CITATION:	*KG v Firth* [2019] NTCA 5
PARTIES:	KG v FIRTH, Justin Antony
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	AP 4 of 2018 (21711417)
DELIVERED:	18 June 2019
HEARING DATE:	9 April 2019
JUDGMENT OF:	Grant CJ, Blokland J and Mildren AJ

CATCHWORDS:

CRIMINAL LAW – CRIMINAL LIABILITY AND CAPACITY – *DOLI INCAPAX*

Appeal from decision of the Supreme Court quashing acquittal entered on basis prosecution had failed to establish 13 year old appellant knew his conduct was morally wrong – prosecution bore burden of proving appellant knew that his conduct was "wrong" – that question was one of fact – required proof child knew conduct was "seriously wrong" or "gravely wrong" – presumption cannot be rebutted merely as inference from the doing of serious act – questions put by defence counsel could not be taken to amount to the appellant's instructions or form basis for inference that appellant that conduct was seriously wrong in the moral sense – not incumbent on the trial judge to accept expert's opinion on ultimate issue – trial judge's finding of reasonable doubt that appellant knew his conduct was seriously wrong in the moral sense not so unreasonable as to make the conclusion irrational and arbitrary – appeal allowed.

Criminal Code 1983 (NT) s 43AQ, s 43C, s 192
Local Court (Criminal Procedure) Act 1928 (NT) s 163
Youth Justice Act 2005 (NT) s 144

Balchin v Anthony (2008) 22 NTLR 52, *Berlyn v Brouskos* (2002) 134 A Crim R 111, *Harvey v Bofilios* [2017] NTSC 68, *Peach v Bird* (2006) 159 A Crim R 416, *Police v Eiffe* [2007] SASC 178, *R v Lander* (1989) 52 SASR 424, *R v MAP* [2006] QCA 220, *R v Robinson* [1977] Qd R 387, *Rigby v Taing* (2015) 249 A Crim R 320, *RP v The Queen* (2016) 259 CLR 641, *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32, *Wilson v Lowery* (1993) 4 NTLR 79, referred to.

REPRESENTATION:

Counsel:

Appellant:	P Boulten SC with M Aust
Respondent:	M Nathan SC

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	22

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

KG v Firth [2019] NTCA 5
No. AP 4 of 2018 (21711417)

BETWEEN:

KG
Appellant

AND:

JUSTIN ANTONY FIRTH
Respondent

CORAM: GRANT CJ, BLOKLAND J and MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 18 June 2019)

THE COURT:

[1] This appeal is from the decision of the Supreme Court delivered on 28 September 2018[1] allowing a prosecution appeal from the decision of the Youth Justice Court delivered on 29 November 2017. The Youth Justice Court had dismissed a charge of performing an act of gross indecency on another person contrary to s 192(4) of the *Criminal Code 1983* (NT) and acquitted the appellant. The basis for that finding was that the prosecution had failed to establish that the appellant knew his conduct was morally wrong.

1 *Firth v KG* [2018] NTSC 68.

The circumstances of the alleged offending and offender

[2] The appellant was 13 years of age at the time of the alleged offending. It was common ground that the appellant suffered from a significant intellectual disability and severe functional impairments secondary to Foetal Alcohol Spectrum Disorder. He had also been raised in dysfunctional and transient home environments and suffered early childhood trauma, including exposure to domestic and sexual violence.

[3] The circumstances of the alleged offending were summarised by the intermediate court as follows:[2]

