HIGH COURT OF AUSTRALIA

KIEFEL, BELL, GAGELER, KEANE AND GORDON JJ

RP APPELLANT

AND

THE QUEEN RESPONDENT

RP v The Queen
[2016] HCA 53
21 December 2016
S193/2016

ORDER

1. *Appeal allowed.*

2. *Set aside orders 4, 5 and 6 of the orders of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 26 August 2015 and in their place order that:*

   (a) appeal allowed with respect to counts 2 and 3; and

   (b) quash the convictions in respect of counts 2 and 3 and enter verdicts of acquittal.

On appeal from the Supreme Court of New South Wales

Representation

H K Dhanji SC with J L Roy for the appellant (instructed by Legal Aid (NSW))

S C Dowling SC with N J Owens SC and B K Baker for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

RP v The Queen

Criminal law – Criminal liability and capacity – *Doli incapax* – Where appellant convicted of two counts of sexual intercourse with child under 10 years – Where appellant approximately 11 years and six months at time of offending – Where appellant found to be of very low intelligence – Whether presumption of *doli incapax* rebutted.

Words and phrases – "*doli incapax*", "knowledge of the moral wrongness of the act", "merely naughty or mischievous", "morally wrong", "seriously wrong".

Children (Criminal Proceedings) Act 1987 (NSW), s 5.
Crimes Act 1900 (NSW), s 66A(1).

1 KIEFEL, BELL, KEANE AND GORDON JJ. In August 2014, the appellant was tried by judge alone in the District Court of New South Wales (Letherbarrow SC DCJ) on an indictment that charged him with two counts of aggravated indecent assault (counts one and four)[1] and two counts of sexual intercourse with a child aged under 10 years (counts two and three)[2]. He was acquitted of the offence charged in count one and convicted of the remaining offences.

2 The complainant in each of the offences is the appellant's younger brother. The offences charged in counts two and three are alleged to have taken place when the complainant was aged six years and nine months. The offence charged in count four is alleged to have occurred when the complainant was aged seven years and five months. The trial judge determined that the appellant was aged approximately 11 and a half years at the time of the offences charged in counts two and three. His Honour determined that the appellant was aged approximately 12 years and three months at the time of the offence charged in count four.

3 The evidence at the trial was wholly documentary. The facts of the offences, contained in an interview between the complainant and the police which took place when the complainant was aged 15 years, were not disputed.

4 The common law presumes that a child under 14 years lacks the capacity to be criminally responsible for his or her acts. The child is said to be *doli incapax*. The sole issue for the trial judge's determination was whether the prosecution had rebutted the presumption that the appellant was *doli incapax*. The appellant's counsel conceded that, if the presumption was rebutted in relation to the offence charged in count two, it would follow as a matter of logic that it was also rebutted in relation to the offences charged in counts three and four. The trial judge was satisfied that the circumstances surrounding the commission of the offence charged in count two proved beyond reasonable doubt that the appellant knew his conduct was seriously wrong and therefore that the presumption was rebutted in relation to that offence. His Honour acted on trial counsel's concession in holding that it logically followed that the presumption was rebutted in relation to the offences charged in counts three and four.

5 The appellant was sentenced to an effective sentence of two years and five months' imprisonment with a non-parole period of 10 months. The sentence for

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1 *Crimes Act* 1900 (NSW), s 61M(2).

2 *Crimes Act* 1900 (NSW), s 66A(1).

the offence charged in count four, a fixed term of imprisonment for three months, was made wholly concurrent with the sentence imposed on count three.

6 The appellant appealed against his convictions and sentence to the Court of Criminal Appeal of the Supreme Court of New South Wales (Johnson, Davies and Hamill JJ). The Court of Criminal Appeal was unanimous in concluding that the presumption that the appellant was *doli incapax* had been rebutted in relation to the offence charged in count two but that it was not rebutted in relation to the offence charged in count four. The appellant's conviction for the latter count was quashed and a verdict of acquittal entered. By majority, the Court of Criminal Appeal held that the trial judge did not err in finding that the presumption that the appellant was *doli incapax* had been rebutted in relation to the offence charged in count three. The appeal against the appellant's convictions on counts two and three was dismissed. So, too, was the appeal against sentence dismissed.

