SUPREME COURT OF QUEENSLAND

CITATION:	*R v MBI* [2009] QCA 374
PARTIES:	**R** **v** **MBI** (appellant)
FILE NO/S:	CA No 273 of 2008 DC No 2820 of 2008 DC No 2614 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	8 December 2009
DELIVERED AT:	Brisbane
HEARING DATE:	15 September 2009
JUDGES:	McMurdo P, Fraser JA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – OTHER MATTERS – the appellant was convicted after a trial of one count of indecent treatment of a child under 12 and two counts of rape – the complainant's evidence was contained in four police interviews and two sessions of pre-recorded evidence – the complainant's evidence was not articulate or clear – the dates charged in the rape counts were amended twice – whether the guilty verdicts were unreasonable and cannot be supported having regard to the evidence APPEAL AND NEW TRIAL – NEW TRIAL - IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – MISCONDUCT OF COUNSEL – GENERALLY – the defence counsel applied for a stay of proceedings at the conclusion of the appellant's trial – the learned trial judge refused the application for a stay – whether the circumstances were exceptional enough to warrant a granting of a stay in this case – whether the conduct of the prosecution of the appellant on this indictment amounted to an abuse of process

Criminal Code 1899 (Qld), s 668E

Jago v District Court (NSW) (1989) 168 CLR 23; [1989] HCA 46, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Ferguson; ex parte A-G (Qld) (2008) 186 A Crim R 483; [2008] QCA 227, cited
R v S [2000] 1 Qd R 445; [1998] QCA 271, considered
The Queen v Glennon (1992) 173 CLR 592; [1992] HCA 16, cited

COUNSEL: C Morgan and K Hillard for the appellant
M R Byrne for the respondent

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

[1] **McMURDO P:** The appellant pleaded not guilty, initially on 8 May 2007, in the Brisbane District Court to one count of indecent treatment of a child under 12 (count 1); one count of vaginal rape (count 2); and one count of anal rape (count 3). The three counts all concerned his de facto step-sister, T. They were each originally charged as occurring between 30 June and 1 August 2005. The appellant's first trial commenced on 31 March 2008 but ended in a mistrial after three days when, at the close of the evidence, the judge allowed the prosecutor to amend the dates when counts 2 and 3 were said to have occurred to read: "on a date unknown between the 31st day of December, 2001 and the 1st day of August 2005". On 2 September 2008, the appellant pleaded not guilty to the amended counts. Three weeks later, on 22 September 2008, before the jury on the second trial was empanelled, the prosecutor asked the judge for leave to further amend the second of the dates between which both counts 2 and 3 were said to have occurred from "the 1st day of August 2005" to "the 31st day of August 2005". Defence counsel conceded that the appellant would not be prejudiced by amending the second date in counts 2 and 3 to "the 11th day of August 2005". Consistent with that concession, the judge allowed the prosecutor to amend each of counts 2 and 3 so that they alleged each count occurred "on a date unknown between the 31st day of December 2001 and the 11th day of August 2005".

[2] On 29 September 2008, the jury convicted the appellant on all three counts. He was sentenced on 23 October 2008 to three years imprisonment on count 1 and to six and a half years imprisonment on each of counts 2 and 3. On the same day, he pleaded guilty to two further counts of indecent treatment of a child under 12 years, involving another de facto step-sister, T's sister, L. He was sentenced to three years imprisonment on each count against L. All sentences were concurrent. He appeals against his conviction and has applied for leave to appeal against his sentence in respect of the matters involving T.

[3] His grounds of appeal against conviction are now:

> "**Ground 1** The trial miscarried because of the failure of the prosecution to properly particularise Counts 2 and 3. The verdicts on Counts 2 and 3 are unreasonable and cannot be supported having regard to the evidence.

> **Ground 2** The learned trial judge erred in refusing a stay of proceedings. The conduct of the prosecution of the appellant on this indictment amounted to an abuse of process."

[4] The appellant's counsel has not made any written or oral submissions in support of the application for leave to appeal against sentence, but informed this Court that she did not have instructions to abandon the application.

[5] I would dismiss the appeal against conviction and refuse the application for leave to appeal against sentence for the following reasons.

Background

[6] The prosecution case was that the appellant committed all three offences against T in the family home. T resided in the household with her father, McT (Snr); his de facto wife, A, the appellant's mother; T's sisters, L and Sh; and their brother McT (Jnr). The appellant also resided at the family home at various times from an unknown date around 2000 until early to mid August 2005. The appellant's sister, M; his brother, J; J's partner, E; and their two children also stayed in the family home for periods during this time. The blended family unit lived initially in a two bedroom apartment, then in house A and then in house B. The prosecution case turned largely on the evidence of the complainant, T, who was born in April 1995 and so was aged between six and 10 in the period covered by the charges. The appellant was then aged between 15 and 19.

[7] This appeal has been unusually complex for three reasons. First, the young complainant's evidence was contained in four police interviews taken between August 2005 and January 2008 and in two sessions of pre-recorded evidence taken on 8 May 2007 and 20 February 2008. The complainant's accounts were not articulate or clear. Second, there were, as I have explained, two trials during which the dates charged in counts 2 and 3 were twice amended. Third, the appeal record book did not contain a large amount of material which it should have contained, but wrongly included material completely irrelevant to this appeal.[1]

[8] Before discussing the grounds of appeal, it is necessary to review in some detail the course of the two trials, especially the circumstances of the amendments to the indictment; the particulars relating to counts 2 and 3; and the evidence before the jury in the second trial on which the appellant was convicted.

The evidence of the complainant T at both the first and second trials

[9] The prosecution case on all three counts turned largely on the evidence of the complainant, T. She gave her evidence in four interviews with police which were tendered at both trials under s 93A *Evidence Act* 1977 (Qld). She was also cross-examined before the first trial and this was pre-recorded. I will deal with each of these parts of her evidence in the order she gave them.

The interview of 31 August 2005

[10] The first of her police interviews was conducted in her primary school principal's office on 31 August 2005 when she was 10 years old and included the following. It

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[1] Counsel for the appellant informed the Court that the pre-recorded evidence at AB 70 to AB 99 was not evidence in the appellant's trial and had been wrongly included. This Court has disregarded that material.

was scary living in the family home because her dad and the appellant's mother would "always drink", "always fight" and they argued. When asked whether the appellant had touched her, she said he had not, but added that he had tried to. He pulled down his pants and tried to touch her "bum" with his "rude part". He had not touched her on her "rude part" before. He pulled down her pants and his shorts and touched her on the leg. She felt a "disgusting" "squashy thing" on her leg and looked around. She saw something hairy and knew what it was. (This evidence was relied on to establish count 1.)

