault on the child, including the version repeated in her statutory declaration, was fully ventilated at trial. It is not surprising that, if a request was made that a prison chaplain who had conversations with the appellant be called to give evidence, a decision was taken by counsel not to call the evidence since much of the evidence would have merely confirmed the circumstances of the offences and a good deal of the rest would have been inadmissible. It was not flagrant incompetence not to call him. The allegation in the mother's statutory declaration that the children's rights were invaded because the police took appropriate steps to investigate the alleged offences against them is baseless.

[21] Finally, reference should be made to what appear to be misconceptions about statements made in bail applications and medical reports. In some instances, references to availability of defences, the strength of the case, and what are said to be statements of opinion by doctors appear to be relied on as supportive of the appellant's case. In reality such statements are often only reflective of submissions put to a court without the benefit of the evidence being tested, or recitations of a clinical history given to a doctor. Their weight is not always as substantial as the appellant's submissions imply.

[22] One aspect of this concerns the allegation that it was flagrantly incompetent not to attempt to have the confession excluded. With the benefit of knowing the state of the evidence, it is apparent that the possibility of successfully applying for its exclusion was minimal. The manner of the confession, which followed a spontaneous revelation of child abuse, and the opinion of Dr Hoskins that there was no objective evidence of the appellant being affected by drugs at the time of the interview show that a judgment by counsel not to challenge admission of the confession was one that could have properly been made by competent counsel.

[23] Nothing in the additional material establishes a reason why the conviction should be set aside. The grounds of appeal originally argued must now be considered.

Failure to direct that each count was to be considered separately

[24] The focus of this submission was a passage where the learned trial judge told the jury that possible verdicts were guilty, not guilty on the ground of unsoundness of mind or not guilty. It was submitted that this conveyed to the jury that the verdicts were "all or nothing" in respect of all counts. The focus is unduly narrow. The passage is immediately preceded by another where the learned trial judge directed the jury that when asked for their verdicts the Associate would start with count 1 and work his way through the indictment, asking with respect to each count whether they found the accused guilty or not guilty before moving on to the next. The passage was immediately followed by a direction that the jury would find the appellant not guilty of any of the offences if not satisfied beyond reasonable doubt the prosecution had proved the elements which went to make up "that offence". There are then two other directions referring to verdicts in relation to "an offence about which you're asked" and the need for proof of the elements of "that offence".

[25] Not long after the jury retired it asked for a redirection as to what incidents related to three particular counts. The learned trial judge said that he had intended to give, but had overlooked giving, a direction as to the particulars of each count. He then gave those directions. The fact that the jury asked for clarification of the incidents to which particular counts related suggests that the jury was aware that each count required separate consideration. Apart from that, a reasonable jury would not have gained a contrary impression when the passages surrounding the one complained of are read together with it. This ground is not made out.

Failures to direct that the circumstances involving each complainant were to be considered separately and as to admissibility of evidence concerning one complainant in respect of the other

[26] These may be dealt with together. The case was unusual in that the appellant had confessed in a detailed way to offences against both children. In the case of the

child who was old enough to give an account, the details in her s 93A statement corresponded strikingly to those in the confession. The appellant did not dispute her evidence but denied in evidence committing any offences with respect to the male child who was too young to give evidence and put in issue the reliability of the confession insofar as it related to him. No complaint is made about the summing-up in so far as it dealt with the relevance of his mental state to issues of truth and reliability.

[27] Subject to one matter to which reference will be made shortly, the jury may well have been prepared in the circumstances to accept that the confession as a whole was true and reliable. However, counsel for the appellant submitted that in respect of the counts involving anal penetration of the boy particularly, evidence of the absence of physical signs that there had been interference cast doubt on the reliability of the confession in so far as it related to those counts at least. He submitted that it was not a case where, without proper directions, the jury's verdicts could be sustained. It was not sufficient to direct them, as the learned trial judge did, that they must not simply say that because the confession with respect to the girl was true the confession regarding the boy must be true also.