7 On 21 July 2016, Gageler and Gordon JJ granted the appellant special leave to appeal on two grounds. The first ground contends that the verdicts on counts two and three are unreasonable because the evidence did not establish to the criminal standard that the presumption that the appellant was *doli incapax* had been rebutted. The second ground contends it was an error for the Court of Criminal Appeal to fail to quash the appellant's conviction for the offence charged in count three on the ground that he had been denied a fair trial. For the reasons to be given, the first ground is made good, which makes it unnecessary to address the second ground. The appeal must be allowed, the convictions quashed and verdicts of acquittal entered. Before turning to the evidence to explain why that is so, it is convenient to say something more about the presumption of *doli incapax*.

Doli incapax

8 The rationale for the presumption of *doli incapax* is the view that a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for mens rea[3]. The presumption of *doli incapax* at common law is irrebuttable in the case of a child aged under seven years. From the age of seven years until attaining the age of 14 years it is rebuttable: the prosecution may adduce evidence to prove that the child is *doli capax*.

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3 Hale, *The History of the Pleas of the Crown*, (1736), vol 1 at 25-28; *C (A Minor) v Director of Public Prosecutions* [1996] AC 1; *R v ALH* (2003) 6 VR 276; *BP v The Queen* [2006] NSWCCA 172.

9 The age at which a child is capable of bearing criminal responsibility for his or her acts has been raised by statute in New South Wales. Under s 5 of the *Children (Criminal Proceedings) Act* 1987 (NSW) ("the Act"), there is a conclusive presumption that no child under the age of 10 years can be guilty of an offence. The Act does not otherwise affect the operation of the common law presumption of *doli incapax*. From the age of 10 years until attaining the age of 14 years, the presumption may be rebutted by evidence that the child knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence. Knowledge of the moral wrongness of an act or omission is to be distinguished from the child's awareness that his or her conduct is merely naughty or mischievous[4]. This distinction may be captured by stating the requirement in terms of proof that the child knew the conduct was "seriously wrong" or "gravely wrong"[5]. No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts[6]. To the extent that the decision of the Court of Appeal of the Supreme Court of Victoria in *R v ALH*[7] suggests a contrary approach, it is wrong. The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct. This directs attention to the child's education and the environment in which the child has been raised[8].

10 The history of the common law presumption is traced in *C (A Minor) v Director of Public Prosecutions*[9]. It appears to have been settled by the first half

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4 *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 38; *BP v The Queen* [2006] NSWCCA 172 at [27]-[28].

5 *R v Gorrie* (1918) 83 JP 136; *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 38; *Archbold: Criminal Pleading, Evidence & Practice*, (1993), vol 1 at 52 [1-96].

6 *R v Smith (Sidney)* (1845) 1 Cox CC 260 per Erle J; *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 38; *BP v The Queen* [2006] NSWCCA 172 at [29]; *R v T* [2009] AC 1310 at 1331 [16] per Lord Phillips of Worth Matravers.

7 (2003) 6 VR 276 at 298 [86]; see also at 280-281 [19], 281 [24].

8 *B v R* (1958) 44 Crim App R 1 at 3-4 per Lord Parker CJ; *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 8 citing *F v Padwick* [1959] Crim L R 439 per Lord Parker CJ.

