The Queen v J O [2009] NTCCA 4

PARTIES:	THE QUEEN v J O
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA2/09 (20820757)
DELIVERED:	7 MAY 2009
HEARING DATES:	23 MARCH AND 20 AND 27 APRIL 2009
JUDGMENT OF:	MARTIN (BR) CJ, RILEY J and OLSSON AJ
APPEAL FROM:	ANGEL J

CATCHWORDS:

CRIMINAL LAW – APPEAL – APPEAL AGAINST CONVICTION
Unreasonable verdict – failure of trial Judge to summarise evidence – trial of short duration – directions as to burden of proof – application for leave to appeal dismissed.

CRIMINAL LAW – APPEAL – CROWN APPEAL AGAINST SENTENCE
Indecent dealing with child under 10 years – victim step-daughter of respondent – gross breach of trust – findings of trial Judge in the absence of evidence – sentence manifestly inadequate – principles of Crown appeals – appeal against sentence allowed – re-sentencing.

Sentencing Act (NT), s 78BB.

BRS v The Queen (1997) 191 CLR 275; *R v Osenkowski* (1982) 30 SASR 212; *R v Riley* (2006) 161 A Crim R 414, applied.

Daniels v The Queen (2007) 20 NTLR 147; *R v Anderson* (2001) 127 A Crim R 116; *R v MAH* (2005) 16 NTLR 150; *R v Malvaso* (1989) 168 CLR 227; *R v Malvaso* (1989) 50 SASR 503; *R v Nemer* (2003) 87 SASR 168, discussed.

R v Olbrich (1999) 199 CLR 270; *RPS v The Queen* (2000) 199 CLR 620, referred.

REPRESENTATION:

Counsel:

Appellant:	R Coates
Respondent:	J Tippett QC

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Northern Territory Legal Aid Commission

Judgment category classification:	A
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v J O [2009] NTCCA 4
No. CA2/09 (20820757)

BETWEEN:

THE QUEEN
Appellant

AND:

J O
Respondent

CORAM: MARTIN (BR) CJ, RILEY J AND OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 7 May 2009)

THE COURT:

Introduction

[1] J O was convicted by a jury of two crimes of indecently dealing with a child under the age of 16 years. Each crime was accompanied by the circumstance of aggravation that the child was under the age of 10 years.

[2] Leave to appeal against the convictions was sought upon grounds concerned with the directions given to the jury and the weight of the evidence.

[3] The maximum penalty for each of the crimes was 14 years imprisonment. The learned sentencing Judge imposed sentences of 12 months imprisonment, to be served cumulatively, making a total sentence of two

years imprisonment. His Honour ordered that the sentences be suspended after J O had served one day in custody.

[4] The Crown appealed as of right against the sentences upon the sole ground that by reason of suspension after service of one day of the total sentence of two years, the sentence was manifestly inadequate.

[5] At the conclusion of submissions on the first day of hearing the Court dismissed the appeal against conviction and allowed the Crown appeal against sentence. At the request of counsel for J O, the Court ordered a pre-sentence report to assist the Court in the task of re-sentencing. The pre-sentence report was provided in the form of a psychiatric report.

[6] Upon resumption of the hearing submissions were made as to the sentence, but the hearing was again adjourned to hear oral evidence from the psychiatrist ("the first psychiatrist"). When the hearing resumed, the oral evidence was given and a report from a second psychiatrist was received. The Court then imposed the following sentences:

Count 1 - imprisonment for two years commencing 20 April 2009.

Count 2 - imprisonment for two years and three months, of which one year and three months is to be served cumulatively upon the sentence imposed in respect of count 1.

[7] The total sentence was imprisonment for three years and three months, commencing 20 April 2009, and the Court ordered that the sentence be suspended after J O has served one year upon the following conditions:

(i) J O is to be under the supervision of the Director of Correctional Services for the operational period of the suspension, namely, two years and three months from the date of release.

(ii) J O is to obey the reasonable directions of the Director or a probation officer, including directions as to his reporting, residence, employment, associates, treatment and counselling, including treatment and counselling for issues relating to offending of a sexual nature.

(iii) J O is to obey the reasonable directions of the Director or a probation officer as to the nature and extent of association and contact with young children.

[8] At the time of imposing sentence, the Court delivered oral reasons by way of summary in relation to the question of sentence only. We now set out our reasons in detail for the orders made with respect to both conviction and sentence.

Evidence

[9] The female complainant was born in 2000 and was aged eight years at the time of the events under consideration. J O was aged 36 years. The child's parents separated in 2002 and in that year the child's mother commenced a relationship with J O. They married in 2005.

[10] In July 2008 the complainant resided with her mother and J O during the week and spent weekends with her father and his partner. The complainant's mother worked during weekdays leaving J O at home as the sole carer of the complainant and two younger children born of the relationship between the complainant's mother and J O. The younger children were aged four ("H") and nearly one ("the baby").

[11] On Friday 18 July 2008 the complainant had been home with J O and the younger children in the absence of the complainant's mother. When the complainant's father and partner collected the complainant at about 6.15pm, she told her father that she had a big secret to tell him and his partner. In substance the child complained of being touched inappropriately and was taken immediately to the police. A formal interview was conducted on the following day, Saturday 19 July 2008, which interview was played to the jury as the evidence-in-chief of the complainant. The interview was supplemented by evidence from the complainant at trial during both examination and cross-examination. J O gave evidence and denied that any inappropriate conduct occurred. The jury accepted the complainant's version as to the essential events and rejected J O's denials.

[12] The complainant said that the first incident occurred two days before she complained to her father. The complainant described playing with J O and H in J O's bedroom where the baby was asleep. She lay on the bed and said she wanted to sleep. J O placed a blanket over her. J O was wearing a sarong with nothing underneath it. He removed the sarong and when the complainant looked the other way, J O said, "What's the matter?" to which the complainant replied "I don't want to see it". J O was naked and under the blanket with the complainant. She said that when she was trying to go to sleep, J O was "pulling me to him but I was trying to go forwards and I said … I was saying in my own head what is he doing". The complainant said J O was talking "some rude stuff", but was unable to remember the details. While he was talking the rude stuff, J O was "making me touch his rude bit and I was trying to pull my hand away". The complainant said J O held her hand and made her touch his "rude part" and described the rude part as long and used by J O to go to the toilet. The complainant said she was trying to pull her hand away, but J O would not let her and "he was kind of holding on tight". Asked what he was holding on to, the complainant replied, "My wrist".

[13] As to how the first incident ended, the complainant said she thought it was because she was trying to pull her hand away that J O told her she should hop out of bed. The complainant gave the following description of the end of the incident:

> "So um he said 'But mum will get jealous cause you're in here.' I said 'no' and he said 'yes' and um he said 'You'd better get up otherwise we'll get in trouble'. So I did then he came out then he said 'I'll never do it again' except but he lied cause he did it yesterday …"

[14] Later in the interview the complainant gave the following answer to a question, "Is that all of it?":

> "I remember saying when [J O] was trying to make me touch his rude bit. He said um 'Do you play with it?' and I said 'no' but and he says that 'I do' and I said gross in my head and so that's when I was trying to get out of the room but he said 'You should get out of the room cause mum might get jealous of us'. I said 'no' and that's when um he said 'Let's get out of the room and I promise I'll never do it again.'"

[15] The complainant was asked what she meant by the reference to getting into trouble, and replied that J O said, "Otherwise I would get in trouble" meaning J O would get into trouble. The transcript suggests that the complainant was uncertain as to whether J O meant himself or the complainant.

[16] As to the second incident, when the interviewer first broached the question of the "secret" about which the complainant had told her father, the complainant spoke of J O hopping on top of her and of trying to push him off. The interview dealt at length with the first incident before the interviewer returned to the events of the previous day:

> "Q Tell me about yesterday?
>
> A Um we went, me and [H], well [H] was in the room before me. He was looking 'Let's see what's going on' and then um

> whenever he went out that's when [J O] was trying to do it to me again. I was laying down on [the baby's] bed and he was playing around and that and um that's when [J O] was going down and um hopped on me and then he hopped off cause I said '[H] come on come back in' and then he hopped on me and [H] and then when I gave just gave him a kiss he um poked his tongue out [H] and [the baby]. I said '[H] don't' and [J O] just watched and didn't say stop."

