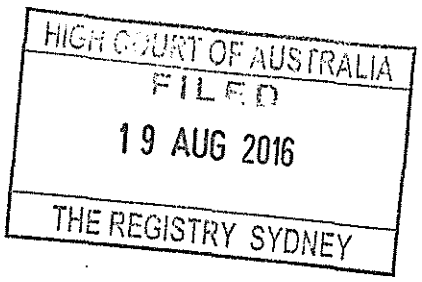
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S193 of 2016

BETWEEN:



RP
Appellant

and

10 THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: We certify that this submission is in a form suitable for publication on the internet.

Part II: Issues presented by the appeal

1. In a criminal case in which the common law presumption of *doli incapax* applies what is required in order for the Crown to rebut the presumption? In particular:
20 a. Can evidence of the charged act, without more, rebut the presumption?
   b. Where particular conduct might, except for the presumption of *doli incapax*, constitute two or more offences, must the child know that the act constituting the charged offence is seriously wrong, or can the child be found guilty because he or she understood that the conduct was seriously wrong for reasons other than the proscription reflected in the charged offence?
   c. To what extent, if at all, is it permissible to draw inferences about what a child knew or inferred in various circumstances, in the absence of evidence as to the child's capacity or development?

30 2. Is a court of criminal appeal, when determining whether a verdict is unreasonable for the purposes of the common form criminal appeal provision, bound by the inferences the trial judge does or does not draw from the evidence when assessing the whole of the evidence for itself?

3. In a trial by judge alone, does a failure by the trial judge to independently determine guilt in relation to a particular count on the indictment, and to give reasons referable to that count, necessarily result in a substantial miscarriage of justice?

Part III: Section 78B Notice

40 4. It is not considered that notice is required pursuant to s 78B of the *Judiciary Act 1903*.

Part IV: Citation of reasons for judgment

5. The citation of the reasons for judgment of the intermediate court is *RP v R* [2015] NSWCCA 215 (**CCA**). The citation of reasons for judgment of the primary judge is *R v [RP]* (unreported, NSW District Court, Letherbarrow SC DCJ, 28 August 2014).

Part V: Narrative statement of facts

6. In August 2014, the appellant was tried before Letherbarrow SC DCJ, in a judge alone trial, in relation to two counts of aggravated indecent assault (counts 1 and 4) contrary
50 to s 61M(2) of the *Crimes Act 1900* (NSW) and two counts of sexual intercourse with a

LEGAL AID NSW
323 Castlereagh Street
Sydney NSW 2000
DX 5 SYDNEY

Telephone: (02) 9219 5000
Fax: (02) 9219 5935
Email: sally.mclaughlin@legalaid.nsw.gov.au
Ref: Sally McLaughlin

child under ten years (counts 2 and 3) contrary to s 66A(1) of the *Crimes Act 1900* (NSW). A verdict of acquittal was directed on count 1. His Honour found the appellant guilty of counts 2, 3 and 4. The appellant's appeal was dismissed in relation to counts 2 and 3 (the latter by majority). The appeal was upheld and a verdict of acquittal entered in respect of count 4. The appellant was sentenced to 2 years 5 months imprisonment with a non-parole period of 11 months that expired 5 November 2015 in respect of counts 2-4, which was not varied by the CCA despite the acquittal. Conviction for such offences also triggers permanent placement on the Child Protection Register: *Child Protection (Offenders Registration) Act 2000* (NSW), s 3A.

7. The appellant is the older brother of the complainant. The offences the subject of counts 2 and 3 occurred when the appellant was between 11 years 7 months and 12 years 4 months of age. In respect of count 2, the appellant was left at home with the complainant and two other siblings. No adults were present. A fight broke out between the complainant and another brother (cf. CCA [24] which incorrectly records that the fight was between the appellant and complainant) and the appellant locked the complainant in a room: Ex A Q216. The complainant cried to be let out. The appellant entered the room and said if "you want to come out, you gotta let me do this to ya". The appellant then pulled his pants down and put a condom on his penis, at which stage the complainant "kept on saying No [RP] no": Ex A Q258. The appellant grabbed the complainant and threw him on the bed, and then pulled the complainant's pants and underpants down. He then inserted his penis into the complainant's anus and put his hand on or around the complainant's mouth. The complainant said that he was "crying" and he "just kept on trying to tell [the appellant] to stop but he had his hand up over me mouth and wouldn't stop". The complainant said that this went on for what felt like "a long time", and did not cease until they heard their father's girlfriend calling out for help to get the groceries out of the car, at which point the appellant withdrew his penis. The appellant said to the complainant "don't say nothing".

8. The count 3 conduct occurred a few weeks later. The appellant and complainant had been left alone at their father's place of work. The appellant took the complainant to an office, where he took his pants down so he could "get his penis out". On seeing this, the complainant ran towards the door but the appellant stopped him. The complainant called for his sister, but the appellant grabbed him and put him on the floor face down on a pile of clothes. The appellant then pulled the complainant's pants down and commenced penile/anal intercourse which continued for about two to three minutes. It stopped when they heard their father returning: CCA [28]-[31].

9. No oral evidence was called at trial. The Crown evidence consisted of: a DVD and transcript of the complainant's interview with the police (the trial judge was not asked to watch the DVD); a statement from the appellant's mother (not relied upon for counts 2-4); a statement from the appellant's sister (relevant to count 4 only); a psychologist's report directed to the appellant's fitness to plead at age 18 (Ex D) and an Australian Government Job Capacity Assessment Report (Ex E, when the appellant was age 17). The fitness report indicated that the appellant possessed an IQ in the borderline disabled range, displayed a lack of maturation and had an upbringing marked by turmoil and dysfunction including exposure to violence and possibly being the victim of molestation. The Job Capacity Assessment Report indicated that he had a verified permanent intellectual disability, adaptive behavioral problems, impaired memory, problem solving, decision making ability and comprehension, and was unable to live

independently: CCA [17]. No evidence was led by the defence. The sole issue was whether the prosecution had rebutted the presumption that the appellant was *doli incapax*.

10. The trial judge determined the issue of *doli incapax* in respect of count 2 and then applied this finding without any independent analysis to counts 3 and 4, resulting in convictions on all three counts. The appellant appealed his conviction on the grounds that this approach was erroneous, and that the verdicts were otherwise unreasonable.

10 11. The CCA found that the trial judge's approach to determining counts 3 and 4, based solely on his determination of count 2, was erroneous. The majority (per Davies J, Johnson J agreeing) found that the Crown had rebutted *doli incapax* beyond reasonable doubt in respect of counts 2 and 3. The conviction on count 4 was quashed and a verdict of acquittal entered. Hamill J, in partial dissent, found that the Crown had rebutted *doli incapax* in respect of count 2 only, and would have entered verdicts of acquittal on both counts 3 and 4.

Part VI: Argument

Appeal Ground 1: Doli Incapax

20 12. In a case in which the presumption of *doli incapax* applies, the prosecution must prove beyond reasonable doubt that when doing the act charged the child "knew it was seriously wrong, as distinct from an act of mere naughtiness or mischief": CCA [34] and [125]. It has been observed that this test is simply stated but difficult in application: CCA at [129] per Hamill J and, see also, *C (A Minor) v DPP* [1996] AC 1 (***C v DPP***) at [53](3) and [73].

13. In the present matter, application of the test was of particular difficulty. This was the result of a combination of factors including: the nature of the offences charged; the fact that the offences were not charged or prosecuted until some years after their alleged
30 commission (with the result that the appellant, aged somewhere between 11-12 years old at the time of the alleged offences, was 21 years old by the time of trial); the absence of evidence led as to the capacity of the appellant to understand the nature of the charged act; and the fact that such evidence as there was raised a question with respect to the development of the appellant. The CCA, it is submitted, failed to properly deal with these difficulties.