[28] The counts involving penetration all involved anal penetration. The medical evidence concerning lack of signs of penetration came from Dr Harris, director of paediatrics at Nambour Hospital, and Dr Greggora. Both examined each of the complainants on 22 October 1999, almost 2 months after the latest date of the periods alleged in respect of those counts. Dr Harris said that the anus of each complainant was normal and there was no evidence of trauma. He said he would "almost definitely" expect to find no injury after a few days. This was his experience even in cases where the act had been admitted by the perpetrator. Dr Greggora said he found no evidence of trauma in either case but said he was not experienced enough to give an authoritative opinion as to whether evidence of penetration would necessarily be found.

[29] While on the subject of medical evidence, there was one count of common assault on or about 23 September 1999, based on an admission of blows to the male complainant's forehead. On 23 September 1999, Dr Ross-Smith, a general practitioner, was consulted about a bruise on the child's forehead. As a result, the child was x-rayed. He said the appellant had told him there were two causes, falling from a chair and falling from a trampoline. The injury was consistent with these stated causes or a blow from a fist. The child's mother gave evidence of taking the child to the doctor and then for x-rays after another child had reported that he had fallen from the trampoline. The appellant said in his record of interview that the injury for which the child was taken to the doctor was caused when he got really angry to the point where he could not stop himself and inflicted a "major bruise" on the child's forehead. It was plainly a case where the jury had different accounts of the incident. It was open to them to prefer the account in the record of interview.

[30] The argument developed in relation to these grounds of appeal was that failure to direct the jury appropriately was important because of the denial of the offences against a male complainant, the absence of supporting evidence generally and more particularly the absence of signs of anal penetration. It was submitted that if a clear and emphatic direction had been given, there may have been verdicts of not guilty on the counts of rape on the basis of the jury not being satisfied beyond reasonable doubt of penetration. It was submitted that if that view was taken by the jury with

respect to those counts, it may have raised a reasonable doubt about other counts especially those relating to the male complainant. This submission, in so far as it related to the female complainant, was not vigorously pressed.

[31] A jury is generally entitled to accept or reject parts of a witness' account. While this is true as a general proposition it is one that needs to be treated with caution in some cases. There is a risk that giving a direction in that form in some cases may tend to confuse the jury and lead to inconsistent verdicts. In the present case it was maintained that in respect of the counts involving anal penetration, there was a real basis in the medical evidence for distinguishing between what was reliable and what was not in the confession. In my view, the jury was entitled to conclude the absence of any physical evidence of interference was not inconsistent with it having occurred, and did not necessarily affect the truth or reliability of the confession. It was submitted that if the evidence with respect to one child was admitted with respect to the other, the jury should have been given adequate directions as to the use that could be made of it but was not. The learned trial judge's summing-up dealt with the confession by referring to the similarity between the appellant's confession and the girl's evidence and pointing out that he had confessed in the record of interview to doing things to the boy although he had denied it in evidence. He referred to the defence submission that the confession was unreliable and that the jury should not be satisfied that it was true with respect to him. As mentioned above the learned trial judge warned the jury that they must not simply say that because the confession with respect to the girl was true the confession regarding the boy must be true also.

[32] In a highly unusual case like the present it is somewhat artificial to require a direction which deals in detail with the principles of admissibility of bodies of evidence in respect of different complainants. *R v Thornely* (1998) 3 VR 888 upon which the appellant relied is a very different kind of case, in which a direction to consider each count and the cases in relation to each complainant separately was essential. In respect of the boy, this Crown case stood or fell by the jury's view of the reliability of the confession. The jury was entitled to take into account, when considering the issue of the confession as a whole, that while there was not an admission that the confession was accurate with respect to the girl, it was not contested. In principle, the jury was entitled to have regard to the evidence of commission of offences against the female complainant in considering the counts relating to the boy in any event. However, in all probability the jury would have simply resolved the matter on the basis that because of the circumstances of the confession they were satisfied beyond reasonable doubt as to the truth and reliability of what he had said. No direction of the kind argued for was necessary. Neither of these grounds is made out.

No case to answer on counts relating to "stupefying drug"

[33] The elements of an offence under s 316 relevant to a case where the substance administered is alleged to be a stupefying drug are:

(a) that the offender administered a stupefying drug to another;
(b) that what the offender administered was a stupefying drug; and
(c) that the offender administered the stupefying drug with intent to commit an indictable offence.

