SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cain* [2010] QCA 373
PARTIES:	**R** **v** **CAIN, Ryan Thomas** (applicant/appellant)
FILE NO/S:	CA No 156 of 2008 DC No 35 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Mackay
DELIVERED ON:	23 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	29 September 2010
JUDGES:	Fraser and White JJA and Jones 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 – MISCARRIAGE OF JUSTICE – WHAT CONSTITUTES – where the appellant was charged with four counts of rape, one count of doing grievous bodily harm and one count of breaking and entering with intent – where the appellant pleaded guilty to breaking and entering – where the appellant was acquitted of one count of rape and doing grievous bodily harm, and was convicted of the remaining rape counts – where the appellant applied for leave to appeal against sentence and his solicitor became concerned about his mental health – where the appellant was seen by a psychiatrist who reported that he was suffering from paranoid schizophrenia with grandiose and persecutory delusions – whether the appellant was fit for trial – whether the appellant was able to make a defence or answer the charge by giving instructions and evidence – whether on appeal the evidence raises a real and substantial question to be considered about the appellant's fitness for trial – whether a jury, acting reasonably, could conclude that the appellant was not fit for trial – whether there was a miscarriage of justice APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE –

SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was sentenced to concurrent terms of 11 years imprisonment for each count of rape and three and a half years imprisonment for breaking and entering – where the appellant sought leave to appeal against sentence – whether the sentence imposed by the primary judge was manifestly excessive

Criminal Code 1899 (Qld), s 613(1), s 668E(1), s 668E(1A)
Corrective Services Act 2006 (Qld), s 182
Penalties and Sentences Act 1992 (Qld), s 161A

Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485; [1993] HCA 15, cited
CAL No 14 Pty Ltd v Motor Accidents Insurance Board (2009) 239 CLR 390; [2009] HCA 47, cited
Eastman v The Queen (2000) 203 CLR 1; [2000] HCA 29, applied
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22, cited
Gett v Tabet (2009) 254 ALR 504; [2009] NSWCA 76, applied
Hili v The Queen; Jones v The Queen [2010] HCA 45, cited
Kesavarajah v The Queen (1994) 181 CLR 230; [1994] HCA 41, cited
R v Basaca [2006] QCA 352, cited
R v Basic (2000) 115 A Crim R 456; [2000] QCA 155, applied
R v Bolton [2005] QCA 335, cited
R v Butler [2010] 1 Qd R 325; [2009] QCA 111, cited
R v Cain [2009] QCA 365, related
R v Dowden [2010] QCA 125, discussed
R v Presser [1958] VR 45; [1958] ALR 248, applied
R v T (2000) 109 A Crim R 559, applied
R v Taylor (1992) 77 CCC (3d) 551, cited
R v Walsh [2008] QCA 391, cited
R v Williams [2002] QCA 211, cited
Re Malt, unreported, Dutney J, No 218 of 2008, Mental Health Court of Queensland, 9 March 2009, discussed
Rinaldi v The State of Western Australia [2007] WASCA 53, discussed
Robinson v R [2008] NSWCCA 64, discussed
Shenton v The State of Western Australia [2005] WASCA 118, discussed
Walker Corporation Pty Ltd v Sydney Harbour Foresure Authority (2008) 233 CLR 259; [2008] HCA 5, cited

COUNSEL: S Hamlyn-Harris for the applicant/appellant
M B Lehane for the respondent

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

[1] **FRASER JA:** On 12 March 2008 the appellant was arraigned in the District Court at Mackay on an indictment charging four counts of rape, one count of doing grievous bodily harm), and one count of breaking and entering a dwelling with intent to commit an indictable offence (burglary). The appellant pleaded guilty to the burglary count and not guilty to the other counts. On 18 March 2008 the jury found the appellant guilty of three counts of rape and acquitted him of one count of rape and of the grievous bodily harm count. On 30 May 2008 the trial judge sentenced the appellant to concurrent terms of 11 years imprisonment on each count of rape and three and a half years imprisonment for the burglary offence.

[2] The appellant applied for leave to appeal against sentence on the ground that the sentences were manifestly excessive. In the course of taking instructions in relation to that application the appellant's lawyers became concerned about his mental health. The appellant was seen by a psychiatrist, Dr Beech, who reported on 12 January 2009 that the appellant was suffering from paranoid schizophrenia with grandiose and persecutory delusions and, if he had that illness at the time of his trial, it might have impaired his ability to give instructions, to properly challenge, and to properly plead to the charges. Dr Beech was briefed with further information. On 29 June 2009 Dr Beech expressed opinions that the appellant suffered from paranoid schizophrenia characterised by the grandiose delusions that he was a music celebrity and persecutory delusions that his conviction resulted from a conspiracy to deprive him of his rights as a music artist. Dr Beech considered that it was likely that the appellant's psychosis had intervened by the time he went to trial, and that the appellant would have been unfit for trial because his delusional thinking would have had a significantly adverse effect on his capacity to know what defence he should rely upon, to give his account to the court, and to instruct counsel.

[3] The appellant was treated for his illness. He applied for an extension of time within which to appeal against his convictions. On 27 November 2009 the Court granted that application[1] and the appellant duly filed a notice of appeal against his convictions.

[4] The only ground of the appeal is that the appellant might have been unfit for trial. I will discuss and the parties' arguments after I have first outlined the evidence at the trial, the relevant legal principles, and the evidence adduced in the appeal about the appellant's fitness for trial.[2]

The evidence at the trial

[5] The complainant in the rape offences had met the appellant only once. The complainant's husband had known the appellant for many years. On 8 June 2007 the complainant's husband drove from his home in Mackay to collect the appellant from Rockhampton. (The appellant was released from prison that morning, but that was not disclosed to the jury). They arrived back in Mackay late in the morning.

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1 *R v Cain* [2009] QCA 365.

2 I will use the expression "fitness for trial" as comprehending fitness to plead as well as fitness to participate in the trial in all respects.

The complainant's husband had arranged employment for the appellant and for him to stay at his house. On the night of 8 June they and another man went to some nightclubs in Mackay, leaving the complainant and her two children in their house.