9 [1996] AC 1.

of the 17th century that it applied to children aged under 14 years[10]. The presumption served to ameliorate the harshness of the criminal law. Its survival in the case of children above the age of criminal responsibility but under 14 years has attracted criticism[11]. Writing in the middle of the last century, Professor Glanville Williams observed that the paradoxical result of its operation is that "the more warped the child's moral standards, the safer he is from the correctional treatment of the criminal law"[12]. Putting to one side that the offence under s 66A(1) of the *Crimes Act* 1900 (NSW) carried a maximum penalty of imprisonment for 25 years, the "correctional treatment" accompanying a conviction for the offence includes registration for a Class 1 offence under the *Child Protection (Offenders Registration) Act* 2000 (NSW)[13]. In the case of an accused who is a child at the date of the offending conduct, it is not self-evident that the policy of the law is outmoded in requiring that the prosecution prove the child understood the moral wrongness of the conduct.

11 In *R v M*, Bray CJ commenced his analysis of the nature of the knowledge required to rebut the presumption of *doli incapax* by considering whether it is knowledge that the act is contrary to law, or is wrong judged by the standard of the ordinary person or is wrong according to the child's subjective and perhaps idiosyncratic ethical standards[14]. His Honour drew an analogy with proof of insanity under the second limb of the M'Naghten Rules, which requires knowledge that the act is wrong according to the principles of reasonable men[15]. The analogy is apt insofar as the knowledge in each case is of the wrongness of

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10 *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 24 citing Sir Edward Coke.

11 The Law Commission, *Codification of the Criminal Law: A Report to the Law Commission*, Law Com No 143, (1985) at 100 [11.22]; *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 25-26.

12 Williams, "The Criminal Responsibility of Children", [1954] *Criminal Law Review* 493 at 495-496.

13 Section 14B of the *Child Protection (Offenders Registration) Act* 2000 (NSW) provides that the reporting period for a child offender is half the period that would otherwise apply.

14 (1977) 16 SASR 589 at 590-591.

15 (1977) 16 SASR 589 at 591 citing *Stapleton v The Queen* (1952) 86 CLR 358 at 375 per Dixon CJ, Webb and Kitto JJ; [1952] HCA 56.

the act as a matter of morality and not law[16]. There is, however, in the case of the child defendant, the further dimension of proof of knowledge of serious wrongness as distinct from mere naughtiness.

12 What suffices to rebut the presumption that a child defendant is *doli incapax* will vary according to the nature of the allegation and the child. A child will more readily understand the seriousness of an act if it concerns values of which he or she has direct personal experience. For example, a child is likely better able to understand control of his or her own possessions and the theft of others' property compared to offences such as damaging public property, fare evading, receiving stolen goods, fraud or forgery. Answers given in the course of a police interview may serve to prove the child possessed the requisite knowledge. In other cases, evidence of the child's progress at school and of the child's home life will be required. It has been said that the closer the child defendant is to the age of 10 the stronger must be the evidence to rebut the presumption[17]. Conversely, the nearer the child is to the age of 14, the less strong need the evidence be to rebut the presumption[18]. The difficulty with these statements is that they are apt to suggest that children mature at a uniform rate. The only presumption which the law makes in the case of child defendants is that those aged under 14 are *doli incapax*. Rebutting that presumption directs attention to the intellectual and moral development of the particular child. Some 10-year-old children will possess the capacity to understand the serious wrongness of their acts while other children aged very nearly 14 years old will not.

The evidence

13 The offence charged in count two occurred on an occasion when the appellant had been left in charge of the complainant and two other younger siblings while their father was at work. The complainant and another brother were fighting over who could play with the brother's "stuff". The appellant locked the complainant in a room as punishment. The complainant demanded to be let out. The appellant went into the room and said "if you wanna come out, you gotta let me do this to ya". He put a condom on his penis, took hold of the

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16 See *R v Chaulk* [1990] 3 SCR 1303 at 1320.

17 *R (A Child) v Whitty* (1993) 66 A Crim R 462 at 465; *DK v Rooney* unreported, Supreme Court of New South Wales, 3 July 1996 per McInerney J.