[34] The evidence in this case, if accepted, established that prior to committing the offences the appellant blew cannabis smoke from a bong into the female complainant's mouth. In the record of interview he variously described the purpose as "to put her into a state where she was kind of out of it … so her recall of events would be blurred" and "basically to put her into a different state. Like she wouldn't, you know, think it was that bad". He said that he made the male complainant inhale smoke from cannabis from a plastic bag so that it would dull his senses. As the appellant put it in the record of interview (at 17) "I thought that … at least they're out of it, it wouldn't hurt as much, they wouldn't remember as much, it wouldn't affect him as much". He also believed there would be an element of self-protection from prosecution if their senses were dulled.

[35] Dr Hoskins gave evidence that ingestion of cannabis produced a sense of wellbeing in an average person. Very high doses could induce sleep. He had observed people with altered gait and slurred speech from excessive use of cannabis. The Crown Prosecutor put to him a meaning of "stupefying" as "inducing stupor". Dr Hoskins said that if the dose was sufficient it would have that effect but such doses were rarely encountered since users tended to self-regulate their consumption. He was not cross-examined on this subject.

[36] No submission of no case to answer was made at the end of the prosecution case but at the end of the evidence in rebuttal, defence counsel submitted that there was no case to answer on the counts under s 316 since the evidence did not establish that cannabis was a stupefying drug. He relied on *R v S* ([1996] QCA 93, CA 233 of 1994) in support of his submission. In that authority Davies and McPherson JJA said that the effects of inhalation of cannabis were not a matter of common knowledge which would render expert evidence unnecessary. In the present case, Dr Hoskins gave evidence of its properties but counsel submitted that it did not establish that it was a stupefying drug.

[37] Counsel also relied on Fryberg J's comments to the effect that the question whether a drug is a stupefying drug cannot be determined in the abstract by having regard solely to the effect which an unlimited quantity of the substance is hypothetically capable of producing when administered to a human being. He said:

> "It may be relevant to take into account the quantity of the drug which was administered as well as any susceptibilities or immunities of the person to whom it was administered which may promote or retard its effect".

Later, he said:

> "If the Crown seeks to demonstrate that the drug in question was stupefying by reference to its effects on human beings generally, some evidence of the quantity of the drug needed to have a stupefying effect on a person with relevant characteristics of the person to whom the drug was administered may be necessary".

[38] The judgments in *S* focus on the need for proof that a particular drug is a stupefying drug, but, in the end, the case was one where both cannabis and alcohol were involved, and was resolved on the basis of an inference from the consequences described by the complainant that a stupefying drug or thing had been administered.

[39] In the present case there was evidence from Dr Hoskins about the properties of cannabis. The effect of his evidence was that, in sufficient quantities, exposure to it affects the senses. The ordinary meaning of the word "stupefying" in this context is that something has the effect of dulling the senses or faculties or blunting the faculties of perception or understanding. Coincidently, one example of usage given in the Princeton University WordNet is "the stupefying effects of hemp." The potential effect need not extend to total deprivation of sensibility but total loss of faculties would be comprised in the term.

[40] One of the purposes of the section is to proscribe the administration of a substance having a tendency to deprive the person to whom it is administered of his or her powers of resistance against an intended indictable offence (*cf R v Murcott and Ah See* (1893) 19 VLR 408, 411). At the point where a submission of no case to answer is made the issue is whether there is evidence upon which a jury might reasonably conclude that the substance administered was a stupefying drug. In my view there was sufficient evidence to satisfy that test.

[41] Whether the verdict of a jury which has found the element beyond reasonable doubt is unsafe or unsatisfactory is a separate question. In addition to the evidence of Dr Hoskins as to the properties and effects of cannabis there was evidence that the appellant was an experienced user of the drug. The jury may well have placed significance on the appellant's belief, as an experienced user, that causing the children, one of whom was only 2 and the other 11, to inhale the drug would cause a dulling of the senses, and concluded that in the circumstances the evidence of Dr Hopkins was supported by that fact. It was open to the jury to find beyond reasonable doubt that cannabis was a stupefying drug and that the appellant had administered it with intent to commit an indictable offence in each instance.

Failure to direct on s 23 of the Criminal Code

[42] Section 26 of the Code expresses an evidentiary presumption of sound mind which may be displaced by other evidence. Section 27 provides that a person is not criminally responsible for an act or omission if at the relevant time the person is:

(a) in a state of mental disease or natural mental infirmity; and
(b) deprived, because of it, of the capacity
  (i) to understand what the person is doing
  (ii) to control the person's actions; or
  (iii) to know the person ought not to do the act or omission.

