HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY **No. B 52 of 2022**

BETWEEN **BDO**

Appellant

and

THE QUEEN

Respondent

APPELLANT'S SUBMISSIONS

Part I: This version of these submissions is in a form suitable for publication on the internet.

Part II: The issues presented by the two grounds of appeal are as follows:

Ground 1:

a. Whether this Court's statements of principle on the law of *doli incapax* in *RP v The Queen* (2016) 259 CLR 642 (***RP***) apply to s 29 *Criminal Code* (Qld), and by necessary extension, to the criminal codes of other code States.[1]

b. What directions are required to be given by a trial judge to a jury under s 29?

10 **Ground 2**: Whether, and if so when, a withdrawal of an element of the offence (here, consent) from the jury could be saved by the proviso. In particular, when it might be said that that element was "live", such that the proviso could not save it?

Part III: It is not considered that notice is required pursuant to s 78B *Judiciary Act* 1903.

Part IV: The citation of the reasons for judgment for the intermediate court is *BDO v The Queen* [2021] QCA 220.

Part V: Narrative statement of facts

1. The appellant was tried before a jury in the District Court of Queensland on 15 counts of rape[2] and one count of indecent treatment of a child under the age of 16.[3] He was acquitted

[1] See *Criminal Code Act* 1983 (NT), sch 1, s 38; *Criminal Code Act* 1924 (Tas), sch 1, s 18; and *Criminal Code Act Compilation Act* 1913 (WA), sch, s 29.
[2] *Criminal Code Act* 1899 (Qld), sch 1 (***Criminal Code***), s 349 (as that section appeared in Reprints No 4 & 4M).
[3] *Criminal Code* (Qld), s 210.

of four counts of rape (counts 1, 10, 15 and 18) and the count of indecent treatment (count 16) and convicted of the rest.[4] The complainant was the appellant's younger sister.

2. But for count 4,[5] each count was alleged to have taken place "on a date unknown between 20 October 2001 and 16 November 2010".[6] That is, **a period spanning nine years** during which time the appellant could have been anywhere between ten and 19 years of age.[7] The complainant, five years his junior, was aged between four and 14.[8]

3. The only evidence of the offending at trial came from the complainant. She said that the appellant had sexually abused her "for years".[9] Her first memory (led as an uncharged act) was when she was around four years old, and the appellant was around nine. The appellant told the complainant and their brother [BB] that they "were all going to play a game"[10]. The appellant touched the complainant under her underwear, and then put his fingers, and then his penis, inside her vagina. The complainant said she told the appellant to stop and that he was hurting her. The appellant held the complainant "tightly" and said that this was "our little secret".[11] He threatened to hurt her if she told anyone. The complainant was not sure where BB was when all this was happening. The appellant asked BB if he could do the same thing to the complainant. BB did not want to.[12]

4. The complainant then gave evidence of each of the counts. Confusingly for the jury, they were not indicted or led chronologically.

5. **Counts 2** and **3** took place in "later primary school" in the defendant's "loft bedroom".[13] The appellant had asked the complainant the night before to go to his room as soon as she woke up in the morning. In his bedroom, he put his tongue inside her vagina (ct 2) and then held her head and put her mouth around his penis (ct 3).[14]

6. **Count 12** occurred when the complainant and the appellant had been riding motorbikes when they stopped near a shack on the hill. The appellant lifted the complainant onto the bench, pulled down her pants and put his penis in her vagina.[15] The complainant said that

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[4] Counts 5 and 17 were discontinued by the Crown before the commencement of the trial.
[5] In relation to which the indictment charged the appellant with offending between 30 June and 1 August 2005.
[6] Core Appeal Book [**CAB**], 6 – 8.
[7] The appellant was born on 21 October 1991: See Appellant's Book of Further Materials [**ABFM**] at 179 [1].
[8] The complainant was born on 16 November 1996: ABFM at 179 [2].
[9] ABFM at 22, ll 9 – 10.
[10] ABFM at 23, l 9.
[11] ABFM at 23, ll 16 – 17.
[12] ABFM at 22 – 23.
[13] ABFM at 25, ll 20 – 27. With respect to when this incident occurred *cf* ABFM 26, ll 9 – 10.
[14] ABFM at 25, ll 31 – 47.
[15] ABFM at 26, l 40 to 27, l 2.

when she screamed, the appellant put a rag in or over her mouth. The appellant stopped when he heard their father start his motorbike.[16] This was "late primary school".[17]

7. **Count 7** was alleged to have taken place in the bedroom the complainant shared with her younger sister [NB] in primary school.[18] She did not remember how old she was, but could say she was younger than the incident in count 11.[19] One afternoon, while she was on the bottom bunk and NB was on the top bunk, the appellant came into the room, walked towards her, covered her mouth with a pyjama shirt and put his penis inside her vagina.[20] He stopped when NB skimmed her head on the ceiling fan and began to cry. They did not want to get in trouble from their parents for leaving NB alone on the top bunk.[21]

10 8. **Count 11** was the second incident in that bedroom. The complainant woke up in the morning to the appellant inserting his fingers into her vagina and putting his tongue inside her vagina underneath the bedsheets. NB was asleep at the time. The complainant said she froze. She did not want her sister to wake up. She said that it occurred when her arm was broken which was placed in July 2008.[22]

9. **Count 10** was "the time in the shed when [BB] walked in".[23] The complainant had been playing with her brothers in the cubbyhouse adjacent to the shed before the appellant took her into the shed. He placed her on the bench, took off her pants and underwear and put his penis inside her vagina. The complainant said BB walked in and then left the shed.[24] There was no evidence of when this occurred.