[17] As the interview progressed, further details emerged. The complainant said that she, H and J O were all on the bed. She drew a diagram showing her and H lying parallel to each other and J O lying across them. She said J O was hopping on top of her and she "sort of" could not breathe and she told J O that she needed to go to the toilet in order to "trick him so he could hop off". The trick worked, but when "we" came back in the room J O lay on her again and his "rude part laid on me". The complainant described herself as lying on her back and she thought H was lying on his tummy or his back. She spoke of J O kissing her and poking his tongue into her mouth "a little bit". She said H also poked his tongue into her mouth and she told him to stop, but J O did nothing about it. When asked whether kissing and poking his tongue into her mouth was the only thing that J O did, the complainant replied, "Yeah oh no he was doing lots of stuff to me, rude stuff to me". Asked to tell the officer about that, the complainant gave the following answer:

> "Um he was touching me um where my two rude parts are and I didn't like it and I was trying to push his hand away but he was still doing it and um I couldn't make him stop and I said 'please stop' and I said 'because' and he said 'why' and I didn't answer back cause I didn't know why I wanted to stop but I just did because I didn't feel like it. And when that was all over we went to pick mum up."

[18] The complainant went on to describe that she and J O were both clothed and she was attempting to make him stop by trying to pull her dress down so he couldn't do it any more. J O put his hand under the complainant's dress and on top of her underpants. She thought J O touched the skin on her bottom, but not on her vagina. Asked how J O touched the skin on her bottom, the complainant said:

> "I think he kind of tickled it and rubbed it with his hand around."

[19] The complainant said this tickling and rubbing occurred on top of her underwear.

[20] In relation to the second occasion, according to the complainant J O said that what had happened was "our little secret", but she told her father "because um I didn't want him to keep doing it".

[21] During cross-examination it was put to the complainant that none of the events she had described by way of inappropriate behaviour, including the kissing, had occurred. The complainant's responses were positive affirmations that the incidents had occurred, as were her denials when it was put to her that she had lied about the various incidents.

[22] As we have said, when she was picked up by her father and his partner, the complainant immediately complained about J O's conduct. She was visibly and significantly distressed when doing so.

Conviction

[23] The primary submission advanced by counsel for J O was made under ground 2 which complained that the learned trial Judge erred "in failing sufficiently to summarize the evidence, including the evidence of the applicant". Counsel submitted that even accepting the truth and reliability of the complainant's evidence, nevertheless it was open to the jury to conclude that it was reasonably possible that the complainant's hand did not touch J O's penis. In these circumstances, so it was said, the trial Judge was obliged to remind the jury that even if they rejected the evidence of J O and accepted the evidence of the complainant, nevertheless they should scrutinise the complainant's evidence with respect to this particular issue in order to determine whether they were satisfied beyond reasonable doubt that the touching occurred. In this process it was necessary for the trial Judge to remind the jury of the relevant parts of the complainant's evidence.

[24] For the reasons that follow, in our opinion this complaint is not made out. At the outset, it must be noted that at trial no one raised this issue or sought such a direction. The trial was conducted on the basis that the complainant was saying her hand touched J O's penis and J O was denying that such touching occurred. There was no hint of any suggestion that the jury might accept the evidence of the complainant, but have a doubt as to whether an actual touching occurred.

[25] Further, the wording of ground 2 does not appear to be aimed at the complaint as presented to this Court. In addition, the written outline of

submissions provided in advance of the hearing expressed J O's contention under this ground in the following terms:

> "It is contended therefore that the trial judge was required to refer the jury to the appellant's evidence and explain to them the relevance of that evidence in determining the issues in the trial (see *BRS v R* (1997) 191 CLR 275, *RPS v R* (2000) 199 CLR 620)".

[26] The argument as presented to this Court possesses all the hallmarks of the ingenuity of fresh counsel having scrutinised the transcript without regard to the context in which the trial was conduced. This is one of those occasions when the conduct of counsel at the trial is a relevant consideration.

[27] The submission to this Court concerned the complainant's evidence only as to the first count. Counsel drew attention to passages in the complainant's interview in which the complainant spoke of J O trying to make her touch his "rude part". Attention was also drawn to the complainant's inability to answer a question as to how she touched the penis.

[28] First, the context in which the complainant spoke of J O trying to make her touch his penis must be considered. In the major passage to which counsel drew attention the complainant, having said she tried to stop J O, was asked how she was trying to make him stop. She said she was trying to pull her hand away, but he was holding onto her wrist. Asked why he was holding on to her wrist, the complainant answered, "Cause um he was trying to make me touch his rude part". There is no suggestion in this passage of the interview that the complainant was saying J O was unsuccessful.

[29] In a subsequent passage the complainant was asked whether there was anything else she wanted to tell the interviewer. She replied that when J O "was trying to make me touch his rude bit", he asked if she wanted to play with it, to which she said no, but J O said "I do". Again, the complainant was speaking of a particular aspect, namely, J O's question as to whether she wanted to play with it and her response.

[30] As to the inability of the complainant to answer a question concerning how she touched J O's penis, again the context is of importance. The complainant had given a number of answers in which she spoke of J O putting her hand on his penis by holding her hand and making her touch the penis. It was against this background that she was asked, "And how did you touch it?" to which she replied, "Um I don't know he was just making me".

[31] The complainant was an eight year old child. She had already said on more than one occasion that J O had made her touch his penis by taking her hand and putting it on his penis. It is hardly surprising that she might then find difficulty in answering a specific question "how did you touch it?" She had already explained that J O took her hand and put it on her penis, yet the adult interviewer was apparently not satisfied and was asking again about the touching in a way that a child could easily find rather puzzling. Many adults might also experience similar difficulty.

[32] In our opinion, the interview and evidence of the complainant left no room for the possibility that the complainant was telling the truth about the

occasions of sexual interference, but it was reasonably possible that her hand did not touch J O's penis. The following passages from the interview plainly state that the child touched J O's penis:

(i) "Q … When he was saying the rude stuff what was he doing?

A Um he said he was um making me touch his rude bit and I was trying to pull my hand away.

Q Mm.

A But he wouldn't let me".

(ii) "Q Mm ok you said he was trying to make you touch his rude bit. How was he making you?

A Um by um putting my hand on it but I was trying to pull it away from him.

Q Mm.

A But he wouldn't let me.

…

Q You said he was making you?

A Yep.

Q How was he making you?

A He was like holding my hand and then making me um touch it."

(iii) "Q … So did you touch anywhere else when you were in the bed?

A No.

Q Just the rude bit?

A He was making me touch it but yeah …"

[33] In addition to the interview with the police, the complainant was cross-examined at trial by counsel for J O. She gave the following evidence:

(i) "Q What do you remember telling the police?

A Saying that [J O] was making me touching his rude part and me tricking him to say I need to go to the toilet and me saying '[H, H, H,] coming back in' and [J O] saying 'No'.

Q That didn't happen any of that that you told the police, did it?

A It did."

(ii) "Q You see, and you said – you told the police that he made you put your hand on his private part. Do you recall saying that?

A Yes.

Q That didn't happen did it?

A Yes it did."

[34] Against the background of this evidence, it is not surprising that the point now taken by counsel was not raised at trial. Importantly, in his directions to the jury the learned trial Judge reminded the jury that the first charge was based on the evidence of the complainant that J O took her hand "and placed

it on his penis". Later, his Honour explained the meaning of "indecently dealt with" in the following terms:

> "Each of the charges speaks of or uses the words 'indecently dealt with'. 'Deals with' has a legal meaning. All I need to tell you is, that if you find as a fact, beyond reasonable doubt, that the accused held S's hand and touched his penis with her hand, that in law amounts to a dealing with S."

[35] The jury were plainly told that in order for the Crown to prove the case, it was necessary for the Crown to prove beyond reasonable doubt that J O took the complainant's hand and placed it on his penis. There is no basis for a suggestion that the jury did not carefully consider the evidence of the complainant and find accordingly.

[36] The circumstances in which the jury came to consider its verdict on Wednesday 11 February 2009 leave no room for any doubt that the evidence would have been fresh in the mind of the jury.