The interview of 5 October 2005

[11] Police interviewed the complainant for a second time about five weeks later on 5 October 2005 after she had been medically examined[2] when she gave the following account. She said the appellant touched her with his finger "down below" on her bottom and on her vagina. She was wearing brown pants and an orange shirt. He always wore shorts and a singlet shirt. He said if she told anyone he would kill her. One day she was watching her brother, McT (Jnr), playing an X-box car game. McT (Jnr) left the room. The appellant pulled her over to his bed and lay her down. Her sister, Sh, was also home but in another room. The appellant pulled down his pants. She saw his "big thing". He used it for "hurting" her. He put it in her "In both parts". (This evidence was relied on to establish counts 2 and 3.)

[12] He did this about five times. The last occasion was "a couple of days before youse come" in his bedroom at night-time. On that occasion, she; her sister, L; and her brother, McT (Jnr), were in the bedroom wrestling. She and the appellant were wearing the same clothes as the last time. The appellant told them to leave and he did "the same thing as last time". She was scared when speaking to police because the appellant threatened her and she thought she was going to get hurt.

The interview of 17 February 2007

[13] Police interviewed T a third time on 17 February 2007 when she was 11 years old. Her account on this occasion included the following. When everyone was asleep the appellant would come into her room, drag her off the top bunk, take her to his room and start touching her. When someone moved he would push her back into her room. He would pull down his pants, pull down her pants, and "put his thing in [her] bum and that and [her] front part". He used his "rude part" to pee with and it was his "rude part" that he put inside her. He held her mouth so she did not scream. He did it to her bum and her front part, her vagina.

[14] She could not remember the first time it happened but she thought it was when the family lived in the two bedroom apartment. The first time she could actually remember it happening was when the family lived in house B. She added that the first time something happened was when the appellant was 16. She did not remember back then but she knew that that was when it started: in the two bedroom apartment when all the children, including T and the appellant, shared one bedroom. She could remember only that he kept touching her in her "rude parts" with his hand which he would leave there. She was uncertain how often it happened, but she thought "it was like every day of the week".

[15] The police officer asked her about the last time something happened. She said it was "the date before the police took us". The appellant came back to house B to

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2 See the summary of Dr Deakin's evidence at [36] of these reasons.

collect his stuff. He called her into the room. He pulled her pants down, and pulled his pants down. He "put his rude part into [her] bum and stuff". She felt "wet stuff and it would feel yuck".

The pre-recorded cross-examination of 8 May 2007

[16] The complainant's initial cross-examination was pre-recorded on 8 May 2007, a month after the complainant's 12th birthday. She agreed that she did not like living with her father because he drank heavily every night. He was often angry and hung-over. Sometimes he would lock her in her room. She wanted to live with her mother. T was now living with her mother and had been since making the allegations against the appellant.

[17] When she spoke to police officers on 31 August 2005, she described an incident[3] which she thought had happened at house B, a few weeks before that police interview. Her sister, Sh, was in her room and her door was closed as she was doing homework. The appellant pulled T into his room and pulled her pants down. T maintained that, on this occasion, the appellant touched her with his penis on her leg and called her a "Nasty bitch" (count 1).

[18] Defence counsel then asked her about another incident which she told police about on 5 October 2005 (that is, counts 2 and 3). T said that incident occurred before the incident when the appellant's penis touched her leg (count 1). It happened "Just after school so like 3.30" in his room. The questioning continued:

> "… And who was home on this occasion please [T]?—My dad, my sisters, my brother and [the appellant's mother, A]. Me and [the appellant], that's all.
> So, everything except [the appellant's sister]?-- Yes.

[19] She, her brother, McT (Jnr), and their sister, L, had been playing an X-box game. The appellant told L and McT (Jnr) to get out. He shut his door and started to touch her. He managed to pull her pants down, pull his own pants down and put his penis in her bum. T maintained that the appellant did this and that he did it "on every occasion". He also put his penis in her vagina.

[20] She maintained that her earlier accounts to police concerning the appellant's sexual abuse of her in house B were true. She denied that on another occasion when she and her sister, L, were playing with neighbourhood boys that any of them had penetrated her vagina and anus with his penis. She denied that she was jealous of the appellant's relationship with her brother, McT (Jnr). She agreed that, when she was living with her father, he swore at her; he paid her no real attention; he hit her; and she wanted to get away from him. She also agreed that sometimes the appellant would discipline her and send her to his room.

The police interview of 24 January 2008

[21] Police interviewed the complainant for a fourth time on 24 January 2008 when she was 12 years old, this time about her relationship with the neighbourhood boys of whom she gave evidence on 8 May 2007. She said that her brother, McT (Jnr), caught some neighbourhood boys in an incident involving her sister, L. The boys did not touch T.

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[3] Count 1.

Pre-recorded evidence of 20 February 2008

[22] Defence counsel obtained leave to further cross-examine T about this incident involving the neighbourhood boys and it was pre-recorded on 20 February 2008. T gave the following account. One of the neighbourhood boys, Ma, was about 11 years old. His older brother, C, was about 12 years old. Ma and C had a sister, K, who was about nine or 10 years old. Defence counsel asked about an incident, two or three months before August 2005, when T and her sister, L, were alone with Ma and C in a cubby-house near the park. T said that she did not remember being alone with Ma and C. She did not remember Ma showing her his penis. She remembered that L was in trouble for "going out with" Ma. She denied that Ma and C put their penises into her (T's) vagina or anus. She denied that McT (Jnr) told L and her to go home and that they then got into trouble with their father. She denied that she was in trouble with her father, that he sent her to her room or that he grounded her for some weeks over this incident. She agreed that her father spoke to Ma's father. She agreed that Ma and C's family moved away from the area just before T "got taken" in about October 2005.