18 *R (A Child) v Whitty* (1993) 66 A Crim R 462 at 465; *DK v Rooney* unreported, Supreme Court of New South Wales, 3 July 1996 per McInerney J.

complainant and threw him onto a bed, pulled the complainant's pants and underpants down and inserted his penis into the complainant's anus and commenced intercourse. The complainant was crying and protesting, saying "no, [RP], no". The appellant put his hand over the complainant's mouth. When the appellant heard the sound of an adult returning to the home, he withdrew his penis and said to the complainant "don't say nothin'".

14 The offence charged in count three took place a few weeks later. The appellant and the complainant had been left alone at their father's workplace. The appellant took the complainant to an office where the appellant exposed his penis. The complainant "went to run away" but the appellant was blocking the door. The complainant "went to call out for" his sister, but the appellant took hold of him and put him face down on a pile of clothing on the floor. The appellant then pulled the complainant's pants down and commenced to have anal intercourse with him. This continued for two or three minutes until the appellant heard their father returning to the office.

15 The offence charged in count four occurred on an occasion when the complainant and the appellant were watching a DVD while their father was out of the room. The appellant put his hand on the complainant's penis on the outside of the complainant's clothing and rubbed it for approximately five minutes. The complainant then said that he was "starting to get sick of this" and the appellant stopped.

16 Apart from such inferences as may be drawn from the circumstances of the offences, the only evidence concerning the appellant's intellectual and moral development at the date of the offences was contained in two reports tendered by the prosecution at the request of the appellant's counsel. The first, a Job Capacity Assessment Report, was prepared in connection with the appellant's eligibility for a social security benefit. It was based on an assessment of the appellant conducted when he was 17 years old. The report referred to the results of an IQ test carried out on the appellant by a psychologist. The appellant obtained a score of 70-79, placing him in the "borderline range of intellectual functioning". He was described as having "moderate difficulty in social/occupational functioning" and as requiring supervision in daily activities. The appellant was placed on a disability support pension.

17 The second was a report prepared by Mr Champion, a clinical psychologist, who assessed the appellant when he was aged 18 years. The purpose of the assessment was to determine the appellant's fitness to plead in relation to charges pending against him that are not the subject of these proceedings. Mr Champion also administered an IQ test to the appellant. The appellant achieved an overall score at the top of the borderline disabled range,

placing him in the eighth percentile in terms of functioning. There was a fair measure of variation in the appellant's scores on the various sub-scales of the test. Mr Champion was left with the impression that the appellant's educational and social deprivation may have contributed to his low scores, together with his "innate limitation".

18 Mr Champion reported that the appellant's "upbringing appears to have been marked by a measure of turmoil and dysfunction". The appellant had completed primary education and commenced secondary education at a public high school. He was transferred from that school to a special school in or about Year 9 as the result of behavioural difficulties. The appellant repeated Year 9 and commenced Year 10 but did not complete the year.

19 Mr Champion described the appellant at the date of the report as "a fairly naïve and unsophisticated young man, whose emotional and behavioural control may at times fluctuate, and who may at times tend to be overwhelmed by events". Comments made by the appellant and the appellant's father suggested to Mr Champion "some fairly unsatisfactory aspects of [the appellant's] upbringing (exposure to violence, possibly being a victim of molestation, exposure to family law type disputes etc), which have probably contributed to [the appellant's] difficulties in coping with the vicissitudes of life".

The trial judge's reasons

20 At the trial, the parties were agreed that the evidence concerning the appellant's use of the condom was equivocal with respect to his capacity to understand the moral wrongness of his acts. Accordingly, the trial judge put the evidence of the condom to one side in determining whether the presumption that the appellant was *doli incapax* had been rebutted.

21 His Honour found that the appellant was most likely of "very low intelligence" at the date of the offence charged in count two and, for this reason, to have had a lesser appreciation of the seriousness of his conduct. Nonetheless, his Honour was satisfied that the circumstances surrounding the commission of the offence established beyond reasonable doubt that the appellant knew that what he was doing was seriously wrong. The circumstances to which his Honour referred were: the use of force; the placement of the hand over the complainant's mouth; the complainant's evident distress; the breaking off of the act of intercourse when an adult returned to the home; and the instruction to the complainant to say "nothin'".

