HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GORDON, STEWARD, GLEESON AND JAGOT JJ

BDO APPELLANT

AND

THE QUEEN RESPONDENT

BDO v The Queen
[2023] HCA 16
Date of Hearing: 20 April 2023
Date of Judgment: 17 May 2023
B52/2022

ORDER

1. *Appeal allowed with respect to counts 2, 3, 4, 7 and 8.*

2. *With respect to those counts, set aside order 1 of the Court of Appeal of the Supreme Court of Queensland made on 15 October 2021, and in its place enter a judgment and verdict of acquittal.*

3. *Set aside order 3 of the Court of Appeal.*

4. *Remit the matter to the Court of Appeal for resentencing of the appellant.*

On appeal from the Supreme Court of Queensland

Representation

S C Holt KC with Z G Brereton for the appellant (instructed by Legal Aid Queensland)

C W Heaton KC with C Cook for the respondent (instructed by Office of the Director of Public Prosecutions (Qld))

Aboriginal Legal Service of Western Australia Ltd appearing as amicus curiae, limited to written submissions

CATCHWORDS

BDO v The Queen

Criminal Law – Rape – Appeal against conviction – Capacity – Where appellant charged with 15 counts of rape and one count of indecent treatment of child under 16 – Where conceded or reasonable doubt as to whether appellant over 14 years of age for five counts – Where *Criminal Code* (Qld), s 29(2) states presumption of incapacity of person under 14 years rebuttable by evidence of capacity to know person ought not do the act – Where presumption of incapacity rebuttable by evidence of knowledge of moral wrongness at common law applying *RP v The Queen* (2016) 259 CLR 641 – Whether what is required by s 29(2) to rebut presumption of incapacity equated with what is required by common law – Whether reasonable doubt as to whether appellant over 14 years of age – Whether evidence of capacity sufficient to rebut presumption where applied to counts of which appellant convicted – Whether retrial should be ordered if evidence insufficient to rebut presumption of incapacity.

Words and phrases – "acquittal", "actual knowledge", "capacity to know", "criminal responsibility", "doli incapax", "indictment", "inference", "intellectual and moral development of child", "jury directions", "moral wrongness", "ordinary principles of reasonable people", "presumption of incapacity", "proof of capacity", "rape", "reasonable doubt", "rebut", "retrial", "serious wrongness".

Criminal Code (Qld), s 29.

1 KIEFEL CJ, GORDON, STEWARD, GLEESON AND JAGOT JJ. The appellant was charged with 15 counts of rape[1] and one count of indecent treatment of a child under 16[2]. After a trial before a jury in the District Court of Queensland he was convicted of 11 counts of rape. All of the offences that were the subject of the counts, save for one, were alleged to have occurred on a date unknown over a nine year period between 20 October 2001 and 16 November 2010.

2 The appellant was born on 21 October 1991. In the period stated in the indictment, the appellant was aged between nine and 19 years of age. The complainant was the appellant's sister who was five years younger than him. Her evidence was that she was sexually abused by the appellant from the age of four over many years until she was in high school.

3 The principal issue on this appeal concerns the appellant's criminal responsibility with respect to those acts which took place when he was over ten years of age but under 14 years of age. Section 29 of the *Criminal Code* (Qld) ("the Code") provides:

> "**Immature age**
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> (1) A person under the age of 10 years is not criminally responsible for any act or omission.
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> (2) A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission."

4 Section 29 may be understood to ameliorate the harshness of the application of the criminal law to children by providing for an irrebuttable presumption that a child under ten years of age lacks the capacity to understand the wrongness of their conduct, and a rebuttable presumption to that effect with respect to a child whose age is between ten and 14 years of age.

5 The common law has for a long time made similar provision by recourse to the presumption that a child is doli incapax[3]. It is unsurprising that Sir Samuel

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1 *Criminal Code* (Qld), s 349.

2 *Criminal Code* (Qld), s 210.