Because of the presumption in s 26 the onus is on the person asserting lack of criminal responsibility because of s 27 to prove, on the balance of probabilities, that the person was deprived of one or more of those capacities at the relevant time. Section 28 of the Code provides that the provisions of s 27 apply to the case of a person whose mind is disordered by intoxication or stupefaction caused without intention on his or her part by drugs or intoxicating liquor or by any other means. They do not apply to the case of a person who has to any extent intentionally caused himself or herself to become intoxicated or stupefied. It is irrelevant whether the person has done so in order to afford excuse for the commission of an offence or not. It is also irrelevant whether the cause of the disorder to his or her mind is intoxication alone or intoxication in combination with some other agent. Section 28(3) provides that when an intention to cause a specific result is an element of an offence, intoxication, whether complete or

partial and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed.

[43] Section 23 of the Code provides, relevantly to the facts of the present case, that a person is not criminally responsible for an act that occurs independently of the exercise of a person's will. It follows that if a person physically does an act, but the act is not accompanied by an exercise of the person's will the person is not criminally responsible for that act. *Cooper v McKenna, ex parte Cooper* [1960] Qd R 406, 419 recognises that an act done during a lapse of consciousness due to concussion falls within s 23 rather than s 27. Where an issue of that kind is raised the onus is on the prosecution to prove beyond reasonable doubt that the act was a willed act. The onus does not shift, in that case, to the accused person.

[44] However, where the act is done by a person whose absence of will is precipitated by a mental disease or natural mental infirmity, the question of criminal responsibility falls to be resolved under s 27. The provisions of s 27 also apply in a case where the person's mind is disordered by intoxication or stupefaction caused, without intention, by drugs or intoxicating liquor or other means. In each case the onus lies on the defendant to prove the absence of one or more of the relevant capacities on the balance of probabilities. However, if the person has to any extent intentionally caused himself or herself to become intoxicated or stupefied, deprivation of one or more of the capacities referred to in s 27 does not relieve the person of criminal responsibility.

[45] However, it also follows that if an intention to cause a specific result is an element of the offence, intoxication may be regarded for the purpose of ascertaining whether the necessary intention in fact existed whether the intoxication is intentional or unintentional. It would also follow that if there were evidence that a person who had intentionally caused himself or herself to become intoxicated or stupefied (so that s 28(1) was excluded) and evidence that the person had, at the time of the alleged offence, been deprived of one or more of the capacities in s 27, that fact would be relevant to the question whether the person had an intention that was an element of an offence.

[46] In the present case the defence principally focused on the issue whether the appellant was entitled to a verdict of not guilty on the grounds of insanity. There was also evidence that he was an habitual consumer of amphetamines and cannabis and that, at the time of some or all of the offences, had taken those drugs voluntarily. The evidence on the subject of the appellant's mental state and his consumption of the drugs came from associates of his and medical witnesses. The offences of stupefying to commit an indictable offence and attempted rape are offences where specific intents are elements of the offences.

[47] The evidence from associates concerning his mental state came from the four women previously mentioned. His mother gave evidence that there was a family history of bipolar disorder. The appellant had suffered bouts of depression interspersed with periods when he described grandiose schemes. He had been prescribed Lithium by a doctor to stabilise his moods.

[48] The woman with whom he had been in a relationship until December 1998 gave evidence of mood swings, from occasions when he had "incredible ideas of making millions of dollars" to periods of depression bordering on his being suicidal. He

talked of evil in a way that did not make sense and was out of touch with reality. He had taken Lithium irregularly. She left him because of his emotional instability. She had also seen him in July 1999. At that time he was very disturbed. He was talking about burning the house down because everybody in it would be better off because of the evil. He had told her that the television was talking to him and that he had heard voices. He talked about seeing demons in a bizarre way. He was greatly agitated.

[49] The mother of the complainants gave evidence that she met the appellant in February 1999, about 5 months before the offences commenced. He talked of schemes to make millions of dollars which came to nothing. He was taking Lithium at the time and later Prozac. During August and September 1999 he believed that people were following him, that the house was bugged and that a television show was talking to him. She had been told by him that he had been herded by carloads of people to the local cemetery. He was "absolutely psychotic". She thought that he was going insane. He believed that the house was possessed by her ex-husband and that he was going to burn their bed and burn the house down. He walked around the house with a samurai sword saying he was protecting them all. By the time he confessed she thought that things were getting worse and that he needed help.