[6] The complainant gave evidence that after she had fallen asleep in her bed she awoke to find the appellant next to her. She went into the kitchen to ring her husband and the appellant followed her. He smelt of alcohol and asked her to kiss him. The complainant refused. The appellant violently assaulted her, dragging her by her neck down the hallway to her bedroom. He told her that he had a knife and threatened to kill her if she would not do as he asked. She was in pain, crying, and telling the appellant to stop. He raped her vaginally (the first count of rape). He put his hands around her neck and started to choke her and she lost consciousness. When she revived the appellant was still raping her. During these events she heard the telephone ringing. The complainant gave evidence that the appellant then put his penis into her bottom (the second count of rape). (Defence counsel cross examined the complainant with a view to demonstrating uncertainty or unreliability in her evidence about that count. In particular, the complainant agreed, in effect, that this occupied a very brief period and that it occurred close to the time when she blacked out. The jury acquitted the appellant of the second count of rape.) The appellant continued to tell the complainant to shut up or he would kill her and he raped her vaginally again (the third count of rape). Later the appellant hit the complainant's breasts and put his finger in her vagina (the fourth count of rape). The complainant heard footsteps and her husband opened the door from the hallway. The appellant barricaded the door with his foot. The complainant's husband attempted to break through the door whilst he bashed on it and yelled to the appellant to let the complainant out. While this was happening the appellant telephoned police and told them that a crazy man was trying to kill him and a lady was going crazy. Eventually the complainant escaped by jumping out of the window and running back inside the house to her children.

[7] Defence counsel cross examined the complainant at some length about details of her account and suggested to the complainant that she had consensual sex with the appellant. The complainant denied that suggestion. She adhered to the essential aspects of her account, including her evidence that the appellant assaulted her and threatened her with a knife.

[8] The complainant's husband gave evidence that after he and the appellant and another man had visited nightclubs he lost contact with the appellant. He spoke to his wife by telephone. She said that the appellant had arrived home in a taxi and that she would drive into town to collect her husband. The complainant's husband started walking home to meet her, but she did not arrive. He attempted to telephone her but her mobile kept going to message bank. He hurried home and arrived to find that the appellant was in the couple's bedroom with the complainant, who was distressed. The door was shut. He attempted to break through the door using an ornamental sword. Whilst he was ripping at the door with his hands to complete the hole he had made, one of his fingers was severed. Inferentially, the appellant cut the complainant husband's finger using a hunting knife kept in the house. The complainant's husband had shown the knife to the appellant earlier that day and on the following day the knife could not be found (the grievous bodily harm count, of which the appellant was acquitted). The complainant's husband gave evidence that he broke through the door and attacked the appellant with a posthole shovel, after which the appellant left the room through the window and ran away. The complainant's husband chased the appellant, but he escaped.

[9] In cross examination, the complainant's husband agreed with defence counsel's suggestions that he attacked the closed door to the bedroom using the ornamental sword, broke through the door, and attacked and injured the appellant using a posthole shovel. He denied that he had caused his own injuries using the hunting knife. He made it clear that if he had that knife in his possession he would have killed the appellant with it.

[10] The appellant later broke into a different house. The complainant in the burglary offence (to which the appellant pleaded guilty) was away from her house for the night. When she returned in the morning she found the appellant wrapped in a rug on her bed. The track pants he was wearing were ripped and torn, he was bleeding from a cut on his forehead, and there was dried blood around his mouth and scratches below his navel. He had been through her wardrobe and but not taken anything. She was scared. The appellant said that he had had a fight with his mate. He was shaking and clenching his fists whilst she was talking to him. She made him a cup of coffee and bathed the cut to his head and around his mouth to get rid of the blood. She noticed he had skin off some his knuckles. The appellant used the telephone, apparently to ring his mother and his sister. She kept telling him to go and gave him some clothes. Eventually she agreed to drive him to a service station outside Mackay. She left him there. The appellant did not threaten or harm her. On her return she reported those events to the police.

[11] The appellant did not give or call evidence.

Relevant legal principles

[12] In Queensland the governing provision is s 613 of the *Criminal Code* (Qld). It provides:

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

> (4) A person so found to be incapable of understanding the proceedings at the trial may be again indicted and tried for the offence."

[13] It was common ground in the appeal that under s 613 of the *Criminal Code* 1899 (Qld) the test for determining whether an accused person is fit for trial is that stated by Smith J in *R v Presser*.[3] Smith J's judgment has often been quoted with approval, including by the High Court in *Kesavarajah v The Queen*[4] and *Eastman v The Queen*.[5] In *Kesavarajah*[6] Mason CJ, Toohey and Gaudron JJ said:

> "In *Reg. v Presser*, Smith J. elaborated the minimum standards with which an accused must comply before he or she can be tried without unfairness or injustice. Those standards, which are based on the well-known explanation given by Alderson B. to the jury in *R. v Pritchard*, require the ability (1) to understand the nature of the charge; (2) to plead to the charge and to exercise the right of challenge; (3) to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged; (4) to follow the course of the proceedings; (5) to understand the substantial effect of any evidence that may be given in support of the prosecution; and (6) to make a defence or answer the charge."

[14] There was no contravention of s 613(1) at the trial because, as was common ground between the parties, no uncertainty about the appellant's fitness for trial was or should have been apparent at that time. One of the issues in this appeal concerns the role of this Court in a case of this kind, where a question about fitness for trial is raised for the first time on appeal. The Court's role is defined, so far as is presently relevant, by s 668E(1) of the *Criminal Code*, which provides that on an appeal against conviction the Court "shall allow the appeal if it is of the opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal." Section 668E(1A) provides that "the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred." The respondent did not argue that the proviso in s 668E(1A) could be applied if the appellant established a ground of appeal under s 668E(1). It follows that the question for this Court is whether the evidence about the appellant's fitness for trial establishes that he was the victim of a miscarriage of justice.