20 10. **Count 9** was said to have taken place in a different shed in a horse paddock in "late primary school". [25] The appellant had dared the complainant and BB to touch their horse's genitals. They both refused. The appellant "got really mad" and took the complainant to the shed, put her on the mud dirt floor and put his penis in her vagina.[26]

11. **Counts 13** and **14** occurred in "late primary school, early high school"[27] when the appellant had moved out of his loft bedroom to a shed adjacent to the house. The

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[16] ABFM at 27, ll 7 – 15.
[17] ABFM at 27, l 19.
[18] ABFM at 38, l 38.
[19] ABFM at 91, l 33.
[20] ABFM at 37, ll 31 – 35.
[21] ABFM at 38, ll 25 – 30.
[22] ABFM at 38, ll 40 to 39, l 8.
[23] ABFM at 182.
[24] ABFM at 39, ll 46 – 40, l 7.
[25] ABFM at 41, ll 44 – 45.
[26] ABFM at 41, ll 25 – 35.
[27] ABFM at 44, ll 4 – 5.

complainant went to the shed to retrieve something for their mother, the appellant sat her down on some car seats and made her put his mouth over his penis (ct 13). He then put her on the seat and put his penis inside her vagina (ct 14).[28]

12. The complainant said that the appellant used to put objects in her vagina. **Count 6** was one such occasion when she "would've been in late primary school".[29] The appellant came into her room, lifted the sheets and put a vibrating pen inside her vagina.[30] **Counts 15** and **16** involved the appellant putting a Listerine mint in her vagina (ct 15), and then his tongue (ct 16).[31] There was no evidence of when this took place.

13. **Count 8** took place underneath the laundry, when the complainant was in "mid-primary school". The appellant put his penis inside her vagina while she was laying down on the dirt. At some point, their mother walked into the laundry. The appellant paused what he was doing and then resumed when his mother left.[32]

14. The complainant said the property had two dams. **Count 18** occurred "on the island in the dam" when the complainant was in "early primary school". The appellant took her to the island, lay her down and put his penis inside her vagina.[33]

15. **Count 4** was the only incident on the indictment that was charged with any specificity: "between the thirtieth day of June, 2005 and the first day of August 2005",[34] when the appellant was 13. The complainant described a family holiday to Hervey Bay in July, when she and her brothers shared a motel bedroom. During the night, while BB was asleep, the appellant climbed off the top bunk and inserted his fingers into her vagina. [35]

16. The final charged incident was **count 1**. She described an evening near Christmas time, in "early to mid-primary school" when she was seated between her two brothers watching TV in the loungeroom with the family. The appellant put his hand between her legs and put his fingers inside her vagina. The complainant was wearing a small silk nightie, with underwear and nothing else covering her. The complainant sat frozen.[36]

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[28] ABFM at 44, ll 17 – 20.
[29] ABFM at 45, l 35.
[30] ABFM at 45, ll 26 – 40.
[31] ABFM at 45, l 42 to ABFM 46, l 19.
[32] ABFM at 49, ll 7 – 16.
[33] ABFM at 50, l 41 – 43.
[34] CAB at 6.
[35] ABFM at 52, ll 1 – 12.
[36] ABFM at 55, ll 7 – 27.

17. The complainant described that "towards the end" of the "encounters", she was "coming to terms with what was happening and realising it wasn't how he was describing it to me. It wasn't something that brothers and sisters just do". [37] The appellant became more forceful, as she resisted "a lot more".[38] She said the sexual abuse stopped in early high school, around the age of 12 or 13. She was threatening to tell "mum and dad everything".[39] The first time she disclosed the offending, was to a friend in high school.[40] She then told her mother in November or December 2016.[41]

18. In November 2017,[42] the complainant first complained to the police. At that time, she made a pretext call to the appellant from the police station. During that conversation,[43] the complainant told the appellant she needed to know "why you did what you did to me when I was younger". The appellant replied, "I don't understand why we did what we did. I was young as well. I don't know what I was doing". He said, he was "very young too", that it stopped "once we were both old enough to know what we were doing", and that he "never did anything unless it was consensual".

19. Aside from the inferences that it was said could be drawn from the circumstances of the offending – and the appellant's assertions that he did not know what he was doing –[44] there was almost no evidence led at trial as to the appellant's capacity. Still less was there any attempt to locate that evidence as being relevant between the ages of 10 and 14. His mother gave evidence that he was a "quiet child"[45] who had been held back in preschool because he was not "ready" to start grade 1;[46] he had been diagnosed with dyslexia;[47] and his father assessed that he was of "below average to average"[48] intellect. There was also limited evidence, relied upon by the Crown, that his mother spoke to him about sexual education from the time he was a toddler,[49] telling him that "no one was allowed to touch any private part of [his] body", that "that was wrong" and to "let somebody know" if it

[37] ABFM at 56, ll 11 – 21.
[38] ABFM at 56, ll 11 – 15.
[39] ABFM at 57, ll 7 –10.
[40] ABFM at 57, ll 15 – 24.
[41] ABFM at 57, ll 45 – 46.
[42] ABFM at 126, ll 4 – 5; *cf* ABFM 59, ll 9 – 10 where reference is made to "November 2018".
[43] See transcript of the pre-text call: ABFM at 201 – 205.
[44] See pretext call transcript (above), as well as the appellant's mother's evidence at: ABFM at 146, ll 28-29.
[45] ABFM at 141, l 30; 143, l 26.
[46] ABFM at 150, l 45 to 151, l 2.
[47] ABFM at 151, ll 8 – 9.
[48] ABFM at 163, ll 3 – 7.
[49] ABFM at 144, l 41 – 47.

happened.[50] She said that he had sexual education every year at primary school prior to year seven,[51] when the "Harold the Giraffe" van came around to the school.[52]