[50] His sister gave evidence that over the years she had observed his mood swings between happiness and depression. In about mid-June, she was concerned about him because he believed the television set was talking to him, that the house was possessed and there were demons, and that there were cameras in the house and the phone was tapped.

[51] Each of the women gave evidence of heavy use of amphetamines and cannabis by him. None of their evidence suggests that he was acting in a state of sane automatism at the time of the offences generally or of any particular offence. It may be observed that the notion of continuous sane automatism or recurrent bouts of sane automatism at the time of each offence would, no doubt, have been likely to be unattractive to a jury looking at the facts in a commonsense way.

[52] The medical evidence on this aspect of the matter consisted of evidence from psychiatrists Drs Kingswell and Reddan, and Dr Hoskins, the government medical officer. Dr Kingswell's opinion was that the appellant's mental state in the period when the offences were committed and at interview was either manic depressive illness or psychotic symptoms caused by amphetamine use. He was unable to say on the information available to him that there was manic depression sufficient to deprive the appellant of any of the necessary capacities. He said that if the appellant's account of his symptoms in the record of interview was accepted he was in a psychotic state, which would involve severe disturbance of thinking, due to amphetamine intoxication.

[53] Dr Reddan's opinion was that there was no objective evidence of bipolar affective disorder. She was unable to be convinced that there was sufficient evidence that he was suffering from psychotic illness or a mental disease or natural mental infirmity at the time of the offences. She said that methylamphetamine could cause a psychotic state such as hypomania which would manifest itself in excitability but not out of context with reality, or mania which would be characterised by grandiosity and rapid speech. Use of amphetamines and a large quantity of

cannabis could cause a psychotic state. If he was suffering psychiatric illness its most likely cause was drug use. If it was accepted that he experienced voices and thought there were surveillance devices in the house he might have had paranoid psychosis.

[54] Dr Hoskins gave evidence that chronic use of amphetamines may lead to psychosis involving detachment from reality, disordered thoughts which could not be recognised as unreal, delusions and hallucinations. At the levels of consumption assumed from the level of amphetamines in his body at the time of the testing it was possible that the appellant may have been experiencing delusions or hallucinations. Use of Prozac after a period by a person who had been using Lithium could cause psychosis.

[55] In *R v Milloy* [1993] 1 Qd R 298, 299 Thomas J said the following:

> "It is probably correct, as the appellant's counsel submitted, that the general view in this State was that if evidence were called of a mental disease or infirmity which deprived a person of the capacity to control his actions, the defence was of insanity under s 27, and no alternative defence of sane automatism could go to the jury under s 23. Conversely, in the absence of evidence of insanity, such as in the case of post-concussional actions the defence of automatism simpliciter was available under s 23 (cf. *R v Wakefield* (1958) 75 W.N. (N.S.W.) 66; *Cooper v* McKenna; *ex parte Cooper* [1960] Qd.R. 406; *R v Scott* [1967] V.R. 276; *R v Stripp* (1978) 69 Cr.App.R. 318)."

[56] In *Re Bromage* [1991] 1 Qd R 1, 5, McPherson J made the following observations:

> "In the application of ss 23, 27, and 28 of the Code, there is an area in which, at least potentially, the provisions of those sections tend to overlap. An act occurring independently of the will in terms of s 23 is in theory capable of being ascribed to a state of mental disease under s 27 resulting from intoxication within s 28. However, in *Kaporonovski v The Queen* (1973) 133 C.L.R. 209, at 227, Gibbs J. recognised that it is s 27 and s 28 that govern cases of insanity and intoxication that might otherwise fall under s 23. Broadly stated, acts and states of mind resulting from intoxication attract the particular provisions of s 28; they must be considered in the context of that section, and not under the less specific provisions of s 27: see *R v Corbett* [1903] St.R.Qd 246; *R v Smith* [1949] St.R.Qd. 126, 130-131; or under the even more general provisions of s 23: see *R v Kusu* [1981] Qd.R. 136. Likewise, cases of insanity belong under s 27 and not s 23: *R v Foy* [1960] Qd.R. 225; *R v Mursic* [1980] Qd.R. 482. Only if the state of mind, if any, is neither insanity nor intoxication can exemption from criminal responsibility be claimed under s 23 in respect of an act occurring independently of the will, as with the kind of post-concussional automatism considered in *Cooper v McKenna, ex parte Cooper* [1960] Qd.R. 406."