14. The appellant submits that an analysis of the reasons of the CCA reveals the ways in which its approach led to an erroneous conclusion that the presumption of *doli incapax* had been rebutted. In particular, the appellant submits:

40 a. The CCA failed to assess whether the appellant knew that the conduct constituting the offence with which he was charged was seriously wrong. Instead his knowledge of wrongness was assessed by reference to a less serious offence;

b. The CCA failed to eschew adult value judgments and consequently gave undue significance to the sexual act and circumstances surrounding it in determining that the *doli incapax* presumption had been rebutted (in effect negating the presumption);

c. The CCA failed to properly distinguish between knowledge that the conduct was "seriously wrong" and a belief that it was a breach of some rule or merely naughty;

d. The CCA failed to approach the presumption as a matter for the Crown to disprove beyond reasonable doubt by "clear and complete evidence" (*C v DPP* at [64]), treating it instead as a matter "largely... of impression" (CCA [53], cf [128]);

e. The CCA failed to properly apply the test in *M v The Queen* (1994) 181 CLR 487 at 493–4 (***M v The Queen***) in disposing of the unreasonable verdict ground of appeal;

f. The CCA adopted an otherwise erroneous approach to reasoning to guilt in relation to count 3; and

g. The CCA reasoned in a manner which unduly elevated equivocal evidence.

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15. The above matters will be dealt with, in turn, below. Prior to dealing with these matters, it is convenient to first consider some more general observations with respect to the presumption of *doli incapax*.

The doli incapax principle

16. It has been repeatedly said that "No civilised society regards children as accountable for their actions to the same extent as adults".[1] The age of criminal responsibility may thus be regarded as the age at which the law considers that a person "has the capacity and a fair opportunity or chance to adjust his behavior to the law".[2]

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17. The minimum age of criminal responsibility in New South Wales (and all Australian jurisdictions) is 10 years: *Children (Criminal Proceedings) Act 1987* (NSW) s 5.[3] The common law has also long distinguished a second age range for liability, above the absolute minimum, in which the individual child may be assessed for sufficient capacity (since at least the reign of King Edward III, 1327-1377).[4] The upper threshold of 13 years was set around the fifteenth century.[5]

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[1] Colin Howard, *Criminal Law* (Law Book Co, 4th ed, 1982) 343, cited in *R (A Child) v Whitty* (1993) 66 A Crim R 462 (***Whitty***), 462 (Harper J), *C v DPP* [1996] AC 1 (***C v DPP***), [73] (Lord Lowry) and *R v CRH* (unreported, NSWCCA, 18 December 1996, Smart, Newman and Hidden JJ) (***CRH***).

[2] HLA Hart, *Punishment and Responsibility* (Oxford University Press, 1968) 181 and see also 152, and Mathew Hale, *History of the Pleas of the Crown* (Vol 1, 1736) 14-15.

[3] *Criminal Code Act 1995* (Cth) s 7.1, *Criminal Code Act 1899* (Qld) s 29, *Criminal Code Act Compilation Act 1913* (WA) s 29, *Criminal Code Act 1924* (Tas) s 18 *Criminal Code Act 1983* (NT) s 38, *Criminal Code 2002* (ACT) s 25. Ten is towards the lower end of the scale internationally. The most common age of criminal responsibility around the world (below which there is absolute protection) is 14, the median age is 13.5 years, and the average is 11.9. Excluding four countries that do not set a minimum age, the mean is 12.5 and the median is 14: Neal Hazel, *Cross-National Comparison of Youth Justice* (Youth Justice Board, 2008) 31. And see UN Committee on the Rights of the Child, *Concluding Observations on the Rights of the Child: Australia* (1997) CRC/C/15/Add.79 [29], and UN Committee on the Rights of the Child, *General Comment No. 10* (2007) CRC/C/GC/10 [30]-[33].

[4] Sir William Blackstone, *Commentaries on the Laws of England* (Vol 4, 1769) 23.

[5] AWG Kean, 'The History of the Criminal Liability of Children' (1937) 53 *Law Quarterly Review* 364, 369, cited in Thomas Crofts, 'Lagging behind Europe: The Criminalization of Children in England' (2008) 2 *Humanitas Journal of European Studies* 1, 3. The upper limit of 13 years was affirmed in *Whitty* at 462.

18. In New South Wales, the common law rebuttable presumption of *doli incapax* is applied to children between 10 and 13 years of age (inclusive): *BP v R* [2006] NSWCCA 172 (***BP***) at [27]. It is also applied in Victoria and South Australia: *R v ALH* (2003) 6 VR 276 (***ALH***) at [20], [24] and [86]; *The Queen v M* (1977) 16 SASR 589 (***M***). In the remaining Australian jurisdictions the presumption has been replaced with statute.[6] The language used varies between jurisdictions, but the provisions have either been accompanied by an express legislative intention to "repeat" the common law or else silence as to the desired effect of the provision.[7]

10 19. The test for rebutting the presumption stated in *C v DPP* has been accepted by intermediate courts in Victoria and New South Wales as representing the common law in Australia (*BP* at [27], and see *ALH* at [20], [24] and [86]):

> [T]he onus is on the prosecution to prove beyond a reasonable doubt not only that the child did the act charged, accompanied by the necessary mental element, but also that, when doing it, he or she knew it was seriously wrong as distinct from an act of mere naughtiness or mischief.

20. "Seriously wrong" can be traced to *R v Gorrie* (1918) 83 JP 136 (***Gorrie***) in which it
20 was said the child must understand that what he was doing "not merely ... was wrong but ... gravely wrong, seriously wrong."[8] In *BP*, Hodgson JA, citing *M* and *Stapleton v The Queen* (1952) 86 CLR 358 (***Stapleton***, which concerns *M'Naghten*), characterised the test as: "The child must know that the act is seriously wrong as a matter of morality, or according to the ordinary principles of reasonable persons, not that it is a crime or contrary to law": at [28].

21. "Seriously wrong" is often distinguished from "mere naughtiness", however this formulation can mislead. Hamill J noted that such a direction could (CCA [129]):

30 > ... give rise to an erroneous process of reasoning whereby a finding that the act was more than naughty or mischievous may lead to a finding that the child knew that what they did was seriously or gravely wrong without proper attention being paid to that question. There is a vast chasm between something that is "naughty" or "mischievous" and something that is gravely or seriously wrong. ... it is easy to fall into the trap of thinking that if something is more than naughty, it must therefore satisfy the test. It does not. The question is a simple one, although one that is difficult in application. The question was well stated by Salter J

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[6] *Criminal Code Act 1995* (Cth) s 7.2, *Criminal Code Act 2002* (ACT) s 26 and otherwise per fn 3 above. Around the common law world, the presumption continues to operate in (at least) Hong Kong, Ireland, New Zealand, South Africa, India, Malaysia and Singapore (the last three set the range at 10-12 years): Thomas Crofts, 'Reforming the Age of Criminal Responsibility' [2016] *South African Journal of Psychology* 1, 4, and Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perpsective* (Ashgate, 2009) 187-224. The presumption for children between 10 and 14 years of age was abolished in England and Wales in 1998.

[7] Eg "This provision also repeats the law as it currently stands in the ACT and the rest of Australia": Explanatory Memorandum to the Criminal Code 2002 (ACT) Clause 26 (which provision is in the same terms as the Commonwealth Code), and see *M v J* [1989] Tas R 212 cited below at [25] and FN 9.

[8] Previous formulations, including "knew that he was doing wrong or was acting altogether unconscious of guilt", "guilty knowledge that he was committing a crime" and "knew that the act was morally wrong" are canvassed in *The Queen v M* (1977) 16 SASR 589 (*M*) at 597-598.

in *R v Gorrie* - the child must know "that he was doing what was wrong not merely what was wrong, but what was gravely wrong, seriously wrong."