The first trial

[23] The first trial on the three counts involving T took place in the District Court at Brisbane from 31 March to 2 April 2008, just before the complainant turned 13. The indictment alleged that all three counts occurred between 30 June 2005 and 1 August 2005. The prosecution gave the following particulars. Count 1 was the 'first occasion' the complainant could articulate. She was in the room with the appellant. He pulled her pants down, he pulled his pants down and his penis touched the back of her legs. She told him to stop, and he called her a "nasty bitch", but desisted. Counts 2 and 3 occurred on a separate occasion on another day, again, in 2005, and in the appellant's room. It was alleged that the appellant pulled the complainant's pants down and his pants down and put his penis into her vagina and into her anus.

[24] The trial was conducted over three days on the basis that all three offences were committed in July 2005. After the prosecution closed its case, the appellant and his mother, A, gave evidence that he had left the family home at the beginning of August 2005 and did not return. At the conclusion of all evidence, in legal discussion in the absence of the jury, confusion emerged as to when, on the complainant's account, counts 2 and 3 occurred. Defence counsel thought the prosecution case was that they occurred during the incident she described to police on 17 February 2007 as "the last time" on "the date before the police took us".[4] But that evidence seemed inconsistent with her pre-recorded evidence of 8 May 2007 when she said that what seemed to be counts 2 and 3 occurred before count 1. The prosecutor then sought leave from the judge to amend the indictment to cover a three and a half year period from December 2001 (immediately before the family moved to house B) until August 2005, when T complained to police. Defence counsel opposed the amendment, although not vigorously, and urged the judge, if the amendments were allowed, to discharge the jury. The judge noted that the scenario demonstrated the utmost importance in cases of this kind in obtaining clear and unequivocal particulars of allegations from the outset. His Honour granted the prosecution's application to amend the indictment to allege that counts 2 and 3

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[4] See these reasons [15].

occurred on an unspecified date over a three and a half year period between 31 December 2001 and 1 August 2005, rather than during July 2005 as originally charged.

[25] His Honour considered that the appellant should have the opportunity of obtaining further evidence about that extended time period and so discharged the jury from returning a verdict and adjourned the trial.

The complainant's further evidence on 2 September 2008 (after the first trial)

[26] The appellant successfully applied to further cross-examine the complainant because of the amendments to the indictment. The appellant pleaded not guilty to the amended counts on 2 September 2008 when a third cross-examination of T was again pre-recorded. It included the following.

[27] About four weeks after the appellant moved out of the family home at house B, T told a woman from the Department of Families that the appellant had never touched her with his fingers or his penis or asked her to remove her clothes. She also refused to be medically examined. Her mother told T that unless T told the doctor about the things that the appellant had done, she would not be allowed to live with her mother and may have to return to her father. That was why T then told the doctor about what had happened with the appellant. She agreed she lived with the appellant and others in the family home from when she was in grade 1 until she was about 10 years old.

[28] She did not tell anyone about what the appellant was doing to her because he threatened her and she was worried that he could carry out his threats. She was very close to her sister, Sh, and they told each other secrets. She was also close to her brother, McT (Jnr) and to the appellant's sister, M, a person with whom she felt comfortable. She had other family friends with whom she felt comfortable. She could have told any of these people about the appellant's conduct had she not been frightened of him.

[29] Defence counsel then asked her about the incident at house B which occurred after McT (Jnr) was playing an X-box game and when the appellant put his penis in her (counts 2 and 3). As this evidence is central to this appeal, I will set out relevant portions of it:

> "Now, do you remember what time of year it was?-- No.
> Do you remember how old you were?-- Nuh.
> Do you remember if it was around anybody's birthday?-- Nuh.
> If it was Christmas?-- Towards the end of the year.
> Towards the end of which year, do you think?-- 2003/2004.
> So if I say that the year that [the appellant] moved out was 2005, are we talking about Christmas 2004 or are we talking about Christmas 2003?-- Christmas 2004.
> So Christmas 2004. Sorry, I put in 'Christmas', you just said 'towards the end of the year', so we're talking about some time October/November/December-----?-- Yep.
> -----2004 that that happened?-- Yep.
> Why do you remember that?-- I don't know. I've had a think the past couple of days and just thought back a bit.
> And that's the best you can say?-- Yep.

> Okay. You're not sure when exactly, but some time October/November/December of 2004?-- Yep.
> …
> Was it before Christmas that year, do you remember, or-----?-- I don't remember.
> …
> … Since 2004 – we're talking about midway through 2004 – [the appellant] didn't actually live at the house except for the couple of weeks up to the end of August, isn't that right?-- Yep.
> Is that right?-- Yes.
> … Middle of August, sorry, is the time he moves out. He only lived at [house B] for three weeks before that, isn't that right?-- No.
> Three or four weeks? No?-- Yep.
> I have to be clear. You don't have to agree with me. You can say what you want. I'm just suggesting things to you and asking you for your comments on them. Okay?-- Yep.
> Just going back to that, immediately before you left – before he left the house, he had only lived there for a few weeks is what I'm saying. Do you agree or disagree with that?-- Disagree.
> And that before that he had been living with his aunty in another part of [south east Queensland]?-- No.
> …
> And before that, looking at the period you're talking about earlier, which is the middle of 2004 till the end of 2004, he was actually up in … North Queensland, wasn't he?-- No.
> He wasn't even around the house?-- Yeah, he was at the house still.
> He was in North Queensland from around the middle of 2004 until at least the end of 2004, isn't that right?-- No."

The second trial

[30] As noted earlier, on 22 September 2008, before the jury in the second trial was empanelled, the prosecutor asked the judge for leave to further amend the second date in both counts 2 and 3 from "the 1st day of August 2005" to "the 31st day of August 2005". Consistent with defence counsel's concession that the appellant would not be prejudiced by amending the second date in counts 2 and 3 to "the 11th day of August 2005", the judge allowed the prosecutor to make that amendment so that counts 2 and 3 were each alleged to have occurred "on a date unknown between the 31st day of December 2001 and the 11th day of August 2005".

The prosecutor's opening address to the jury

[31] The next day, the appellant pleaded not guilty and the jury were empanelled. They were supplied with a copy of the indictment prior to the prosecutor's opening address. She invited them to make notes of the particulars of each count.

[32] She opened count 1 in this way. A few weeks before the appellant moved out of the family home in August 2005, T was at home with her sister, Sh, and the appellant. The appellant took down his pants and T felt his penis on the back of her leg. She desisted and he called her a nasty bitch. She thought at the time that he was trying to touch her bottom bit or her bum. Police interviewed her on 31 August 2005 and she said that this episode was the only occasion that the appellant did anything to her.