3 *RP v The Queen* (2016) 259 CLR 641 at 649-650 [10].

Griffith, in his draft of the Code, noted beside the provision which became s 29: "common law"[4]. The rationale for the presumption at common law, as explained in *RP v The Queen*[5], is that a child under 14 years of age is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong, and therefore lacks the capacity for mens rea. The rationale for the presumption encompassed in s 29 may be taken to be the same.

6 At common law 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"[6]. It is evident from the reasons of the plurality in *RP v The Queen*[7] that what is spoken of is the child's actual knowledge. The Code states that the presumption may be rebutted by evidence of the child's "*capacity* to know that [they] ought not to do the act or make the omission" (emphasis added).

The jury directions and the Court of Appeal

7 The trial judge directed the jury according to the terms of s 29. His Honour explained that a child who is ten but not yet 14 can be criminally responsible, but only if it is proved that, at the time of doing the act, the child had capacity to know they ought not to do the act. His Honour repeated the statement concerning capacity at a number of points in his summing up.

8 The trial judge reminded the jury of relevant dates, including the appellant's birth date and when he attained the age of 14 years. His Honour directed the jury that in relation to each of the charges, they needed to determine separately whether the prosecution had proved that the appellant was at least 14 when the act occurred. If the prosecution had not so proven, and the appellant might have been under 14, the jury were to consider whether the prosecution had proved that the appellant had the capacity to know that he ought not to do whatever it was that was alleged.

9 The day following the conclusion of the summing up, the trial judge received a note from the jury which asked: "Ages 10/14, was it wrong or criminally

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4 Griffith, *Draft of a Code of Criminal Law* (1897) at 15.

5 (2016) 259 CLR 641 at 648 [8].

6 *RP v The Queen* (2016) 259 CLR 641 at 649 [9].

7 (2016) 259 CLR 641 at 649 [9].

wrong? Law says ought not to do it. Does this mean they knew it was a crime or just a bad thing to do?".

10 The trial judge directed the jury that "the prosecution does not have to prove the [appellant] knew that his act, whichever one it might be, constituted a crime or was illegal. Knowledge that it amounted to a criminal offence … is not what is necessary here". His Honour said it had to be proved that "at the time he did the act, the [appellant] had the capacity to know he ought not do it". He further explained that this meant "the capacity to know that he should not do it". Another way of putting it was to pose the question "[h]as the prosecution proven beyond reasonable doubt at the time the [appellant] did the act he had capacity to know the act was seriously wrong according to the ordinary principles of reasonable people". His Honour explained that what was in question was the capacity of the appellant as distinct from his actual knowledge, though "there may be not really much to distinguish between those two concepts".

11 The appellant's appeal from his conviction was dismissed by the Court of Appeal[8]. The appellant's primary ground of appeal to this Court is that the Court of Appeal misapplied the principles in *RP v The Queen*[9]. In fact the Court of Appeal did not refer to that decision. The Court held that it was a sufficient direction to the jury that it was for the jury to decide, in relation to each count, whether the appellant was 14 years of age when the act in question occurred and, if he was not, if he had the capacity to know that he ought not do the act. The Court concluded that it was open to the jury, on the evidence before them, to conclude beyond reasonable doubt that each time the appellant did an act the subject of a count for which he was convicted, he knew that the act was wrong according to the ordinary principles of reasonable people.

12 The appellant's primary ground of appeal raises, in the first place, the question whether what is required by s 29(2) to rebut the presumption of incapacity can be equated with what is required by the common law. The question focuses attention on the language employed in s 29(2) and is one of construction.

Capacity to know and knowledge

13 The requirement of the common law that it be shown that the child had knowledge of the moral wrongness of an act or omission, before the presumption

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8 *R v BDO* [2021] QCA 220.