> The complainant met the respondent and his co-accused in the early hours of the morning on 2 March 2017. They met near the Nightcliff Service Station. The complainant was staying at Papaya House, which is supported accommodation, and she had difficulty sleeping. She went to the service station to purchase an iced coffee. After she purchased the iced coffee she sat on a concrete slab nearby. Soon after the complainant sat down the respondent and another boy arrived in a taxi with their two female cousins, who were considerably older than the two boys. The two boys approached the complainant and asked her for a cigarette. She gave them a cigarette each and they started roaming around the service station. They came back and asked her for another cigarette. The complainant gave them another cigarette and the two ladies came out of the service station. She asked the boys who they were. The boys said they were their cousins. The two ladies then went and sat on the concrete near the road. The boys went over and spoke to them for a bit before returning and asking if their cousins could also have a cigarette. So the complainant then went over to their cousins and sat down with them and gave them a cigarette. They were sitting down eating food and drinking a soft drink. They had a laugh and talk for about an hour or so. They then all went for a walk and spent some time at other nearby locations. When they were on the other side of the road in front of the Nightcliff shops the respondent asked the complainant if he could use her phone so he could listen to music on YouTube.

2 *Firth v KG* [2018] NTSC 68 at [22]-[24].

During the time they were together they spoke about a number of different topics. For some time things were very convivial. The complainant was sitting next to one of the ladies, VG. The two boys were mainly talking to their cousins. The boys told her they were between 15 and 17 years of age. VG had a conversation with the complainant and told her that the respondent liked her. She was told that the boys wanted to meet her at Casuarina the next day. The complainant laughed in response. She noticed that the boys were trying to impress her. The complainant was also told that the other boy was jealous of the respondent. The complainant did not say anything in reply. She understood that both the boys liked her. They were interested in her. They were telling stories to try and impress her. The boys spoke to her about the kind of music she liked and asked her if she liked the song they were playing. Up to this point in time, and indeed at no stage during the time she spent with the two boys, did the complainant indicate or suggest that she was interested in them and giving them cigarettes and lending them her telephone could not be so construed.

At some point in time, the behaviour of the two boys made her feel uncomfortable. The other boy continued to stare at her and the boys would laugh and stare at her. It made her feel uncomfortable and she said that she needed to go home. However, they all said no, and asked her sit with them until 6 am. So she just sat with them. She knew they were talking about her in their language.

The respondent then got up and walked away with the complainant's phone. She told him that she needed her phone but he continued to walk away. The other boy got up and started following him. The complainant then got up and started following the boys in order to get her phone back. She kept following them and they led her to a secluded alley way. About 10 steps into the alley way the respondent turned around as if to return her phone. The complainant lent out and took her phone and the respondent pushed her left hand and swung her around so that her back was against him. The respondent was facing forward and the complainant's back was against him. The respondent grabbed her hands and placed them on her stomach. He held them there. The other boy was watching what was going on. They were both yelling out in their language. The other boy grabbed her ankles and lifted her up while the respondent held her arms and they dropped her to the ground on her back. They were pretty much doing the same moves as had happened to the complainant before. The respondent was holding her hands on the ground and the other boy had her ankles. She felt her pants being removed. One of the boys got her shirt half off. They were touching her breasts and her legs. The respondent was licking her breasts and kissing them. He

> was licking the nipples of her breasts. Her pants were off and her bra was lifted up. They tried to get her shirt off but they could not because she was resisting. They tried to get her boxers off and that is when she pushed herself up. After she pushed herself up, the respondent grabbed the back of her head and turned it around and started forcing her to kiss him. He pushed her head into his head and he was trying to kiss her but she did not allow him to kiss her. She was locking her lips. She could feel his lips and his chest. He had one of his legs to her side. He was pushing himself on her and then she felt his hand go down to her vagina. His hand went underneath her boxers and her underpants and the respondent was rubbing her vagina for a bit. That is when she crossed her legs and he removed his hand. She managed to get both her hands free and push the respondent in the middle of his chest. He stumbled backwards and that's when she turned around, grabbed her shorts and ran. The complainant was then able to make her escape. She saw the two boys walk back and join the two ladies. The complainant first ran into the bush where she put her clothes back on. She then went to Planet Tenpin where she called 000. The police arrived at the bowling centre soon after.

[4] Both parties to this appeal accept that as an accurate and adequate statement of the circumstances of the alleged offending.