20. In her closing address to the jury, the prosecutor submitted that the surrounding circumstances of the first uncharged act alone (the appellant's threats to hurt the complainant if she told anyone, and his reference to the incident being "their little secret"[53]) "clearly shows" that "he had the capacity … to know that the offending was 'seriously wrong'" before he was 10 years old.[54] This, of course, was at a time when the appellant was conclusively presumed not to have such capacity.[55] The prosecutor then listed evidence which, taken in "combination",[56] would allow the jury to be satisfied that "the accused knew right from wrong at a very early stage in life and throughout the entire period of the offending".[57] That list is set out in MFI "H".[58] It includes circumstances linked to incidents that the prosecutor submitted occurred after the appellant turned 14,[59] as well as circumstances not linked to any point in time.[60]

21. Given the extraordinary breadth of the time span on the indictment, the appellant's capacity was in issue for all of the charges. This meant that, as the trial judge directed, in relation to each of the charges, the jury needed to separately determine two issues: (1) "whether the prosecution have proven the defendant was at least 14 when an act occurred", and (2), "if the prosecution have not proven that, if they have proven that the defendant had the capacity to know that he ought not to do whatever it is that is alleged".[61]

22. To help the jury with the first exercise, the trial judge took the jury through the date ranges given by the complainant (where any had been given): i.e. "early", "mid" or "late primary school",[62] directing the jury that what those phrases meant was a matter for them to

[50] ABFM at 145, l 26 – 30.
[51] ABFM at 144, ll 25 – 27.
[52] ABFM at 153, l 40.
[53] ABFM at 218, ll 10 – 15.
[54] ABFM at 218, ll 14 – 15.
[55] *Criminal Code* (Qld), s 29(1).
[56] ABFM at 219, l 13.
[57] ABFM at 219, ll 10 – 15.
[58] ABFM at 206. See also ABFM at 218, l 9 to 219, l 24.
[59] The prosecutor submitted that cts 2, 3, 13 and 14 would have taken place when the appellant was over 14: ABFM at 217, l 39 to 218, l 4. This would mean that the circumstances attaching to those incidents (including him telling her to "come to his room early in the morning", or him coming into her room at night when the family was asleep) could not be used to rebut the presumption.
[60] Such as his calling the shack their "secret hideaway": ABFM at 28, l 7.
[61] CAB at 18, ll 42 – 47.
[62] CAB at 16, l 28 to 18, l 40.

consider.[63] The jury was not reminded of the uncertainty introduced by the complainant's inability to say if counts 2 and 3 (otherwise described as "late primary school"[64]) occurred before or after December 2004.[65]

23. In relation to the second exercise, the trial judge first directed the jury on s 29 using only the words of the statute.[66] His Honour summarised each party's submissions, including the prosecutor's submissions on the inferences as to the applicant's capacity that the jury "would" draw from the circumstances of the offending.[67] After retiring, the jury wrote a note, asking: "*Ages 10/14, was it wrong or criminally wrong? Law says ought not to do it. Does that mean they knew it was a crime or just a bad thing to do*?".[68]

24. In response, his Honour gave the following re-direction:

> "So the first thing I want to say is that the prosecution does not have to prove the defendant knew that his act, whichever one it might be, constituted a crime or was illegal. Knowledge that it amounted to a criminal offence, for instance, is not what is necessary here. What has to be proved is that at the time that the defendant did the act … the defendant had the capacity to know that he ought not do to it. Ought not is a bit of an old-fashioned phrasing, I know. It might be better put that he had the capacity to know that he should not do it. That might be a plainer way in modern English of putting it. There's another way that it might be put, and it could be to pose the question, 'Has the prosecution proven beyond reasonable doubt at the time the defendant did the act, he had the capacity to know the act was seriously wrong according to the ordinary principles of reasonable people'. So did he have the capacity to know that the act was seriously wrong according to the ordinary principles of reasonable people…."[69]

25. The trial also proceeded on the mistaken view that for the entire period of the indictment, s 349(3) *Code* deemed that a child under the age of 12 cannot consent. That provision did not come into force until 5 January 2004,[70] mid-way through the charge period.[71] The trial judge thus wrongly told the jury that for any act that they were satisfied occurred before the complainant turned 12, they "must find there was an absence of consent".[72]

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[63] CAB at 16, 13 – 17; and 16, ll 32 – 34 and ll 48 – 49.
[64] ABFM at 25, ll 26 – 27.
[65] ABFM at 26, ll 9 – 10; see also ABFM at 101, ll 13 – 24.
[66] CAB at 14, ll 40 – 49; see also CAB at 15, l 20 – 25.
[67] CAB at 19, ll 1 – 20 (summary of Crown submissions); 20, l 1 – 14 (summary of defence submissions).
[68] CAB at 38, ll 15 – 16.
[69] CAB at 47, ll 17 – 40.
[70] By 2003 Act No 55. See *Criminal Code* (Qld), s 29 Reprint No. 4M (as in force on 5 January 2004).
[71] For all but count 4.
[72] CAB at 20, ll 34 – 46.