The Court of Criminal Appeal

22 Each member of the Court of Criminal Appeal rejected the contention that the verdict on count two was unreasonable. Davies J, with whose reasons on this issue Johnson J agreed, considered the distinction between knowledge of the moral wrongness of conduct and an understanding that conduct is simply naughty to be largely a matter of impression[19]. Contrary to the way the matter had been argued before the trial judge, in the Court of Criminal Appeal both parties invited the Court to take into account the appellant's use of the condom, although they differed in what use should be made of the evidence[20]. On the appellant's behalf, it was submitted that it indicated sexualised behaviour which was consistent with finding that he may not have realised that his behaviour was wrong[21]. The prosecution submitted that the use of the condom evidenced the appellant's "preparation for, and knowledge of, wrongdoing"[22].

23 Davies J held that the proper approach to assessing whether the trial judge's finding was unreasonable was to disregard the evidence of the condom[23]. His Honour said the approach might have been different had there been evidence that was simply not mentioned by the trial judge: an inquiry whether, on all of the evidence, the verdict was unreasonable must entail a consideration of all of the evidence that was before the trier of fact[24]. However, his Honour said, where evidence had been expressly disregarded by the trial judge, the Court of Criminal Appeal would be "substituting its own view for that of the trial judge by considering evidence that he has effectively excluded"[25]. Davies J considered the act of penile/anal intercourse to be "obviously wrong"[26], and this strengthened the conclusion that the presumption had been rebutted.

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19 *RP v The Queen* (2015) 90 NSWLR 234 at 245 [53].

20 *RP v The Queen* (2015) 90 NSWLR 234 at 245 [55].

21 *RP v The Queen* (2015) 90 NSWLR 234 at 245 [55].

22 *RP v The Queen* (2015) 90 NSWLR 234 at 245 [55].

23 *RP v The Queen* (2015) 90 NSWLR 234 at 248 [68].

24 *RP v The Queen* (2015) 90 NSWLR 234 at 248 [69].

25 *RP v The Queen* (2015) 90 NSWLR 234 at 248 [69].

26 *RP v The Queen* (2015) 90 NSWLR 234 at 248 [70].

24 Hamill J considered that the presumption had been rebutted in relation to count two, taking into account circumstances including the use of force, the complainant's evident distress, the covering of the complainant's mouth and the instruction to the complainant not to tell[27].

25 The Court of Criminal Appeal was divided on whether the trial judge was right to reason, as a matter of logic, that if the presumption was rebutted in relation to count two it was also rebutted in relation to the remaining counts. Each of their Honours recognised the need to prove the appellant's knowledge of the moral wrongness of his act in relation to each count. Johnson and Davies JJ, in separate reasons, each placed emphasis on the finding that the appellant knew the serious wrongness of the act of intercourse charged in count two. Johnson J explained that this was not to apply "some automatic consequence" but to recognise that the issue is considered in the context of the developing understanding of a child, which takes into account the child's previous acts, knowledge and experience[28]. Here, the offence charged in count three included evidence of the complainant's clear desire not to participate in intercourse.

26 Davies J considered that it could not rationally be inferred that because the act was carried out less forcefully or with less resistance from the complainant on the occasion charged in count three, the appellant did not believe it was seriously wrong in light of his conduct on the occasion charged in count two[29].

27 Hamill J, in dissent, observed that while the act was the same in counts two and three, almost all the features relied on for the conclusion that the appellant knew the act was seriously wrong on the occasion charged in count two were not present on the occasion charged in count three. Hamill J, correctly, held that the concession made on the appellant's behalf, as to the logical consequence of a finding that the presumption was rebutted in relation to count two, should not have been made[30]. The conviction on count three was tainted by error of law. His Honour was unable to conclude that the appellant's conviction on count three was inevitable[31]. Indeed, taking into account the appellant's youth and

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27 *RP v The Queen* (2015) 90 NSWLR 234 at 258 [140].