The proceedings at first instance

[5] The matter proceeded to trial in the Youth Justice Court on 9 and 10 October 2017. The Court reserved its decision, and on 29 November 2017 acquitted the appellant despite being satisfied that the prosecution had proven all of the elements of the offence created by s 192(4) of the *Criminal Code*. The basis for the acquittal was that the prosecution had failed to prove beyond reasonable doubt that the appellant knew his conduct was wrong, and had therefore failed to rebut what was said to be the presumption created by s 43AQ of the *Criminal Code* that he lacked criminal capacity.

[6] That section provides:

> **43AQ CHILDREN OVER 10 BUT UNDER 14**
>
> (1) A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.
>
> (2) The question whether a child knows that his or her conduct is wrong is one of fact.
>
> (3) The burden of proving that a child knows that his or her conduct is wrong is on the prosecution.

[7] In drawing that conclusion the trial judge considered the circumstances of the alleged offending, the appellant's personal circumstances so far as they were apparent from the evidence, and the evidence of a child psychologist specialising in juvenile sexual dysfunction. The psychologist expressed the view that although the appellant had cognitive impairment and had been raised in an environment of dysregulated behaviours, he knew his conduct was morally wrong at the time.

[8] The trial judge found the psychologist's opinion to be based on five matters. First, the nature of the appellant's cognitive impairment was not such as to bear on his ability to tell right from wrong. Secondly, the appellant had previously been subject to sanction for sexual offending. Thirdly, the appellant could articulate concepts such as appropriate touching and the requirement for consent in a sexual context. Fourthly, the appellant had denied engaging in any sexual conduct towards the complainant, which the psychologist saw as

demonstrating his understanding of the wrongfulness of that conduct. Finally, in order to achieve his purpose the appellant had engaged in what the psychologist described as "contextual manipulation" by taking the complainant's telephone into the lane in order to lure her there. For various reasons, the trial judge discounted those matters as being determinative of the ultimate question whether the appellant knew his conduct was wrong at the time.

[9] Although the trial judge had expressed the preliminary view that the nature of the appellant's conduct on the night in question might of itself be sufficient to prove that the appellant knew it was wrong, at the conclusion of the evidence the following finding was made:

> Given the totality of the evidence, or perhaps more properly the limited evidence that I have in relation to this child, [the appellant's] education and upbringing and the manner in which he might have been made to understand appropriate relationship and sexual conduct, I cannot say that I have been satisfied beyond a reasonable doubt that the Crown has discharged the onus set out for it in section 43AQ of the *Criminal Code*.
>
> In that circumstance and for that reason I dismiss the charge.

[10] The prosecution brought an appeal from that decision to the Supreme Court on the ground that the Youth Justice Court had erred in finding that the respondent did not know his conduct was wrong. As the intermediate court observed, that ground did not accurately state the ultimate finding of the trial judge. The finding was in fact that the prosecution had failed to rebut the presumption of *doli incapax*.

The decision at intermediate level

[11] After stating the principles which governed the prosecution appeal and the assessment of the appellant's capacity, the intermediate court turned to consider the reasons of the trial judge and made criticisms of some of that reasoning.

[12] First, difficulties were identified with the trial judge's finding that the circumstances "would certainly constitute recklessness as to the lack of consent".[3] For the reasons identified by the intermediate court, the only inference reasonably open was that the appellant knew the complainant was not consenting to the acts.[4] However, it is not altogether clear whether the finding by the trial judge in relation to this element was limited to recklessness, or whether there was a principal finding that the appellant had knowledge the complainant was not consenting. Immediately prior to the reference to recklessness, the trial judge had observed that "it must have been clear to [the appellant] that [the complainant] was not consenting to the involvement of the boys in lifting her and dropping her to the ground". During the course of the trial, the trial judge had observed that "it would be ridiculous to take the view that [the appellant] might have had any misapprehension that … you can behave like that towards a woman and still think she might be consenting".[5] It may be, as counsel for the appellant

3 Appeal Book (**AB**) 176.

4 *Firth v KG* [2018] NTSC 68 at [14].