[57] In *Hawkins v The Queen* (1994) 179 CLR 500, a case where the Tasmanian Criminal Code was under consideration, after observing that s 13(1) of that Code appeared to have a similar operation to s 23 of the Queensland Criminal Code, the High Court said the following at 509-510:

> "In these circumstances, it is not surprising that, in Tasmania as elsewhere, counsel for the defence have sought to use evidence of mental abnormality to raise a reasonable doubt about the voluntariness of the accused's act independently of and distance from a defence of insanity. Apart from the reversal of the ultimate onus of proving insanity … (the equivalents of ss 23 and 27) operate by absolving the doer of an incriminated act from criminal responsibility for that act. On proof that an incriminated act is done by a person, there is a presumption that that person is of sound mind and that presumption justifies the further presumption that the act was 'voluntary and intentional'. Where there are two available avenues of complete excuse for an incriminated act, one placing the onus of proof on the prosecution, the other placing the onus on the defence, it is not surprising that great difficulties in theory and practice have arisen. One basis for distinguishing between the two avenues of excuse is to confine the relevance of mental disease to the defence of insanity, denying its relevance to the issue of voluntariness. This has been the solution adopted in most if not all jurisdictions. The solution requires, of course, the determination by the court of the character of any mental abnormality the existence of which is proved or raised by the evidence. Where evidence of mental abnormality is relied on by the defence and the issue is criminal responsibility for the incriminated at, it is necessary to characterise the abnormality in order to determine whether the connection, if any, between the alleged abnormality and the doing of the act falls for consideration as a question of voluntariness or as a question of insanity. Characterisation was the issue addressed by this court in *R v Falconer*."
> (footnotes omitted)

[58] After referring to the issues in *Falconer v The Queen*, (1990) 171 CLR 30, the judgment continued at 510:

> "… if the only evidence tendered to raise the question of the voluntariness of the incriminated act is evidence of a mental abnormality amounting to a 'mental disease'….. the admissibility of the evidence does not depend on its relevance to the issue of voluntariness but on its relevance to the issue of insanity. And, if there be evidence of mental disease but the evidence is incapable of proving that the mental disease produced any of the consequences prescribed by (the insanity provision) that evidence is both insufficient to establish insanity and irrelevant to the issue of voluntariness."
> (footnotes omitted)

[59] In *R v Milloy*, de Jersey J distinguished *Falconer v The Queen*, saying that in *R v Milloy* all the specialist medical evidence supporting the existence of the dissociative state ascribed that state to mental disease or disorder. There was no evidence that the dissociative state amounted to non-insane automatism. On the other hand, in *Falconer v The Queen*, there was no evidence that the appellant was suffering from any mental disease or natural mental infirmity.

[60] In the present case the evidence from the medical practitioners all points to the appellant's condition being due to voluntary intoxication by drugs, with the alternative being a state of mental disease or natural mental infirmity. There is nothing in the evidence of the non-medical witnesses that suggests a basis for saying that sane automatism, which would require a direction under s 23, was fairly raised on the evidence. While the ultimate onus lies on the prosecution to establish beyond reasonable doubt that the act of the accused person was not an act done independently of the exercise of his will, there must be at least some evidence that fairly raises the issue before a direction is necessary. I am satisfied that there is none in this case. Nor is it a case of the category where the issues of insanity and sane automatism are open, depending upon which body of evidence as to state of mind is preferred.

[61] With regard to the effect of the appellant's state of mind, however caused, on intention, the particular facts of the case are inconsistent with the conclusion that there may have been a lack of intention upon the appellant's part to commit those offences of which a specific intent is an element. The critical issue for the jury's consideration was whether the appellant had made a confession that was true and reliable.