[37] The trial commenced on Monday 9 February 2009. The Crown evidence comprised the evidence of the complainant, the complainant's mother, her father and step mother. The Crown case closed on 10 February 2009 and the only evidence for J O was his evidence which was completed that day. The transcript comprises 87 pages, of which J O's evidence occupies ten pages. Addresses of counsel were completed the same day.

[38] The learned trial Judge addressed the jury on 11 February 2009, being the third day of the trial, commencing at about 10:00 am and concluding shortly

before 11:00 am. Apart from reminding the jury that count 1 was based on the evidence of the complainant that J O placed her hand on his penis, and that count 2 was based on the evidence that J O rubbed the complainant on the outside of her underwear in the area of her vagina and bottom, his Honour did not remind the jury of the evidence of the prosecution witnesses. The only parts of the Crown evidence to which his Honour specifically referred were brief passages from the cross-examination of the complainant as a reminder of the submission by counsel for J O that the jury should take into account the number of times a complainant said "I can't remember".

[39] The summing up was well balanced. The trial Judge told the jury that J O did not have to give evidence and that, if they saw fit, the jury could give J O credit for having done so. His Honour told the jury that "little weight" could be given to the evidence of the complainant's distress when complaining to her father and step mother and that the jury were to treat the evidence of distress as "neutral".

[40] The trial Judge gave correct directions as to the complaint and reminded the jury of the submission by counsel for J O that a story does not improve by telling and re-telling. His Honour went further than was necessary in directing the jury to weigh the evidence of the complainant with "extreme care" by reason of her young age. His Honour referred to the vivid imagination of children and their capacity to invent stories. His Honour warned the jury that the evidence of the complainant stood alone and they

should only rely upon it if, after "careful scrutiny", the jury was satisfied beyond reasonable doubt "of its truth in its material particulars".

[41] The trial Judge was also careful to explain to the jury that it was not a matter of which evidence to prefer. His Honour gave these directions in the context of the onus of proof. The directions emphasised that the jury could only convict if they were satisfied beyond reasonable doubt that the child gave accurate evidence and was satisfied that J O gave false evidence in his denials.

[42] The concluding directions of the trial Judge were a summary of the points made by counsel. It was a fair and balanced summary.

[43] The evidence was completed in two days. In our opinion, it was utterly unnecessary for the trial Judge to remind the jury of the evidence, including the evidence of J O.[1] A balanced summary of the evidence would have required his Honour to remind the jury of the evidence of the complainant as to the particular incidents and of the evidence of the complainant's father and step mother concerning the details of the complaint. Such a reminder would have been disadvantageous to J O.

[44] The complaint in ground 2 was not made out.

[45] Ground 1 was a complaint that the verdict is unreasonable and cannot be supported having regard to the evidence. While not abandoning this

[1] *RPS v The Queen* (2000) 199 CLR 620 at [42].

complaint as a general ground based upon an examination of the evidence, in essence this ground was linked to the issue argued in respect of ground 2. Whichever way this ground is approached, in our opinion it fails.

[46] Various matters were identified in the written outline of submissions in support of this ground. They were matters properly raised for the consideration of the jury, but in our opinion they do not cast any doubt upon the correctness of the verdict.

[47] A reading of the transcripts has left us with the clear and strong impression that the complainant was telling the truth. The content of the complainant's evidence possesses the ring of truth and there is a distinct absence of embellishment. It is a common feature of offending of this type committed against children that offenders tell the child to keep the events a secret and it is highly unlikely that this child of eight years would have fabricated this type of detail. Similarly, it is highly unlikely that the complainant fabricated the statement by J O that the complainant's mother would be jealous. No other explanation for a "secret" between the complainant and J O has been advanced. In addition, the complainant's conduct in immediately telling her father that she had a secret and in complaining that J O had touched her in the area of her vagina was entirely consistent with the criminal conduct having occurred. The complainant was firm in her denials of suggestions in cross-examination that the inappropriate conduct did not occur or that she might have misinterpreted the actions of J O. "Tickle play" is a most unlikely explanation.

[48] Having read the evidence, in our opinion it was open to the jury to convict and there is no basis for a finding that the verdict is in any way unreasonable or unsafe. In our view the jury reached the correct verdicts.

[49] Ground 3(b) was properly abandoned. It involved contentions as to the burden of proof that are contrary to the law of the Northern Territory.

[50] Ground 3(a) complained that the trial Judge erred in failing to direct "that a reasonable doubt is a doubt which they, the jury, entertain in the circumstances." Relying upon observations of Kirby J in *R v Anderson*,[2] counsel contended that the trial Judge should have given the following direction:

> "First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you find difficulty in accepting the evidence of the accused, but think that it might be true, then you must acquit.
>
> Third, if you do not believe the accused, then you should put his testimony to one side. The question will remain; has the Crown, upon the basis of evidence that you do accept, proved the guilt of the accused beyond reasonable doubt?"

[51] In *Anderson*, Kirby J was not purporting to lay down a principle or rule of practice that such a direction must or should be given in a case of oath against oath. His Honour was merely saying that directions along these lines are customarily given and the wording upon which counsel has relied

[2] (2001) 127 A Crim R 116 at 121.

is his Honour's preferred formulation. Counsel accepted that there was no authority to support his contention.

[52] In our opinion, this ground was without substance. The trial Judge reminded the jury of the presumption of innocence and repeatedly told the jury that the onus was on the Crown to prove guilt beyond reasonable doubt. Specifically as to the burden of proof, his Honour said:

> "I have already mentioned that the Crown, having brought this charge, the onus is on them to prove it if they can. The onus is from first to last. As I have said, the accused does not have to prove anything. The burden of proof is the highest known to our law, that is, beyond reasonable doubt. Those words simply mean what they say. If you are satisfied, beyond reasonable doubt, of the guilt of the accused, then your duty is to return a verdict of guilty. If, on the other hand, you are not satisfied, beyond reasonable doubt, of the guilt of the accused, your verdict will be one of not guilty."

[53] Importantly, the trial Judge directed the jury that it would be wrong for the jury to approach the evidence by asking whether they preferred the evidence of the complainant or J O. His Honour said:

> "In cases of this type, it is important to appreciate how the onus of proof works and the importance of the onus of proof. It is not a case of, well, do we prefer her evidence to that of the accused. That is the wrong approach. Because the onus is on the Crown, in order for the Crown to secure a verdict of guilty, they have to satisfy you, beyond reasonable doubt, of the accuracy of her evidence, not only that, but also of the falsity of his sworn denial. It is not a matter of, well, we just prefer her evidence to his. It is a matter of, we accept her evidence as true and his as false. It is not a choice of, is she lying or is he lying."

[54] The trial Judge distinguished proof beyond reasonable doubt from probabilities:

> "The fundamental question for you is whether you are satisfied, beyond reasonable doubt, of the guilt of the accused. You may think, well, her evidence seems pretty good; yes, I think it is, probably; I think it is good, but I simply cannot say that he is deliberately lying, I am just not satisfied of that. In other words, there is a middle ground here. The middle ground being you entertain a reasonable doubt as to the guilt of the accused. It is not a matter of what is more probably than not.
>
> From first to last, I remind you, the Crown have to satisfy you, beyond reasonable doubt, that her evidence is a true account and that his evidence is false."

[55] Counsel criticised the use by the trial Judge of the expression "middle ground" on the basis that it might have given rise to confusion. We are unable to agree. His Honour was merely explaining, and clearly explaining, that it was not enough to find that J O was probably guilty and if the jury were in that "middle ground" of "probably guilty", J O was to be acquitted.

[56] Ground 4 complained that the trial Judge erred "in effectively leaving to the jury as a relevant consideration evidence of the absence of the complainant's motive or ill-feeling between the complainant's parents". This ground was misconceived and misstated the substance of the directions. No complaint was made at trial about the direction which was attacked.

[57] As we have said, his Honour reminded the jury of the respective cases. In dealing with the Crown case, his Honour said:

> "The Crown also say that her situation is bolstered by the [fact] that there was an amicable separation, or at least not a bad separation between the father and the mother. That is the background of it, and that it is highly unlikely that any coaching was going on so far as her giving her evidence. There is no suggestion in this case, the Crown say, of parents getting at each other through a child."