[33] The prosecutor continued her opening address as follows. Over a month later, T was examined by a paediatrician who noticed an injury to her hymen that indicated penetration. As a result, the police interviewed her again on 5 October 2005 when she told police about the events which are the subjects of counts 2 and 3.

[34] The prosecutor then particularised counts 2 and 3 in this way. McT (Jnr) was playing X-box in the bedroom he shared with the appellant. McT (Jnr) left the room. The appellant then pulled the complainant over onto his bed, pulled her pants down, pulled his pants down and "he put his hairy thing which he uses for sex and hurting her in both her parts, which are her vagina and her bum". Count 2 was the appellant's penetration of T's vagina. Count 3 was the appellant's penetration of her anus. The complainant said this incident happened when she was living at house B. The family moved to house B sometime in 2002 and the appellant left the household in August 2005 which was why the indictment charged the offences occurring between those dates. The last time T gave evidence she said she thought this incident happened towards the end of 2004.

The prosecution evidence

[35] The complainant's evidence at the second trial included all her evidence contained in her police interviews and in the pre-recordings to which I have referred. The prosecution also relied on the following evidence from other witnesses.

[36] Dr Deakin examined the 10 year old complainant on 29 September 2005 because of an allegation that T had been sexually assaulted. (This examination took place about a month after T's first interview with police on 31 August 2005.) Dr Deakin conducted a coloscopic examination which magnified T's genitalia. She found a half thickness tear to the hymen, most likely due to a penetrating injury of some kind. There was no redness, swelling, nor grazes so that the hymen injury occurred more than 48 hours before the examination. The margins of the tear were clear which suggested it occurred in the last few months. The injury could have occurred more than a year beforehand. She also examined the anal area. She saw no bruising nor abnormalities and no sign of acute injury to the anal area which heals very quickly. Dr Deakin did not ask for a history from the mother or from T as this was not her practice. She did ask T whether something had been placed in her vagina or in her anus. T did not disclose whether a penis or a finger had been placed in that area.

[37] The complainant's mother gave evidence that the complainant's father had custody of their children and would not allow her to see them. She had sought custody through the Family Court at the time T complained to police about these offences. She went with T to the hospital. The child safety officer told her that it was a condition of the children being released to her that all three be medically examined. She told T that T must be medically examined if she wished to remain living with her.

[38] T's sister, L, gave evidence by way of a statement to police on 24 January 2008 (two and a half years after the incident of which she spoke) tendered under s 93A *Evidence Act*. She was 14 months younger than T. She was friendly with the boys Ma and C who lived four houses from her family's house B. L, C, Ma and the boys' sister, K, played a "truth and dare" game in their cubby-house. They pretended to have sex with their clothes on. Her brother, McT (Jnr), came to take her home and

saw them playing this game. Her sister, T, had come earlier to go to the park and had also seen the game. Later, Ma told McT (Jnr) about it. A few weeks afterwards, McT (Jnr) told their father about it. L had no actual sexual contact with the neighbourhood boys.

[39] The complainant's brother, McT (Jnr), gave the following evidence in a police interview which was tape-recorded on 23 August 2007 (about two years after the events of which he spoke) and tendered at trial under s 93A. He was born in 1993 and was almost two years older than T. He remembered some neighbourhood boys, including Ma, who had a cubby-house near the park when the family lived in house B. Ma used to show his private parts. McT (Jnr) did not like this and would fight with Ma. On one occasion, Ma "goes oh if you show me your rude part I'll show you mine so like they showed theirs and then he showed his and that's about it". Ma, L, T and Ma's sister, K, were present. C ran off and told Ma's father. McT (Jnr) wanted to fight Ma but Ma's father came over. McT (Jnr) ran off. He spoke to T and L about it afterwards and they said "there was no, they didn't stick in or her or nothing or". He thought T was eight and L seven.

[40] T's father, McT (Snr), gave the following evidence. He obtained custody of his children, including T, in about 2000. He commenced a de facto relationship with the appellant's mother in that year. They lived first in an apartment, then in house A and then in house B. They moved to house B towards the end of 2001. The appellant lived in house B until early August 2005. The appellant moved away from the household from time to time, living with an uncle up north for about six months. The appellant also spent time at his father's home in Adelaide. The appellant came back to house B in early 2005. McT (Snr) recalled an incident in the first half of 2005 involving his daughters, T and L, and some neighbourhood boys in a shed. He sent his son, McT (Jnr), to get the girls. McT (Jnr) told him, in respect of the cubby-house incident with the neighbourhood boys, that the neighbourhood boys and T and L "were flashing at each other". The appellant left house B in early 2005 and only returned to the gate to collect his belongings; he did not come into the house. McT (Snr) was drinking heavily at this time. He was often angry and harsh with his children and would sometimes hit them. The younger girls were sometimes afraid of him. He sometimes argued with the appellant.

[41] In cross-examination, he agreed that, after the girls came home from the incident with the neighbourhood boys, T said that "she had a penis near her bum" but L said "she'd just been flashing or something". The neighbourhood boys' family left the area within two or three weeks of that incident.

The defence evidence

[42] The appellant gave and called evidence. His evidence included the following. He was born in March 1986. He denied any improper contact with the complainant. McT (Snr) became his step-father in 2000 when the appellant and his mother moved in with the McT family. The blended family unit lived in a two bedroom unit, then house A, then house B. At times during this period, the appellant lived away from the family home. He was in receipt of Centrelink benefits and notified Centrelink of his changes of address. He permanently left house B in August 2005 and he never entered the house again. During 2001 to 2005, he sometimes lived in a rural south east Queensland town and also in a provincial town in north Queensland with his uncle. He travelled a lot because he had a big, extended Indigenous family and

he would often visit family members throughout the state. He visited his father in Adelaide in 2000 or 2001. When he attended his cousin's funeral in north Queensland in 2004, he stayed for six months obtaining work picking mangoes. His bank account was with Suncorp Metway and he withdrew money at ATMs with his key card.

[43] In cross-examination he agreed that at times he lived in house B with his mother's blended family.

[44] The appellant's Suncorp Metway account records for the period December 2001 to August 2005 were tendered. They supported the appellant's evidence in that they showed that he made withdrawals from his account in a provincial north Queensland town from August 2004 until 2 March 2005. They also showed withdrawals in the vicinity of house B from March 2005 through to 31 August 2005.