9 (2016) 259 CLR 641.

can be rebutted, is not new[10]. Drawing on what Bray CJ discussed in *R v M*[11], the plurality in *RP v The Queen*[12] held that the nature of the knowledge on the part of the child necessary to rebut the presumption is that an act is wrong according to the standards or principles of reasonable people. The standard, obviously enough, is that of an adult person[13]. The knowledge is of the wrongness of the act as a matter of morality, not as contrary to the law. Because it is knowledge of a child it is necessary to prove knowledge of a serious wrongness, as distinct from mere naughtiness[14]. It may be observed that aspects of what was said in *RP v The Queen* were reflected in the trial judge's directions and to a lesser extent the judgment of the Court of Appeal. But both Courts distinguished a child's capacity to know, as provided by s 29(2), from their actual knowledge.

14 The plurality in *RP v The Queen*[15] went on to say that what suffices to rebut the presumption that a child defendant is doli incapax will vary according to the nature of the allegation and the particular child. 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[16]. There needs to be evidence from which an inference can be drawn, beyond reasonable doubt, that the child's development is such that they knew it was morally wrong, in a serious respect, to engage in the conduct[17]. The development in question is the intellectual and moral development of the child[18].

15 Section 29(2) does not use the term "knowledge" in its requirement as to what the prosecution must prove. It states that it must be proved that "at the time

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10 *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 38.

11 (1977) 16 SASR 589 at 590-591.

12 (2016) 259 CLR 641 at 650 [11].

13 See, eg, *RYE v Western Australia* (2021) 288 A Crim R 174 at 187 [79].

14 *RP v The Queen* (2016) 259 CLR 641 at 650 [11]. See also at 649 [9].

15 (2016) 259 CLR 641 at 650-651 [12].

16 *RP v The Queen* (2016) 259 CLR 641 at 649 [9].

17 *RP v The Queen* (2016) 259 CLR 641 at 649 [9].

18 *RP v The Queen* (2016) 259 CLR 641 at 651 [12].

of doing the act or making the omission" the child "had capacity to know that [they] ought not to do the act or make the omission". There is clearly a difference between what is meant by a person's capacity to know and their knowledge. The former has regard to their ability to understand moral wrongness, the latter to what in fact they know or understand. Whether the difference is great when applied to the circumstances of a particular case is another matter.

16 The appellant argued that *RP v The Queen*[19] both makes clear that a child's understanding of "moral wrongness" is at the heart of the inquiry and directs attention to the child's education and the environment in which they were raised. So much may be accepted. It may also be accepted that those matters are relevant to proof of a child's capacity to understand. But that does not overcome the distinction to be drawn by the language employed in s 29(2).

17 The appellant pointed to the words "common law", which Sir Samuel Griffith wrote beside the draft provision that became s 29, as supporting the absence of a distinction between that provision and the common law. But the note may be no more than an identification of the source of the presumption which was intended to be dealt with in the Code. It is the language of the statute which controls its interpretation[20]. Decisions of the Court of Appeal of Queensland[21] have consistently acknowledged the difference in the language chosen for s 29(2) as to what is necessary to rebut the presumption. They tend strongly against the view that the distinction is merely semantic.

18 In *R v B*[22], Pincus JA noted that the Court of Appeal had been referred to cases which suggest that a requirement to prove "guilty knowledge" might be attributed to s 29(2). His Honour said "[i]t is plain that this is not the law of Queensland. What the Code requires could hardly be more clearly stated: it must be proved that at the relevant time 'the person had capacity' (I emphasise capacity)

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19 (2016) 259 CLR 641 at 649 [9].

20 *CTM v The Queen* (2008) 236 CLR 440 at 446 [5].

21 See *R v B* [1997] QCA 486 at 3-4 per Pincus JA, Davies JA and de Jersey J agreeing; *R v F; Ex parte Attorney-General* [1999] 2 Qd R 157 at 160 per Davies JA, McPherson JA and Shepherdson J agreeing; *R v JJ* [2005] QCA 153 at [9] per McPherson JA, Williams and Jerrard JJA agreeing; *R v TT* [2009] QCA 199 at [15]-[16] per Keane JA, Chesterman JA and Wilson J agreeing.