22. There is divergence between NSW and Victoria as to whether the act constituting the offence could be sufficient (together with the child's age) to rebut the presumption beyond reasonable doubt. It was held in *C v DPP* and *R v CRH* (unreported, NSWCCA, 18 December 1996, Smart, Newman and Hidden JJ) (***CRH***), and the CCA accepted (CCA at [33] and [137]), that, although the act is relevant, there must be more than proof of the act charged. In Victoria, Cummins AJA held in *ALH* that the requirement "that mere proof of the act charged cannot constitute evidence of requisite knowledge" (at [86], Callaway JA and Batts JA agreeing at [20] and [24], *emphasis added*):

> doubtless is founded upon the danger of circular reasoning. But proper linear analysis could have regard to the nature and incidents of the acts charged without being circular. *What is required is the eschewing of adult value judgments. Adult value judgments should not be attributed to children.* If they are not, there is no reason in logic or experience why proof of the act charged is not capable of proving requisite knowledge. Some acts may be so serious, harmful or wrong as properly to establish requisite knowledge in the child; others may be less obviously serious, harmful or wrong, or may be equivocal, or may be insufficient. I consider that the correct position is that proof of the acts themselves may prove requisite knowledge if those acts establish beyond reasonable doubt that the child knew that the acts themselves were seriously wrong. Further, I consider that the traditional notion of presumption is inappropriate. I consider that the better view is that the prosecution should prove beyond reasonable doubt, as part of the mental element of the offence, that the child knew the act or acts were seriously wrong. Such a requirement is consonant with humane and fair treatment of children. It is part of a civilised society.

23. While Cummins AJA is correct that adult value judgments must not be attributed to children (and the appellant says this is, in fact, at the heart of the application of the presumption), the appellant submits that it is difficult to conceive of a case where finding the presumption rebutted having regard only to the charged act would not involve attributing such judgment.

(a) The CCA failed to relate the requisite knowledge to the charged offence

24. Section 66A(1) of the *Crimes Act 1900* (NSW) prohibits sexual intercourse with a person under the age of 10. The sexual act itself, in this case penile-anal intercourse, cannot be said to be morally wrong: cf CCA [141]. Consent is also not in issue in the offence. By operation of s 66A, it is the simple fact of the complainant's age that makes the act of sexual intercourse criminal and, in this case, rendered the appellant liable, with respect to counts 2 and 3, to the maximum penalty of 25 years imprisonment (set to reflect the moral obloquy involved in the offence). It was therefore not sufficient to prove that the appellant knew that what he was doing was wrong because the complainant did not consent. This would constitute the lesser offence of sexual intercourse without consent (s 61I), which carries a 14 year maximum penalty (or 20 years in the aggravated form: s 61J). It was necessary to prove the appellant knew that engaging in sexual intercourse with a person under the age of 10 was "seriously wrong as a matter of morality".

25. In *M v J* [1989] Tas R 212; (1989) 44 A Crim R 373, a 13 year old boy was convicted of discharging a firearm while under age. The statutory test for a child under 14 was

whether he had sufficient capacity to know that the act or omission "was one which he ought not to do or make". This was held to "re-enact the common law requirement".[9] On appeal Neasey J said in respect of offences in which there is little if any content of "wrongness" in the acts or omissions proscribed (because the wrongness related to the age of the offender and not the act itself, at A Crim R 383, *emphasis added*):

> ...it would have been necessary to prove in respect of the first charge that the applicant had sufficient capacity to understand and know that the act of discharging the air-rifle was wrong *because he was a child when he discharged it,* whereas if he had been aged 16 years or over it would not have been wrong.

26. This is not precisely analogous to this case, in which the "wrongness" related to the age of the complainant, not the offender. Nevertheless, the fact that an otherwise lawful act (sexual intercourse) was unlawful because of the *age* of the complainant requires a different, and more sophisticated, understanding than that required of lesser offences such as intercourse without consent or even assault.

27. By way of example, consider a child who was told repeatedly to stay out of a construction site that is near to his home. He breaks into the site and while there indecently assaults another child. Evidence that he knew at the time that it was seriously wrong to break into the construction site may be sufficient to demonstrate that he is *doli capax* in respect of the breaking and entering. However, it will not suffice to demonstrate that he is *doli capax* in respect of the indecent assault, or in respect of a charge of break, enter and commit indictable offence. It may be true that he knew that he was doing something he ought not, namely, being on the construction site. This is quite different from knowing that the act of indecent assault was seriously wrong. Thus, it cannot be that everything a child does while under the impression that they are behaving wrongly in a particular manner is necessarily captured by that knowledge of wrongness.

28. Where the same conduct may make out different offences, greater care is required to ensure that the knowledge of serious wrongness attributed to the child is referable to the offence charged. For example, a child who steals a firearm from someone licenced to possess it may be proved to have knowledge that such stealing is seriously wrong. This will render him criminally accountable for his actions if he is charged with stealing. However, it will not suffice if he is instead charged with possession of a firearm without an appropriate licence. The latter requires the quite different understanding that possession of the item is in some circumstances permissible and in other circumstances not (and that where the possession is not permitted, it is "seriously wrong").

29. To take an example closer to the present case, expert evidence might establish that a child knew his actions in assaulting another were seriously wrong but that the child had no awareness that the means by which the assault was perpetrated (which included a sexual element) was seriously wrong. A real question arises as to whether the child is properly guilty of a sexual assault or a simple assault (and exposed to vastly different

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[9] This statutory language is also used in Queensland, Western Australia and the Northern Territory, and the different statutory test in the ACT and Commonwealth has also been said to replicate the common law; albeit there appears to be some divergence in approach as to the content of the common law test that is said to be replicated: see, eg, *R v JA* (2007) 161 ACTR 1.

maximum penalties). The principle in this respect operates in a similar manner to the principle in *The Queen v De Simoni* (1981) 147 CLR 383, but working at the conviction stage (noting that the conviction will render the child liable to a particular penalty).

30. In many cases a correlation between the physical act and the offence charged will be such that it is unnecessary to further consider which "act" the knowledge of serious wrongness must relate to. In the present case, however, the appellant was charged with the act of intercourse with a child under 10. That act carries a significantly higher penalty than the act which the Crown case, incorporating the evidence relied upon to rebut the presumption of *doli incapax*, appeared directed to proving: intercourse without consent. The Crown must prove that the appellant was sufficiently competent to appreciate the moral quality of the act in respect of which he was charged, not merely that some aspect of his course of conduct was wrong. At no point did the CCA assess whether he had the capacity to understand that sexual intercourse with a child was seriously wrong.

31. There is nothing extraordinary in requiring the Crown to prove that the child knew that the act, as it relates to the particular charge, was seriously wrong. It may mean that the more appropriate charge in a case such as this is sexual intercourse without consent (albeit the appellant submits the lacuna in the evidence as to the appellant's capacity at 11-12 years old would also be fatal to such a charge in this case).

32. Even if this is wrong, and evidence that the appellant knew the complainant was not consenting could be taken into account in assessing whether the appellant knew the acts he was charged with were seriously wrong, there are significant difficulties in attributing knowledge of serious wrongness to an appellant on the basis of his knowledge of the complainant's lack of consent. This is so even when such knowledge is combined with his desire to keep the behaviour from adults and any perception that he was causing distress to the complainant. These matters, and the CCA's treatment of them, are discussed below.

(b) The CCA failed to eschew adult value judgments

33. All reasonable adults experience moral abhorrence at the notion of sexual intercourse with a child. This abhorrence is directed to protecting children from acts and concepts that are not comprehensible, safe or appropriate for them. In other words, it is an abhorrence that is inherently of an adult kind. It is for this reason that the danger of ascribing adult value judgments to children, and effectively reversing the burden of proof, is so high in relation to sexual offences.