Part VI – Argument

Ground 1: The Court of Appeal erred in failing to apply the principles from *RP* to s 29 *Code*

Background to the common law presumption of doli incapax

26. The presumption of *doli incapax* regulates the entry of children into the criminal justice system. In 1736, Lord Hale explained the rationale underlying the presumption, that an infant is "*prima facie…* to be adjudged not guilty, and to be found so, because he is supposed not of discretion to judge between good and evil".[73] The courts' anxiety to ensure that children fall within the protection of the presumption is reflected in the strength of evidence required to rebut it: such evidence must be, "very strong and pregnant";[74] "strong and clear beyond all doubt or contradiction"; "very clear and complete"; and "clear and beyond all possibility of doubt".[75]

27. At least until this Court's decision in *RP*, the protection offered by the presumption at common law was often undermined.[76] In the absence of evidence of a child's intellectual and moral development, courts allowed the presumption to be rebutted by pointing to circumstances surrounding the offending, and the "obvious" seriousness of the offence itself combined with the age of the child.[77]

The rejection of that approach by this Court in RP

28. In *RP*, the plurality held that no matter how 'obviously wrong' the act or acts constituting the offence may be, the presumption will not be rebutted merely by inference from the doing of the act.[78] The Court also acknowledged that age does not bear upon the strength of the presumption:

> "The only presumption which the law makes in the case of child defendants is that those aged under fourteen are *doli incapax*. Rebutting that presumption directs attention to the intellectual and moral development of the particular child. Some ten-year-old children will

[73] Mathew Hale, *History of the Pleas of the Crown* (Vol 1, 1736) 16, 26.
[74] *Ibid.*
[75] Each of these expressions of the strength of the evidence required to rebut the presumption is quoted in *C (A minor) v the Director of Public Prosecutions* [1996] AC 1 (***C (A Minor))*** at [15] and [68] (*per* Lord Lowry).
[76] For anecdotal evidence of how the presumption is undermined in practice in Victoria, see Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17(2) *Youth Justice* 134.
[77] See, e.g., *R v ALH* (2003) 6 VR 276. And in *C (A Minor)* at [68] Lord Lowry said: "The cases seem to show, logically enough, that the older the defendant is and the more obviously wrong the act, the easier it will generally be to prove guilty knowledge".
[78] *RP v The Queen* (2016) 259 CLR 642 (***RP***) at 649 [9] (Kiefel, Bell, Keane and Gordon JJ).

possess the capacity to understand the serious wrongness of their acts while other children aged very nearly fourteen years old will not".[79]

29. In *RP*, at first instance and on appeal, the 'surrounding circumstances' had been decisive.[80] The plurality made clear that a child's actions at the time of the offending, and in the aftermath, will frequently be (and, in *RP*, were) equivocal. While such evidence *might* suggest awareness by the child that the conduct was seriously wrong, it may also reflect only an understanding that her actions were "rude or naughty".[81]

30. *RP* refocused the common law of *doli incapax*. It included a firm reminder that children are *presumed in law* to be incapable of criminal responsibility.[82] It held that a child's understanding of "moral wrongness" is the heart of the inquiry. It shifted focus away from the circumstances of the offending and towards the intellectual and moral development of the child. To rebut the presumption:

> "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".[83]

The current Queensland approach is wrong

31. Section 29 *Criminal Code* (Qld) is headed "immature age". It provides that:

> "(1) A person under the age of 10 years is not criminally responsible for any act or omission.
>
> (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."[84]

32. In common with the statutory tests in the Northern Territory,[85] Tasmania[86] and Western Australia,[87] s 29 is concerned with a child's "capacity to know", rather than the common law's concern with "actual knowledge".[88]

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[79] *Ibid* at 651 [12].
[80] *Ibid* at 653 [21].
[81] *Ibid* at 658 [33].
[82] *Ibid* at 657 [32].
[83] *Ibid* at 649 [9].
[84] This wording is reflected in the current version of the *Criminal Code* (Qld), as well as in the versions which applied throughout the indicted date range.
[85] *Criminal Code Act* 1983 (NT), sch 1, s 38; cf *Criminal Code Act* 1983 (NT), s 43AQ.
[86] *Criminal Code Act* 1924 (Tas), sch 1, s 18.
[87] *Criminal Code Act Compilation Act* 1913 (WA), sch, s 29.
[88] See *R v F ex parte Attorney General* [1999] 2 Qd R 157 ***(R v F)***; see also *Rye v Western Australia* [2021] WASCA 43 (***Rye***) at [42] – [44] (*per* Buss P and Mazza JA).

33. Because of that difference in language, intermediate appellate courts have disagreed on whether the code provisions reflect the common law.[89] In Queensland, the prevailing view (expressed by Pincus JA in *R v B*[90]) is that the reference in the *Code* to "capacity" requires something different:

> "We were referred to authorities which would if applied, attribute to the subsection which I have quoted a rather different meaning from that which its language appears to convey. For example, reference was made to B v. R (1958) 44 Cr.App.R., an English case, in which speaking of an accused between the ages of 8 and 14 it was said that in order to rebut the presumption in favour of such a child 'guilty knowledge must be proved and the evidence to that effect must be clear and beyond all possibility of doubt'. It 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) 'to know that the person ought not to do the act. This is, of course, different from proving actual knowledge… Further, there is no indication in the section that any special burden of proof applies to this issue."

34. The absence of any distinction is supported by the fact that Sir Samuel Griffith wrote in his Draft Criminal Code, the words "common law" next to what would become s 29.[91]

35. Even so, and appealing to this difference in language, Queensland courts have rejected the need to differentiate between a child defendant's understanding of what she "ought not to do" as opposed to whether something is "merely naughty or mischievous".[92] The Court of Appeal has also reasoned that the presumption may be rebutted merely by inference from the surrounding circumstances, together with an *absence* of evidence that the child suffers from an impairment or disability.[93] In *R v JJ*, the Court held:[94]

> "There was, in any event, ample evidence on which the jury could make the necessary finding. **It included the surrounding circumstances including conduct closely associated with the act:** see *R v F*…. The question, as Pincus JA observed in *R v B*..., and as is evident from s 29(2) itself, is not whether the accused knew he was doing