[58] The impugned direction was given against the background of submissions by the Crown. The prosecutor put to the jury that it was the defence case that the complainant had lied, either of her own volition or at the instigation of another person. Counsel submitted that in order to consider this question it was necessary to look at the surrounding circumstances of the case and the history of the family circumstances. The submission then urged that the complaint of sexual assault came out of the blue in a matrimonial context where there was an absence of disharmony in connection with the separation and custody sharing arrangements. Counsel suggested that the only minor disagreement would not be enough "to fuel the flames of a child or a parent to want to concoct the story which [the complainant] has made".

[59] There was no cross-examination of J O seeking an explanation as to why the complainant would lie. However, the content and implication of the cross-examination of the complainant clearly advanced the defence case that the complainant was lying. In these circumstances, the Crown was entitled to submit to the jury that there was nothing in the custody sharing arrangements or circumstances of separation of the complainant's parents to support the view that the child or a parent might wish to concoct the story or coach the child. Counsel for the Crown did not directly or indirectly put to the jury that J O was unable to come up with an explanation for why the complainant would lie.

[60] In the passage of the summing up about which complaint was made, the trial Judge was merely repeating a Crown submission. His Honour did not add

the weight of judicial approval. It should also be noted that his Honour did not repeat what had been said about the possibility of the complainant concocting the story. His Honour's restatement of the Crown submission was restricted to the possibility that any coaching was given.

[61] For these reasons, we were of the view that the appeal against the convictions should be dismissed.

Sentence

[62] The Crown appealed against sentence on the sole ground that the sentencing Judge "erred in suspending all but one day of the sentence resulting in a sentence that was manifestly inadequate". The Crown did not include as a ground of appeal a complaint that the individual sentences of 12 months imprisonment were manifestly inadequate.

[63] At the hearing of the appeal, because the Court had previously given an indication that it would wish to hear from counsel as to the adequacy or otherwise of the individual sentences of 12 months, the Director of Public Prosecutions provided the Court with a schedule of sentences imposed during the period 17 March 2004 to 20 March 2009 for the crime of which J O was convicted. It was on 17 March 2004 that the maximum penalty for this crime was increased from ten to 14 years imprisonment.

[64] As to the individual sentences of 12 months, the Director submitted that although the sentences were at the lower end of the range of appropriate sentence, nevertheless they were not "dramatically out of kilter". In

substance, the Director accepted that the individual sentences of 12 months were not manifestly inadequate.

[65] For the reasons that follow, we did not agree with the submission of the Director as to the individual head sentences. In our opinion, they were manifestly inadequate. We were also of the view that, irrespective of the length of the individual head sentences, suspension after one day resulted in a manifestly inadequate sentence.

Sentencing Remarks

[66] The Crown identified only one specific error by the sentencing Judge, namely, a finding in the absence of evidence to support it that J O did not pose a "risk of future offending of this nature". In our view this contention was made out and we will return to that issue. Although no other specific error was identified by the Crown, viewed in their entirety the sentencing remarks convey a clear impression that the sentencing Judge might have concentrated too much on the circumstances of J O and given insufficient weight to aggravating circumstances of the crime and matters of general and personal deterrence thereby leading to error in the imposition of manifestly inadequate sentences.

[67] As to the facts of the offending, the sentencing Judge dealt with the first crime in the following terms:

> "The first count related to an incident when you took the complainant's wrist and placed her hand on your bare penis asking her to play with it. She tried to withdraw her hand. The duration of

this conduct was not the subject of questioning but I infer it was not prolonged.

At the time you were home looking after the children while your wife was at work. You were in the bedroom on the bed under a doona with the complainant. She was clothed. You were unclothed. Your sons were also present in the room at the time."

[68] In a subsequent passage cited below concerning the second crime, the sentencing Judge referred to J O telling the victim on the first occasion that he would not do it again and not to speak to her mother because her mother might become jealous.

[69] Sentencing remarks are not intended as an essay of the facts in detail and an appellate court should be slow to infer from a failure to mention a particular feature of a crime that the sentencing Judge has overlooked that feature or given insufficient weight to it. However, in our view this brief recitation of the facts of the first crime does not reflect adequately the true context in which the specific act of placing the victim's hand on J O's penis occurred.

[70] As the summary of the victim's evidence earlier in these reasons demonstrates, the first offence occurred during the day after the victim lay on J O's bed and said she wanted to go to sleep. J O removed his sarong so that he was naked and got under the blanket with the victim who had indicated a reluctance to look at his penis. J O talked "some rude stuff" while using a degree of force in placing the victim's hand on his penis and resisting her attempts to pull her hand away. In the context of dealing with the second count, the sentencing Judge later referred to J O telling the

victim he would not do it again and not to speak to her mother because she might be jealous, but his Honour did not refer to these statements being made in the context of the reference to getting into trouble. Viewed in their entirety, J O's statements amounted to emotional manipulation of the child victim and an attempt to ensure that the criminal conduct would be kept secret. His Honour's remarks do not reflect this significant aspect.

[71] The second crime was summarised by the sentencing Judge in the following terms:

> "On that occasion, you placed your hand up your stepdaughter's dress and rubbed her on the outside of her knickers in the area of her vagina and bottom. It is not clear whether you were prone at the time or standing. Again the duration of that was not the subject of any questioning but again I infer that the activity was not prolonged. It took place after you had kissed her in what was described as a French kiss placing your tongue in her moth. Both your sons were present at the time. Both you and the complainant were clothed at the time.
>
> The complainant found your activity distasteful and told you she wanted to go to the toilet and she left the bedroom. Following the first incident you told your stepdaughter that you would not do it again and that she was told not to speak to her mother because her mother might become jealous. Your stepdaughter said that you were a liar because you did what you did on the second occasion, breaking your promise not to do it again. On the second occasion, you mentioned that this conduct was a secret between the two of you."

[72] Again, in our view this summary fails to reflect adequately the true context in which the second crime occurred. This crime was preceded by J O lying across the victim in such a manner that the victim felt the need to trick J O into getting off by saying that she needed to go to the toilet. Upon the

victim's return from the toilet, J O again laid on her and, from her perspective, his penis "laid" on her. During these activities the victim kissed J O and he poked his tongue into her mouth, after which the specific offence occurred when J O placed his hand under the victim's dress and rubbed her in the area of her vagina and bottom. As she had done on the first occasion, the victim offered a degree of resistance by trying to pull her dress down. The breach of trust involved was exacerbated by the breaking of the promise not to do it again made by J O two days earlier.

[73] Other than the brief recitation of the facts to which we have referred, and properly classifying the offending as a "gross breach of trust" because J O had the sole care of the victim, his Honour made no reference to other aggravating features of the offending such as the following:

- The very young age of the victim (eight years) and her particular vulnerability within the confines of the matrimonial home in the hands of her mother's husband who had been in a close relationship with the victim as her second father for a number of years.

- The large disparity in age between J O (36 years) and the victim (eight years).

- The maturity of J O at the time of the offending.

- The element of pre-meditation disclosed by the preparatory conduct and callous disregard of the victim's reluctance to look at J O's penis or engage in the conduct.

- The use of a degree of force to overcome the victim's resistance.

- The emotional manipulation of the victim by suggesting that her mother would be jealous and saying "we'll get in trouble".

- The attempts to conceal the criminal conduct by telling the victim that her mother would be jealous and that "we'll get in trouble" and, in respect of the second offence, that what had happened was "our little secret".

- In respect of the second offence, the fact that it occurred at a time when J O was aware that he had previously given in to a criminal temptation and engaged in conduct that was both criminally and morally wrong. Against this background, J O consciously placed himself in a situation where he could sexually interfere with the victim. The second offence involved an element of premeditation in the preparatory "tickle play" conduct and kiss. Further, it involved a different form of criminal conduct upon the same child victim.

- From the perspective of the victim, the fact that the second offence was a breach within two days of a promise by a person she trusted not to do it again. J O was aware that he was in breach of that promise.

- The significant harmful effects of the offending upon the victim. While the sentencing Judge referred to the "devastating effect on the family", his Honour immediately placed that description in the context of J O's wife and their sons being deprived of contact with the victim since July 2008. His Honour did not, at any time in his remarks, refer to the distress caused to the victim by being deprived of contact with her mother. Nor did his Honour mention the significant emotional effects of the crime.