34. The law in NSW effectively deems a child under 16 years incapable of consent to sexual acts: see, eg, *Crimes Act 1900* (NSW) ss 66A-D. Thus, not only the complainant, but also the appellant, was many years short of the age at which the law considers he would be able to formulate his own consent to sexual acts. Putting to one side the cognitive incapacity of this particular appellant, the empathic reasoning ability of any 11 or 12 year old to comprehend not just the unwillingness of another person to go along with his wishes, but also the seriousness (and moral wrongness as opposed to naughtiness) of imposing his will against their wishes and violating their personal autonomy, must be, at the least, reasonably doubted in the absence of contrary evidence.

35. This is particularly so in respect of another prepubescent child over whom, by virtue of the fraternal relationship, the older child was in a position to exert some physical authority (including, here, to lock him in his room for fighting with another brother). Children are, for most hours of the day, subject to the authority of others. They are accustomed to caregivers and others making a myriad of decisions about their physical person, including when, what and how they eat, wear, wash, watch, play, sleep and move about.

36. The exertion of authority over children will often involve physical intrusion which may cause the child to cry in pain, scream or run away. Parents and other authority figures (including siblings acting with or without parental permission), regularly administer or oversee unpleasant or painful care such as vaccinations, casts or stitches. Caregivers may brush out tangled hair, physically restrain or remove overexcited children, and administer corporal punishment causing a child to scream and cry. Children are exposed to material that is ambiguous in its treatment of violence, such as cartoons depicting repeated graphic acts of extreme interpersonal violence with no permanent consequence to aggressor or victim. To add to this, some children will be subject to abuse. In the absence of evidence, it is not possible to know what moral structure a child has managed to distil from his or her world. Thus, even if it can be inferred that the appellant was aware of the distress he was causing the complainant, it did not follow that the appellant knew what he was doing was seriously wrong: cf CCA [140]. As noted above, causing distress to a child is not necessarily wrong.

37. Assuming a child within a certain age range has a proper understanding of which intrusive acts are permissible, in what circumstances, and by whom, and which might be seriously wrong as opposed to frowned upon, naughty or merely wrong, fails to give effect to the presumption and may reverse the onus of proof. It is also contrary to the psychological and neurological understanding of the moral development of children and adolescents. Knowing something is "seriously wrong" involves:

> more than a child-like knowledge of right and wrong, or a simple contradiction. It involves more complex definitions of moral thought involving the capacity to understand an event, the ability to judge whether their actions were right or wrong (moral sophistication), and an ability to act on that moral knowledge.[10]

38. Indeed, even in respect of children and adolescents above 14, developments in neuroscience in particular suggest that, "with respect to moral culpability, those parts of the brain that deal with judgment, impulsive behavior and foresight" develop much later than previously thought, well into the late teens and even twenties.[11] Research

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[10] N J Lennings and C J Lennings, 'Assessing serious harm under the doctrine of doli incapax: A case study' (October 2016) *Psychiatry Psychology and Law* 1, 2.

[11] R Arthur, 'Rethinking the criminal responsibility of young people in England and Wales' (2012) 20(1) *European Journal of Crime, Criminal Law and Criminal Justice* 13-29, 12. And see Ann L Kramers-Olen, 'Neuroscience, moral development, criminal capacity, and the Child Justice Act: justice or injustice?' (2015) 45(4) *South African Journal of Psychology* 466; Judge Andrew Becroft, Principal Youth Court Judge of New Zealand, '"From little things big things grow: Emerging youth justice themes in the South Pacific' paper presented to the Australasian Youth Justice Conference (2013), 5-6; and K Richards 'What makes juvenile offenders different from adult offenders' (2011) 409 *Trends & Issues in Crime and Criminal Justice,* Australian Institute of Criminology, 4-6.

also suggests that children who commit sexual offences are particularly likely to have experienced abuse and disadvantage.[12]

39. Further, presuming normality as to development (i.e. what an average child of the relevant age would know) or environment (i.e. that the child is not smacked at home or otherwise subjected to violence or inappropriate sexual behavior) or education (i.e. that the child has been taught and understood standards of acceptable behavior through the school system) "undermines the presumption of *doli incapax* itself": *C v DPP* at 32H. Further, to the extent one draws on one's own experience of children, it is, for the most part, experience of children not exposed to trauma, or, at the least, children not inclined to act in the manner here alleged, and doing so similarly undermines the presumption.

40. For the reasons given above, even with a relatively normal upbringing, there will be difficulty in drawing inferences as to a child's understanding of whether an act that causes distress to another is wrong. As it happens, in the present case the evidence at trial (such as there was) was that the appellant had a dysfunctional upbringing, including exposure to violence. Add to this the evidence suggesting that this appellant was potentially developmentally disabled at the time of the offence, and it cannot be said the Crown discharged its onus as to the appellant's ability to comprehend the serious moral wrongness of the charged acts.

41. In the present case, in finding the presumption was rebutted, the CCA was entitled to have regard to the circumstances surrounding the charged act. It remained essential, however, to restrict the drawing of inferences to those it could safely be concluded must also have been drawn by the appellant. The evidence, apart from the sexual act, that was taken into account by the CCA in respect of count 2 was set out by Hamill J (CCA [144]):

    (1) The [appellant] knew that the Complainant did not want to engage in the relevant act even before it occurred.
    (2) The [appellant] used force on the Complainant.
    (3) The [appellant] put his hand over the Complainant's mouth in an attempt to stop him calling out in order to avoid detection.
    (4) The Complainant was crying in pain and trying to tell the [appellant] to stop.
    (5) The [appellant] "persisted over some time" or, as it was subsequently put, for a significant period of time, and only stopped when an adult returned home.
    (6) The [appellant] told the Complainant not to say anything.

42. (1), (2) and (4) relate to consent (and in the case of (4) the infliction of some pain). The inference drawn in (3), the second half of (5), and (6) are capable of giving rise to the inference that the appellant wanted to avoid detection, but are ambiguous as to whether he appreciated the actions were seriously wrong as opposed to naughty (and say nothing at all as to his knowledge of wrongness being tied to the age of the complainant). None of these matters could establish the appellant knew that the act he was engaged in was "seriously wrong".

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[12] Emily Bladon et al, 'Young sexual abusers: A descriptive study of a UK sample of children showing sexually harmful behaviours' (2005) 16(1) *The Journal of Forensic Psychiatry & Psychology* 109-126, 111; and see Wendy O'Brien, *Problem Sexual Behaviour in Children: A Review of the Literature* (Australian Crime Commission, 2008) at 2-6.

43. Nothing in any of the matters listed above, either individually or cumulatively, take the appellant's actions outside of ordinary (albeit naughty or even slightly more than naughty) roughhousing. Children fight, pull hair, hit, kick and punch, give friction burns, choke, bite, knee, kick or pull on each others genitals in play or with the intention of causing pain or humiliation. Children scream at each other in the course of these sorts of encounters; they cover each others' mouths either because they are annoyed, angry or wish to avoid detection. Children make younger siblings cry. (It should also be noted that there was no evidence the appellant was actually aware that the complainant was crying because he was in pain.) Children lie and otherwise attempt to hide their naughty or disobedient behavior. Indeed, the fact that the appellant persisted, despite the protestations of the complainant, would, if anything, suggest that he did not know what he was doing was seriously wrong (*a fortiori* in the context of the presumption he was *doli incapax*). To reason otherwise is to engage in adult value judgments.

44. Children also engage in behaviour that is appropriate for adults but not appropriate for children. This ranges from harmless dressing up, to drinking alcohol and smoking, which while not harmless, might be thought more in the nature of naughty than seriously wrong. They will also take pains to avoid the detection of such behavior. Many children engage in sexual behavior that adults may find inappropriate or disturbing; children "play doctor", touch and stimulate their genitals and those of other children, experience arousal and/or mimic or engage in sexual gestures and acts they have seen in person or in mainstream media or pornography. It is not clear that the appellant understood that his behaviour was adult behaviour. Even if he did, the Crown proved no more than that the appellant engaged in "adult behaviour" which his younger brother did not wish to participate in and which caused his younger brother to cry. Having made his brother cry, it is hardly surprising that he sought to keep this from his father and stepmother. The surrounding circumstances do not distinguish the behaviour from merely "naughty".