[15] The appellant contended that where an issue of fitness for trial is raised for the first time on appeal, the Court may hold that there has not been a miscarriage of justice only if it is affirmatively persuaded that no jury, acting reasonably, could conclude that the accused was not fit for trial. The authorities support that contention. In *Eastman v The Queen*[7] one issue was whether the Full Court of the Federal Court

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3 [1958] VR 45 at 48.
4 (1994) 181 CLR 230.
5 (2000) 203 CLR 1.
6 (1994) 181 CLR 230 at 245.
7 (2000) 203 CLR 1.

was obliged or empowered to consider an appellant's fitness for trial in an appeal in which there was no relevant ground of appeal and the question of fitness for trial was not raised by the parties at trial or on appeal. Gaudron J, who, with Hayne and Callinan JJ, dissented in holding that the Full Court erred in not inquiring about and considering the appellant's fitness to plead, said:[8]

> "Unless there is material to suggest otherwise, a person is presumed fit to plead. And that is so both at trial and on appeal. At trial however, that presumption is displaced if there is material which raises a question as to that person's fitness to plead. Moreover, if there is a question as to the accused person's fitness to plead, the trial must stop unless and until the appropriate body determines that he or she is fit to plead.
>
> Once it is accepted that the law acknowledges that a person who is not fit to plead may also lack the capacity to raise that issue, it must follow that the role of an appellate court differs from that of a trial judge in one respect only, namely, that it looks to the past whereas the trial judge is concerned with events as they are happening. More precisely, if there is material suggesting that the appellant was not fit to plead, an appellate court must inquire whether, at the time of the trial, the appropriate tribunal could not reasonably have found the appellant not fit to plead."

[16] Hayne J said:[9]

> "The question that now arises is, however, of a different kind. It is one which goes, not to the fairness of the trial, but to whether there could be a trial at all. The miscarriage of justice said to have occurred is that there has been a trial where there should not have been.
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> The fact that neither party raised the issue in the Full Court did not relieve that Court of its separate obligation to consider it in this case. Once it is accepted, as in my view it must be, that the question of fitness stands outside the adversarial process of the criminal trial, the facts that the parties to the proceedings at trial did not raise it, and that the trial judge had no cause to raise it, do not lead to the conclusion that an appellate court, armed for the first time with material which suggests the accused may not be fit to plead, is not itself bound to raise that issue for consideration in the appeal. In this respect the question of fitness to plead is very different from other issues which may cause a trial to miscarry. Those issues must be raised by a party to the proceeding; the appellate court has no obligation (and may have no power) to do so of its own motion. But that cannot be so in relation to the issue of fitness to plead, because the issue is one which raises for consideration the validity of the premise which underpins the conclusion that ordinarily it is for the prosecution to prove its case and for the accused to choose the ground or grounds on which to meet the accusation.

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8 *Eastman v The Queen* (2000) 203 CLR 1 at [86]-[87]. I have omitted footnotes.

9 *Eastman v The Queen* (2000) 203 CLR 1 at [317]-[319]. I have omitted footnotes.

> The Full Court was bound to set aside the conviction if there was a miscarriage of justice. And there is a miscarriage of justice if an accused is put to trial when that accused *may not* have been fit to plead and stand trial. That is, to adopt the terms used earlier, there is a miscarriage of justice if there is a real and substantial question to be considered about the accused's fitness. The conclusion that there is a miscarriage if the accused *may not* have been fit follows from the decisions in this Court and in intermediate appellate courts in which questions of fitness have been raised on appeal. There the question for the appellate court has been treated as being whether there was a question as to the accused's fitness, not whether the appellate court was persuaded that the accused was not fit. Only if the appellate court is affirmatively persuaded that no tribunal, acting reasonably, could conclude that the accused was not fit, may that court determine that no miscarriage of justice has occurred and only then could the question of fitness be put aside."

[17] In *Shenton v The State of Western Australia*[10] McLure JA (with whose reasons Malcolm CJ and Roberts-Smith JA agreed) applied Hayne J's analysis in holding that there was a miscarriage of justice when the accused may not have been fit to plead and stand trial, that is, if there is a real and substantial question to be considered about the accused's fitness. Hayne J's analysis was also applied in a series of New South Wales decisions cited in *Robinson v R* by Latham J, with whose reasons Spigelman CJ agreed:[11]

> "In short, before it could dismiss the appeal, the Court was required to reach the affirmative view that, had the question of fitness been raised at trial, the court below, acting reasonably, *must* have found the appellant fit to stand trial: *Eastman v The Queen* (2000) 203 CLR 1; *R v R.T.I.* (2003) 58 NSWLR 438; [2003] NSWCCA 283; *R v Rivkin* (2004) 59 NSWLR 284 at 296; *R v Henley* [2005] NSWCCA 126; *Kirkwood v R* [2006] NSWCCA 181."

[18] The respondent argued that this Court should instead adopt a test which is analogous to the test for the admission on appeal of "fresh evidence", that is, evidence which did not exist at the time of the trial or which could not then with reasonable diligence have been discovered. The respondent argued that there was an advantage in applying a consistent test in the present context. The respondent referred to the statement by Steytler P, with whom Wheeler and Pullin JJA agreed, in *Rinaldi v The State of Western Australia*[12] that in a "fresh evidence" case the question for the appellate court is whether there is a significant possibility that, in light of all of the admissible evidence, including the evidence given at the trial, a jury acting reasonably would have acquitted the accused. The respondent submitted that, by analogy with the fresh evidence test, the question in the present case was whether there was a significant possibility in light of all of the admissible evidence that a jury, acting reasonably, would have found the appellant not fit for trial.

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10 [2005] WASCA 118 at [40]-[41].

11 [2008] NSWCCA 64 at [63]. The relevant appeal provision in New South Wales, s 6 of the *Criminal Appeal Act* 1912 (NSW), is not materially indistinguishable from s 668E(1) of the *Criminal Code* 1899 (Qld).

12 [2007] WASCA 53 at [78]-[82], referred to by Keane JA (as his Honour then was), with whose reasons McMurdo P and Holmes JA agreed, in *R v Butler* [2009] QCA 111 at [40].