[45] The appellant's mother gave evidence. She confirmed that the appellant did not live with her at all times when she was in a de facto relationship with McT (Snr). He sometimes lived elsewhere in the neighbourhood with friends or relatives, and at other times he visited relatives in provincial towns in south-east and north Queensland. She thought he lived in north Queensland for about a year. At the time of the alleged offences, she and McT (Snr) were drinking alcohol a lot of the time. She recalled an incident where McT (Jnr) told his father something about T and L. He said, "The girls are down in the shed. There's two – the boys were in there – the – he's putting their things in their bum and their private parts". McT (Snr) told McT (Jnr) to go and get the girls and bring them back home, and he did. In cross-examination, she agreed she was drinking a lot of alcohol around this time and McT (Snr) was her drinking partner. They were more involved with each other and with their drinking than with their children. On the day when McT (Jnr) told them of the contact between the neighbourhood boys and T and L, she had drunk about eight glasses of wine before that conversation.

Defence counsel's application for a permanent stay of proceedings on counts 2 and 3

[46] After all evidence was given, defence counsel applied for a permanent stay on counts 2 and 3. He contended that a stay should be granted as the complainant's evidence was that counts 2 and 3 occurred in October, November or December 2004 when other evidence established that the appellant was not living at house B at that time. The prosecution could not invite the jury to disregard that part of the complainant's evidence without this amounting to an abuse of process requiring an order for a permanent stay of the prosecution of counts 2 and 3.

[47] The judge noted that the complainant gave the evidence that counts 2 and 3 occurred in late 2004 when she was cross-examined in a pre-recorded hearing on 2 September 2008, three years after she initially provided her statement to police. The prosecution case was that the complainant was mistaken when she gave her evidence in September 2008 and that her evidence, that counts 2 and 3 happened at some unknown time when the family lived in house B, should be preferred. The trial judge concluded that a permanent stay of proceedings was not justified as the issue of the inconsistencies in the complainant's evidence as to the date of the offences was best left for the jury to decide, after being given appropriate directions. The judge refused the application.

The prosecutor's closing address to the jury

[48] The prosecutor's closing address to the jury included these submissions as to counts 2 and 3:

> "You may think [T] is honest because you may recall her giving evidence that [the appellant] would stick his penis in her vagina and anus so many times that she was upfront in saying she can't even remember the first time it happened.
>
> But she does remember a specific incident, the subject to counts 2 and 3. She said it occurred when they were living at [house B] and that's the best she can do. When [McT (Jnr)] was playing X-box because he shared a room with the [appellant], he'd left, the [appellant] then removed his pants and [the complainant's] and then he inserted his penis into her vagina and then her bum."

[49] Later, the prosecutor said:

> "Yet four police interviews later and three prerecord hearings later, from 31 August 2005 to 2 September 2008, over three years of being interviewed and cross-examined, she has always maintained these events have occurred when it was put to her. Instead, counsel for defence have picked on dates for counts 2 and 3 in particular, something clearly she can't remember because at the time she was five to ten years old.
>
> In my submission, they saw an easy target. You may recall my cross-examination of the [appellant] and his mother, they weren't much better and they were older. They couldn't say when the [appellant] came and went from their household. So how would you expect a five to ten year old girl at the time she was giving these interviews, how would you expect her to give an exact date?
>
> She said, as I said, the best she can give is for counts 2 and 3 that it happened at [house B] and we can place a time on that based on her evidence. She said in the first prerecord hearing that it happened when at [house B] and they first moved there in 2002 and the [appellant] left there around the first half or early August 2005.
>
> She said in the second police interview that she was raped a few weeks before he left. …
>
> Counsel for defence are also trying to make a big thing of the fact that she said it happened in October to December 2004 in that prerecord hearing this month. Well, it seems, as my learned friend pre-empted, clearly she's mistaken about that, but I urge you to look at the factors around that.
>
> Her evidence was given almost three years after she was first interviewed about this incident. As I mentioned, four police interviews later and it was on the third prerecord hearing and I also urge you to look at the context of when she said it. In my submission, there was some pressure on her to come up with a date. She was asked:
> "Do you remember what time of the year it was? – No.
> Do you remember how old you were? -- Nuh.

> Do you remember if it was around anyone's birthday? -- Nuh.
> Do you remember if it was Christmas?'
> And then she comes up with, 'Towards the end of the year.'
> 'Towards the end of the year, do you think? -- 2003, 2004'."
>
> For a short prerecord hearing, if you counted the number of times she went along with what was put to her, and I did, she said, "Yes", "Yep", "Yes", "Yeah", 74 times, so much so that my learned friend, as he said, actually had to say to her she didn't have to agree with him, could say what she wanted to say, and that didn't change anything. Compared to the other interviews and the other pre-record hearings, I urge you to look at how responsive she was to questions on those other times.
>
> You might think looking at that last prerecord hearing this month, you were looking at a girl who had been thoroughly exhausted after all the interviews and court hearings over the last three years.
>
> …
>
> Her evidence has always been that it happened at [house B]. She said it was – she said that when it was closer to the offence at the time back in October 2005. So that certainly, it seems, more accurate as to what her memory was when this offence occurred."

Relevant aspects of the primary judge's summing up to the jury

[50] No complaint is made in this appeal about the adequacy of the judge's directions to the jury. The following judicial directions to the jury are of relevance in this appeal:

> "… in respect of the counts here on the indictment, as you will have noted, the respective charges allege that certain events occurred … between certain dates. … Count 2 [and count 3] on a date unknown between the 31st of December 2001 and the 11th of August 2005 … So the Crown is entitled to phrase the indictment in that way because it is not a necessary or crucial part of any indictment that it be alleged that an event happened on a certain or specific day.
>
> The prosecution must, however, satisfy you that the particular offence alleged in the indictment, where it is described as occurring between several dates, did occur within that time frame that is fixed by those dates in respect of that particular offence. So, although a specific date does not … have to be alleged, and the Crown can couch the indictment in the manner it has in respect of those counts. However, it must satisfy you that the alleged offence in the indictment occurred between those dates set out - that is, the offence they allege to have occurred between certain dates, in fact, occurred between those dates and not otherwise; and, of course, you must be satisfied that the particular offence occurred beyond a reasonable doubt."