  In her victim impact statement, the victim described how J O made her feel "scared, frightened and confused". She said she felt upset because she was angry and disappointed that J O had hurt her. She described feeling sad because she had not seen her mother and brothers in a long time and sad because her mother does not believe her as she believes J O. The victim spoke of crying a lot as she was sad when someone talked about her mother and brothers. She said she felt very sad and angry when "the defence lawyer was calling me a liar". She also described being sad that her brothers would not have a father if he goes to gaol and being scared that her brothers and mother will be angry with her for that reason.

  The victim said she is now scared of men she does not know. She now experiences bad nightmares and cries a lot because of those nightmares. The victim requested that J O write her a letter saying sorry for what he did.

[74] There is an additional factor which has an influence upon the degree of harm caused to the victim and her future recovery. The offending took place in the matrimonial home and in the context of a family situation. The victim's mother does not believe the victim and continues to live with J O. While J O maintains he did not sexually assault the victim, and while the victim's mother continues to believe him, the victim is in a most invidious position and the distress she is experiencing because of the breakdown of her relationship with her mother and brothers will remain unresolved. While it is unknown what attitudes will be taken in the future or how the victim will ultimately respond to the circumstances in which she finds herself, it is clear that J O's criminal conduct and his unwillingness to accept responsibility and acknowledge his guilt has had significant and harmful psychological effects upon the child, which effects are ongoing and are unlikely to be resolved in the near future without a change of heart on the part of J O.

[75] As to matters personal to J O, the sentencing Judge spoke of J O's prior history as a "hardworking man" and his record as a good sportsman. His Honour recognised that J O was not a first offender, but correctly expressed the view that the prior record was of limited relevance because J O had not offended since 1996 and did not have a history of prior offending of the type under consideration. Nevertheless, J O was not entitled to any mitigation by reason of his prior good character.

[76] Of concern are the findings of the sentencing Judge that the offending was "uncharacteristic" and J O was not at risk of future offending. His Honour's remarks with respect to these findings were as follows:

> "I find this offending is uncharacteristic. There is no suggestion of any need for psychological or psychiatric treatment or anything of that nature. There is no suggestion of that. Hopefully you can put this aberrant behaviour behind you and I am going to give you that opportunity.
>
> I do not regard you as a risk for future offending of this nature."

[77] The trial Judge heard evidence that J O had been a good family person who had looked after the children. J O's wife, the mother of the victim, gave evidence concerning the loving nature of J O's relationship with the victim. J O had also given evidence about his good sporting record. However, there was no positive evidence of prior good character and J O was not a first offender. Although J O had not previously committed an offence of a sexual nature, he had previously committed offences against the criminal law, including two offences involving violence.

[78] A finding that an offender is unlikely to re-offend in the future is a circumstance of mitigation and the burden of establishing that circumstance on the balance of probabilities rests upon the offender.[3] There was a dearth of material to support the finding of the Judge. In addition, his Honour made no mention of countervailing factors, including J O's failure to acknowledge his guilt or to accept responsibility for his criminal conduct.

[3] *R v Olbrich* (1999) 199 CLR 270.

Nor did his Honour refer to J O's lack of remorse or empathy for the victim. These were matters of particular importance in determining whether there was a risk of offending in the future.

[79] In our opinion, the evidence and other material before the Judge was incapable of supporting a finding that J O did not present "as a risk for future offending of this nature". In addition, the failure to acknowledge guilt and accept responsibility for the criminal conduct, coupled with the fact that J O committed the second offence two days after the first offence knowing full well that his conduct was morally and criminally wrong, strongly weighed against such a positive conclusion. This was not a case in which there were any mitigating circumstances attaching to either crime. Nor were the crimes committed in circumstances that might explain why the conduct occurred and why it was unlikely to be repeated. For example, it was not a case in which an offender of otherwise exemplary character, affected by alcohol, gave in to a temptation by reason of the effects of alcohol and there was reason to be confident that the offender would abstain from alcohol in the future.

[80] The learned trial Judge erred in making a positive finding that J O was unlikely to commit offences of a sexual nature in the future. At best from J O's point of view, the evidence and other material failed to establish that positive fact and the Judge was left in the position of not being able to make a finding one way or the other. In these circumstances, personal deterrence

remained a relevant factor in the exercise of the sentencing discretion. The sentencing Judge did not refer to this aspect.

[81] In addition, the question of general deterrence assumed particular significance in the exercise of the sentencing discretion. Unfortunately, offences against children of a sexual nature are far too common. The sentencing Judge made no reference to the prevalence of this type of offence or to the importance of general deterrence.

[82] Every offence against a child is a serious offence. In 2004 the maximum penalty for the offences of which J O was convicted was increased from 10 to 14 years and sentencing courts must respond accordingly. Sexual assaults against children are abhorrent crimes which cause grave disquiet throughout the community. In recent years the community has come to recognise that these offences are far more prevalent than previously was thought to be the situation. The community has reached a more enlightened understanding of the nature of sexual crimes and the personal violation involved in all such crimes, including those previously regarded as relatively minor offences. The impacts of these types of crimes are now better recognised and understood, particularly the long term effects upon victims who were children at the time of the offending.

[83] Children are among the most vulnerable members of our community and are entitled to the full protection of the law. Children in domestic circumstances are particularly vulnerable to abuses of trust by a trusted

family member. Penalties imposed by the criminal court in recent years have increased in recognition of both the increased maximum penalties for crimes of the type committed by J O and of their prevalence and harmful effects. General deterrence is a matter of particular importance, together with denunciation by the community through the imposition of condign punishment.

[84] While every crime of sexual assault against a child is a serious crime, there is a scale of seriousness according to the particular circumstances of each crime. The sentencing Judge did not make a specific finding as to where the offending by J O stood in the scale of seriousness, but his Honour properly rejected a submission that the offending was "very low" on that scale. In that context his Honour referred to the gross breach of trust. However, as we have said, his Honour did not mention the other aggravating features to which we have referred.

[85] Notwithstanding the existence of the aggravating features discussed earlier in these reasons, in assessing where the criminal conduct stands in the scale of seriousness it must be borne in mind that the conduct was of short duration and did not involve gratuitous physical violence, physical harm or penetration. Weighing all the factors, in our opinion when the crimes committed by J O are viewed objectively, while not at the lowest end of the scale of seriousness, they sit toward the lower end of that scale.

[86] As to the individual sentences and the question of suspension, there is no tariff for crimes involving sexual assaults. This much is demonstrated by the schedule of sentences provided to the Court. Such crimes are committed in a wide variety of circumstances and by a wide variety of offenders. The appropriate sentence must be determined according to the individual circumstances of the offending and the offender.

[87] Notwithstanding the absence of a tariff, there is a range of appropriate sentences that can be said to comprise the sentencing "standard" for the crimes under consideration. A sentencing standard is not a fixed range or tariff. The role of a sentencing standard was explained in the joint judgment of Martin (BR) CJ and Riley J in *Daniels v The Queen*:[4]

> "The role of sentencing standards must be properly understood. They do not amount to a fixed tariff, departure from which will inevitably found a good ground of appeal. We respectfully agree with the observations of Cox J in *R v King* (1988) 48 SASR 555 as to the proper role of sentencing standards (at 557):
>
> > '… In a word, this case is about sentencing standards, but it is important, I think, to bear in mind that when a standard is created, either by the cumulative force of individual sentences or by a deliberate act of policy on the part of the Full Court, there is nothing rigid about it. Such standards are general guides to those who have to sentence in the future, with certain tolerances built into or implied by the range to cater for particular cases. The terms of approximation in which such standards are usually expressed – "about" and "of the order of" and "suggest" and so on – are not merely conventional. … It follows that a particular sentence will not necessarily represent a departure from the standard because it is outside the usual or nominal range; before one could make that judgment it would be necessary to look at all of the circumstances of the case.

[4] (2007) 20 NTLR 147 at [29].

> Those circumstances will include, but of course not be confined to, the questions whether or not the offences charged are multiple or single and whether the defendant is a first offender with respect to the particular crime charged. That is not to undermine the established standard but simply to acknowledge that no two cases, not even two "standard" cases, are the same. …'"

[88] In the absence of a tariff for crimes of the type under consideration, a comparison with previous individual sentences is of limited assistance. However, some guidance can be obtained from previous decisions, particularly those of the Court of Criminal Appeal. One of these decisions of assistance is the decision of this Court in *R v MAH*.[5] The offender had been convicted by a jury of two offences of unlawfully and indecently dealing with a child aged seven years. Sentences of 11 months imprisonment and seven days imprisonment, to be served concurrently, were imposed and the total sentence was suspended after the offender had served a period of four months. A Crown appeal against the sentence of 11 months imprisonment was successful and a sentence of 18 months was substituted. In addition, the Court ordered that the respondent serve nine months of the sentence.