5 AB 124-125.

submitted, that the trial judge was simply "covering his bases" by making advertence to recklessness. In any event, the trial judge proceeded on the basis that the issue was not whether the appellant believed the complainant was consenting or not, "but whether he knew that his conduct in the circumstances at hand was seriously wrong".[6]

[13] Secondly, the intermediate court found that the trial judge had misapprehended the level of the complainant's resistance. The evidence in that respect was summarised by the intermediate court as follows:[7]

> As to the complainant's level of resistance the following is a fair assessment of the evidence. She was struggling when her arms were pinned in front of her. The complainant was shocked when the two boys grabbed her and lifted her up and dropped her to the ground. She could not move or scream. She was that scared she could not even think of what was happening to her. She knew what was happening but she just thought it was not real. She did not say anything once they got her on the ground. She was just too scared. She thought if she fought back they would fight her and hurt her even more. However, she was trying to get her arms free. They could not remove her shirt completely because she was resisting. She was just trying to get her hands away so she could push up. But they managed to somehow hold her arms down. When they started trying to remove her boxers that is when she pushed herself up. She was fighting off the boy on top of her. She was ultimately able to push herself up. When the respondent turned her head and tried to kiss her she locked her lips. When the respondent started touching her vagina she crossed her legs. After she crossed her legs she got both her hands and pushed the respondent in the middle of his chest and he stumbled backwards.

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6 AB 178.

7 *Firth v KG* [2018] NTSC 68 at [25].

[14] Again, the parties to this appeal accept that as an accurate summary of the evidence at trial. Against that background, the intermediate court was critical of the trial judge's findings that the complainant "gave no positive permission" when she gave no permission at all; that there was no clear evidence of any specific overt act of resistance when the evidence disclosed overt and active resistance; that the complainant's act of pushing the appellant away was the first overt act of resistance when there had been overt acts prior to that time;[8] and that the lengthy interaction prior to the assault was relevant to the appellant's understanding of the wrongfulness of his act when there was nothing in that interaction which could have suggested that the complainant was prepared to make herself sexually available to him.[9] The intermediate court concluded that the trial judge had taken into account irrelevant considerations such as whether there was any obvious refusal on the part of the complainant to the appellant's initial approaches and whether the force applied by the appellant and his accomplice caused any injury.

[15] Thirdly, the intermediate court found the surrounding circumstances to include that the appellant took advantage of an opportunity to sexually assault the complainant in a calculating fashion; that the appellant kept possession of the complainant's phone after she told him she wanted it

8 *Firth v KG* [2018] NTSC 68 at [26].

9 *Firth v KG* [2018] NTSC 68 at [27]-[28].

back and wanted to go home; that the appellant deliberately manipulated the complainant away from the group and into a secluded alleyway where he would not be seen assaulting her; that he overpowered her with the assistance of his accomplice; and that when he returned to the group he told his female cousins only that he had kissed the girl.[10] Having regard to those circumstances, the intermediate court found that the obvious inference was that the appellant knew it was morally wrong.

[16] Fourthly, the intermediate court found that inference received support from "the detailed false instructions the respondent gave his counsel". During the cross-examination of the complainant it was put to her that she and the appellant had left the group and engaged in consensual and mutual kissing and touching at a bus shelter and then in the alleyway. From that, the intermediate court concluded that the only reason the appellant would have given his counsel those false instructions was because he knew what he had done was seriously wrong and that the giving of those instructions could be used to infer consciousness of guilt.[11] Although that matter was not crucial to the intermediate court's determination, we approach that form of reasoning with some circumspection. The appellant did not give evidence in the matter and there was no discrepancy between the case as put by defence counsel

10 *Firth v KG* [2018] NTSC 68 at [29]-[30].

11 *Firth v KG* [2018] NTSC 68 at [31]-[33].

and evidence given by the appellant. As King CJ observed in *R v Lander*:[12]

> Only evidence can amount to corroboration. Statements contained in counsel's questions are not evidence and cannot be converted into evidence by a process of inference. Use may legitimately be made of matters occurring in the course of the trial, including the conduct of the accused's case, in evaluating evidence but inferences drawn from the conduct of the case cannot amount to evidence of facts in issue and cannot therefore amount to corroboration.