45. Ultimately, the sexual acts remained at the centre of the criminality alleged in respect of both counts. It is unlikely that if all of the conduct, but for the sexual acts, had occurred in precisely the same manner (i.e. an 11-12 year old child restrains his younger brother and throws him onto a bed, covers his mouth and ignores his crying and pleas to stop, and even inflicts non-sexual penetrative violence, such as by shoving fingers into his ears, nose or mouth, or even into the anus), proof of capacity would be established beyond reasonable doubt. Children fight, sometimes savagely. The central feature of the charge in this case (and the evidence to prove capacity), was plainly the sexual act, and the abhorrence of it being performed on a child. For the reasons above, the practical effect of this was that the CCA attributed adult value judgments to the appellant, in essence denying him the benefit of the presumption.

(c) The CCA failed to properly distinguish between knowledge that the conduct was "seriously wrong" and a belief that it was a breach of some rule or merely naughty

46. Davies J set out with approval (at [34]) a passage from the reasons of Hodgson JA in *BP* (at [28]), including the following: "The child must know that the act is seriously wrong as a matter of morality, or according to the ordinary principles of reasonable persons, not that it is a crime or contrary to law: *Stapleton v. The Queen* (1952) 86 CLR 358, *The Queen v. M.*" Some further examination of this principle, in the context of the evidence led in this case, is required.

47. A child may have a perception of "wrongness" that has no relationship to the categories of rules, laws and prohibitions which actually govern adult society. For example, many children would be aware that they ought not smoke cigarettes. Some children might think that if caught smoking, dire consequences will follow, and the act is, in the eyes of the child, "seriously wrong". The act, however, does not rise above naughtiness.

48. By comparison, transgressions of consent and interpersonal violence may not even be perceived as contrary to rules of conduct for children. As discussed above, children's play will involve fighting, rumbles, unprovoked attacks and deliberate infliction of pain. It follows that something more than the child's view of relative seriousness is required.

49. There must be an understanding of wrongness which comprehends the moral quality or the basis of the offence with which they have been charged in order to hold the child criminally responsible for that offence. The reasoning in *Stapleton* in respect of *M'Naghten* is again apposite (at 367):

> A case of this description must turn very largely upon the jury's appreciation of what amounts to knowledge of the nature and quality of the act and of its wrongness. For it is evident that a jury although satisfied that no capacity existed in a particular accused to reason at all may think that at the back of it all was an awareness of the nature of the act and of the fact that other people might regard it as wrong more especially if that means regarded by the law as wrong. That would not lead to a conviction if the jury understands that, given a disease disorder or defect of reason, then it is enough if it so governed the faculties at the time of the commission of the act that the accused was incapable of reasoning with some moderate degree of calmness as to the wrongness of the act or of comprehending the nature or significance of the act of killing.

50. The Court then referred to the direction given by Dixon J in *R v Porter* (1933) 55 CLR 182 at 189-190:

> The question is whether he was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong? If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong.

51. In the present matter reliance was placed on evidence of the appellant's desire to avoid detection. When regard is had to the various rules to which a child is subject it follows that, as Lord Lowry observed, evidence of things done to avoid detection will usually be equivocal: *C v The DPP* at 39A. A desire to avoid detection does not establish that the appellant could "think rationally of the reasons which to ordinary people make that act right or wrong". However, rather than putting this matter to one side, Davies J acknowledged that it was equivocal but held that "[i]t is clear that all of the matters identified by the Trial Judge must be viewed together and not individually" (at [63]) and "[t]he matters must be viewed as a whole": at [65]. It follows that his Honour gave weight to this factor. In so doing it is respectfully submitted his Honour erred. This aspect of the conduct was not capable of distinguishing between knowledge on the part of the appellant that his conduct was subject to some form of prohibition and knowledge it was seriously wrong.

(d) The CCA failed to approach the presumption as a matter for the Crown to disprove beyond reasonable doubt by clear and complete evidence

52. In the present case, the majority, per Davies J, said (CCA [53]):

> A determination of whether a child aged between 10 and 14 years is *doli incapax* is a question of fact for a jury. It must also be acknowledged that determination of the issue is largely one of impression. Logic and reasoning take the matter only so far. There is no bright line between a realisation that an act or particular behaviour is simply naughty or mischievous and a realisation that it is seriously wrong.

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53. Proof beyond all reasonable doubt cannot be a matter of impression. As Hamill J noted, the chasm between "naughty" and "seriously wrong" is vast. It is true that, in the present case, logic and reasoning could take the matter only so far. That was a result of the absence of evidence from which the necessary inference could be drawn. That is, logic and reasoning cannot fill a gap created by the absence of clear evidence. Once the court (or jury) has reached the point of reasoning to guilty on the basis of general impression, the presumption has ceased to operate as it should.

54. What was required was regard to the evidence (or lack of it) of the capacity of the
20 appellant and to determine whether that evidence sustained a finding beyond reasonable doubt that the presumption was rebutted. It was essential to focus on the appellant's capacity and not that of a hypothetical 11 or 12 year old. In this regard, it has been recognised that in jurisdictions where the protection of the absolute presumption is not available to children over 10 years, the rebuttable presumption at least allows for the "vast differences" in the development of the capacities necessary for criminal responsibilities between individuals of the same biological age to be taken into account and, in theory, for children under 14 lacking adult capacity to be protected.[13] As discussed above, the ability of children, even at the upper end of the presumption age range, to understand the "serious wrongness" of an act (or omission),
30 cannot be presumed, and, if anything, from a modern neurological perspective, remains presumptively in doubt throughout adolescence.

55. For these reasons, the evidence necessary to discharge the burden must be (per Lord Lowry in *C v DPP* at [64], cited by Hamill J at CCA [128]):

> as in Blackstone, "strong and clear beyond all doubt or contradiction", or, *Rex v Gorrie* "very clear and complete evidence" or, in *B v R* (1958) 44 Cr App R 1, 3 per Lord Parker CJ "It has often been put in this way, that 'guilty knowledge must be proved in the evidence to that effect must be clear and beyond all possibility of doubt'".

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56. Indeed, as early as 1736 it was said that "very strong and pregnant evidence ought to be to convict one of that age, and to make it appear he understood what he did".[14]

57. In *C v DPP* Lord Lowry commented that, apart from evidence of what the child has said or done (in addition to the alleged act), the prosecution must rely on interviewing the child or having him or her psychiatrically examined, or on evidence from someone

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[13] Thomas Crofts, 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility' (2015) 27 *Current Issues in Criminal Justice* 123, 126.

[14] Mathew Hale, *History of the Pleas of the Crown* (Vol 1, 1736) 27, cited in Thomas Crofts, 'Doli Incapax: Why children deserve its protection' (2003) 10(3) *Murdoch University Electronic Journal of Law*, [6].

such as a teacher: at [70]. To this might be added a requirement that the evidence address the moral maturity (which Lord Lowry distinguished from mental development: at [70]) of the child at the time of the offending.

58. In the present case, apart from evidence of the acts said to constitute the offences themselves that was given by the complainant some eight years after the events, the Crown had only reports from experts addressed to the appellant's capacity at ages 17 and 18, in relation to different issues, themselves made some five to six years after the offending conduct. The Court had no evidence directed to the appellant's intellectual or moral development at ages 11-12. Even without regard to the errors in reasoning and fact finding set out elsewhere in these submissions, the appellant submits that the CCA fundamentally misconceived the nature of the presumption and the quality of evidence necessary to rebut it beyond a reasonable doubt.