[62] The learned trial judge explained that the offences of administering a stupefying drug with intent to commit an indictable offence and attempted rape were offences involving intention. He also directed the jury to consider, as defence counsel had urged upon them, whether what he was confessing to was not in fact the truth at all but was being prompted by his mental state. Once the jury accepted beyond reasonable doubt that the confession was true and accurate there was no room for a conclusion that the appellant may not have had the necessary intentions. The only reasonable view of the confessions was that he was describing an incident, on each occasion where he administered smoke from cannabis to each of the complainants, in which he had an intention to commit an indictable offence after doing so, and in the case of the attempted rapes, where he had an intention to effect penetration but failed to do so.

[63] *Hawkins v The Queen* is also authority for the proposition that evidence that a person has a mental disease or natural mental infirmity but is not deprived of one of the s 27 capacities (and is therefore criminally responsible for the act done) is relevant and admissible in determining whether, when the person did the act he or she had a specific intent which is an element of the offence. In regard to intoxication, s 28(3) of the Code requires consideration to be given to the question whether a relevant intention in fact existed in cases where there is evidence of intoxication, however occurring. No specific direction on these issues was given in the present case. While failure to give a specific direction as to this aspect of the matter may have been erroneous, I am satisfied that there has been no miscarriage of justice. Once the jury was satisfied as to the truthfulness and accuracy of the confession there was no rational basis upon which a jury could have concluded that he did not have the necessary intentions, given the terms of the confession. It is a clear case for the application of the proviso in s 668E(1A).

Unsafe and unsatisfactory

[64] In my view the convictions were not unsafe and unsatisfactory. The reasons already given demonstrate that the critical issue for the jury's determination was whether it

accepted the confessional evidence, supported as it was, in the case of the female complainant, by her s 93A statement, which was not challenged. In the case of the female complainant the Crown case was extremely strong. There is no basis for concluding that those convictions were unsafe and unsatisfactory. With regard to the male complainant, once the issue of the status of the confessional evidence had been resolved against the appellant, the case was also strong. There is no reason to suppose that the convictions were unsafe and unsatisfactory for reasons connected with the evidence as to his mental state. With regard to the convictions for administering a stupefying drug, it was in my view open to the jury to find beyond reasonable doubt that the drug administered was a stupefying drug. There is no reason to disturb those convictions.

[65] The appeal against conviction should be dismissed.

Sentence

[66] There is an application for leave to appeal against sentence on the grounds that it is manifestly excessive and the Attorney-General has appealed against sentence. The Attorney-General contends that the sentence imposed is manifestly inadequate because:

(a) it fails to reflect the gravity of the offence generally and in the particular cases;

(b) it failed to take sufficiently into account the aspect of general deterrence;

(c) the sentencing judge gave too much weight to factors going to mitigation.

The level of sentencing for the most serious offences is the real issue for determination.

[67] The Crown Prosecutor at trial relied on a number of matters as serious aggravating factors. One was that the prisoner was in a position of trust acting in the role of a parent while the children's mother was in hospital. Another was the age of the complainants. Physical violence was inflicted on the boy and threats of harm to other members of the family were made to the girl. It was submitted that there was premeditation involved in setting up the location where the offences were to take place and in making arrangements to use a stupefying drug. It was submitted that after initially revealing the offences the offender's subsequent conduct showed a lack of remorse. It was submitted that a sentence of 10 to 14 or 15 years was appropriate and that a declaration that the offences were serious violent offences should be imposed.

[68] The prisoner's counsel at trial relied on a number of matters. There were no directly relevant convictions. (The applicant has been dealt with in Magistrates Courts on three occasions for drug related offences and once for a "serious assault" on a police officer for which he was fined without a conviction being imposed.) The applicant volunteered the information relied on to prove his guilt. He ceased the conduct of his own accord. He did not require the female complainant to be cross-examined at trial although she was questioned at committal. He was in a somewhat disordered state from drugs or factors personal to him at the time the offences were committed. He had begun to take medication which appeared to have substantially altered his life.

[69] A schedule of sentences imposed for offences of this kind was placed before the sentencing judge. Defence counsel relied on the fact that it showed a wide range of penalties, and submitted that a sentence below the range suggested by the Crown Prosecutor was supportable.

[70] In the written submissions in this court counsel for the Attorney-General relied on the abhorrent nature of the acts committed on the boy, his age, his distress and the violence inflicted on him. In the case of the girl, he relied on her distress and the applicant's persistence notwithstanding, and the threats made concerning other family members to enforce compliance by her. The submissions below about the position of trust he occupied, his attempt to avoid the consequences of his actions after initially confessing and the duration of the offences over a few months were repeated. It was also submitted that the nature of the sentence suggested that it was constructed to avoid a declaration that the applicant was a serious violent offender.