22 [1997] QCA 486 at 3-4.

'to know that the person ought not to do the act'. This is, of course, different from proving actual knowledge."[23]

19 In *R v F; Ex parte Attorney-General*[24], the trial judge had said that to rebut the presumption in s 29(2) the Crown must call strong evidence concerning the accused's understanding of the wrongness of what they did. Davies JA said[25] that this was an incorrect statement of the principle in s 29(2) – the section is to be distinguished from the common law in its concern with the capacity to know, rather than actual knowledge. His Honour said that it was unfortunate that an earlier decision of the Court of Criminal Appeal in Queensland[26] had cited English authority dealing with the common law[27], but that its citation should not be taken as acceptance of the need to prove guilty knowledge; the Court had otherwise expressly stated that what was necessary was proof of capacity to know.

20 It is of interest to observe that in *R v F*[28], Davies JA accepted that, were it necessary to paraphrase the words "that the person ought not to do the act", the phrase "that the act was wrong according to the ordinary principles of reasonable [people]" would be appropriate. This accords with the nature of the knowledge discussed in *RP v The Queen*[29], and with the view expressed in *RYE v Western Australia*[30], drawing upon the Queensland cases. The difference from *RP v The Queen*, expressed in *RYE v Western Australia* and the Queensland cases, is that what is to be shown is the child's capacity to know that the act was morally wrong.

21 In submitting that there was no real difference between the requirements of the common law and of s 29(2) to rebut the presumption, the appellant submitted

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23 *R v B* [1997] QCA 486 at 4.

24 [1999] 2 Qd R 157 at 159-160.

25 *R v F; Ex parte Attorney-General* [1999] 2 Qd R 157 at 160.

26 *R v B (an infant)* [1979] Qd R 417 at 425.

27 *B v The Queen* (1958) 44 Cr App R 1 at 3.

28 *R v F; Ex parte Attorney-General* [1999] 2 Qd R 157 at 160, referring to *R v M* (1977) 16 SASR 589 at 591.

29 (2016) 259 CLR 641 at 650-651 [11]-[12].

30 (2021) 288 A Crim R 174 at 187 [79].

that if a child has knowledge of the wrongness of the act, then the child necessarily has the capacity to know it is wrong. This is clearly correct. The appellant went on to argue that the reverse is also true. If a child has the capacity to know that the act is wrong at the time the child does the act, then it would seem certain that the child in fact knows it is wrong at the time. This latter proposition may go too far. It may be possible, even likely, that in many cases that will be the case, but it cannot be stated as a certainty so as to remove any distinction between an ability to understand and actual knowledge.

22 It may be accepted that in some cases where it is proved that a child had the capacity to know that an act was morally wrong, it may follow that the child is likely to know that to be the case. The respondent accepts that in such a case it might be said that the child may wilfully not be applying their ability to understand. But whether this is so will depend upon the evidence in the particular case. In some cases there may be little distinction to be drawn between the child's capacity to understand and their actual knowledge, but this may not always be the case. The fact remains that there is a fundamental distinction drawn by the language in s 29(2). The capacity of the child to know or understand the moral wrongness of an act remains the question to be considered in Queensland.

23 What will be sufficient to rebut the presumption in s 29(2) beyond reasonable doubt will vary from case to case. It will depend on the nature of the allegations and the child[31]. It may, however, be that much of what was said in *RP v The Queen*[32] about matters of proof is relevant to the question of a child's capacity to know or understand that the act in question is morally wrong. In the first place, wrongness is expressed by reference to the standard of reasonable adults, from which it takes its moral dimension. It is not what is adjudged to be wrong by the law or by a child's standard of naughtiness. The capacity of a child to know that conduct is morally wrong will usually depend on an inference to be drawn from evidence as to the child's intellectual and moral development. It may be added that there may be a disability from which the child suffers which affects their capacity to know or understand. Such a disability may be a factor which is relevant, but the lack of disability – or proof that a child is of "normal" mental capacity for their age – will clearly not be sufficient to prove the capacity to know or understand[33].