59. Various aspects of the Crown's evidence also gave rise to a reasonable hypothesis consistent with innocence; namely, that the appellant may have thought the actions were not seriously wrong because he had been himself subjected to sexual abuse or else had been inappropriately exposed to pornography. The CCA erroneously constrained itself from taking this evidence into account in a number of ways. The appellant's use of the condom is one such matter. The CCA's failure to have regard to the use of the condom is dealt with separately, below. Other aspects of the evidence of capacity specific to the appellant include the report of the psychologist, Mr Champion. In relation to the evidence contained in that report, Davies J said (CCA [67]):

> Reliance on the report of Mr Champion has a number of difficulties. His examination of the Applicant was conducted in January 2012 which was more than six years after the events complained of. It is not easy to determine, for example, what violence the Applicant was exposed to nor how it had affected him at the relevant time. Certainly a reading of paragraph 29 of Mr Champion's report leads to the strong inference that the violence was not directed towards the Applicant. Moreover, Mr Champion speaks of "possible molestation" without the Applicant having suggested it or made complaint about it, and despite there being no other evidence of it. Contrary to the Applicant's submission it cannot be concluded on the evidence that he was highly sexualised.

60. The report of Mr Champion raised the possibility that the appellant may have been experiencing PTSD type issues which may have flowed from "past adverse events such as possible molestation or exposure to violence in earlier years" (Ex D [21] and [23]); stated that the appellant "does not have the level of understanding of the proceedings that a person of his age with average intelligence would have"; and noted his disadvantage "by reason of his intellectual limitations": Ex [31]. At the time of the report the appellant fell within the "borderline disabled range" (albeit towards the top of that range), meaning his IQ was 79 or less. The Job Capacity Assessment Report (Ex E), conducted two years earlier, was also tendered in the Crown case and also cast doubt on the appellant's capacity. The evidence suggestive of molestation, considered together with the act itself and use of the condom, also gave rise to a strong inference that the appellant had himself been inappropriately sexualised.

61. That the appellant was instigating acts of anal sex at 11 years of age also tended to contradict Davies J's assertion that there was "no other evidence" supportive of the possibility the appellant had been molested. More importantly, however, the onus was on the Crown to displace the presumption the appellant was *doli incapax*. It was

enough that the evidence raised the possibility that the appellant was *doli incapax*. Whether or not the acts and use of the condom, with or without the psychologist's report, proved that the appellant had been molested or highly sexualised is besides the point. A rational explanation for the appellant's behaviours consistent with his incapacity was clearly raised by the evidence and the Crown did not disprove this as a reasonable possibility.

62. Put another way, the act of forced penile-anal intercourse (together with the use of the condom) seems to raise one of two possibilities: either the appellant, independently of any interference from an adult or access to inappropriate materials, worked out for himself that it felt good to use a condom to insert his penis into his brothers anus, or he himself had experienced this behaviour or was otherwise copying behaviour he had (necessarily inappropriately) witnessed. The former may be quite unlikely, but if true, necessarily means that the act was accompanied with no moral implications as he was acting out an impulse uninformed by external influence. The latter, which common sense must suggest is more likely, indicates that any moral lessons that might be speculated to have accompanied his previous exposure to sexual acts are likely to have been severely corrupted.

63. It should also be noted that the CCA did not refer to the substance of the Job Assessment Capacity Report which indicated that, at least by the age of 17, he had a verified permanent intellectual disability, adaptive behavioral problems, impaired memory, problem solving, decision making ability and comprehension, and was unable to live independently. It is submitted the CCA erred by placing an undue burden on the appellant.

(e) The CCA failed to properly apply the test in M v The Queen

64. As noted above, before the CCA the appellant relied on the fact that, in relation to count 2, a condom had been used. The act of anal intercourse and use of the condom by an 11 year old are themselves difficult to comprehend had the appellant not at least witnessed penetrative genital sex and condom use. The CCA, erroneously it is submitted, held that it could not consider the appellant's argument that the condom use suggested inappropriate sexualisation because (CCA [68]):

> The proper approach to the task of assessing whether the finding was unreasonable is likely to mean that evidence expressly disregarded by the Trial Judge should similarly be ignored by this Court. That evidence concerns the Applicant's use of the condom. A jury would have been told to ignore that evidence. The Judge has expressly done so.

65. The CCA considered that it was prohibited from "substituting its own view for that of the Trial Judge": CCA [69]. There is, it is submitted, no principle of law that in reviewing all of the evidence in order to determine an unreasonable verdict ground, the CCA is bound by the trial judge's approach to the evidence. To the contrary, the CCA is required to conduct its own review of the evidence: *M v The Queen*, *Weiss v The Queen* (2005) 224 CLR 300 (***Weiss***) at [41]-[43] and *Filippou v The Queen* (2015) 89 ALJR 776 (***Filippou***) at [82]. In doing so it was not bound by the position taken at trial: *SKA v The Queen* (2011) 243 CLR 400 (***SKA***) at [22]. Whether or not it would be appropriate for the CCA to take into account incriminating evidence that the trial judge had expressly excluded, in this case it was the appellant seeking to rely on evidence tendered in the case against him. That the trial judge had declined to accept an

inference suggested by the Crown in respect of the same evidence in no way prevented the CCA from accepting (let alone even considering the evidence giving rise to) the inference drawn by the appellant. The appellant's position at trial did not bind the CCA and there is no suggestion that the CCA declined to have regard to it by reasons analogous to r 4 of the *Criminal Appeal Rules*. Indeed, leave under r 4 was expressly granted in respect of ground 2, and not raised in respect of ground 1. The use of the condom was part of the evidence at trial. The CCA was bound to assess the evidence, including the evidence of the condom, for itself.

66. Davies J's approach to the use of the condom, it is submitted, is an aspect of what appears to be a broader error in approach. His Honour regarded the question of how the CCA should determine the question of unreasonable verdict as raising "a significant matter for consideration", a matter highlighted by the combination of the fact that it was a judge alone trial and that no oral evidence was led: CCA [39]. His Honour referred, appropriately, to the decisions of this Court in *Filippou*, *SKA* and *M v The Queen*. In particular his Honour set out (at [45]) paragraphs [11] and [12] of *Filippou* which include reference to the test in *M v The Queen*, to the effect that in "most cases a doubt experienced by an appellate court will be a doubt which the judge ought to have experienced", subject to the qualification that such a doubt may be resolved as a result of the trial judge's advantage in seeing and hearing the evidence. However, despite having referred to the fact that there was no oral evidence, at no stage did his Honour acknowledge that this was a case in which the trial judge held no relevant advantage over the CCA.

67. Further, despite referring to the above authorities, his Honour rejected the appellant's submission that the CCA "could move beyond its function as a court of error": CCA [46], apparently intending to indicate a narrow approach to determination of the unreasonable verdict ground. The submission was rejected by reference to the reasons of the plurality in *Filippou* at [44]-[48]. Those passages in *Filippou*, however, are concerned with the second limb of s 6(1) of the *Criminal Appeal Act 1912* (NSW): "that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law". That a court of criminal appeal may be concerned with error with respect to the second limb of s 6(1) does not restrict its function with respect to the first limb (unreasonable verdict).

68. His Honour went on to refer to *Libke v The Queen* (2007) 230 CLR 559 (***Libke***) and in particular Hayne J's statement (at [113]) that the question is "whether it was open to the jury to be satisfied beyond reasonable doubt, which is to say whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt". While the formulation of whether it was "open" to convict reflects the ultimate test in *M v The Queen* (and indeed the footnote to Hayne J's statement references *M v The Queen*), that test does not inevitably carry the same meaning unless it is applied in the manner more fully described in *M v The Queen* . As Brennan J noted in *M v The Queen*, the phrase "open to the jury upon the whole of the evidence to be satisfied beyond reasonable doubt", "conceals an underlying controversy as to when it is 'open to the jury' to be so satisfied": at 501. In similar vein McHugh J said in *M v The Queen* (at 525), "To ask whether it was open to the jury to be satisfied of the accused's guilt beyond reasonable doubt is to come perilously close to applying the test for determining whether there was a sufficiency of evidence to convict the accused." While Brennan and McHugh JJ were in the minority in *M v The Queen*, the observations referred to above are not affected.