[17] For that same reason, the questions put by defence counsel in this matter could not be taken to amount to the appellant's instructions, much less form the basis for an inference that the appellant was aware at the time of the conduct of that it was seriously wrong in the moral sense.

[18] Fifthly, the intermediate court found that the trial judge's reasons for not being satisfied with the psychologist's evidence could not be sustained. That finding was made notwithstanding the intermediate court's recognition that the evidence was at times confusing and that it was "not easy to determine the precise foundation of [the psychologist's] main conclusions about the moral and intellectual development of the [appellant]".[13] In particular, the intermediate court found that although the appellant had been detained for a number of

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12 *R v Lander* (1989) 52 SASR 424 at 426. See also *Police v Eiffe* [2007] SASC 178 at [18]-[20]. Cf *R v Robinson* [1977] Qd R 387 in which the defendant had given evidence inconsistent with the case put by his counsel. The endorsement of that decision in *R v MAP* [2006] QCA 220 at [57] does not lead to any different conclusion.

13 *Firth v KG* [2018] NTSC 68 at [20], [40].

offences at the time he had previously been detained for a sexual offence he must have understood by the time of the conduct here under consideration that there were serious consequences for inappropriate sexual behaviour; that a proper understanding of the psychologist's evidence was that the appellant's cognitive impairments affected his impulse control rather than his ability to understand right from wrong; that during the appellant's attendances on the psychologist he was able to articulate appropriate sexual boundaries and the importance of obtaining consent generally, rather than only in the context of relationships that were taboo in Aboriginal culture; and that it was tolerably clear why the psychologist had concluded that by taking the telephone to lure the complainant to the alleyway the appellant had demonstrated a consciousness of wrongness.[14]

[19] In the final result, the intermediate court allowed the appeal and set aside the adjudication of the acquittal by the Youth Justice Court.[15] The reasons for that were summarised as follows:[16]

> Significantly, in this case the trial Judge misapprehended significant aspects of the evidence, failed to take into account crucial relevant aspects of the evidence, asked himself the wrong question from time to time, and took into account irrelevant aspects of the evidence. For example, his Honour: misapprehended or mischaracterised the nature and quality of the circumstances surrounding the acts of gross indecency performed by the

14 *Firth v KG* [2018] NTSC 68 at [40]-[47].

15 The intermediate court acknowledged that the decision could only be set aside if it was "so unreasonable as to make [the] conclusion irrational and arbitrary", and found that to be the case: *Firth v KG* [2018] NTSC 68 at [49].

16 *Firth v KG* [2018] NTSC 68 at [48].

respondent, and thereby failed to take the evidence about the nature of the surrounding circumstances into account; took into account the fact that the evidence about the complainant giving cigarettes to the respondent and sharing her telephone with him was capable of being construed as demonstrative of a reciprocated sexual interest in the respondent; misapprehended the evidence of Mr Nussey set out at [27]; assumed without any factual foundation that violent sexual conduct was normalised in the respondent's background and therefore concluded that the respondent would not have appreciated that the complaint's resistance meant that his conduct was wrong because it was not violent enough and his Honour did not draw a conclusion that the respondent was aware that the complainant was not consenting to the whole of the sexual assault (as opposed to being reckless as to consent); took into account the fact that the complainant simply laughed and did not positively state she was not interested in the respondent as a basis for the respondent possibly believing that his conduct was not wrong; failed to take into account the evidence of Mr Nussey that the various impairments the respondent suffered (which are set out at [17]) were not impairments which precluded a person knowing right from wrong; failed to take into account the fact that, in addition to the two examples of appropriate behaviour by the respondent, Mr Nussey gave evidence that the respondent clearly articulated his understanding of the importance of obtaining consent and his understanding of consent; failed to take into account Mr Nussey's evidence that the respondent manipulated the circumstances surrounding his offending conduct so as to be able to commit the offence of gross indecency and this demonstrated that the respondent understood his behaviour was wrong; and failed to take into account the false instructions of the respondent that were put to the complainant during cross-examination.