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31 *RP v The Queen* (2016) 259 CLR 641 at 650-651 [12].

32 (2016) 259 CLR 641. See above at [13]-[14].

33 cf *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 33.

24 In relation to the first aspect of the appellant's primary ground of appeal, it may be concluded that the trial judge and the Court of Appeal were not in error in their approach as to the requirements of s 29(2). It does not require that the prosecution prove actual knowledge of the moral wrongness of the act in question on the part of the child, but rather the capacity to know or understand that to be the case. It may be that in practical terms in some cases the distinction will not be of importance, but the distinction remains.

25 It is necessary then to consider whether there was evidence sufficient to rebut the presumption where it applied to the counts of which the appellant was convicted. That question may be considered in light of what was said in *RP v The Queen*[34]. Before doing so, however, it is necessary to identify the conduct which took place when he was under 14 years of age, or in respect of which there may be a reasonable doubt as to whether he was more than 14 years of age.

Identifying the counts and the dates

26 It must be observed at the outset that the prosecution case was not presented in a way which gave much assistance to the jury or to the trial judge. In the way that it was presented, there was every possibility that the jury would have difficulty ascertaining the date when each of the events occurred.

27 The problem with the prosecution case started with the indictment. As mentioned at the outset of these reasons, all but one of the particularised offences (count 4) were said to have taken place on a date unknown in a nine year period between 20 October 2001 and 16 November 2010. When evidence was led it became apparent that the indictment did not list the counts in chronological order and that the evidence was not led in that fashion either.

28 In oral argument in this Court, the respondent observed that although the prosecution case may have been complicated in the manner in which it was presented, nonetheless the trial proceeded upon the basis that the evidence identified when the offences were said to have been committed and directions were given to "cover all possibilities". Certainly the defence does not appear to have thought otherwise. No complaint was made about how the trial was conducted.

29 The only evidence as to when offences occurred was that given by the complainant. She said she had been sexually abused by her elder brother for years. She did not specifically recall the first occasion when the abuse took place but gave

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34 (2016) 259 CLR 641. See above at [23].

evidence of her first memory of such conduct. She said she was four at the time, which would have made the appellant under ten years of age and account for why the act was not the subject of a charge, given the provisions of s 29(1).

30 Thereafter the complainant gave evidence by reference to periods when she was at school. In relation to primary school, she divided that broader period into "early primary school", "early to mid primary school", "mid primary school", and "late" or "later primary school". The complainant explained that the reference to "later primary school" was to when she was in grades five to seven. At this time, she would have been aged between nine and 12 years of age, and the appellant would have been 14 to 17 years of age. It can be inferred that she was aged six to nine years of age when she was in mid primary school, and the appellant would have been 11 to 14 years of age.

31 The respondent submitted that it may be seen that the jury convicted the appellant only of those offences where there was evidence which supported the conclusion that he was over 14 years of age at the time the particular offence was said to have been committed. That submission was not said to apply to count 4, in respect of which it was conceded that the appellant was under 14 years of age. It was later conceded that there was a possibility that the appellant was under 14 years of age when the events to which count 8 refers took place. And as will be seen, the same may be said of counts 2, 3 and 7.

32 A close review of the evidence shows the chronological order of the counts relevant to the first ground of appeal, by reference to the earliest date the evidence supports them having occurred, is: 7 and 8, 4, and 2 and 3. The evidence of the appellant's conduct before he was 14 years of age can be summarised as follows.

33 The complainant's evidence concerning her first memory of sexual abuse, not the subject of a charge, was that the appellant told the complainant and a younger brother ("BB") that they were going to play a game. The appellant first put her hands on his crotch and then put them down his pants onto his penis. He touched her under her underwear and put his fingers in her vagina. He then put his penis in her vagina when she was lying on the ground. She told him to stop because it was hurting her. He said "this was our little secret" and he threatened to hurt her if she told anyone. He was holding her tightly as he said this. He asked BB if he wanted to do the same thing to the complainant, but he did not.