28 *RP v The Queen* (2015) 90 NSWLR 234 at 236 [5].

29 *RP v The Queen* (2015) 90 NSWLR 234 at 249 [78].

30 *RP v The Queen* (2015) 90 NSWLR 234 at 260 [150].

31 *RP v The Queen* (2015) 90 NSWLR 234 at 262 [155].

intellectual difficulties, Hamill J was left with a reasonable doubt as to whether the appellant knew that what he was doing was seriously wrong in a moral sense on the occasion charged in count three[32]. As the evidence at trial was wholly documentary, there was no question of the trial judge having enjoyed an advantage not experienced by the appellate court; Hamill J held that the verdict on count three was unreasonable and his Honour would have quashed the conviction and entered a verdict of acquittal[33].

The submissions

28 The appellant argues for a requirement of a correlation between the child's knowledge of the moral wrongness of the act and the prohibition that is breached. The offence, contrary to s 66A(1), of which the appellant was convicted was punishable by a maximum sentence of 25 years' imprisonment. The circumstances on which the prosecution relied to establish the appellant's knowledge of the moral wrongness of his act were those tending to establish his knowledge that the complainant was not consenting to the intercourse, which of itself constitutes an offence of lesser objective seriousness[34]. The concern of the law, so the argument goes, is not with criminal responsibility at large, but with criminal responsibility for particular offences carrying particular penalties. In the case of many offences, the identification of the act to which the child's knowledge must relate may be uncontroversial. However, the position is said to be less clear in the case of sexual offences: sexual intercourse itself not being morally wrong, the appellant submits that it is necessary to identify the feature of the intercourse that is the subject of the proscription. Thus, the appellant maintains that it was incumbent on the prosecution to prove his understanding that it was morally wrong to sexually interfere with a child. The requirement arises, the appellant submits, because at the heart of the attribution of criminal responsibility is a concern with "particular offences that carry particular penalties".

29 There is no incongruity in fastening criminal responsibility on a child for doing an act which the child knows to be morally wrong even though the child

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32 *RP v The Queen* (2015) 90 NSWLR 234 at 263 [162].

33 *RP v The Queen* (2015) 90 NSWLR 234 at 262 [155].

34 The offence of having sexual intercourse with another person without that other person's consent knowing that the other person does not consent is punishable by a maximum sentence of imprisonment of 14 years under s 61I of the *Crimes Act* 1900 (NSW).

does not know that the circumstances in which the act is done enliven liability for one or more than one offence. The prosecution sought to demonstrate, from the circumstances in which the intercourse occurred, the appellant's knowledge that it was morally wrong to have sexual intercourse with the complainant: the complainant did not consent to the intercourse and he made his non-consent evident. The appellant's invocation of the evidence of non-consent in the context of the differing penalties for sexual offences is a distraction. The evidence of the complainant's distress, and other signs of his non-consent, was capable of proving that the appellant knew that engaging in sexual intercourse with the complainant was seriously wrong in a moral sense.

30 There is a deal more force to the appellant's second argument, which is that it is open to doubt, in the absence of evidence to the contrary, the reasoning capacity of an 11-year-old to comprehend not only that another is unwilling to go along with his wishes, but also that it is morally wrong to impose those wishes in violation of the personal autonomy of another. This, it is submitted, is particularly so in respect of another prepubescent child over whom, by virtue of the fraternal relationship, the older child is in a position to exert some physical authority.

31 The respondent supports Davies J's analysis of the rebuttal of the presumption in relation to the offence charged in count two. In addition to the circumstances to which his Honour referred, the respondent points to the trust placed in the appellant by his father in leaving the younger children in his care, and to the fact that the offence was committed in circumstances in which the appellant had sequestered the complainant away from other children and prevented the complainant from calling out to them. While naughty conduct may be carried on away from the gaze of parents, the respondent submits that there will normally be no reason to obscure it from the view of other siblings or playmates. The desire to avoid *all* witnesses is put forward as a basis for the inference that the appellant appreciated the serious wrongness of his conduct. Reverting to the position adopted at the trial, the respondent submits that the evidence of the use of the condom gives rise to competing inferences and is "incapable of giving rise to a reasonable hypothesis consistent with innocence".