The grounds of appeal

[20] The appellant challenges the determination made by the intermediate court on the following grounds:

1. The intermediate court erred in finding that the Youth Justice Court was acting arbitrarily or irrationally in entertaining a doubt about the appellant's knowledge of the wrongfulness of his conduct.

2. The intermediate court erred in assessing the significance of the appellant's knowledge of the victim's absence of consent to the ultimate issue of the reasonableness of the doubt that the appellant knew that his conduct was wrong.

3. The intermediate court erred in assessing the significance of the cross-examination conducted by the appellant's counsel to the ultimate issue of the reasonableness of the doubt that the appellant knew that his conduct was wrong.

4. The intermediate court erred in failing to dismiss the appeal in the exercise of its residual discretion.

Ground 1: arbitrary or irrational

[21] Section 144 of the *Youth Justice Act 2005* (NT) creates an avenue of appeal to the Supreme Court from an order or adjudication of the Youth Justice Court, and provides that the provisions of the *Local Court (Criminal Procedure) Act 1928* (NT) relating to appeals from the Local Court apply, with the necessary changes, to an appeal of that nature. Section 163(3) of the *Local Court (Criminal Procedure) Act* creates an avenue of appeal from an order or adjudication of the Local Court, including acquittal. The right of appeal is limited to "an error

or mistake on the part of the Local Court on a matter or question of law alone or a matter or question of both fact and law".[17]

[22] The effect of that limitation in the context of a prosecution appeal was summarised by Southwood J in *Peach v Bird* in the following terms:[18]

> Strict principles apply to a prosecution appeal against the dismissal of a complaint. The allowance of an appeal against a dismissal of a complaint has always been regarded as the exercise of an exceptional discretionary power. This is because, as in the case of prosecution appeals against sentence, what is involved is the undesirable placing of an alleged offender in a situation of double jeopardy: *The King v Wilkes* [1948] HCA 22; (1948) 77 CLR 511 at 516. An appeal should only be allowed in the clearest and most compelling circumstances, for the purpose of correcting manifest error. An appellate court will be prepared to set aside an order of dismissal based upon the impact of the evidence upon the fact finder and remit a matter for retrial only where it appears that the order of dismissal sought to be impugned was plainly wrong on any reasonable interpretation of the recorded evidence and the inferences that patently arise from it: *Semple v Williams* (1990) 156 LSJS 40.

[23] It follows that there will only be error of law in making a wrong finding of fact or drawing an illogical inference if the finding or inference could only have been made or drawn by an irrational tribunal acting arbitrarily.[19] Even if the appeal court forms that view, it retains a residual discretion to dismiss the appeal if the interests of justice so

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17 *Local Court (Criminal Procedure) Act*, s 163(5); *Peach v Bird* [2006] NTSC 14; 159 A Crim R 416 at [7]-[11]; *Rigby v Taing* [2015] NTSC 16; 249 A Crim R 320; *Balchin v Anthony* [2008] NTSC 2; 22 NTLR 52 at [17].

18 *Peach v Bird* [2006] NTSC 14; 159 A Crim R 416 at [12].

19 *Berlyn v Brouskos* [2002] VSC 377; 134 A Crim R 111 at [30], [33]. See also, in a different context, the reasons of Mildren J in *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32, which were repeated by this Court in *Wilson v Lowery* (1993) 4 NTLR 79 at 84-85. The Judge at intermediate level correctly stated these principles at the outset of his reasons: see *Firth v KG* [2018] NTSC 68 at [3].

require.[20] An appellate court will be particularly reluctant to interfere with a verdict of acquittal which is based upon a reasonable doubt. This is for the reason that the appeal court will usually not have the same advantages as the trial judge where the issues in the appeal depend on the view taken of conflicting testimony or an impression gained from an observation of a witness.[21]