34 Count 7 was alleged to have taken place in the bedroom the complainant shared with her younger sister. They shared a bunk bed. One afternoon she was on the bottom bunk and her sister on the top bunk when the appellant came into the room, walked towards her, covered her mouth with a pyjama shirt and put his penis

in her vagina. He stopped when the sister skimmed her head on the ceiling fan and began to cry. Before leaving the room, he told the complainant that she was "not to tell anyone".

35 The complainant did not recall how old she was at this time and gave a broad time reference ("primary school") when it may have occurred. The appellant could have been any age between ten and 17 in this period. The respondent submitted that the appellant must have been over 14, but the respondent's submissions incorrectly record the complainant as saying that the incident took place during the period of "late primary school".

36 The complainant could say that it occurred before July 2008 by reference to a later incident which took place in the bedroom when she had a broken arm. The respondent relies upon the complainant having accepted that incident occurred in 2006 or 2007, when the appellant would have been over 14 years of age. The transcript shows that the complainant was accepting that she had referred to those dates in a statement she had earlier made. Her acceptance of the dates as accurate was equivocal. It should therefore be concluded that there is a reasonable doubt as to the appellant's age at the time of the conduct referred to in count 7.

37 The conduct which count 8 may be taken to refer to occurred when the complainant was in "mid primary school", at which time she was aged six to nine years of age and the appellant between 11 and 14 years of age. It took place in an area underneath the house where the complainant was playing. The appellant came down and took her to an area underneath the laundry, pulled down the bottom part of her clothing and put his penis in her vagina. She was lying in the dirt and he was on top of her. He paused when their mother was heard in the laundry and then continued after she left. The respondent was correct to concede that there is a reasonable doubt as to the appellant's age at the time of the conduct referred to in count 8.

38 The complainant said that on a separate occasion the family's pet dog was also under the house. The complainant gave evidence that she was in early to mid primary school, from which it can be inferred the appellant was between ten and 14 years of age. The appellant put his fingers "in [the dog's] bottom" and was holding the dog down. The complainant remembered crying and screaming and telling him not to do it. She said he could do whatever he wanted to her, but not to the dog. The appellant said that if the complainant did not let him do whatever he wanted to her, then he would do it to the dog.

39 There is no dispute about the time when the conduct to which count 4 is referable occurred. The appellant was 13 years and nine months old in July 2005,

the date referred to in the indictment. The family was attending a wedding in Hervey Bay and stayed in a motel room with two bedrooms. The younger sister stayed with her parents in one room while the complainant stayed with her brothers in the other. The complainant was placed in the bottom of a bunk bed. She said that the appellant climbed down from the top bunk and inserted his fingers inside her vagina and touched her. The other brother, who had been unwell, was in a single bed in the room asleep.

40 The conduct to which counts 2 and 3 refer took place in a loft bedroom then occupied by the appellant. According to the complainant, the appellant had asked her the night before to go to his loft bedroom as soon as she woke up. He would often arrange such meetings to be held in his or her bedroom. They started talking and playing a card game, but he then touched her on her vagina over the top of her clothing and then underneath her underwear and put his tongue inside her vagina. He then put her mouth around his penis, held it there and ejaculated in her mouth.

41 The evidence as to when this conduct occurred was not entirely clear. The complainant at one point thought it was in the "later primary school" period, at which time the appellant would have been between 14 and 17 years of age. When shown a photograph of the appellant in the loft bedroom, which was said to have been taken on 30 December 2004 when the appellant would have been 13 years of age, the complainant said she did not know whether the conduct occurred before or after the photograph was taken. However, the complainant did say that the appellant commenced sleeping in that room at that time. The mother was unsure when the appellant moved into the loft bedroom. But when she was shown the photograph she said it was probably taken when he first moved in, although it was hard to tell. The father, however, said that the appellant would have been sleeping there around 2004. It should therefore be concluded that there is a reasonable doubt as to the appellant's age at the time of the conduct referred to in counts 2 and 3.