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[89] Compare *R v B* [1997] QCA 482 (***R v B***) with *B (An Infant)* [1979] Qd R 417 at 425 *per* WB Campbell J; and *M v J* [1989] TASSC 55; (1989) Tas R 212 (***M v J***) at [16] *per* Neasey J.
[90] [1997] QCA 486 at 3 – 4 *per* Pincus JA, Davies JA and de Jersey J agreeing.
[91] Sir Samuel Walker Griffith, *Draft of a Code of Criminal Law* (1897) 15, cl 31.
[92] *R v F* at 159 – 160.
[93] See also the approach taken in *R v TT* [2009] QCA 199 at [20] (*per* Keane JA) where the act was assumed to be so obviously, seriously wrong that any normal 12-year-old child would have known this; so, in the absence of proof that the child was suffering from a disability, it was open to the jury to reason that the child had the requisite capacity.
[94] *R v JJ; R v JJ ex parte A-G* [2005] QCA 153 *per* McPherson JA, Williams and Jerrard JJA agreeing.

> wrong, but whether he had the capacity to know he ought not to do the act in question. Here, his own sister, according to her evidence, told JJ that she was too young for it and, he being her brother, 'you don't do that to me'. His response was that 'he could do this', and after the event, 'Don't tell mum or Dad, or I'll hurt you. **Uncontradicted, the evidence was sufficient to satisfy the jury that he had the capacity to know he ought not to rape her. It was not suggested that JJ was intellectually impaired** and, indeed, the jury were in a position to form their own impressions from having seen him giving evidence in the witness box even if many years after the event".[95]

36. If the presumption can be rebutted by proof that a child is of "normal" mental capacity for his or her age, then it is no longer a presumption.[96] For the presumption to work as it should, proof of normality should confirm a *lack* of capacity, rather than be taken to prove the opposite.[97] The *absence* of evidence that a child is intellectually impaired (and the inference, which seems to follow in the cases, that a child is "normal") cannot fill the gap created by a lack of positive evidence of a child's intellectual and moral development. Such an approach ignores the reality that: "Individual children of substantially identical age groups and demographics may demonstrate vastly different cognitive capacities for understanding."[98]

The principles set out in RP apply with equal force to s 29 Code

37. Both the common law and the Code provisions perform the same function: to undo a presumption of incapacity. To the extent that s 29 uses the word "capacity" and the common law uses the word "knowledge" as shorthand, it is intended to achieve the same thing. To use the Latin – to get from *incapax* to *capax.* As much is clear from *RP* where it was said that "[t]he sole issue for the trial judge's determination was whether the prosecution had rebutted the presumption that the appellant *was doli incapax*."[99]

38. Section 29 directs attention to the child's capacity "at the time" of doing the act or making the omission. This point-in-time assessment merges the question of capacity almost entirely with the question of actual knowledge. If a child has *knowledge* of the wrongness of an act, then she necessarily has *capacity* to know that it is wrong. Equally, if a child

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[95] *Ibid* at [9] (emphasis added)
[96] Or, as was held in *C (A Minor)* at [53], it is an illogical one which presumes all children not to be normal.
[97] Criticism of the 'presumption of normality' can be found in: Thomas Crofts, 'Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of Doli Incapax' (2018) 40 *Sydney Law Review* 339, 353-355.
[98] Nicholas J Lennings and Chris J Lennings, 'Assessing Serious Harm under the Doctrine of Doli Incapax: A Case Study (2014) 21(5) *Psychiatry, Psychology and Law* 791.
[99] *RP* at 647 [4].

has capacity to know that the act is wrong at the time she does the act, then it would seem certain that she in fact knows it is wrong at the time. The distinction is semantic only.[100]

"Ought not to do" and "wrong"

39. The next question is whether any distinction between the common law and the *Code* arises from the words "ought not to do".

40. In *R v F*; *ex parte Attorney-General*[101] Davies J doubted whether the words of the statute needed to be paraphrased. If they did, his Honour preferred to use the phrase, "that the act was wrong according to the ordinary principles of reasonable men" – a test which borrows from the common law governing proof of 'insanity'– over the language of "seriously wrong".[102] As was observed in *RP*,[103] this formulation omits "the further dimension of proof of knowledge of serious wrongness as distinct from mere naughtiness".

41. A majority of the Western Australian Court of Appeal opined in *Rye v Western Australia*, that "the word 'ought' in s 29 [of the WA Code] connotes, in context, duty or rightness".[104] Their Honours understood this to mean "morally wrong" in the sense in which this was used in *RP*, such that, "a child's capacity to know that 'he ought not to do the act or make the omission' in s 29 is concerned with the child's capacity to know that the relevant act or omission was morally wrong as distinct from legally wrong or a breach of the criminal law or merely naughty, mischievous or rude."[105]

42. This interpretation of the words "ought not to do" which incorporates a threshold requirement of capacity to understand moral wrongness beyond naughtiness or mischief, is consistent with the purpose of s 29 *Code*, which is not to create criminal responsibility for children at large, but rather to gatekeep their entry into the criminal justice system.

43. The plurality's reasons in *Rye* acknowledged and applied some of the principles in *RP*, while at the same time retaining the baggage of the old Queensland cases. As a result, the approach lacks coherence and is apt to confuse rather than enlighten juries.

The Court of Appeal erred in failing to apply the principles in RP to s 29 Code

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[100] See *M v J* at [19] (*per* Neasey J).
[101] [1998] QCA 97; [1992] 2 Qd R 157.
[102] *Ibid* at 160 *per* Davies JA (McPherson JA and Shepherdson J agreeing).
[103] *RP* at 650 [11].
[104] *Rye* at [50] (*per* Buss P and Mazza JA) citing the Australian Oxford Dictionary (2nd ed, 2004) 915.
[105] *Ibid* at [51].