69. Immediately after setting out the above quote from *Libke*, Davies J said (apparently equating the statements, CCA [48]), "or as the joint judgment said in *Filippou* at [56]: [T]he question for the Court of Criminal Appeal was not whether it was "satisfied that the judge's account was correct" but whether her Honour's findings as to the sequence of events were not reasonably open."

70. This passage in *Filippou* was, again, however, concerned with the second limb of s 6(1). The application of a "not reasonably open" test is not consistent with the proper application of *M v The Queen*. His Honour's departure from the test is also suggested by the statement at [54]:

> Despite the submission made by the Applicant based on *Weiss* [to the effect that Court was not concerned with error] the parties accepted that the issue for this Court is not what finding it would make on the evidence led but on whether the Trial Judge's finding was open to him beyond reasonable doubt on the evidence. Put another way, the question for this Court is whether the Trial Judge must have had a doubt that the Crown had rebutted the presumption that the Applicant was *doli incapax*, because that was the only matter for his determination.

71. His Honour's concern to distinguish between the finding the CCA would make and "whether the Trial Judge's finding was open to him beyond reasonable doubt on the evidence" is to be contrasted with the observations of Barwick CJ in *Ratten v The Queen* (1974) 131 CLR 510.[15] Indeed, in the present case, there was no relevant distinction given that, as noted above, this was not a case in which the trial judge held any relevant advantage. It appears that, despite earlier references to *M v The Queen*, *SKA* and *Filippou*, and the subsequent reference to *Weiss*, his Honour took an unduly narrow approach to the task of determining whether the verdict at first instance was unreasonable.

(f) The CCA otherwise erred in its approach to reasoning to guilt in relation to count 3

72. In relation to count 3, it should also be noted that many of the features relied upon to support a finding of guilt with respect to count 2 (identified at [41]), were absent. Indeed, Davies J expressly held (at [78]):

> Although surrounding circumstances such as the Complainant crying or being forcibly thrown down, or having his mouth covered by the [appellant's] hand all contributed to the conclusion that the presumption was rebutted [on count 2], the absence of those circumstances in relation to count 3 does not have the effect that the [appellant] does not know that the act charged in count 3 was not seriously wrong. Although it is the Applicant's state of mind which must be examined it could not rationally be inferred that because the act was carried out less forcefully or with less resistance from the Complainant the Applicant could have believed that it was not seriously wrong in light of what he had done in relation to count 2. The surrounding circumstances in relation to count 2 demonstrated that the Applicant knew that the act charged was seriously wrong. When he committed the same act in relation to count 3 the absence of a number of accompanying circumstances does not detract from his knowledge that the act itself was seriously wrong.

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[15] Barwick CJ's observation that "it is the doubt in the court's mind upon its review an assessment of the evidence which is the operative consideration" (at 516) is discussed by the majority in *M v The Queen* at 494, in the context of the oft quoted observation that "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced".

73. Davies J, in commencing with the proposition that "the absence of [circumstances relied on in relation to count 2] does not have the effect that the [appellant] does not know that the act charged in count 3 was not seriously wrong", appears to have reversed the onus of proof. A further reversal of onus is evident in the proposition that "it could not be rationally inferred that because the act was carried out less forcefully or with less resistance from the Complainant the [appellant] could have believed that it was not seriously wrong". It was not necessary to establish that the appellant possessed any positive belief the act was not seriously wrong.

74. Quite apart from the above, it is respectfully submitted that it was not possible to reason from guilt on count 2 to guilt on count 3 in the manner his Honour did. The reasoning involves a number of implicit steps. First, it is reasoned that the circumstances surrounding the act the subject of count 2 demonstrated that the appellant knew that what he was doing was seriously wrong. Second, that these surrounding circumstances also meant that he knew that the sexual act he was charged with (as opposed to the whole of the conduct, or even merely the surrounding conduct) was seriously wrong. Third, that the appellant then understood or, as a consequence of the circumstances surrounding count 2, learned that, in all circumstances, anal intercourse with his brother would be seriously wrong. Fourth, that he therefore understood that, at the time of the count 3 offence, it was seriously wrong to have anal intercourse with his brother, despite the absence of many of the factors that were said to give rise to this knowledge in respect of count 2. The first and second steps reinforce the difficulty with failing to assess capacity by reference to the charged offence (as opposed to the conduct more generally). The second and third steps reveal the significant assumption, contrary to the presumption, that the appellant inferred (and had the capacity to infer) something about the inherent moral quality of the charged act abstracted from the surrounding circumstances. The final step is that the appellant was able to rely on his understanding of the quality of the abstract act such that he was aware, at the time of count 3, that his conduct was seriously wrong.

75. It is respectfully submitted that Hamill J was correct in stating that "the conclusion reached on count 2 could not as a matter of law, logic, or fact dictate the conclusion to be reached on count 3": CCA [149].

(g) The CCA reasoned in a manner which unduly elevated equivocal evidence

76. With respect to the combination of factors relied on to rebut the presumption (referred to at [41] above), the majority, it is submitted, erroneously applied this Court's reasoning in *Shepherd v The Queen* (1990) 170 CLR 573 at 580 and *R v Hillier* (2007) 228 CLR 618 at [48]: CCA [63]-[64]. Reasoning on the basis the cumulative effect of circumstantial evidence was inapposite. This was not, for example, an identification case in which the equivocal evidence that an accused's mobile phone transmitted to a particular aerial, together with equivocal evidence that a car matching the description of the accused's was sighted in the relevant area, together with the equivocal evidence that the accused missed an appointment at the relevant time, gives rise to a strong, less equivocal inference that the accused was an identified perpetrator. In such a case the independence of the individual facts is such that the improbability of their combination allows for the drawing of the particular inference. The facts relied on in the present case were not independent. Each was equivocal for the same reason – it did not distinguish the conduct of the appellant and complainant from ordinary (if naughty) roughhousing. Put another way, there is no great coincidence in the combination of

factors. Rather the presence of each of the factors can be explained by the same possibility – a lack of capacity to understand the conduct was seriously wrong.

77. Where "all matters... viewed together" are explained by the same reasonable alternative hypothesis, their cumulative effect does not elevate them beyond the reasonable doubt of that hypothesis.

Conclusion in respect of Appeal Ground 1

78. For the reasons discussed above it is respectfully submitted the CCA erred in failing to find that the verdicts with respect to counts 2 and 3 were unreasonable on the basis that the evidence led at trial did not establish to the criminal standard that the presumption of *doli incapax* had been rebutted.

Ground 2: Section 6(1) of the *Criminal Appeal Act 1912 (NSW)*

79. The correct approach to an appeal from a trial by judge alone was most recently set out in *Filippou* (at [4]):

> [T]he Court of Criminal Appeal is required to deal with an appeal from judge alone in three stages. The first is to determine whether the judge has erred in fact or law. If there is such an error, the second stage is to decide whether the error, either alone or in conjunction with any other error or circumstance, is productive of a miscarriage of justice. If so, the third stage is to ascertain whether, notwithstanding that the error is productive of a miscarriage of justice, the Crown has established that the error was not productive of a substantial miscarriage of justice.

80. In *Filippou* the CCA found error in the trial judge's approach, but dismissed the appeal because, on its own view of the evidence, it considered the appellant was proved guilty beyond reasonable doubt. This Court held that this "did not engage with the requirements of the statutory task": at [48]. The Court also stated that if the Court of Criminal Appeal has concluded "that the appellant has not received a fair trial [by reason of miscarriage of justice] it will follow that it has concluded that there has been a substantial miscarriage of justice": at [15]. The effect of *Filippou* (which was handed down after oral argument in this case) appears to have been misunderstood by the majority in the CCA.