Was the presumption rebutted?

32 The starting point, which the respondent's submissions are apt to overlook, is that the appellant is presumed in law to be incapable of bearing criminal responsibility for his acts. The onus was upon the prosecution to adduce evidence to rebut that presumption to the criminal standard. The trial judge found the appellant was of "very low intelligence" and possessed a lesser appreciation of the seriousness of his conduct. The prosecution did not adduce

any evidence apart from the circumstances of the offences to establish that, despite these deficits, the appellant's development was such that he understood the moral wrongness of his acts.

33 It is common enough for children to engage in forms of sexual play and to endeavour to keep it secret, since even very young children may appreciate that it is naughty to engage in such play. The appellant's conduct went well beyond ordinary childish sexual experimentation, but this does not carry with it a conclusion that he understood his conduct was seriously wrong in a moral sense, as distinct from it being rude or naughty.

34 The evidence of the appellant's use of the condom is significant. Given the way the appeal was conducted, it was an error for Davies and Johnson JJ to disregard it[35] in determining whether, upon the whole of the evidence, it was open to the trial judge to be satisfied that the presumption had been rebutted and the appellant's guilt of the offence charged in count two established beyond reasonable doubt[36]. The fact that a child of 11 years and six months knew about anal intercourse, and to use a condom when engaging in it, was strongly suggestive of his exposure to inappropriate sexually explicit material or of having been himself the subject of sexual interference. Mr Champion's report did not serve to allay the latter suggestion. Mr Champion referred to comments made by the appellant and the appellant's father which he considered to be indicative of unsatisfactory aspects of the appellant's upbringing. Mr Champion considered it possible that the appellant was the victim of sexual molestation. Despite this possibility, which was plainly pertinent to the only issue at the trial, the prosecution did not call the father or other persons responsible for the appellant's care to give an account of the environment in which he was raised.

35 The conclusion drawn below that the appellant knew his conduct, in having sexual intercourse with his younger sibling, was seriously wrong was largely based on the inferences that he knew his brother was not consenting and that he must have observed his brother's distress. It cannot, however, be assumed that a child of 11 years and six months understands that the infliction of hurt and distress on a younger sibling involves serious wrongdoing. While the evidence of the appellant's intellectual limitations does not preclude a finding that the

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35 *RP v The Queen* (2015) 90 NSWLR 234 at 236 [1] per Johnson J, 248 [69] per Davies J.

36 *M v The Queen* (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ; [1994] HCA 63.

presumption had been rebutted, it does point to the need for clear evidence that, despite those limitations, he possessed the requisite understanding.

36 A statement from the appellant's mother was in evidence in relation to the offence charged in count one, of which the appellant was acquitted. The trial judge did not have regard to that statement in relation to the remaining offences and that ruling was not the subject of contention in the Court of Criminal Appeal. In relation to the offences charged in counts two and three, there was no evidence about the environment in which the appellant had been raised or from which any conclusion could be drawn as to his moral development. The circumstance that at the age of 11 years and six months he was left at home alone in charge of his younger siblings does not so much speak to his asserted maturity as to the inadequacy of the arrangements for the care of the children, including the appellant. No evidence of the appellant's performance at school as an 11-year-old was adduced. In the absence of evidence on these subjects, it was not open to conclude that the appellant, with his intellectual limitations, was proved beyond reasonable doubt to have understood that his conduct, charged in counts two and three, in engaging in sexual intercourse with his younger brother was seriously wrong in a moral sense.