44. As a consequence of the Court of Appeal's decision below, Queensland remains, unjustifiably, out-of-step with the common law. Although *RP* was brought to the attention of the Court, Boddice J (writing the reasons of the Court) did not refer to it. Rather, his Honour endorsed both:

    a. the test set out in *R v F*, which draws from the common law defence of insanity;[106] and

    b. the traditional Queensland approach, by focusing on the surrounding circumstances of the offending, rather than on the evidence (or lack of it) of the appellant's intellectual and moral development.[107]

10 ***The trial judge erred in his directions to the jury***

45. Had the Court of Appeal assessed the trial judge's directions against the principles in *RP*, they would have been found inadequate. At the very least, the jury needed to be told that:

    a. Children under 14 are presumed not to be capable of knowing that their acts are seriously wrong in a moral sense.

    b. The Crown needed to satisfy them, beyond reasonable doubt, that the appellant had the capacity to know, at the time he did each of the acts, that they were seriously wrong in a moral sense, as opposed to being merely naughty or mischievous. (Expressing this, as the trial judge did, in terms of whether the appellant had "the capacity to know that the act was seriously wrong according
20 to the ordinary principles of reasonable people" linked the question of moral wrongness to a higher, adult standard, which sits at odds with the legal policy underlying the principles in *RP*.)

    c. In determining the question of capacity, their attention should be primarily directed to the appellant's intellectual and moral development, by way of evidence of his education and the environment in which he was raised.[108]

    d. Inferences can only be drawn by them as to the appellant's capacity, from evidence of the surrounding circumstances (for example, the appellant's use of force or his concern for secrecy) if:

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[106] *BDO* at [135]. That is, "wrong according to the ordinary principles of reasonable people".
[107] *Ibid* at [134] – [135].
[108] *RP* at 649 [9].

i. they were satisfied that those surrounding circumstances occurred concurrently with, or prior to, the incident in question;

ii. in the context of the evidence of the appellant's intellectual and moral development, the surrounding circumstances were unequivocal as to the appellant's capacity to know his actions were seriously wrong.

e. That it was critical to link the evidence said to show capacity to the time which the specific act being considered occurred. This was important given that almost every count covered the whole of the period that the appellant was 10 to 14 *and* that much of the evidence relied on may have post-dated that entire period[109] *and* that some were said to have happened before he was 10 years old at all.

46. Without such help from the trial judge, there is a real risk that the jury reasoned to guilt by drawing inferences from evidence (such as his sister's distress, or his desire for secrecy) that was not only equivocal,[110] but irrelevant.[111] Indeed, they were invited to do so by the prosecutor,[112] whose approach was approved when his Honour repeated, without correction, the prosecutor's submissions on how the jury "would" reason from the evidence.[113]

A jury properly directed could not have found the presumption rebutted

47. It was not open to a jury, properly directed, to find that the appellant had the capacity understand that engaging in sexual intercourse with his younger sister was seriously wrong in the moral sense.

48. The only evidence of the appellant's intellectual development was to the effect that he had been held back in preschool because he was not considered "ready" to advance to year 1, and of his "below average to average" performance in primary school. This evidence was, at best for the Crown, neutral. The absence of evidence of a disability could not advance the prosecution case in any way.

49. Insofar as the Crown pointed to evidence of the appellant getting into trouble for "throwing sticks" or being disciplined for taking his siblings' belongings,[114] discipline

[109] See *fn* 58 above.
[110] *Ibid* at 658, [33] and [35].
[111] In the sense that the jury may have used evidence of surrounding circumstances from a later incident to rebut the presumption of capacity for an earlier incident.
[112] See submissions above at [20]. ABFM at 218, ll 14 – 15.
[113] See submissions above at [23]. CAB at 19, ll 1 – 20.
[114] See MFI "H".

for actions that are "naughty" do not speak to his capacity to assess the moral quality of his acts. Equally, the fact that the appellant had been exposed to sexual education from the time he was a toddler says nothing about the attention he paid to it, his ability to understand it, why he had been told that it was wrong for another person to touch him sexually, or that it would be equally wrong for him to touch his sister. If one lacks the capacity to understand that an act is seriously wrong in a moral sense, simply being told that one should not do it (or that others should not do it to him) is hardly likely to reverse that position.

50. Without knowing more (or really anything) about the appellant's upbringing and intellectual development, the surrounding circumstances taken individually or together could not establish that he had the capacity to know that his actions were seriously wrong.

Remedies on this ground

51. The very wide charge period meant that the question of the appellant's capacity was live in relation to all counts. Given that there is no evidence rationally capable of rebutting the presumption, the appropriate order would be for acquittals to be entered on all charges.

Ground 2:[115] The trial judge's misdirection on consent precluded the application of the proviso, because it removed from the jury's consideration an element of the offence and, as a necessary consequence, an excuse under s 24 *Code*, both of which were live on the evidence.

52. At trial, everyone assumed that for the entire period charged on the indictment, s 349(3) *Code* deemed that a child under the age of 12 could not consent.[116] As a result, the trial judge directed the jury on consent in the following terms:[117]

> "Now, consent has a legal definition and the first thing I need to tell you is this: a child under the age of 12 years cannot consent. So if you are satisfied in relation to a particular alleged act, that it occurred before [the complainant] turned 12, you must find there was an absence of consent …".

53. In the Court of Appeal, the respondent conceded that this was an error. The law did not change until 5 January 2004,[118] mid-way through the charge period. This meant that consent was an element of the offence from the time the complainant was four, until she

[115] This ground is not argued in relation to ground 4 by reason of the different date range particularised for it (between 30 June 2005 and 1 August 2005).
[116] Consent is defined at *Criminal Code* (Qld), s 348.
[117] CAB at 20, ll 34 – 46.
[118] *Criminal Code* (Qld) s 29 was amended by 2003 Act No. 55 (see Reprint No 4M, in force 5 January 2004).

was seven years, one month and 20 days old, but thereafter, was not an element of the offence until she turned 12.