[89] The offending by *MAH* took place in November 2004 when the victim was aged seven years. The offender was staying with the victim's mother and

[5] (2005) 16 NTLR 150.

the victim and the offending was described in the judgment of Mildren J on appeal in the following terms:[6]

> "At sometime during the day J went into the lounge room at a time when the respondent was lying on the lounge. The respondent took hold of J's left hand and put it down the front of his pants in the genital region. She was able to feel the respondent's erection. After approximately 10 seconds, the respondent put his hand down J's pants and fondled her bottom. He then took hold of J's hand again and placed it on his erection for a short period of time, some three or four seconds."

[90] The first count was concerned with the touching of the penis on two occasions and the second count with the touching on the bottom. The offender was aged 32 years and took advantage of being trusted alone with the children of the family. Mildren J noted that the respondent had no prior convictions, but no character references were presented to the Court and the victim impact statement indicated that the offending had a "negative impact" upon the victim. With the concurrence of Thomas and Southwood JJ, his Honour expressed the view that the sentences were manifestly inadequate and that the offending required a head sentence of two years with a considerable portion of that sentence be served. However, having regard to the special considerations peculiar to Crown appeals and the restraint on re-sentencing in those circumstances, Mildren J determined to allow the appeal against sentence on count 1 and to substitute a period of 18 months. The Crown appeal with respect to the sentence on count 2 was dismissed. The

[6] *R v MAH* (2005) 16 NTLR 150 at [13].

respondent was required to serve nine months before the balance of the sentence was suspended.[7]

[91] Having regard to the absence of a reduction in sentence that would flow from a plea of guilty, and to the particular circumstances of the offending and offender under consideration, in our opinion the individual sentences of 12 months and the total to be served were so far outside the proper range of the sentencing discretion as to be manifestly inadequate. As we have said, in our view the sentencing Judge fell into error with respect to his Honour's finding that there was no risk of future offending. In addition the other matters arising out of the sentencing remarks to which we have referred tend to suggest that his Honour gave insufficient weight to the aggravating features of the offending and the importance of general deterrence. However, regardless of the question of identifiable error, in our view the manifest inadequacy itself establishes error in point of principle.

[92] We are also of the view that suspension of the total sentence after service of imprisonment for only one day resulted in a sentence that was so manifestly inadequate as to demonstrate error in point of principle. All of the factors to which we have referred were relevant to the exercise of the discretion to suspend the sentence, but of particular significance were the aggravating circumstances of the total criminal conduct and the absence of mitigating circumstances accompanying that conduct. In addition, of particular

[7] The transcript incorrectly records that the appeal was allowed and the respondent re-sentenced in respect of count 2.

relevance was the absence of any matters personal to J O that could be called in aid of mitigation. The absence of mitigating matters personal to J O is compounded by J O's failure to acknowledge his guilt and accept responsibility for his conduct.

[93] There is no tariff in the sense that, for crimes of the type committed by J O, suspension of all but a nominal period of a sentence can never be justified. However, given the serious and repeated criminal offences against a very young child, being offences of a sexual nature, suspension could only be justified if powerful mitigating circumstances exist either in respect of the offence or the offender or both. In view of the gravity of the total criminal conduct, the requirements of retribution, denunciation and general deterrence must be given great weight and, usually, such considerations will prevail over matters personal to an offender. This view is reinforced by a consideration of the schedule of sentences provided by the Crown which demonstrates the rarity of suspension after service of a nominal period. Suspension after service of a nominal period was ordered in only two matters, one of which involved an offender aged 17 who suffered from a cognitive impairment. Both offenders pleaded guilty and the criminal conduct of the adult offender was far less serious than that of J O.

[94] In the matter under consideration, there were no matters of mitigation, either relating to the offence or to J O, capable of justifying suspension after service of imprisonment for only one day in the face of such serious and

repeated criminal conduct. In this respect the sentencing discretion miscarried to the extent of demonstrating error in point of principle.

Crown Appeals - Principles

[95] The principles governing Crown appeals are not in doubt. They have been discussed in numerous decisions, including *R v Riley*,[8] and there is no need to repeat that discussion. It is sufficient to note that if the sentence is so manifestly inadequate as to shock the public conscience and demonstrate error in point of principle, nevertheless it remains necessary for the court to determine whether this is one of those rare and exceptional cases in which the Crown appeal should be allowed and the offender re-sentenced.

[96] While it is unnecessary to discuss in detail the principles governing Crown appeals, in view of the extensive publicity that followed the imposition of the sentence at first instance, it is appropriate to emphasise that the Court of Criminal Appeal cannot be influenced by public criticism that a sentence is inadequate. As Doyle CJ said in *R v Nemer*:[9]

> "If the sentence is within an appropriate range, the court cannot interfere. If the court does interfere, it does so because an error has been made, not because the sentence has been widely criticised."

[8] (2006) 161 A Crim R 414 at [18] – [21].
[9] (2003) 87 SASR 168 at [15].

[97] In making that observation, Doyle CJ was not suggesting that a sentencing Judge or the Appeal Court ignores community concerns about crime. His Honour said:[10]

> "The judge can take account of public attitudes to the type of crime in question, and public concern about the prevalence of a type of crime or about its effects. In this general way public opinion is relevant. A sentencing judge can also have regard in a general way to a public expectation that serious crime will attract severe punishment. But it is not lawful for a judge to try to identify and then impose the sentence that the public expect. The judge must sentence according to law, not according to the public expectation. In any event, there is no way of knowing reliably what the public as a whole want or expect in a particular case."

[98] In the context of strong public criticism of the sentence in that case as being inadequate, Doyle CJ emphasised that it would be wrong to increase a sentence because it had been strongly criticised. As his Honour said, the Court is not "trying to satisfy the critics". The Court can only interfere if error has occurred. His Honour added that this approach does not mean that public criticism of a sentence is wrong or resented by the Court. His Honour continued:[11]

> "The public have a right to criticise and to hear the criticisms of others through the media. This is a legitimate function of the media. But the public needs to understand the points I have just made."

Role of the Crown

[99] As we have said, in our view both the individual sentences and suspension after service of one day were manifestly inadequate to the point of

[10] *R v Nemer* (2003) 87 SASR 168 at [14].
[11] *R v Nemer* (2003) 87 SASR 168 at [20].

demonstrating an error in point of principle. Notwithstanding these findings, however, the question remains whether this Court should interfere with the individual sentences and/or suspension and reimpose sentence. In the context of the individual sentences, the role of the Crown on this appeal requires consideration.

[100] Before dealing with the Crown approach to the appeal, it is appropriate to deal with a submission by counsel for J O concerning the approach adopted by the Crown before the sentencing Judge at first instance. Counsel suggested that the Crown did not oppose suspension after service of one day.

[101] During submissions as to sentence before the sentencing Judge, the Crown referred to s 78BB of the *Sentencing Act* and the requirement that J O serve a term of imprisonment which was not wholly suspended. The prosecutor identified aggravating features of the crime and referred to the decision at first instance in the matter of *MAH*, being the sentence that was subsequently increased on appeal. The sentence at first instance involved service of four months of actual custody.

[102] Recognising that a sentence of imprisonment was inevitable by reason of s 78BB, counsel for J O suggested that the sentence could be "fully suspended" in order to allow J O to return home. Although that specific submission was made, a reading of the submissions in their entirety suggests that this particular submission was advanced in hope rather than realistic anticipation of success. In response, counsel for the Crown again

emphasised that his Honour should accept the entirety of the evidence of the victim, but made no comment as to the question of suspension.

[103] This is not a case in which the Crown acquiesced before the sentencing Judge in the imposition of a fully suspended sentence. There was nothing in the conduct of the Crown that could have led his Honour to reach that conclusion. In substance the prosecutor submitted that the offending was more serious than the offending in *MAH* where, at first instance, the offender had been required to serve four months in prison. This is not a case in which the conduct of the prosecution at first instance contributed to any error made by the sentencing Judge.