[19] There may not be much difference in practice between that test and the test approved in *Shenton* and *Robinson*, but in my opinion it is the latter test that should be applied. In *Eastman* Hayne J rejected the analogy which the respondent advocates:[13]

> "The analogy with cases of fresh evidence breaks down, in my view, in relation to the degree of persuasion the appellate court must have that the relevant issue is a live issue. (In a fresh evidence case, the issue is of guilt or innocence; in the present case, it is the issue of fitness to plead.) *Gallagher* held that there must be a "significant possibility" of acquittal, although Gibbs CJ warned against regarding the particular form of expression adopted as "an incantation that will resolve the difficulties of every case". How to formulate the quality which must attach to fresh evidence to ground a successful appeal was considered further in *Mickelberg* but it is not necessary, for present purposes, to stay to consider details of that discussion. Fitness to plead, going as it does to whether there could be a trial, raises different issues from those that arise in relation to cases of fresh evidence. In cases of fresh evidence (where guilt has already been decided by a jury) there is the competing consideration of the desirability of treating jury verdicts as final. No such issue intrudes in relation to fitness to plead for, as I have said, the issue is not guilt or innocence of the charge or how the trial should have proceeded. The issue is whether there should have been a trial. Accordingly, I consider the appropriate test in the present case to be as I have stated earlier: must the Tribunal, if the question had been put to it and it had acted reasonably, have found the accused to be fit to plead and stand trial?"

[20] The respondent argued that the decisions in *Shenton* and *Robinson* placed too much weight upon Hayne J's analysis. In the respondent's submission, Hayne J's analysis was inconsistent with passages in the reasons of the Justices who comprised the majority. I do not accept that argument. It was not necessary for the majority Justices to consider this question and their Honours did not do so. The respondent emphasised a passage in the reasons of the Chief Justice.[14] That concerned the different question whether the fact that an issue of fitness to plead is in some degree apart from the adversarial trial processes, makes it so different from other potential miscarriages of justice that it is the duty of a court of criminal appeal to investigate fitness for trial even where that is not raised by the appellant. The Chief Justice gave a negative answer to that question, but neither his Honour nor any of the other Justices held that, for the purposes of appellate review, a ground of appeal which raised a question about fitness to plead should be determined with reference to the test which applies in relation to other possible miscarriages of justice.

[21] What is in issue in this respect is the connotation of the expression "there was a miscarriage of justice" in s 668E(1) of the *Criminal Code* 1899 (Qld). Hayne J's analysis was applied in *Shenton* and *Robinson* in a statutory context which, so far as the present question is concerned, is relevantly indistinguishable from that which applies in this State. The respondent's counsel pointed out that McLure JA

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13 *Eastman v The Queen* (2000) 203 CLR 1 at [323]. I have omitted footnotes. McLure JA also rejected that analogy: see *Shenton v The State of Western Australia* [2005] WASCA 118 at [40]-[41].

14 *Eastman v The Queen* (2000) 203 CLR 1 at [46]-[47].

mentioned in *Shenton* that the court did not have the assistance of submissions from counsel for the appellant. Nevertheless, McLure JA decided the question and her Honour's decision is consistent with *Robinson* and the decisions followed in that case. An intermediate court of appeal should not depart from a decision of another intermediate court of appeal upon the interpretation of Commonwealth legislation,[15] the interpretation of uniform national legislation,[16] or upon the common law,[17] unless convinced that that the decision is plainly wrong. The question whether or not a similar principle applies when an intermediate appellate court is confronted with a decision of an intermediate appellate court of a different State upon the interpretation of indistinguishable legislation of that other State may not have been finally resolved,[18] but at the very least such a decision must be treated as a guide.[19] I would act upon that guidance and adopt the same interpretation. I would also reach the same view apart from that consideration because, in my respectful opinion, Hayne J's analysis in *Eastman* is compelling.

[22] Accordingly, there is a miscarriage of justice if, to adapt Hayne J's words,[20] the appellant may not have been fit for trial, that is, if there is a real and substantial question to be considered about the accused's fitness; and the Court may determine that no miscarriage of justice has occurred only if the Court is affirmatively persuaded that no jury, acting reasonably, could conclude that the accused was not fit for trial.

Evidence about the appellant's fitness for trial

[23] Before considering the application of that test it is useful to summarise the evidence adduced in the appeal.

[24] In a conference in October 2008 between the appellant and his lawyers which concerned the appellant's application for leave to appeal against sentence the appellant behaved so oddly and made a number of statements that were so bizarre as to suggest that he might be mentally ill. He made similar statements in his facsimile dated 20 October 2008, in which he claimed to be "one of the best rappers in the world" and a "political prisoner charged with a horrific crime which I did not commit". The appellant made other bizarre statements in the course of giving instructions to his lawyers. In due course the appellant was examined by Dr Beech and he gave the reports of 12 January 2009 and 29 June 2009 mentioned earlier.

[25] The appellant relied upon those reports and upon Dr Beech's further report dated 17 June 2010. The respondent relied upon affidavit evidence by the appellant's former solicitor, Mr Aberdeen, and defence counsel, Mr Cullinane, and upon a report dated 2 September 2010 by a psychiatrist, Dr Kingswell. Each of those witnesses also gave evidence and was cross examined at the hearing of the appeal.

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15 *Hili v The Queen; Jones v The Queen* [2010] HCA 45 at [57], in which the Court cited the decisions in the following two footnotes.

16 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492.

17 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151 to 152, at [135]; *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 at 411 to 412, at [48]-[50], 417 at [63].

18 See *Gett v Tabet* (2009) 254 ALR 504 per Allsop P, Beazley and Basten JJA at 564 to 565, at [286]-[295].

19 See *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at 270, at [31], which is referred to in *Gett v Tabet* (2009) 254 ALR 504.

20 *Eastman v The Queen* (2000) 203 CLR 1 at [319].