[51] The judge then reminded the jury that the prosecutor in her opening address alleged that counts 2 and 3 occurred between the date the complainant's family moved to house B sometime in 2002 and the date the appellant left the household in August 2005.[5]

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[5] See these reasons at [49].

[52] The judge emphasised that the prosecution must prove each count beyond reasonable doubt and that the onus did not shift to the appellant because he gave evidence. His Honour uncontroversially dealt with the elements of the three offences. As to the complainant's evidence of the appellant's improper sexual conduct towards her which was not the subject of any charge, the judge referred the jury to it and said:

> "So, as you have heard, the complainant has not been specific about when that activity occurred and could only give a general account of the circumstances in which she alleges other sexual activity occurred.
>
> Now, you can only use this evidence if you accept it beyond reasonable doubt. If you do not accept it, then that finding will bear upon whether or not you accept the complainant's evidence relating to the charges before you beyond reasonable doubt.
>
> So if you do accept the complainant's evidence that these other acts of a sexual nature took place, then you can only use that against the [appellant] in relation to the charges before you if you are satisfied that the evidence demonstrates that the [appellant] had a sexual interest in the complainant and that the [appellant] had been willing to give effect to that interest by doing those other acts. If persuaded of that, you may think that it is more likely that the [appellant] did what is alleged in the charges that are under consideration.
>
> If you are not so satisfied, then the evidence cannot be used by you as proof of the charges before you. Of course, whether any of those other acts occurred and if they did, whether those occurrences make it more likely that on a different occasion the [appellant] did the acts with which he is charged, that is, of course, a matter for you to determine.
>
> Remember, even if you are satisfied that some or all of those other acts did occur, it does not inevitably follow that you would find him guilty of the acts the subject of the charges. You must always decide whether having regard to the whole of the evidence the offences charged have been established to your satisfaction beyond a reasonable doubt.
>
> …
>
> You have regard to the evidence of the incidents not the subject of charges only if you find it reliable. If you accept it, you must not use it to conclude that the [appellant] is someone who has a tendency to commit the type of offence with which he is charged so it would be quite wrong for you to reason you are satisfied he did those acts on other occasions, therefore, it is likely that he committed the offence or offences with which he is presently charged.
>
> Further, you should not reason that the [appellant] had done things equivalent to the charges - to the offences charged on other occasions and on that basis could be convicted of an offence charged even though the particular offences charged are not proved beyond a reasonable doubt.

> So do you understand that? Remember that the evidence of incidents not the subject of charges comes before you only for the limited purpose mentioned, and before you can find the [appellant] guilty of any charge, you must be satisfied beyond reasonable doubt that the charge has been proved by the evidence relating to that charge.
>
> If you do not accept the complainant's evidence relating to incidents not the subject of the charges before you, then you take that into account when you are considering her evidence relating to the alleged events the subject of the charges before you."

[53] The judge summarised the prosecution and defence evidence for the jury before summarising the competing contentions of both counsel. In his summation of defence counsel's contentions the judge referred to the submission that the appellant could not have committed the acts complained of in counts 2 and 3 in the latter part of 2004 because of his absence in north Queensland. In summarising the prosecution contentions, the judge referred to the prosecutor's submission that in the complainant's pre-recorded cross-examination in September 2008, the complainant was prone to agree with what defence counsel asked her and that, bearing in mind the young age of the complainant, it was not surprising she was confused as to dates. The judge added:

> "In summary, the defence says that you could not possibly find his client guilty of the offences charged. When you weigh up all the evidence, you take into account the inconsistencies in respect thereof. You take into account, in particular, the evidence that is before you about his absences from [house B] at various times, particularly in that latter part of 2004, and that on the whole of the evidence, you would find that he is not guilty of the offences with which he is charged. The Crown says, on the other hand, you've heard the evidence of the complainant child. You make up your own minds. You determine yourself whom you believe. You have seen her give evidence, and it is really a matter for you to satisfy yourselves as to the - whether the prosecution has discharged its onus of proof in respect of these offences."

Jury re-directions

[54] During the jury's deliberations, they sent a note to the judge in these terms: "Exhibit 1 (audio tape), exhibit 2 (first video tape of [T] conducted by Constable Streeting)." The judge arranged for those tapes to be re-played to the court and as a matter of balance also had re-played the crucial pre-recorded cross-examination of T on 2 September 2008 in which T said counts 2 and 3 occurred in late 2004. The jury then retired to consider their verdict at 5.46 pm on the fifth day of the trial. They returned with their verdict at 6.17 pm that same day.

The appellant's contentions

[55] The two grounds of appeal[6] are interwoven and interconnected. The appellant firstly contends the primary judge erred in refusing defence counsel's application to stay the proceedings because the conduct of the prosecution amounted to an abuse

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6 See these reasons at [3].

of process: the prosecution provided particulars and the appellant's evidence did not marry with those particulars. The prosecutor was not entitled to suggest its own key witness was unreliable.

[56] Alternatively, but closely connected to that submission, the appellant contends the second trial miscarried because of the failure of the prosecution to properly particularise counts 2 and 3 and that the guilty verdicts on those counts are unreasonable and not supported by the evidence: *S v The Queen*;[7] *R v R*[8] and *R v Baker; ex parte A-G (Qld).*[9] Essential to this submission is that the complainant's evidence was conflicting, inconsistent and confusing. The complainant said that the appellant penetrated her so many times that she could not remember the first time. Her account was so confusing that the first trial was conducted on the basis that counts 2 and 3 were both what the complainant referred to as the last incident and the X-box incident. The complainant's evidence leaves it unclear as to whether her answers to questions related to the X-box occasion or the appellant's conduct generally or whether there were two or even more occasions of alleged sexual abuse following times when McT (Jnr) was playing on the X-box. But it is impossible to isolate the specific counts charged in counts 2 and 3 from the complainant's confused evidence. The appellant emphasises that T's clear statement in cross-examination on 2 September 2008 was that counts 2 and 3 occurred in late 2004. At this time, other independent evidence established that the appellant was not living in the family home, house B, where it is common ground that the complainant alleges counts 2 and 3 occurred.