[104] As we have said, the notice of appeal filed by the Crown did not suggest that the individual sentences of 12 months were inadequate and, on the hearing of the appeal, the Director accepted that the individual sentences were within the range of the sentencing discretion. As is apparent from our reasons, we are of a different view, but the approach taken by the Director raises the question as to whether, notwithstanding the manifest inadequacy of the individual sentences, it is appropriate for this Court to interfere with those sentences.

[105] When sentencing at first instance, a sentencing court is not bound by the attitude or submissions of the Crown. The position taken by the Crown deserves no more or less weight than the submissions presented on behalf of an offender. The sentencing discretion is individual to the judicial officer

and is exercised in the public interest according to law. It is not constrained in any way by the views of the parties or any "agreement" between the parties as to the appropriate sentence.

[106] In *R v Malvaso*,[12] the offender pleaded guilty to a drug offence. In return for assisting the authorities, the prosecution agreed that on a plea of guilty it would "stand mute" as to the question of whether a sentence of imprisonment should be suspended. This meant that the prosecution would not make any submission in relation to that question. The learned sentencing Judge construed the silence of the Crown on that issue as indicating that the Crown did not oppose suspension.

[107] Following a plea of guilty, the Judge imposed a fine of $5,000 together with a sentence of imprisonment that was fully suspended. The Crown appealed against the length of the sentence, but not against the suspension. Notwithstanding that the Crown did not appeal against the suspension of the sentence, the Court of Criminal Appeal allowed the Crown appeal and re-sentenced the offender to a longer term of imprisonment that was not suspended.

[108] In a judgment with which Cox and O'Loughlin JJ agreed, King CJ distinguished the role of the prosecution in the sentencing process from the role of the Courts in exercising the sentencing discretion:[13]

[12] (1989) 50 SASR 503.
[13] *R v* Malvaso (1989) 50 SASR 503 at 509 - 510.

"The prosecution has a role in the sentencing process which consists of presenting the facts to the Court and of making submissions which it thinks proper on the question of what sentence ought to be imposed. The decision as to what sentence is to be imposed is, however, entirely a matter for the Court which may, of course, be influenced by the arguments that are placed before it by the prosecution as well as by the defence, but must never be influenced by the attitudes or opinions as distinct from the arguments of either. In particular it must be stressed that the attitude of the prosecution towards a particular proposed course of action in relation to sentence is, as such, irrelevant; the view of the prosecution has no greater weight than the arguments advanced in support of that view. These propositions are elementary and fundamental propositions relating to the administration of criminal justice by independent courts, but their express elaboration may assist in clarifying the confusion of thought which lay at the root of some of the argument addressed on the present appeal.

It was put to us that the views, as distinct from the arguments advanced in support of those views, of the prosecution were proper to be taken into account in determining sentence in certain cases. I think that that is fundamentally wrong. It is true, of course, that the view of the prosecution as to certain relevant circumstances may be significant. The Court has received and considered, for example, the views of the Attorney-General and, through him, of the executive government that the prevalence of certain types of crime were of concern in the community. … Likewise, it may be important to know the prosecution's view as to the value of assistance given by an offender to the authorities. Other examples could be given but these are mere factors to be taken into account in assessing the appropriate punishment. It is quite another thing to suggest that the courts should be influenced by views as to the punishment of a particular offender entertained by those who are responsible for prosecutions.

When these principles are grasped, it will be seen that any deal entered into by investigating or prosecuting authorities with an offender can have only a limited impact upon the ultimate decision of the Court. It is the Court which must decide, in the end, having taken into account all relevant factors and arguments put to it, what mitigation of sentence is appropriate in recognition of the co-operation given to the authorities by the offender. The views of the prosecuting authorities cannot influence the Court. The most that those authorities can do, and effectively promise to do, is either to remain silent or to place before the Court considerations which might tend in the direction of leniency."

[109] There is no suggestion in the judgment of King CJ that the Court was required to take into account the fact that the Crown appealed against only the length of the sentence and not the order of suspension.

[110] On appeal to the High Court,[14] the appeal was allowed on the basis that the Court of Criminal Appeal had erroneously overlooked that the proceeding before it was an application for leave to appeal and the Court erred in failing to determine whether that application should be granted. In addition, the Court of Criminal Appeal had acted on a wrong view of a section of the *Criminal Law Consolidation Act* (SA) concerned with statutory remissions of sentences of imprisonment.

[111] Two matters should be noted from the judgments delivered in the High Court. First, it was not suggested that the Court of Criminal Appeal was constrained not to increase the length of the sentence because the Crown appeal did not attack the length of the sentence and only attacked the fact of suspension.

[112] Secondly, the observations of King CJ concerning the distinction between the role of the Crown and that of the sentencing court were approved. In the joint judgment of Mason CJ, Brennan and Gaudron JJ, after referring to the agreement that the prosecution would stand mute on the question of suspension of the sentence, their Honours said:[15]

[14] *R v Malvaso* (1989) 168 CLR 227.
[15] *R v Malvaso* (1989) 168 CLR 227 at 233.

> "That is not to say that the agreement between the prosecuting authorities and the applicant affected the duty either of the sentencing judge or of the Court of Criminal Appeal (if leave to appeal were given) to impose the sentence which appeared appropriate to the Court in the circumstances. The Court's sentencing discretion is to be exercised in the public interest; it cannot be fettered by a plea-bargaining agreement. Nor can such an agreement bind the Attorney-General not to exercise his statutory power to seek leave to appeal and to appeal in any case where, in his opinion, the proper administration of criminal justice requires that power to be exercised. Nevertheless, if an agreement between the prosecuting authorities and an offender has affected the course of proceedings before the sentencing judge and the course of proceedings is relevant to the order which should be made on the Attorney-General's application for leave to appeal, the Court may have regard to those circumstances in determining whether leave to appeal should be given."

[113] In our respectful opinion, those observations are important. They emphasise the duty of both the Court at first instance and the Court of Criminal Appeal to exercise the sentencing discretion in the public interest.

[114] Deane and McHugh JJ delivered a separate joint judgment. Their Honours echoed what King CJ had said that it is "fundamental to our notions of what is proper and desirable in the administration of criminal justice that the distinction between the role of the Attorney-General and those who assist him or her in the prosecution of crime and the role of the courts be maintained and carefully observed".[16]

[115] As we have said, in our view there is nothing in the course of proceedings before the sentencing Judge that contributed to any error made by his Honour. Nor has the fact that the Crown notice of appeal complained only

[16] *R v Malvaso* (1989) 50 SASR 503 at 239.

of suspension of the sentence influenced the course of proceedings in this Court. In advance of the hearing of the appeal the parties were informed that the Court would consider the question of the adequacy or otherwise of the individual sentences and that issue was addressed by the parties.

[116] Views of either party, as opposed to arguments in support of those views, are irrelevant. Notwithstanding the absence of a ground of appeal attacking the length of the individual sentences, and the presence of a submission by the Crown that the individual sentences are not manifestly inadequate, it is the duty of this Court to form its own view as to the adequacy or otherwise of the individual sentences and to act upon that view. This is not to deny the existence of the discretion to decline to interfere notwithstanding the inadequacy of the individual sentences. It is to emphasise the duty of the Court to act in the public interest by faithfully applying the relevant principles of law according to the views it has reached having paid full regard to the relevant facts and submissions of the parties. It would be an error principle for the Court to act otherwise.

[117] In our opinion, when determining whether this is one of those rare and exceptional cases in which the Court should take the final step of setting aside the sentence and re-sentencing, even if weight was given to the attitude of the Crown on this appeal, and notwithstanding that J O was released from custody into the community, this Court would be failing in its duty to the community if it did not set aside the sentences and re-sentence J O. This is one of those rare and exceptional cases in which interference by

this Court to correct manifestly inadequate individual sentences, and suspension after service of one day, is both appropriate and necessary. The maintenance of "adequate standards of punishment"[17] is particularly important in the area of sexual offences against children. This is a sentence which "shocks the public conscience"[18] and requires interference by this Court to correct the error and departure from the appropriate sentencing standard. In our view public confidence in the administration of justice would be seriously undermined if this sentence was not set aside and an appropriate sentence imposed.