[24] The burden of proving that the appellant knew that his conduct was "wrong" was on the prosecution, and that question was one of fact. The finding of the Youth Justice Court was, in essence, that it was not satisfied beyond reasonable doubt that the appellant knew his conduct was wrong. The respondent's appeal against the acquittal challenged that ultimate finding of fact, and the anterior findings of fact on which it was based. The question to be answered at intermediate level in determining the prosecution challenge to that finding was whether it was "plainly wrong on any reasonable interpretation of the recorded evidence" or, to put it another way, whether it could only have been made by an irrational tribunal acting arbitrarily.

[25] Before considering that matter, it is necessary to make some preliminary observations about the burden carried by the prosecution at trial. The requirement was to prove that at the time of the conduct the appellant knew that the conduct was "wrong". That term is not subject

20 *Harvey v Bofilios* [2017] NTSC 68 at [32].

21 *Harvey v Bofilios* [2017] NTSC 68 at [28].

to any statutory definition or elaboration.[22] Section 43AQ of the *Criminal Code* was inserted in 2005, and is modelled on s 7.2 of the *Criminal Code Act 1995* (Cth). The formulation is in different terms to that appearing in s 38 of the *Criminal Code*, which excuses a person under the age of 14 years from criminal responsibility for an act unless it is proved that at the time of doing the act he "had capacity to know that he ought not to do the act".[23]

[26] In the *Macquarie Dictionary* definition of the term, "wrong" means "not in accordance with what is morally right or good". It is generally accepted that the statutory formulation in s 7.2 of the *Criminal Code Act 1995* (Cth), and by extension the formulation in s 43AQ of the *Criminal Code*, is the same as, or at least very similar to, the common law test in relation to *doli incapax*. Neither party to this appeal submits otherwise. In the reasons of the plurality in *RP v The Queen*, that test and the onus it carries were described in the following terms:[24]

> … From the age of ten years until attaining the age of fourteen years, the presumption may be rebutted by evidence that the child knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence. Knowledge of the moral wrongness of an act or omission is to be distinguished from the child's awareness that his or her conduct is merely naughty or mischievous. This distinction may be captured

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22 The provision may be contrasted in that respect with s 43C of the *Criminal Code*, which creates the defence of mental impairment by reference to criteria such as the inability to know the nature and quality of the conduct, or to reason with a moderate degree of sense and composure about whether the conduct was objectively wrong, or to control his or her actions.

23 An offence against s 192 of the *Criminal Code* is a Schedule 1 offence to which the criminal responsibility provisions in Part IIAA of the *Criminal Code* have application.

24 *RP v The Queen* [2016] HCA 53; 259 CLR 641 at [9] per Kiefel, Bell, Keane and Gordon JJ.

> by stating the requirement in terms of proof that the child knew the conduct was "seriously wrong" or "gravely wrong". No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts. To the extent that the decision of the Court of Appeal of the Supreme Court of Victoria in *R v ALH* suggests a contrary approach, it is wrong. The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct. This directs attention to the child's education and the environment in which the child has been raised. (Footnotes omitted and emphasis added)

[27] Once the matter was sufficiently raised as an issue in the trial, the burden was on the prosecution to prove beyond reasonable doubt that the appellant did know his conduct was "wrong" in the relevant sense. The categories of evidence which might be relevant to that issue include: any admissions made by the appellant; the nature of the alleged conduct (subject to the qualification that the presumption cannot be rebutted merely as an inference from the doing of the act); the circumstances surrounding the conduct, including any attempts at concealment or escape; and the appellant's background, including his education, upbringing, mental capacity and any previous criminal convictions. In *RP v The Queen*, the plurality stated:[25]

> What suffices to rebut the presumption that a child defendant is *doli incapax* will vary according to the nature of the allegation and the child. A child will more readily understand the seriousness of an act if it concerns values of which he or she has direct personal experience. For example, a child is likely better able to understand control of his or her own possessions and the theft of others'

25 *RP v The Queen* [2016] HCA 53; 259 CLR 641 at [12] per Kiefel, Bell, Keane and Gordon JJ. These principles were restated and explored in the reasons of the intermediate court in the present matter.