[57] The appellant argues that the complainant's evidence at its highest merely describes an incident when the appellant vaginally and anally penetrated her. This incident was one of many such incidents. In her interview of 5 October 2005, she said such incidents occurred "about five" times and later in her interview of 17 February 2007, she said when asked how many times the appellant touched her: "Um, I don't know, I think it was like every day of the week". The complainant's assertion that these events occurred on a day when her brother, McT (Jnr), was playing the X-box was not relevantly an external event informing the appellant of the case against which he must defend himself: *R v Baker; ex parte A-G (Qld).*[10] There was a real danger that the jury, in reaching their guilty verdicts on counts 2 and 3, may not have been considering the same episode.

Conclusion

[58] When a young complainant, like T, gives evidence of offences of this type, a lack of detail, especially as to the dates of offences, is a common feature. T was young and not very articulate, even considering her young age. She was interviewed in a piecemeal fashion and her disclosures were incremental, confusing and potentially inconsistent. This type of evidence from young complainants in sexual matters is not unusual. It makes it hard for the prosecution to prove the charges. It also makes it difficult for an accused person to defend the allegations and to obtain a fair trial. In *S v The Queen*, the High Court recognised the difficulty for accused persons defending themselves against evidence of general unspecified acts of sexual abuse. The court held that, in the absence of an act or acts identified as the subject of an

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7 (1989) 168 CLR 266.
8 [1998] QCA 83.
9 [2002] 1 Qd R 274.
10 [2002] 1 Qd R 274, Mackenzie J at 276.

offence charged in an indictment, the prosecution cannot lead evidence that is equally capable of referring to a number of occasions, any one of which might constitute an offence the legal nature of which is described in the charge, and invite the jury to convict on any one of them.[11] As Toohey J explained:[12]

> "Of course this does not mean that the prosecution must specify a particular date as the occasion on which it relies. But it does mean that, as soon as it appears that a count in the indictment is equally capable of referring to a number of occasions, each of which constitutes the offence the legal nature of which is described in the count, the prosecution should identify the occasion which is said to give rise to the offence charged."

[59] The Queensland legislature responded to the legal requirement for particularity of offences on the one hand, and its concern for the difficulty young child complainants in sexual offences have in providing such particularity on the other, by introducing in 1989 into the *Criminal Code* 1899 (Qld) the offence of maintaining a sexual relationship (s 229B). I was at first puzzled as to why the appellant was not charged with an offence of maintaining a sexual relationship with T under s 229B. It may have been because of the amendments made to s 229B during the time-frames of counts 2 and 3.[13] But the respondent is bound by the charges it has brought against the appellant and by the way it has conducted its prosecution. If it is unable to lawfully prove the charges it brings, the appellant is entitled to be discharged.

[60] The prosecution's obligation to provide particulars in this case was made difficult by the lack of precision in the complainant's evidence. She did not seem to be an enthusiastic participant in her interviews with police. This is not surprising: she was 10 years old; she had a grossly dysfunctional upbringing; she was not articulate, even considering her young age; and she was speaking to police of matters which she would have found embarrassing. She probably felt reluctant to inform on her step-brother and she may have also wrongly felt some guilt on her part. The prosecution was nevertheless bound to provide adequate particulars.

[61] Dowsett J explained the minimum requirement for particulars in *R v Rogers*:[14]

> "In general, as a minimum requirement, it is necessary that there be sufficient particularity in the allegations to demonstrate one

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11 See also Dixon J's observations in *Johnson v Miller* (1937) 59 CLR 467 at 489.

12 *S v The Queen* (1989) 169 CLR 266 at 282.

13 Section 229B(4) has been in these terms since 1 May 2003:

"(4) However, in relation to the unlawful sexual acts involved in an unlawful sexual relationship –

(a) the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence; and

(b) the jury is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence; and

(c) all the members of the jury are not required to be satisfied about the same unlawful sexual acts."

Between 1 July 1997 and 30 April 2003 s 229B relevantly provided:

"(2) A person shall not be convicted of the offence defined in subsection (1) unless it is shown that the accused person, as an adult, has, during the period in which it is alleged that he or she maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the chid, other than an offence defined in section 210(1)(e) or (f) on 3 or more occasions and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions".

14 CA No 445 of 1997; CA No 17 of 1998, unreported, 6 May 1998 at 25.

> identifiable transaction which meets the description of the offence charged, distinguishable from any other similar incidents suggested by the evidence. … In cases of the present kind it will, for instance, often be difficult for a very young complainant to give particulars of dates although, as this case demonstrates, particulars of place may not be so difficult. A specified period may be sufficient, although the longer the period, the less satisfactory is the degree of particularity so offered. The age of the complainant at the time of the alleged offence and at the time of trial may affect any decision as to the adequacy of the particulars. I mean by this only that a court will be more easily convinced that the Crown cannot further particularize a count where the complainant is a young child than in other cases. However the ultimate question will be whether the particulars are reasonably sufficient for the purposes of the administration of justice and for the accused to make a proper defence. The less satisfactory the particulars, the more important will be an adequate direction as to the difficulties created for the accused in answering the charges and the need for care in scrutinizing the Crown case. As with so many other aspects of a criminal trial, the adequacy of particulars is very much a matter of judgment."

[62] Mackenzie J made similar observations in *R v S*:[15]

> "[14] There are two aspects of the need for particularity. One is the need to eliminate the risk of duplicity. The occasion on which the offence is alleged to have occurred must be sufficiently identified so that it may be differentiated by the jury as a specific event upon which they must focus. There must ultimately be adequate directions that the jury must be satisfied beyond reasonable doubt of guilt of that particular offence and no other and as to the use which may be made of evidence of other unparticularised acts of the same character in the process of reaching the verdict.
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> [15] The second purpose of particulars is to give the accused person a sufficient indication of what is alleged against him on the occasion when he is said to have committed the offence."[16]

His Honour then adopted Dowsett J's analysis in *R.* Later his Honour continued:

> "I doubt whether it is possible or helpful to attempt to lay down absolute rules in this area. Once a sufficiency of particulars falls to be decided in the context of the particular circumstances of the individual case, each case must be decided on its merits. Cases which are insufficiently particularised may have common characteristics. So may sufficiently particularised cases. However, in the end, it may be a matter of judgment and impression whether a case falls on one side of the line or the other, given the wide variety of circumstances which may exist."[17]

[63] The prosecution particularised counts 2 and 3 as occurring on a day when the complainant's family was living in house B and the complainant was home with her

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15 [2000] 1 Qd R 445, McMurdo P and Helman J agreeing.