Re-sentencing

[118] We turn to the question of re-sentencing. This requires the Court to form its own view as to the appropriate sentence, having regard to the circumstances of both the offending and the offender.

[119] As to the circumstances of the offending, we have already referred to the facts and to the aggravating features associated with the commission of the crimes. Although there was an absence of circumstances which would place the criminal conduct at a higher level in the scale of seriousness, and for this reason the crimes committed were toward the lower end of the range of seriousness, there were no mitigating circumstances accompanying the commission of the crimes.

[17] *R v Osenkowski* (1982) 30 SASR 212 per King CJ at 213.
[18] *R v Osenkowski* (1982) 30 SASR 212 per King CJ at 213.

[120] As to matters personal to J O, in addition to the material placed before the sentencing Judge, the Court had the benefit of two psychiatric reports from different psychiatrists who examined J O in March and April 2009 for the purposes of the sentencing proceedings before this Court. Brief oral evidence was given by the first psychiatrist.

[121] The personal history of J O is relatively unremarkable. J O is now aged 37 years. His parents separated when he was aged seven and he has little memory of his father. His mother lives interstate as does one of his two siblings. J O attended school until the age of 14 years, having passed year 9 with average marks. He informed one of the psychiatrists that his family was "up and down" as the marriage of his parents was unstable. Although J O has previously been a heavy consumer of alcohol, that consumption has now been reduced to moderate levels and he does not use illegal drugs. J O's relationship with his wife has been described as "untroubled" and J O has never been the victim of sexual abuse. He has enjoyed sound physical health throughout his life.

[122] It is apparent from the psychiatric reports that J O is within the average intellectual range and there are no signs of a psychiatric disorder or organic impairment of brain function. There are no signs of mental disorder. The first psychiatrist reported that J O is "not bothered by guilt, shame or self-consciousness". To both psychiatrists, J O continued to deny committing the offences.

[123] Not surprisingly, at the time of the examinations J O was in a distressed frame of mind as a consequence of the criminal proceedings and his incarceration. The second psychiatrist expressed the view that J O would qualify for a diagnosis of an "adjustment disorder with anxiety and depression", but emphasised that the condition is mild and temporary. The existence of mood disturbance, insomnia and instability of appetite and weight described by J O to the psychiatrist was confirmed by J O's wife who gave evidence before this Court. She described how, following his release after sentencing at first instance, J O withdrew from his normal activities and found it very hard to live a normal life. She spoke of J O's "ups and downs" and of the likely impact upon her and the children should J O be imprisoned. The impacts on J O and his family are not unexpected and are not matters capable of attracting significant mitigation.

[124] As to the risk of future offending, as we have said in our view the learned Judge erred in making a finding that J O was unlikely to commit offences of a sexual nature in the future. Initially, counsel for J O relied upon the opinion of the first psychiatrist that the risk of further offending appeared to be "low". However, the basis for the expression of that opinion as set out in the written report was unsatisfactory and, when the psychiatrist gave oral evidence, it emerged that he had only been informed of the commission of one offence. The psychiatrist readily acknowledged that if a second offence had been committed, the existence of that offence placed that opinion in "jeopardy" and weakened the basis for it. Further, although the second

psychiatrist also expressed the view that J O "would be properly described as being in a category of low risk of recidivism for sexual offending", the basis for that view was again unsatisfactory.

[125] In these circumstances, counsel for J O conceded that there was no adequate basis upon which he could reasonably urge this Court to reach a positive conclusion in J O's favour that the risk of J O re-offending was "low". That concession was properly made. There were a number of factors to which we have referred which strongly pointed away from such a positive conclusion. These included the absence of any explanation for the commission of the crimes and the commission of a second offence in circumstances where J O had previously acknowledged that his criminal conduct on the first occasion was wrong. They also included the failure by J O to acknowledge his guilt or accept responsibility for his criminal conduct.

[126] Although the material before this Court does not provide a basis for a positive conclusion that the risk of re-offending is low, it does not necessarily follow that a conclusion can properly be drawn that J O presents as a high risk of offending in the future. The material before this Court is not capable of supporting such a positive conclusion adverse to J O. While there is a risk of future offending, and personal deterrence remains a significant factor in the exercise of the sentencing discretion, we are unable to draw any positive conclusion as to the extent of that risk of future offending.

[127] In arriving at our view as to an appropriate sentence we have had regard to the sentences imposed in *MAH* and other cases. As to a comparison with *MAH*, in our view J O's criminal conduct was further up the scale of seriousness. First, although the offender in *MAH* was trusted to be left alone with the child and, as Mildren J said, he "took advantage of that trust", J O was in a far superior position of trust. He had been in a relationship with the victim's mother since 2002 and married to her mother for three years. J O was the victim's stepfather and, according to evidence given by the mother, had looked after the victim since she was aged four months and had a "wonderful bond" with the child. J O's conduct involved a gross breach of trust in a family situation where the very existence and depth of that trust enabled J O to commit the crimes while the child's mother was absent from the family home.

[128] Secondly, the offending in *MAH* involved a single incident of opportunistic conduct occupying less than 30 seconds. In *MAH* it was not clear whether the victim's hand touched the offender's penis or only the clothes outside the penis.

[129] By way of contrast, on the occasion of the first crime JO was playing with the victim while dressed in a sarong without any form of clothing under the sarong. J O disclosed an element of premeditation by removing the sarong and getting under the blanket naked with the child. J O persisted with his criminal conduct notwithstanding the obvious reluctance of the child to look at his penis and her resistance to J O placing her hand on his penis by saying

"no" and trying to pull her hand away. J O disclosed a callous disregard for the wishes of the child.

[130] Thirdly, unlike *MAH*, on the first occasion J O used a degree of force to prevent the child from removing her hand from his penis.

[131] Next, J O engaged in emotional manipulation of the child by telling her that her mother would be jealous and "we'll get in trouble". These statements were also aimed at concealing the criminal conduct.

[132] J O abused his position of trust on a second occasion, two days after committing the first crime. The offending again involved play in the lead up and was preceded by an inappropriate kiss.

[133] The second crime again involved a callous disregard of the child's wishes when she endeavoured to push J O's hand away and asked him to stop. The child also attempted to pull her dress down.

[134] Finally by way of comparison with *MAH*, the second crime by J O was committed against the background of the first offence which J O had acknowledged was wrong by promising not to do it again. J O consciously placed himself and the victim in circumstances in which he was able to commit the second crime. This crime was accompanied by a specific attempt to conceal the criminal conduct by telling the child it was a secret.

[135] For these reasons, in our view the offending by J O was objectively more serious than the offending in *MAH* and J O's culpability was of a higher

order. In addition, unlike the offender in *MAH*, J O was not entitled to the benefit that comes with being a first offender.

[136] As to the Court of Criminal Appeal re-sentencing, there is a further matter of importance that should be understood clearly. In re-sentencing, usually this Court is not free to impose the sentence that it would have regarded as appropriate if sentencing at first instance. In these circumstances a special rule of fairness applies to constrain the Court's discretion.

[137] When re-sentencing following a successful Crown appeal, this Court is required to recognise and give effect to the "element of double jeopardy involved in requiring an offender to face the prospect of being sentenced twice for the same criminal behaviour".[19] The application of this principle is particularly important when an offender has been released by the sentencing Judge and faces the prospect of being sent to prison by the Appeal Court. In applying this principle, the Court of Criminal Appeal imposes a lesser sentence than would have been imposed when sentencing at first instance. The Court often imposes a sentence at the lower end of the range of appropriate sentences.

[138] If we had been sentencing at first instance, for the first crime involving the touching of J O's penis, we would have imposed a sentence of two years and six months imprisonment. For the second offence involving J O placing his hand under the victim's dress and rubbing the general area of her vagina and

[19] *R v Riley* (2006) 161 A Crim R 414 at [22].

bottom on the outside of her underwear, we would have imposed a sentence of two years and nine months imprisonment. However, applying the principle of double jeopardy, we reached the view that sentences of two years on count one and two years and three months on count 2 were appropriate.

[139] Having regard again to the principle of double jeopardy and to the issue of totality, we were of the view that one year and three months of the sentence imposed on count 2 should be served cumulatively upon the sentence imposed on count 1 resulting in a total sentence of three years and three months. We determined that the sentence should be suspended after J O had served a period of one year on the conditions set out in para [7] of these reasons.