81. The whole of the trial judge's reasoning in respect of counts 3 and 4 is as follows (primary judgment p 11):

> Accordingly, I am satisfied that the presumption in question has been rebutted beyond reasonable doubt by the Crown and I find the accused guilty of count 2. It follows from [the appellant's] concession and as a matter of logic that the accused must also be guilty of counts 3 and 4 and accordingly I find him guilty of such counts.

82. This was the subject of ground 3 of the appeal, in respect of which leave was granted under rule 4 of the Criminal Appeal Rules. The appeal was allowed in respect of count 4 only. The CCA did not consider the proviso on count 4; rather it determined that there had been a miscarriage of justice in respect of count 4 only (CCA [77]) because it had not been open to the judge to find the appellant guilty on count 4 (that is, it applied the higher test under the first limb of s 6(1)): CCA [80]. In respect of count 3, the majority concluded that because the surrounding circumstances of count 2 demonstrated that he knew the act (i.e. anal sex with the complainant) was seriously wrong, "the absence of a number of accompanying circumstances does not detract from

his knowledge that the act itself [being the same physical act as relied on in count 2] was seriously wrong": CCA [78].

83. It is, with respect, not clear precisely what statutory task Davies J was engaged in (at CCA [78]). Assuming his Honour was determining guilt for himself for the purposes of applying the proviso to an error of law or miscarriage of justice (and noting that the contrary is suggested by the language the CCA used in its determination of count 4 on the same ground), this was not a case in which the proviso had any work to do.

10 84. The failure of the trial judge to make an independent determination of guilt in respect of counts 3 and 4 (which was accepted by the CCA) is akin to the error in *AK v State of Western Australia* (2008) 232 CLR 438. There the trial judge failed to comply with the obligation created by s 120 of the *Criminal Procedure Act 2004* (WA) (comparable to s 133 of the *Criminal Procedure Act 1986* (NSW)) to give reasons for his determination of the central issue to be tried: *AK* [59]. In such a case, "it cannot be said there was no substantial miscarriage of justice: *AK* per Gummow and Hayne JJ at [59]; and see per Heydon J at [110]; *Fleming v R* (1998) 197 CLR 250 at [39] and *Filippou* at [15].

20 85. The failure to make an independent assessment of guilt on counts 3 and 4 was such that the appellant did not have a fair trial, and therefore the proviso did not arise. The appeal should have been allowed. Alternatively, the CCA engaged in a primary determination of whether the appellant had been proved guilty beyond reasonable doubt, thereby not "engag[ing] with the statutory task": *Filippou* at [48].

Part VII: Applicable provisions, statutes and regulations (See Annexure A)

Part VIII:

1. The appeal is allowed.
30 2. The orders of the Court of Criminal Appeal are set aside.
3. The appellant's convictions are quashed.
4. A verdict of acquittal in respect of all counts is entered.

Part IX: The appellant estimates the hearing will take one half day.

Dated 18 August 2016

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Hament Dhanji
Forbes Chambers
Ph: (02) 9390 7777, Fax (02) 8988 8568
rcoleiro@forbeschambers.com.au

Julia Roy
Sixth Floor Selborne Chambers
Ph: 02 8915 2672, Fax (02) 9232 1069
jroy@sixthfloor.com.au

ANNEXURE A

Crimes Act 1900 (NSW) s 66A

At the relevant time (between 11 October 2004 and 30 June 2005)

66A Sexual intercourse—child under 10

Any person who has sexual intercourse with another person who is under the age of 10 years shall be liable to imprisonment for 25 years.

As amended by *Crimes Amendment (Sexual Offences) Act 2008* (NSW), Sch 1 [9] (1 January 2009)

66A Sexual intercourse—child under 10

(1) **Child under 10**
Any person who has sexual intercourse with another person who is under the age of 10 years is guilty of an offence.
Maximum penalty: imprisonment for 25 years.

(2) **Child under 10—aggravated offence**
Any person who has sexual intercourse with another person who is under the age of 10 years in circumstances of aggravation is guilty of an offence.
Maximum penalty: imprisonment for life.

(3) In this section, ***circumstances of aggravation*** means circumstances in which:

(a) at the time of, or immediately before or after, the commission of the offence, the alleged offender intentionally or recklessly inflicts actual bodily harm on the alleged victim or any other person who is present or nearby, or
(b) at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument, or
(c) the alleged offender is in the company of another person or persons, or
(d) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender, or
(e) the alleged victim has a serious physical disability, or
(f) the alleged victim has a cognitive impairment, or
(g) the alleged offender took advantage of the alleged victim being under the influence of alcohol or a drug in order to commit the offence, or
(h) the alleged offender deprives the alleged victim of his or her liberty for a period before or after the commission of the offence.

(4) A person sentenced to imprisonment for life for an offence under subsection (2) is to serve that sentence for the term of the person's natural life.

(5) Nothing in this section affects the operation of section 21 of the *Crimes (Sentencing Procedure) Act 1999* (which authorises the passing of a lesser sentence than imprisonment for life).

(6) Nothing in this section affects the prerogative of mercy.

(7) If on the trial of a person charged with another offence against this Act the person is instead found guilty of an offence against this section (as provided by section 61Q), the maximum penalty that may be imposed on the person for the offence against this section is the penalty for the offence charged.

As amended by *Criminal Legislation Amendment Act 2009* (NSW), Sch 1.3 [1] (19 May 2009)

66A Sexual intercourse—child under 10

(1) Child under 10
Any person who has sexual intercourse with another person who is under the age of 10 years is guilty of an offence.
Maximum penalty: imprisonment for 25 years.

(2) Child under 10—aggravated offence
Any person who has sexual intercourse with another person who is under the age of 10 years in circumstances of aggravation is guilty of an offence.
Maximum penalty: imprisonment for life.

(3) In this section, circumstances of aggravation means circumstances in which:

(a) at the time of, or immediately before or after, the commission of the offence, the alleged offender intentionally or recklessly inflicts actual bodily harm on the alleged victim or any other person who is present or nearby, or
(b) at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument, or
(c) the alleged offender is in the company of another person or persons, or
(d) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender, or
(e) the alleged victim has a serious physical disability, or
(f) the alleged victim has a cognitive impairment, or
(g) the alleged offender took advantage of the alleged victim being under the influence of alcohol or a drug in order to commit the offence, or
(h) the alleged offender deprives the alleged victim of his or her liberty for a period before or after the commission of the offence, or
(i) the alleged offender breaks and enters into any dwelling-house or other building with the intention of committing the offence or any other serious indictable offence.

(4) A person sentenced to imprisonment for life for an offence under subsection (2) is to serve that sentence for the term of the person's natural life.

(5) Nothing in this section affects the operation of section 21 of the *Crimes (Sentencing Procedure) Act 1999* (which authorises the passing of a lesser sentence than imprisonment for life).

(6) Nothing in this section affects the prerogative of mercy.

(7) If on the trial of a person charged with another offence against this Act the person is instead found guilty of an offence against this section (as provided by section 61Q), the maximum penalty that may be imposed on the person for the offence against this section is the penalty for the offence charged.

As amended by *Crimes Legislation Amendment (Child Sex Offences) Act 2015* (NSW) Sch 1 [1] (29 June 2015 - current)

66A Sexual intercourse—child under 10

(1) Any person who has sexual intercourse with a child who is under the age of 10 years is guilty of an offence.
Maximum penalty: imprisonment for life.

(2) A person sentenced to imprisonment for life for an offence under this section is to serve that sentence for the term of the person's natural life.

(3) Nothing in this section affects the operation of section 21 of the *Crimes (Sentencing Procedure) Act 1999* (which authorises the passing of a lesser sentence than imprisonment for life).

(4) Nothing in this section affects the prerogative of mercy.

***Criminal Appeal Act 1912* (NSW) s 6**
(At all relevant times – current)

6 Determination of appeals in ordinary cases

(1) The court on any appeal under section 5 (1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of 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.

(2) Subject to the special provisions of this Act, the court shall, if it allows an appeal under section 5 (1) against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal under section 5 (1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.