[26] In Dr Beech's final report of 17 June 2010 he expressed the opinion that at the time of the trial the appellant was probably suffering from an episode of paranoid schizophrenia with grandiose and persecutory delusions. Dr Beech considered it likely that a person who was so affected by such significant delusional beliefs that they hold themselves to be an international music star renowned throughout Australia and Europe for music prowess "who have been unjustly accused of offences by sinister elements within the music industry out of jealousy and a desire to prevent him from making or obtaining his wealth from his musical accomplishments" would not be able to adequately instruct counsel. Dr Beech thought that such a person would be likely to misinterpret the nature of the allegations and the evidence as "nefarious attempts to unjustly convict"; and such delusional thinking was likely to extend to a belief of innocence and significantly hinder such a person's ability to suitably plead and inform counsel as to how to defend. Dr Beech observed that it was "quite possible" that the appellant would have been so affected by his belief systems at the trial that, "cogent and lucid as they may have been, his instructions would have been affected by his belief systems as to be, as Mr Cullinane noted, internally inconsistent"; that would have significantly impaired the appellant's ability "to give an account of himself at trial"; and evidence given against the appellant would have been misinterpreted by him to conform with his abnormal belief system. Dr Beech concluded that in those circumstances the appellant would have been unfit for trial, and that:

> "Overriding this, it is quite likely I believe that at trial Mr Cain would in fact not have understood the trial so much as to be an enquiry into whether he had committed the offence, but rather a corrupt process designed to place him in custody away from the music market."

[27] Dr Kingswell disagreed with those opinions. In his report he said that the evidence did not justify the conclusion that the appellant had laboured under persecutory delusions at the time of the trial or that his mental illness rendered him unfit for trial. Dr Kingswell agreed that the appellant suffered from a mental illness but considered that it was a delusional disorder of the grandiose type and not schizophrenia. Dr Kingswell described the appellant's delusions as relatively mundane delusions of success and wealth, rather than the typical bizarre delusions of schizophrenia. The appellant did not suffer from hallucinations, he had well preserved social and occupational functioning within the constraints of a correctional facility, there was no evidence of unusual behaviour, and the appellant demonstrated formal thought disorder only when trying to give voice to some of his delusions about rap music. Dr Kingswell considered that the appellant's delusional disorder was most likely active at the time of trial in March 2008 but, having regard to evidence of the appellant's legal representatives at that time, the disorder was not dominating the appellant's thinking. Dr Kingswell addressed the *Presser* criteria and concluded that each criteria would have been satisfied at the time of the trial.

[28] Mr Aberdeen deposed in his affidavit that he took oral instructions from the appellant in the police watch house at Mackay on 23 October 2007. The appellant instructed that he intended to plead guilty to the burglary charge and not guilty to the rape charges. The appellant said that he had consensual sex with the complainant. He did not cut her husband with a knife or sword and did not have a knife or sword in the room with him. Mr Aberdeen deposed that in the course of giving instructions the appellant said that he had been writing music whilst in jail,

he had signed a contract for his music on the day he had been released from jail, on that night the appellant had been brought to Mackay by the male complainant, and he had performed at a nightclub. When Mr Aberdeen enquired further about those matters the appellant told him not to worry about it. Mr Aberdeen deposed that the appellant gave no indication that he did not understand anything Mr Aberdeen had said. Mr Aberdeen noticed that the appellant's speech lacked emotional content ("…while I would not call his speech "flat", it lacked any overt sign of emotion or animation…") but the appellant was responsive to questions and reasonably articulate.

[29] Mr Aberdeen subsequently wrote to the appellant requesting a written statement of instructions. The appellant responded by handwritten letter dated 21 November 2007 attaching eleven pages, comprising five pages of sixteen "points of argument" and a six page "version of events". Mr Aberdeen described the appellant's instructions as "clear, concise, and highly cogent". There was no reference to the musical exploits the appellant had mentioned at the conference. The appellant referred to his release from jail in Rockhampton on 8 June 2007, being met by the complainant's husband and driven back to Mackay, and to the events during the afternoon, the early evening, and during the night, when the appellant and the complainant's husband became separated after going to nightclubs. The appellant said that he then returned to the complainant's house alone. (In those respects the appellant's version did not materially differ from the version subsequently given in evidence by the complainant's husband at the trial.) The appellant said that shortly after he arrived at the house he had consensual sex with the complainant; they were discovered in bed by the complainant's husband when he returned; the complainant's husband became very violent and attacked the appellant with a large knife; the appellant held the door shut against him; and the complainant's husband stabbed him through the door with a knife. The appellant ran from the house and broke into another house where he lost consciousness. In the morning the lady in that house (the complainant in the burglary charge) gave him a lift to the service station. The appellant stated that he was not violent or threatening towards her but he was in her house with no right to be there so would plead guilty to that charge (as he subsequently did).

[30] Most of the appellant's "points of argument" concerned improbabilities in the versions given by the complainant's husband and the complainant concerning the grievous bodily harm count (of which the appellant was acquitted at the trial). The appellant also contended that he had consensual sex with the complainant, the complainant's relationship with her husband was abusive and dysfunctional, he was a convicted criminal and known drug user wanted by police in South Australia, the complainant was trying to "cover for herself and for him", whilst the appellant had an extensive criminal record he had no convictions for sex crimes, and he had not forced the complainant to have sex with him.

[31] In Mr Aberdeen's evidence in chief he said that the appellant had never raised anything to the effect that he had been unjustly accused of the offences by sinister elements within the music industry. In cross examination Mr Aberdeen confirmed that the instructions the appellant had given him were very good. He expanded upon his statement about the appellant's speech lacking emotional content by observing that the appellant kept a very even tone in his speech. That struck Mr Aberdeen as unusual; most people fairly vigorously or vocally protest their innocence but, whilst the appellant denied having done anything wrong with the

complainant, he did so in a very even tone. Mr Aberdeen deposed that Mr Cullinane informed him that the appellant had told Mr Cullinane of having received a large sum of money from his music which was being withheld from him, that the appellant was to go to England in connection with his music, and that he recorded with a South Australian record company. Mr Aberdeen searched the internet and found the company name the appellant had mentioned. That company's website did not indicate that the appellant was one of the company's stable of artists. The matter was then dropped. Mr Aberdeen asked Mr Cullinane whether the appellant maintained his previous instructions and Mr Cullinane confirmed that he did.