Evidence regarding the appellant's capacity to know

42 Some evidence concerning the appellant's upbringing, sexual education, intellectual ability and a learning difficulty was given by his parents. It would appear that the appellant was disciplined for any unacceptable behaviour, both verbally and physically, and by taking away his privileges. His mother described him as quiet at school. She thought that an IQ test conducted showed that the appellant was "okay", but his father considered his performance at primary school was below average to average. He had difficulty reading and was later diagnosed as having dyslexia.

43 The appellant's mother said that the appellant received sexual education at, and from the time of, primary school. All the children were told, from the time that they were very little, that they were not to allow anyone to touch them or any private part of their body. The appellant would have been a toddler when his mother first spoke to him about this, and she would have had the conversation more than once. If this did occur, she told him to tell an adult – his parents, a teacher or a police officer.

44 The evidence by the parents as to the appellant's development does not provide much insight as to his capacity to understand whether his actions towards his sister were morally wrong. Nothing of substance may be inferred from the fact that he received some sexual education; there was no evidence as to the content of it. It may be inferred from his mother's directions that he understood, or was able to understand, that it was wrong for strangers to touch him in his genital area. It does not follow that he was able to translate this to his actions towards his sister.

45 In addition to the complainant's evidence concerning the conduct in question and the circumstances surrounding it, there was evidence of a pretext call made by the complainant to the appellant after she had been to the police. There is no need to detail what was said between them. The complainant repeatedly asked the appellant why he had done what he had done to her when she was a child, which at one point she described as sexual abuse. The appellant did not deny that some such conduct occurred. He repeatedly replied that they were both young and did not know what they were doing. He denied assaulting her. This evidence goes no way to proving anything about the appellant's capacity (or his lack of capacity) to understand what he was doing at the time.

46 The evidence of the complainant concerning statements or actions by the appellant which accompanied the conduct in question has been recounted above. Some of it showed a consciousness of the need for secrecy. There were occasions, in particular her first memory of sexual abuse by him and her evidence regarding count 7, when he told her not to tell anyone. She said that this was usually the case. And she said that generally he came to her in the middle of the night, when the others were sleeping. In the same vein, in connection with a later incident when the appellant was over 14, but speaking in general terms, the complainant said that the appellant would often make the brother, BB, leave them so that she was left alone with the appellant.

47 On the occasion of count 7, the appellant clearly sought to prevent the complainant from calling out by covering her mouth with a pyjama shirt. The appellant was anywhere between ten and 17 when the conduct in count 7 occurred.

48 *RP v The Queen*[35] cautions against too quickly drawing an inference concerning secrecy and children. An appreciation by the child that they should not be discovered doing the act or acts might be consistent with a sense of it being wrong, but the question is to what extent? The appellant may have appreciated that he would be in trouble with his parents for doing what he did, but it is not clear whether that would have been because it was naughty. To be capable of rebutting the presumption, the evidence must be such as to enable a conclusion that the appellant was able to understand that it was morally wrong. That is not a low standard.

49 The evidence of threats by the appellant is potentially stronger. The threat that he would hurt the complainant if she told anyone about their "little secret" might suggest he was more deeply concerned about the strength of the reaction of others were he discovered, which might imply some capacity to comprehend that what he was doing was seriously wrong. That might be clearer if it was combined with other evidence about his development at that point, given that he was not yet ten years of age at the time of this first incident. Whilst it was not suggested that this evidence, and the other evidence the complainant gave about the appellant telling her his sexual conduct had to be kept a secret, was inadmissible, its weight must be regarded as slight in the absence of other evidence of his development at the time of the relevant counts, particularly given that, as explained above, a child's apparent appreciation of a need for secrecy, without more, is potentially ambiguous evidence.