[71] The respondent relied on the principle that the Court of Appeal ought not allow an Attorney's appeal unless the sentence imposed was outside the scope of the proper sentencing discretion (*R v Melano, ex parte Attorney General* [1995] 2 Qd R 186). He submitted that the case was an unusual one and there was no doubt that the applicant was affected at least to some degree by drug usage superimposed on a disturbed personalty. He had limited previous convictions and the offences were brought to light by his own conduct. It was submitted that the learned trial judge had carefully taken into account the matters raised by both counsel and fashioned a sentence which appropriately took into account all relevant factors. He did not err in principle and no error was demonstrated or discernable by any manifest inadequacy of sentence.

[72] Cases such as *R v Pearce* (CA 212 of 1997, 8 August 1997) where the court took a compassionate view of the fact that the applicant was of advanced age are of little assistance. Cases where the complainant is very young have a particular seriousness which makes comparison with cases where the complainant is somewhat older an uncertain basis for comparison. In *R v* Knox (CA 269 of 1993, 22 October 1993) a case where the applicant was convicted of one offence of vaginal rape of a 5 year old girl, where there was extensive analysis of authority, it was said:

> "It is difficult ….. to generalise having regard to the age of the victim. On the one hand the younger the child the more brutal and degraded is the conduct. On the other, the older the child, the greater is the possibility that she will appreciate what has happened to her and consequently suffer more lasting consequences. Unless there is specific evidence of psychological consequences to a particular complainant, other things being equal, we think that in general, the younger the victim the higher the sentence."

Davies JA and Thomas J also said:

> "It is apparent that sentences for more than ten years tend to be accompanied by aggravating features such as the commission of concurrent offences such as sodomy, or abduction or deprivation of liberty, or circumstances such as a brutal attack, the use of weapons, or attacks on very old women or very young girls, or cases where the authority of a father or person in loco parentis has abused the trust of a child."

Cases which date from many years ago may also be unreliable because of the hardening of attitudes to offences of this kind, although it is not always the case.

[73] Counsel for the Attorney-General particularly relied on *R v Eather; ex parte Attorney-General* (CA 476 of 1994) and *R v Dugdale* (CA 272 of 1991, 13 December 1991). Eather was a child minder who, knowing that he was infected with genital warts sodomised three two year old children in his care infecting two of them with the condition. There was also "convincing evidence" of traumatic consequences in the families of victims. His particular insensitivity to the terror caused to the children at the time of committing the offences was a factor taken into account. He had been sentenced to 12 years. By a majority the court substituted a sentence of 16 years imprisonment without a recommendation for parole for the counts of aggravated sodomy.

[74] *R v Dugdale* involved a series of sexual offences involving four children who were of comparable ages to the present complainants but the youngest was not the victim of sodomy. However, it did involve a girl who was "mentally deficient". The offences occurred over a longer period than in the present case. Cumulative sentences amounting to 16 years imprisonment were set aside and replaced by a sentence of 13½ years imprisonment on counts of rape and sodomy. Time spent in custody was allowed for with the result that the starting point for the sentence was 14 years or slightly more.

[75] When the present case is placed in the setting of these cases and the general principles to be derived from reviewing the authorities, the sentence imposed cannot stand, even allowing for the factors in the applicant's favour. A sentence less than 13 years would in all of the circumstances be inappropriate. The sentences imposed in the District Court on counts 2, 13 and 15 are manifestly inadequate and the Attorney's appeal should be allowed. It follows that the applicant's application for leave to appeal against sentence must be dismissed.

[76] The following orders should be made:

1. The appeal against convictions be dismissed.

2. The Attorney-General's appeal against sentence be allowed. The sentences imposed below in respect of counts 2, 13 and 15 be set aside and in lieu thereof sentences of 13 years imprisonment be imposed, to be served concurrently. A declaration that the offence is a serious violent offence should be made. Otherwise the sentences below are confirmed.

3. The applicant's application for leave to appeal against sentence be dismissed.

[77] **ATKINSON J:** I agree with the reasons of Mackenzie J and with the orders he proposes.