16 [2000] 1 Qd R 445 at 452.

17 [2000] 1 Qd R 445 at 455-456. See also *R v C* [2000] QCA 145 at [3].

brother, McT (Jnr), who was playing X-box in the bedroom he shared with the appellant. McT (Jnr) left the room. The appellant then pulled the complainant over onto his bed, pulled her pants down, pulled his pants down and, in T's words, "put his hairy thing which he uses for sex" in both her parts, her vagina and her bum, and this hurt her. Count 2 was the appellant's penetration of the vagina and count 3 the appellant's penetration of her anus. The family moved to house B sometime in 2002 and the appellant left the household in August 2005, so that counts 2 and 3 occurred on a date within that time frame. Those particulars of three specific counts can be married with and identified from the complainant's evidence, despite its confusing and arguably inconsistent aspects. The prosecutor in the second trial did not particularise counts 2 and 3 as occurring towards the end of 2004. She merely stated that, the last time T gave evidence, T said she thought the incident in which counts 2 and 3 occurred happened towards the end of 2004. The particulars in the second trial made clear that the prosecution was alleging that counts 2 and 3 occurred on an unknown date during the time when the appellant was living in T's household, not that it happened towards the end of 2004. In those circumstances, I consider the particulars given of the complainant's evidence sufficiently married with and can be identified from her evidence so as to just fall onto the adequate "side of the line" discussed by Mackenzie J in *S*.

[64] As Dowsett J stated in *Rogers*, the less satisfactory the particulars, the more important are adequate jury directions from the trial judge. The sufficiency of those directions in light of the borderline nature of the particulars is relevant to the next ground of appeal. I turn now to consider whether the guilty verdicts on counts 2 and 3 are unreasonable and cannot be supported having regard to the evidence.[18]

[65] The complainant was no more than 10 years old at the time she first gave evidence that the appellant committed the three counts against her. It is most unsatisfactory that her evidence was taken piecemeal over many years. When she was cross-examined for the third time, on 2 September 2008, at least three years had passed since the offences were said to have occurred, a very long time in the life of a child of that age. Although her evidence was confusing and at times arguably inconsistent, she did give consistent evidence that counts 2 and 3 occurred at house B after her brother, McT (Jnr), had been playing an X-box game in the bedroom he shared with the appellant, and the appellant had him leave the bedroom. It is true that, during cross-examination on 2 September 2008, the complainant unequivocally said that the episode involving counts 2 and 3 occurred during a time frame when other evidence established the appellant was not living in house B. Defence counsel strongly emphasised this aspect of T's evidence in his jury address.

[66] Importantly, the learned primary judge highlighted that inconsistency to the jury and gave the jury careful and adequate directions in respect of it. The judge's directions which I have set out earlier in these reasons made clear that they could only convict the appellant on counts 2 and 3 if they were satisfied beyond reasonable doubt on the complainant's evidence that those particularised offences occurred in the way she described, at house B, within the time frame charged in the indictment and at a time when the appellant was living in house B. The judge made clear to the jury that they could not convict the appellant simply because they thought he had committed some uncharged offences against the complainant of a similar type to

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18 *Criminal Code* 1899 (Qld), s 668E.

counts 2 and 3. During the jury deliberations, they requested to hear portions of the complainant's early interviews with police. To ensure fairness, the judge had the complainant's cross-examination of 2 September 2008, which was so central to the defence case, played to the jury. In my view, the judge's summing-up ensured that, despite the somewhat vague particulars of counts 2 and 3 and the unsatisfactory nature of the complainant's evidence, the appellant received a fair and balanced trial.

[67] The aspect of the complainant's evidence that she was vaginally sexually abused by someone, although not necessarily the appellant, received support from the medical evidence. The jury were entitled to accept the complainant's evidence that the appellant committed the three counts in the way particularised by the prosecutor during her opening. They were entitled to consider that she was confused and mistaken when she was cross-examined on 2 September 2008 and said that counts 2 and 3 occurred in late 2004, a time when other evidence established that the appellant was not living in house B. The jury were well entitled to accept the complainant's evidence that no penetrative conduct took place between her and the neighbourhood boys. The jury were equally entitled to reject the appellant's evidence that he did not commit the offences. There was ample evidence that he lived in house B for significant periods during much of the time frame in which counts 2 and 3 were charged as occurring. Despite the confusion, weaknesses and inconsistencies in the complainant's evidence, after reviewing it and the other evidence in the case, I am satisfied that it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of each of the three counts: *MFA v The Queen*.[19]

[68] This conclusion also effectively disposes of the appellant's second ground of appeal, that the learned trial judge erred in refusing a stay of proceedings. A stay will only be ordered in a criminal trial in exceptional cases where there is a fundamental defect of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences: *Jago v District Court (NSW)*;[20] *The Queen v Glennon*;[21] *R v Ferguson; ex parte A-G (Qld)*.[22] There was no suggestion of dishonesty in the conduct of the prosecution of this case. Neither the inconsistencies in the complainant's evidence, nor its vagueness, nor the prosecutor's reluctance to rely on the complainant's answers in cross-examination on 2 September 2008, individually or combined, were exceptional enough to warrant the granting of a stay in this case. The primary judge was entitled and indeed plainly right to refuse defence counsel's application for a stay of the prosecution of this matter.

[69] It follows that the appeal must be dismissed. The appellant's counsel has not made any written or oral submissions in support of the application for leave to appeal against sentence. The sentences imposed appear to be well within range for the serious offences of which he was convicted, namely the opportunistic sexual abuse by a young man of his pre-pubescent de facto step-sister within a dysfunctional family context. His conduct of the trial showed no remorse; no co-operation with the administration of justice; and no insight into his offending or empathy for his innocent victim. The application for leave to appeal against sentence must be refused. I would make the following orders:

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19 (2002) 213 CLR 606 at [25], [59].
20 (1989) 168 CLR 23 at 34.
21 (1992) 173 CLR 592 at 605-606.
22 [2008] QCA 227 at [32].

1. Appeal against conviction dismissed.

2. Application for leave to appeal against sentence refused.

[70] **FRASER JA:** I agree with the reasons for judgment of the President and the orders proposed by her Honour.

[71] **CULLINANE J:** I agree with the reasons of the President and the orders proposed.