50 The threat concerning the dog, evidence of which was led in connection with count 8, took place when the appellant was between ten and 14 years of age. It was more clearly used to bend the complainant to his will, and may disclose unattractive aspects of the child's personality. But it does not of itself suggest a capacity to know that his conduct towards the complainant was morally wrong.

51 In her closing address, the prosecutor relied largely on the circumstances of the first, uncharged, act as evidence of the appellant's capacity to understand that his conduct was wrong. The prosecutor listed evidence which was said to show to the jury that the appellant "knew right from wrong at a very early stage in life and throughout the entire period of offending". Some of the evidence listed concerned conduct involved in counts other than those referred to above, and which occurred when he was over 14.

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35 (2016) 259 CLR 641 at 657 [33].

52 It is not necessary to review further the directions of the trial judge, except to observe that the evidence was left to the jury as a whole and not in any way that could be associated with the count in question. Given the charge period and the multiplicity of charges in this case, the jury needed to be told that for each count it was necessary for them to assess the question of capacity "at the time of doing the act". To enable the jury to undertake that task, it was necessary for the prosecution to point to evidence from which an inference could be drawn beyond reasonable doubt that the appellant had the requisite capacity at the time the specific act is said to have occurred[36]. That could not be done globally. In a multi-count indictment where lack of capacity is to be rebutted "at the time of doing the act", that task may require the jury to be instructed to assess the events in chronological order. That approach may be important because the surrounding circumstances of an earlier charge may be relevant to capacity in relation to a later charge. But, in this case, the reverse does not hold true. Given the charge period, no backward reasoning was permissible by reference to later acts and later capacity for an earlier charge or charges. In this appeal, it is not necessary to undertake the exercise of reviewing further the directions in relation to each of counts 7, 8, 4, 2 and 3, because there was insufficient evidence tendered by the prosecution to rebut the presumption of incapacity beyond reasonable doubt in respect of each of counts 7, 8, 4, 2 and 3. The primary ground of appeal is made out for those counts.

Conclusion and orders

53 The appellant had a further ground of appeal. It concerned the issue of the complainant's consent, relevant to the sexual acts alleged. The trial proceeded on the mistaken basis that for the entire period of the indictment the Code deemed that a child under 12 could not consent to such acts. The provision in question (Code, s 349(3)) did not come into force until midway through the charge period. The trial judge did not correct the mistake and gave directions on an incorrect premise.

54 The further ground concerns counts 2, 3, 7 and 8. Since the appeal must be allowed on the first ground with respect to the convictions on those counts, as well as count 4, it is not necessary to consider the further ground.

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36 *RP v The Queen* (2016) 259 CLR 641 at 649 [9], 650-651 [12]; *RYE v Western Australia* (2021) 288 A Crim R 174 at 184 [55].

55 The appellant submits that the appropriate order to be made is an acquittal on each of those counts[37], rather than for a retrial[38]. An order for a retrial would be appropriate were the evidence tendered at trial sufficiently cogent to justify a conviction on the counts in question. This is not possible given the absence of evidence from which a jury may reasonably draw an inference that the appellant had the capacity to know that his actions were morally wrong in a serious respect. Even if it were possible to adduce further evidence to enable such an inference to be drawn, the prosecution should not be given an opportunity to supplement its case on a retrial given the manner in which the prosecution chose to prove the charges in this case[39].

56 The appeal should be allowed with respect to counts 2, 3, 4, 7 and 8, and the decision of the Court of Appeal on those counts set aside. In lieu, there should be entered a judgment and verdict of acquittal on those counts. The matter should be remitted to the Court of Appeal for the resentencing of the appellant.

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37 See *Criminal Code* (Qld), s 668E(2).

38 *Criminal Code* (Qld), s 669.

39 *King v The Queen* (1986) 161 CLR 423 at 429, 433. See also *RYE v Western Australia* (2021) 288 A Crim R 174 at 187 [79].