54. Justice Boddice observed that, "that conclusion does not mean that there has been a miscarriage of justice as a consequence".[119] This language did not, in terms, take up the proviso. The failure to direct on an element would (at least almost) always amount to a miscarriage of justice.[120] The following submissions proceed on the assumption that his Honour was applying the proviso given the methodology deployed (albeit very briefly) in the judgment.[121]

55. Justice Boddice's observation that one does not jump from the existence of an error to a conclusion that a substantial miscarriage of justice has occurred is plainly correct. Nor does a failure to direct the jury on an element of the offence *necessarily* preclude the application of the proviso.[122] It falls first to the Court to determine the nature and effect of the error.[123]

56. It was in this assessment that the Court of Appeal erred. The Court of Appeal's apparent application of the proviso turned on its finding that consent was not a real issue at trial, both because: (1) the defence case was one of "no acts of penetration whatsoever"[124]; and (2) in its assessment, neither consent nor a mistaken belief in consent, arose on the evidence.[125]

57. Neither conclusion was correct. The issue of consent (and, so a mistaken belief in consent) arose on the evidence and was not conceded by counsel, except to the extent that it was mistakenly believed that the law deemed consent irrelevant.

The application of the proviso where there is a misdirection as to an element of the offence

58. Section 668E(1A) *Code* 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".

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[119] *BDO* at 21 [140].
[120] *GBF v The Queen* [2020] HCA 40; 271 CLR 537, [24], but see *Kalbasi v Western Australia* (2018) 264 CLR 62 (***Kalbasi***) at 83 [58].
[121] *BDO* at 21 [143].
[122] *Kalbasi*.
[123] *Ibid* at 71 [15].
[124] *BDO* at [141].
[125] *Ibid* at [142].

59. There is no list of "wrong decisions of law or failures of trial process that will occasion a substantial miscarriage of justice notwithstanding the cogency of proof of the accused's guilt".[126] However, examples include a denial of procedural fairness,[127] and "cases which turn on issues of contested credibility, cases in which there has been a failure to leave a defence or partial defence for the jury's consideration and cases in which there has been a *wrong direction on an element of liability in issue* or on a defence or partial defence".[128]

60. When a failure to leave an element of an offence to the jury will amount to such an error is unclear. It appears from *Kalbasi,* that it will turn on the "gravity"[129] of the error, determined with reference to the "particular misdirection and the context in which it occurred".[130] It is uncontroversial that the omission to direct on an element of liability will rarely (if ever) occasion a substantial miscarriage of justice, if proof of the element was not live or "in issue" at trial.[131] However, exactly when it can be said that an issue is "live" or "in issue" is unclear and intensely case specific.

61. In *Kalbasi,* the majority held that a failure to direct on an element of the offence was not fatal, even where its withdrawal from the jury was due to defence counsel's erroneous concession, in circumstances where (in the majority's assessment) there was "no basis in the evidence or in the way the appellant's case was advanced which left open" the element.[132]

62. We submit that, unless an element of the offence is positively disavowed *and* plainly not open on the evidence, it should be treated as "live". The fundamental obligation on the Crown to prove each element of an offence demands no less. This is to be contrasted with the evidential threshold required to enliven an excuse (and to oblige a trial judge to direct upon an excuse not advanced as part of the defence case)[133] where the higher threshold follows from the evidential onus placed upon the defendant.[134]

The issue of consent was "live"

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[126] *Kalbasi* at 69 [16] (Kiefel CJ, Bell, Keane and Gordon J).
[127] *Weiss v The Queen* (2005) 224 CLR 300 at 317 [45].
[128] *Kalbasi* at 69 [15] (Kiefel CJ, Bell, Keane and Gordon J) (emphasis added).
[129] *Ibid* at 83 [56] (Kiefel CJ, Bell, Keane and Gordon J).
[130] *Ibid* at 83 [57].
[131] *Ibid* at 82 [55] (Kiefel CJ, Bell, Keane and Gordon JJ); at 109, [133] (Nettle J) and at 117 [149] (Edelman J).
[132] *Ibid* at 84 [60].
[133] See *Pemble v The Queen* (1971) 124 CLR 107.
[134] See *CTM v The Queen* (2008) 236 CLR 440.

63. The appellant did not give or call evidence. The case advanced through his counsel was put on alternative bases that:

    a. as to allegations of vaginal rape, there were no acts of penetration;[135] but if there were *and* the complainant was over 12 *and* the jury considered the appellant had capacity such that consent was a "live issue for you to consider", the Crown had not proved an absence of consent;[136] while

    b. oral penetration was accepted by the appellant,[137] and therefore, to be seen in the context of the consensual, sexual relationship between the two.