[32] Mr Cullinane deposed in his affidavit that at a pre-committal hearing conference on 10 January 2008 the appellant said that he was a performing rap artist. Mr Cullinane considered that the appellant's further statements that he was well known as a performer in Europe and was contracted with a rap label with a record company in South Australia stretched the bounds of plausibility, but Mr Cullinane thought that this was an attempt to impress his lawyer and "big note" himself. Mr Cullinane found that the appellant was otherwise lucid and able to instruct him in relation to the charges before the Magistrate's Court. Mr Cullinane informed Mr Aberdeen of the appellant's statements and understood that an attempt had been made to check their veracity. Mr Cullinane deposed that the appellant decided not to give evidence at his trial after that topic had been discussed on a number of occasions throughout the course of the trial. Mr Cullinane referred the appellant to the giving of a consistent version of events which could withstand cross examination. The appellant indicated that he did not want to give evidence under any circumstances. Mr Cullinane was not troubled by that decision because the appellant's instructions internally conflicted on certain points and the appellant was prone to making fantastic or fatuous statements.

[33] Mr Cullinane made it clear in his evidence in chief that he preferred not to rely upon the appellant's written instructions and he took oral instructions from the appellant on at least seven occasions: at the pre-committal hearing conference on 10 January 2008 (by video link), at least once at the committal hearing on 17 and 18 January 2008, after that hearing and before the trial (by video link), at the Mackay watch house immediately before the trial, before or after court during the trial, and on two occasions after the appellant had been convicted. Mr Cullinane had no concerns about the appellant's ability to give instructions. Whilst the appellant's instructions conflicted sometimes between conferences that was not unusual and the appellant maintained a fairly consistent version as to what occurred, apart from some details. (The major inconsistency Mr Cullinane noted was that in the video link conference before the trial the appellant described in a very clinical way the circumstances in which he and the complainant had ended up in bed, including that the two of them had pushed the bed out of way from the wall so as to avoid waking the children, whereas in a subsequent conference shortly before the trial the appellant's instructions were that the two fell onto the bed in a fit of passion.) The appellant's version of events did not strike Mr Cullinane as implausible. The appellant never raised anything to the effect that he had been unjustly accused of the offences by sinister elements within the music industry out of jealousy. He did not ever suggest that there was any conspiracy against him at all in relation to the charges. In relation to the appellant's decision not to give evidence Mr Cullinane referred to the appellant having had a bad habit of going off on a tangent about things such as being a rap artist and that the cross examination of the complainant and her husband had gone fairly well.

[34] In cross examination Mr Cullinane said that he thought at the time that the appellant might have had an attention deficit disorder or something like that, because the appellant had problems staying on track at times, but ultimately it was not difficult to get instructions. Mr Cullinane acknowledged that if the appellant thoroughly believed some of the things he said then the appellant was delusional, but Mr Cullinane had not thought that the appellant did thoroughly believe those things. In relation to the appellant's decision not to give evidence, Mr Cullinane said that part of his concern was that if the appellant gave evidence he would say things that might suggest delusional thoughts or unrealistic statements. The inconsistent accounts given by the appellant between conferences was a big factor in Mr Cullinane's concern about the appellant giving evidence.

[35] Dr Beech gave his evidence after he had listened to Mr Aberdeen and Mr Cullinane's evidence. In evidence in chief Dr Beech referred to the appellant's admission to hospitals for drug induced psychotic episodes when the appellant was as young as 16 years of age and expressed the opinion that this was probably the gradual onset of grandiose delusions. Dr Beech observed that paranoid schizophrenia can have an episodic course, with the symptoms waxing or waning in intensity. Dr Beech considered that the illness was evidenced by statements by the appellant's mother or sister that on the day of the offences the appellant seemed confused and that very soon after his arrest he started talking about rap music and his prowess as a musician. When Dr Beech was asked why he had concluded that the appellant had developed persecutory delusional thinking by the time of his trial he referred to statements the appellant made to his doctors long after the trial. The appellant said that on the day of his release from prison (8 June 2007) the appellant had complained to police security and gone to hospital because of his concern that something was happening; and the appellant said that he was locked in a nightclub where he was playing music, indicating that he was being conspired against.

[36] In cross examination, Dr Beech agreed that there had been a very significant exacerbation of the appellant's symptoms between the March 2008 trial and October 2008 when the appellant wrote the letter to Legal Aid which set out the first florid detail of his grandiose delusions and that the appellant's mother and sister had not expressed concerns that the appellant was having delusions until they spoke to Dr Beech in June 2009. The October 2008 letter was also the first evidence of persecutory delusions. Dr Beech agreed that the appellant's statements in February and March 2009 which indicated that he had suffered such delusions at the time of the trial might themselves have been delusional and false memories. Ultimately Dr Beech acknowledged that there was no firm evidence that the appellant was suffering from persecutory delusions at the time of his trial and that the subsequent worsening of his condition could have brought on the persecutory phase of those delusions.

[37] In re-examination, Dr Beech expressed the opinions that during the course of the trial the appellant was "at times preoccupied by his delusions"; that if he had to give an account of himself, "he would have become disorganised"; and that he suspected that the appellant's fear of giving evidence was in part tied up with his delusional thinking. Dr Beech identified as the aspect of the *Presser* test that would give him concern the appellant's ability to give instructions around the time of the trial and to give his account in court. That was because, when the appellant was giving instructions, "he would go off on a tangent because he would be caught up and preoccupied with his delusions"; although the appellant would seemingly be

contained or brought back to the point, in fact his thinking was affected by his delusions; and he would "possibly" be fearful of giving an account to the jury because of those delusions and his thinking becoming disordered and going off at a tangent. Dr Beech confirmed that this was the essential basis for his overall opinion about fitness for trial, and that he had a "lingering harbouring doubt about the presence of persecutory ideation at that time".

[38] In Dr Kingswell's evidence in chief he noted that whilst the appellant had spoken to his lawyers about his grandiose ideas concerning his success in the music industry, the appellant's accounts that the process was corrupt and the people were trying to imprison him did not come until many months later. In cross examination Dr Kingswell explained why he was confident that, although the appellant's delusional disorder was most likely active at the time of the trial in March 2008, it was not dominating the appellant's thinking: the appellant had provided very clear written instructions to his lawyers about his involvement in the offences, that writing was quite free of psychotic ideas, Mr Aberdeen was quite clear that he could easily direct the appellant to relevant issues, and the inconsistencies described by Mr Cullinane were not flights into psychotic ideas but were inconsistencies about relatively mundane issues about how the offences unfolded. It was put to Dr Kingswell that the appellant's mention to Mr Aberdeen of the appellant having done a spot at the nightclub and having signed a recording contract appeared to be a grandiose account of an event which occurred in the same 24 hour period of the offences, and thus might have affected the appellant's capacity to give instructions and evidence. Dr Kingswell observed that the appellant's illness was "completely peripheral to his involvement in these offences or his capacity to give instructions" and that there was no evidence that the appellant's illness has influenced his instructions at all. Whilst the appellant had attempted to divert his lawyers by telling them about his fabulous success as a music star and some events supposedly occurring on the night of the offence, that had not impacted at all on the appellant's thesis about why he was not guilty of the serious offences. There was no evidence that the appellant's belief in being a famous music star impacted upon his capacity to think clearly through the question whether he was or was not guilty of a serious offence such as rape; there was no intersection at all.