> property compared to offences such as damaging public property, fare evading, receiving stolen goods, fraud or forgery. Answers given in the course of a police interview may serve to prove the child possessed the requisite knowledge. In other cases, evidence of the child's progress at school and of the child's home life will be required.

[28] In *RP v The Queen*, the High Court ultimately concluded that the prosecution had not proved that the appellant knew that his conduct was "seriously wrong" bearing in mind his age (11 years and six months), the finding that he was of "very low intelligence", and the absence of "clear evidence that, despite those limitations, he possessed the requisite understanding" (at [35]). Emphasis was placed on the fact that "there was no evidence about the environment in which the appellant had been raised or from which any conclusion could be drawn as to his moral development" (at [36]).[26]

[29] Turning then to the case at hand, a number of matters may be accepted. First, we would respectfully observe that the learned Judge at intermediate level correctly stated the principles which govern both the determination of an appeal of this nature and the presumption of *doli incapax*. Secondly, the rebuttal of the presumption does not require that in every case there must be a demonstration of knowledge of wrongness in a police interview or evidence concerning the child's

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26 The facts of that matter illustrate the limited extent to which the force applied by the offender and the level of the victim's resistance may inform the enquiry concerning the offender's knowledge that the conduct was seriously wrong. The offender had locked his younger brother in a room, forcibly thrown him onto a bed and removed his clothing, held him down while he anally raped him, placed his hand over the victim's mouth to muffle his cries and protestations, desisted only when he heard an adult return home, and threatened the victim to say nothing of the matter.

social, medical and educational circumstances. It is not incumbent on the prosecution to prove that the child's circumstances did not give rise to any risk that he or she did not know the conduct was wrong in a moral sense. It is only necessary for the prosecution to identify evidence which rebuts to the requisite standard the presumption that the child did not understand that the conduct was morally wrong. Thirdly, many of the criticisms made by the intermediate court of the trial judge's assessment of the circumstances surrounding the act of gross indecency, or at least the expression of that assessment, were well-founded. Fourthly, it will ordinarily be the case that the evidence of an experienced child psychologist in relation to a child's ability to understand right from wrong in a particular context will be given significant weight in determining whether the presumption has been rebutted.

[30] Even allowing for those matters, it cannot be said that the trial judge's finding of reasonable doubt that the appellant knew that his conduct was seriously wrong in the moral sense was so unreasonable as to make the conclusion irrational and arbitrary. While the Judge at intermediate level drew a different conclusion on the evidence, as might this Court have drawn a different conclusion, that was not the question which presented on the appeal. Whatever wrong findings of fact and flawed intermediate inferences there might have been, it remained open for the trial judge to entertain a doubt. Although the appellant demonstrated a

degree of calculation in luring the complainant into the alleyway and used a significant level of force, and although the complainant overtly resisted the assault, the appellant's age and personal circumstances were such that it could not be said that only one result was rationally open on the ultimate question. There was evidence that the appellant had cognitive impairments secondary to a neurodevelopmental disorder, that he had been raised in an unregulated environment, and that he had been exposed to domestic and sexual violence. The trial judge had the benefit of seeing and hearing the child psychologist give evidence, the expert evidence was confused and confusing on some issues, and it was not incumbent on the trial judge to accept the expert's opinion on the ultimate issue.

[31] Having made that finding, it is unnecessary to deal with the other grounds of appeal. In any event, we have dealt with the significance of the victim's lack of consent and the significance of the cross-examination by the appellant's counsel in the discussion of the decision at intermediate level. Those matters are better seen as particulars of the first ground of appeal rather than grounds which stand alone.

Disposition

[32] We make the following orders:

1. The appeal is allowed.

2. The order setting aside the adjudication of acquittal by the Youth Justice Court is quashed.

3. The verdict of acquittal is reinstated.

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