Orders

37 For these reasons there should be the following orders:

1. Appeal allowed.

2. Set aside orders 4, 5 and 6 of the orders of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 26 August 2015 and in their place order that:

   (a) appeal allowed with respect to counts 2 and 3; and

   (b) quash the convictions on counts 2 and 3 and enter verdicts of acquittal.

38 GAGELER J. *Doli incapax* – incapacity for crime – is a common law presumption in the same way as innocence is a common law presumption. To establish that a child under the age of 14 years has committed an offence in a jurisdiction in which the common law presumption continues to apply, the prosecution must prove more than the elements of the offence. The prosecution must prove beyond reasonable doubt that the child understood that the child's conduct which constituted the offence was seriously wrong by normal adult standards. That understanding cannot be inferred from the fact that the child engaged in the conduct which constituted the offence; it must be proved by other evidence. That other evidence might be or include evidence of the circumstances or manner of the conduct. That other evidence might also be or include evidence of the development or disposition of the child.

39 Before the trial judge, the prosecution and the defence were agreed that the evidence of RP's use of a condom at the age of 11 years, to have anal intercourse with his younger brother at their home and at the place of their father's work, was equivocal as to whether RP understood that having intercourse with his brother was seriously wrong by normal adult standards. The trial judge and all members of the Court of Criminal Appeal put the evidence to one side. In my opinion, they were correct to do so. Without greater context, I do not think that use of a condom alone suggests that RP had been exposed to influences that impeded the development of his capacity to tell right from wrong. I agree with the prosecution submission in the appeal to this Court that no relevant inference can be drawn from it.

40 Leaving that evidence to one side, I nevertheless agree with the plurality in this Court that the prosecution evidence was insufficient to discharge the onus of proof. That is to say, I am left – after considering the totality of the evidence that was adduced at the trial – with a reasonable doubt about whether RP understood that the sexual intercourse which he had with his brother was seriously wrong by normal adult standards, with the result that I consider that the appeal to the Court of Criminal Appeal should have been allowed on the ground that the trial judge's finding of guilt (which s 133(1) of the *Criminal Procedure Act* 1986 (NSW) gives the same effect as a verdict of a jury) could not be supported by the evidence within the meaning of s 6(1) of the *Criminal Appeal Act* 1912 (NSW)[37].

41 Both the trial judge and the Court of Criminal Appeal placed considerable weight on the fact that the transcript of a police interview with the brother allowed inferences to be drawn from the circumstances of the first act of sexual intercourse in which RP engaged with his brother at their home. They were that RP: knew that his brother did not want to engage in intercourse, used force on

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37 *Filippou v The Queen* (2015) 256 CLR 47 at 53-54 [12], 75 [82]; [2015] HCA 29.

his brother, was aware that his brother was crying and in pain, put his hand over his brother's mouth to stop him calling out so as to avoid detection, persisted knowing that he was causing great distress to his brother, stopped only when an adult returned to the home, and afterwards told his brother not to say anything. Plainly, those inferences were properly drawn. And, plainly, they showed RP's conduct to go beyond anything which might be considered to be within a normal range of childish behaviour and showed RP to have understood that he would be subjected to some form of punishment if he was found out.

42 Whatever conclusion might be drawn from that evidence of the circumstances of RP's conduct about RP's understanding that the sexual intercourse which he then and later had with his brother was seriously wrong by normal adult standards were those circumstances to be considered alone, that evidence must be considered in the context of other evidence bearing on the mental capacity of RP. The report of the clinical psychologist, Mr Champion, prepared in relation to RP's fitness to plead when he was 18 years of age, assessed him as then having an "overall ability at the top of the borderline disabled range". The job capacity assessment report emanating from the Commonwealth Department of Human Services described him at around the same age as having an intellectual disability and as having been assessed as having an IQ which exceeded those of approximately only 4% of adults his age.

43 The information in those reports exposes the existence, and highlights the significance, of a gap in the evidence as to the state of RP's cognitive development some seven years before. Whether he then had the capacity to understand that the conduct to which he subjected his brother was seriously wrong by normal adult standards is a real and unanswered question.