Consideration

[39] The appellant's counsel confined his argument to the issue whether the appellant was able to make his defence or answer the charges by giving instructions and, if necessary, evidence. It was submitted for the appellant that his instructions and evidence were affected by his delusional thinking, particularly in relation to the appellant's statement to Mr Aberdeen about having performed at a nightclub not long before the time of the alleged offences; at the very least, this Court could not affirmatively conclude that, had this question been raised at the trial, the jury must have found that the appellant was fit to stand trial.

[40] It is of particular significance that there was no challenge in cross examination or in submissions to Mr Aberdeen's description of the appellant's instructions in the attachment to his 21 November 2007 letter as "clear, concise, and highly cogent". Mr Aberdeen's description is borne out by examination of the document. Similarly, there was no challenge to Mr Cullinane's evidence to the effect that the appellant was lucid and that Mr Cullinane had no concerns about the appellant's ability to give instructions before, at, and shortly after the trial, despite the appellant's

propensity to make implausible statements. The appellant's detailed instructions to Mr Cullinane were reflected in his cross examination, in that way presumably contributing to the jury's acquittal on the grievous bodily harm count and perhaps also on the second count of rape.

[41] Dr Beech made appropriate concessions in cross examination to the effect that there was no firm evidence that the appellant suffered from persecutory delusions which rendered him unfit for trial. In any case, whatever was the precise nature of the appellant's illness at the time of the trial, the evidence given by Mr Aberdeen and Mr Cullinane satisfied me that the appellant was able to give, and did give, clear and cogent instructions, despite his propensity to make bizarre statements. The appellant plainly understood the charges and the details of the Crown case and had no difficulty in making rational and informed decisions about how he should plead, how he should defend the charges to which he pleaded not guilty, and whether or not he should give evidence to answer the charges. He could have given evidence in his defence had he wished to do so.

[42] The appellant relied upon Dr Beech's evidence in re-examination that the appellant would go off at a tangent in giving instructions because of his preoccupation with his grandiose delusions and the appellant's decision not to give evidence might have been influenced by his fear that he would voice those delusions. That evidence did not raise a real question about the appellant's fitness for trial. Smith J observed in *R v Presser*[21] that where an accused person has counsel, he needs to be able to make his defence or answer the charge "…through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to have an able defence; but he must… have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel." The appellant plainly did possess those abilities. He was capable of "understanding the proceedings at the trial, so as to be able to make a proper defence".[22]

[43] In these circumstances, the authorities require the conclusion that the fact that the appellant suffered from and voiced delusions in giving instructions and that he might have suffered a forensic disadvantage in giving evidence at his trial did not render him unfit for trial. In *Eastman v The Queen*, where the relevant test of fitness for trial was regulated by a statute[23] which incorporated the test in *R v Presser*, Gleeson CJ held[24] that the following propositions recorded by the Ontario Court of Appeal in *R v Taylor*[25] were sound and consistent with the statutory test:

> "(a) The fact that an accused person suffers from a delusion does not, of itself, render him or her unfit to stand trial, even if that delusion relates to the subject matter of the trial.
>
> (b) The fact that a person suffers from a mental disorder which may cause him or her to conduct a defence in a manner

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21 [1958] VR 45 at 48.

22 *Criminal Code* 1899 (Qld), s 613(1).

23 *Mental Health (Treatment and Care) Act* 1994 (ACT), s 68(3).

24 *Eastman v The Queen* (2000) 203 CLR 1 at [26]-[27].

25 (1992) 77 CCC (3d) 551 at 564 to 565.

> which the court considers to be contrary to his or her best interests does not, of itself, lead to the conclusion that the person is unfit to stand trial.
>
> (c) The fact that an accused person's mental disorder may produce behaviour which will disrupt the orderly flow of a trial does not render that person unfit to stand trial.
>
> (d) The fact that a person's mental disorder prevents him or her from having an amicable, trusting relationship with counsel does not mean that the person is unfit to stand trial."

[44] Propositions (a) and (b) in particular are inconsistent with the appellant's argument.

[45] In *R v T*[26] Chesterman J (as his Honour then was) held that an accused person was fit for trial even though he had delusions that there was an organised conspiracy against him which might cause him to give an unbalanced account to his lawyers. It was not necessary that the accused could give a balanced account of the facts to his lawyers. It was enough that the accused understood the evidence against him and could provide an account of his conduct.[27] Chesterman J observed that:[28]

> "The authorities show a consistency of approach. An accused is fit for trial if he is able to answer the charge brought by the prosecution. To do so he must understand that he is on trial, and what that means, and he must understand the evidence led in support of the charge so that he can put forward whatever answer he has to it.
>
> . . .
>
> The authorities also suggest that the test is not a demanding one. If an accused realises, in general terms, what it is to be put on trial and can make sense of the evidence against him he can take a sufficient part in proceedings for the trial to proceed."

[46] The appellant possessed at least that degree of comprehension and capacity to participate in the trial. The appellant referred to *Re Malt*,[29] but the effect of Dutney J's findings in that case was that the accused person's delusional belief that he and those around him were at risk from the Triad resulted in him having the ability only to give an artificial form of instructions and to exercise an artificial right of challenging jurors, and counsel could not be given rational instructions. The appellant's delusions did not affect his capacity to anything like that extent.

[47] In my opinion the evidence did not raise a real question about the appellant's fitness for trial. No jury, acting reasonably, could conclude that the accused was not fit for trial. There was no miscarriage of justice.