64. The appellant's counsel framed this argument to the jury, as involving a "middle ground between both sides", where there was shared evidence of a sexual relationship, with the questions for the jury being "the *extent* of the sexual conduct", including "*whether* certain particular acts took place, such as penile rape and oral sex [on the complainant] and *if those acts occurred, the circumstances in which they occurred".*[138]

65. This approach was reflected in the appellant's counsel's cross-examination of the complainant, to whom it was suggested both that no acts of vaginal penetration (whether by the appellant's penis,[139] fingers[140] or the insertion of objects[141]) had occurred; while equally suggesting – in the context count 1 in which digital penetration was alleged – that the reason that the complainant did not "complain" was because she and the appellant were "consensually involved … in sexual touching, of sex".[142] It was also put to the complainant that there were "plenty of times when you didn't say 'no', you didn't push him away, and you let it happen".[143]

66. The trial judge summarised defence counsel's argument on consent in this way:

> "On the question of consent, Ms Bain submitted that … if the question of consent arises, of course, an event occurred after Simone was 12, then there are reasons to doubt that the Prosecution have proved an absence of consent."[144]

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[135] ABFM at 220, ll 27 – 34; 231, ll 36 – 45; 232, ll 46 – 47; 232, ll 42 – 45.
[136] ABFM at 232, ll 4 – 13.
[137] ABFM at 231, l 43.
[138] ABFM at 220, ll 27 – 34 (emphasis added).
[139] ABFM at 84, l 39.
[140] ABFM at 84, l 41.
[141] ABFM at 85, l 14.
[142] ABFM at 83, l 24.
[143] ABFM at 83, ll 29 – 34.
[144] CAB at 32, ll 19 – 23.

67. But for the error as to the operation of s 349, his Honour would plainly have directed the jury to consider the question of consent.[145]

68. Quite apart from the way that the defence case was put, consent was also raised on the evidence. The jury would have been entitled to reason in this way:

    a. rejecting the complainant's evidence that she did not consent;

    b. accepting the applicant's assertion in the pretext call that he "never did *anything* unless it was consensual";[146] and

    c. drawing the inference (urged upon them by defence counsel) that the complainant did not react to any alleged offending that occurred in front of – or within earshot of – her parents throughout her childhood because it was consensual.[147]

Evidence giving rise to an excuse under s 24 Code

69. Even if a jury would not have found that the complainant, then seven-years-old or younger, could consent in those circumstances,[148] an excuse under s 24 (honest belief as to consent based on reasonable grounds) was still open. This is particularly so given that "reasonable grounds" would have to be assessed from the point of view of the appellant as a child, then aged 12 or younger.

70. The Court of Appeal was wrong to find that "[n]othing in that call [the pretext call] raised, as a possibility, penetrative acts having been committed by the appellant under a mistaken belief as to consent", because the appellant's assertions that he "never did anything unless it was consensual" occurred "in the context of a complete denial of ever having engaged in penetrative acts".[149] That "context" arose from the way that counsel was thought by Boddice J to have conducted the case, not from the pretext call or any other evidence.

71. It is true that no submissions were made and no direction was sought as to a mistaken belief in consent after the complainant turned 12 (when the appellant would have been 17). But there were different issues involved in raising the excuse in relation to later incidents. In particular, the complainant's evidence that she was increasingly resistant

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[145] As much is clear from his Honour's directions as to consent otherwise: CAB at 20, ll 43 – 46.
[146] ABFM at 204.
[147] ABFM at 83, ll 1–34; 90; 93 ll 27–47; 95, ll 19–20 (cross-examination); See also ABFM at 234, 8 –13; at 241 – 248 (closing address).
[148] Consent is defined in *Criminal Code* (Qld), s 348.
[149] *BDO* at [141].

"towards the end",[150] and the waning reasonableness of any mistake of fact as the appellant grew older. As a result, it cannot be assumed that the same decision would have been made by counsel about a s 24 excuse prior to the change in the law.

72. In any event, such a belief was plainly open on the pretext call alone and was thus required to be left to the jury, quite apart from the way in which the case was advanced by the parties.[151]

Remedies on this ground

73. The Crown chose a nine-year time frame for each charge other than count 4. The law change occurred during that nine-year time frame. The appropriate remedy on this ground would be for all convictions (other than count 4) to be quashed and a re-trial ordered. If the submissions as to remedy on ground 1 are accepted, no remedy is required on this ground.

Part VII: Orders Sought

74. If Ground 1 is successful, then orders quashing the appellant's convictions on all counts and entering acquittals in their place are sought.

75. If only Ground 2 is successful, then orders quashing the appellant's convictions on all counts other than count 4 and ordering a re-trial on those counts are sought.

Part VIII: Estimate of Time

76. The appellant's oral argument is estimated to take one to one and a half hours to present.

Dated: 9 December 2022

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[150] ABFM at 56, ll 11–15.
[151] *Stevens v The Queen* (2005) 227 CLR 319 (***Stevens***), *esp* at 344 [75] (*per* Kirby J); 330-331 [29] (*per* McHugh J). Unlike in CTM, in this case, the complainant was cross-examined to the effect that she (1) was consenting; and (2) did not communicate her lack of consent: see ABFM at 83, esp. ll 33-34

IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY **No. B 52 of 2022**

BETWEEN **BDO**

Appellant

and

THE QUEEN

Respondent

ANNEXURE TO THE SUBMISSIONS OF THE APPELLANT

Pursuant to Practice Direction No.1 of 2019, the Appellant sets out below a list of statutes referred to in these submissions:

No.	Description	Version	Provisions
1.	*Criminal Code Act* 1899 (Qld), sch 1 (***Criminal Code*****)**	Reprint No. 4 (as in force on 7 September 2001)	ss 29, 210, 348, 349
2.	*Criminal Code Act* 1899 (Qld), sch 1 (***Criminal Code*****)**	Reprint No. 4M Amended by 2003 Act No. 55 (as in force on 5 January 2004)	ss 29, 210, 348, 349
3.	*Criminal Code Act* 1899 (Qld), sch 1 (***Criminal Code*****)**	Current	s 668E(1A)
4.	*Criminal Code Act* 1983 (NT), sch 1 (*Criminal Code of the Northern Territory of Australia*)	Current	s 38
5.	*Criminal Code Act* 1924 (Tas), sch 1	Current	s 18
6.	*Criminal Code Compilation Act* 1913 (WA), sch (*The Criminal Code*)	Current	s 29