Sentence

[48] The appellant was 25 years old at the time he committed the offences. He had a lengthy criminal history. The offences of which he was convicted as a child

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26 (2000) 109 A Crim R 559.
27 (2000) 109 A Crim R at [14].
28 (2000) 109 A Crim R at [21]-[22].
29 *Re Malt*, unreported, Dutney J, No 218 of 2008, Mental Health Court of Queensland, 9 March 2009.

between 1996 and 2001 in South Australia included robbery in company, damaging property, breach of bail, conspiracy, larceny, driving a motor vehicle without a consent, breaking and entering, assault with intent to resist apprehension, carrying an offensive weapon and receiving. He was given short periods of detention. In 2001 the appellant was convicted as an adult of failing to comply with a bail agreement and criminal trespass. For the latter offence the appellant was sentenced to six months imprisonment. In 2002 the appellant was convicted in the District Court of South Australia of aggravated serious criminal trespass, serious criminal trespass and larceny committed in 2000 and 2001. For those offences he was sentenced (by the Court of Criminal Appeal after an appeal) to four years imprisonment with a fixed non-parole period of two and a half years.

[49] In Queensland the appellant was convicted of a breach of a bail undertaking in June 2004. Subsequently, in December 2004, the District Court at Cairns imposed an effective sentence of two and a half years imprisonment for offences the appellant committed in 2001 and 2004: two counts of assault occasioning bodily harm with circumstances of aggravation, possession of dangerous drugs, escaping lawful custody, attempted unlawful entry of a motor vehicle, robbery with actual violence in company and using personal violence, deprivation of liberty, two counts of common assault, and going armed so as to cause fear. The appellant committed the present offences within 24 hours after being released from prison after he had served that sentence.

[50] The trial judge referred to the very serious circumstances of the rape offences. The appellant choked the complainant and threatened her with a knife, extending to threats to kill her. The complainant feared for her life. There was no basis for considering that the complainant had permitted any form of sexual conduct with him. The offending took place over a protracted period. The appellant committed the offences in disregard of the friendship and assistance he had been given by the complainant and her husband and whilst the complainant was in her home. The appellant had left the complainant's husband in town, her husband was searching for the appellant, and the children were in the house and awake at various stages. The complainant's husband was injured in the process of endeavouring to rescue her but was unable to do so because the door was locked. The complainant suffered ongoing physical injuries which required and would require further treatment. Her neck and back injuries caused her pain and suffering. She also suffered ongoing depression and post-traumatic stress, for which she had received treatment. The victim impact statement indicated that the complainant's children had also suffered serious emotional and other impacts as a result of the offences. The appellant had demonstrated no remorse, the complainant being put to the ordeal of giving evidence and resisting incorrect suggestions made on the appellant's instructions that she was a willing participant. The trial judge also referred to the traumatic experience suffered by the complainant in the burglary offence.

[51] The trial judge took into account the fact that the appellant had no previous convictions for sexual offences. His criminal history was primarily for offences relating to traffic, drugs, dishonesty and some offences for assault. The trial judge also took into account the appellant's youth and that some of the consequences he caused to his victims might not have been intended, but remarked that someone of the appellant's age should have had the maturity to expect a high potential for ongoing stress problems and a high risk of physical injury of the kind which occurred.

[52] Counsel for the appellant accepted that the offences were undoubtedly serious and must attract a substantial sentence. He submitted that comparable decisions suggested that the appropriate range of penalties fell between eight and 10 years imprisonment. The appellant's counsel referred to *R v Williams*,[30] *R v Bolton*,[31] *R v Basaca*,[32] and *R v Walsh*.[33] I do not accept that those decisions demonstrate that the appellant's sentence of eleven years imprisonment was manifestly excessive. In the most recent of those decisions, *R v Walsh*, Keane JA referred to earlier decisions[34] and observed that they showed a range of sentences of 10 to 14 years imprisonment (with the consequence that 80 per cent of the term must be served in actual custody)[35] for a persistent and prolonged offence of rape where serious, but not extreme, violence has been used by the offender upon the victim.

[53] The appellant's counsel referred also to *R v Dowden*[36] in which the Court set aside a sentence of nine years imprisonment for rape and re-sentenced the appellant to eight years imprisonment. Holmes JA, with whose reasons Fryberg and Applegarth JJ agreed, did not accept the contention that *R v Basic*[37] established that for a rape of a stranger without violence the range was seven to 10 years.[38] The appellant's offences were not without violence. The decision in *R v Dowden* to set aside the sentence of nine years imprisonment reflected the very different circumstances in that case that the offender was only 19 years old at the time he committed the rape, his offence was not accompanied by any significant degree of violence, it was not protracted or repeated, and there was no explicit threat of harm to the complainant.[39]

[54] Like the appellant, that offender had not previously committed any sexual offence, but the appellant had a much more extensive criminal record, he committed his violent offences within 24 hours of being released from prison after serving a substantial term of imprisonment, and his offences were gross breaches of the trust the complainant and her husband had placed in him when they took him into their home. I observe also that there is no evidence or submission that the appellant's mental illness played any part in his offending or that it might render his imprisonment more onerous for him.

[55] In my opinion, the sentence was not manifestly excessive.

Proposed orders

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

[57] **WHITE JA:** I have read the reasons of Fraser JA and agree with his Honour's reasons and the order which he proposes.

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30 [2002] QCA 211.
31 [2005] QCA 335.
32 [2006] QCA 352.
33 [2008] QCA 391.
34 At [19] referring to *R v Rankmore; ex parte A-G (Qld)* [2002] QCA 492; *R v Edwards* [2004] QCA 20; *R v Newman* [2007] QCA 198; *R v Cosh* [2007] QCA 156; and *R v Bolton* [2005] QCA 355.
35 *Penalties and Sentences Act* 1992 (Qld), s 161A and *Corrective Services Act* 2006 (Qld), s 182.
36 [2010] QCA 125.
37 [2000] QCA 155.
38 [2010] QCA 125 at [26]-[29].
39 [2010] QCA 125 at [35].

[58] **JONES J:** I agree, for the reasons expressed by Fraser JA, that the appeal should be dismissed.