SUPREME COURT OF QUEENSLAND

CITATION:	*R v BDT* [2022] QCA 152
PARTIES:	**R** **v** **BDT** (appellant)
FILE NO/S:	CA No 227 of 2021 DC No 4791 of 2021
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Bowen – Date of Conviction: 18 August 2021 (Lynham DCJ)
DELIVERED ON:	Date of Orders: 2 August 2022 Date of Publication of Reasons: 19 August 2022
DELIVERED AT:	Brisbane
HEARING DATE:	27 July 2022
JUDGES:	Mullins P and Morrison JA and Williams J
ORDERS:	**Date of Orders: 2 August 2022** **1. Appeal allowed.** **2. Convictions set aside.** **3. Retrial ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the appellant was convicted after trial before a jury of 16 counts of child sex offences – where on the first day of trial the trial judge noticed errors in the indictment relating to specific offences – where the prosecutor did not have a commission to prosecute – whether the prosecutor proposed that the trial proceed on the basis of a 'proposed new indictment' that had been signed and emailed from Townsville – where the 'proposed new indictment was to arrive later that day or the next day and they would not proceed further on the indictment then before the court – where the trial judge proposed that the appellant would be arraigned on the copy of the new signed indictment – where when the original was received it would then form the indictment on which the appellant's trial proceeded – where the appellant's counsel agreed to the course proposed – where when the original indictment was presented the next day the

associate endorsed it as having been presented before the trial judge on the first day – where no further arraignment occurred – whether a miscarriage of justice occurred because the appellant was not arraigned and tried on an indictment presented in accordance with s 560 of the *Criminal Code* (Qld)

Criminal Code (Qld), s 559A, s 560, s 572, s 597C, s 604
Justice Legislation (COVID-19 Emergency Response – Proceedings and Other Matters) Regulation 2020 (Qld), s 12

R v LT [2006] QCA 534, cited
R v Foley [2003] 2 Qd R 88; [2002] QCA 522, cited

COUNSEL: M J Copley QC for the appellant
P J McCarthy QC, with C M Georgouras, for the respondent

SOLICITORS: Connolly Suthers Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MULLINS P AND MORRISON JA:** The appellant was convicted, after trial in the District Court at Bowen before a jury, of 16 counts that can be generally described as child sex offences. The appellant appeals against his conviction on the sole ground that a miscarriage of justice occurred because the appellant was not arraigned and tried on an indictment presented in accordance with s 560 of the *Criminal Code* (Qld).

[2] An indictment had been presented against the appellant in November 2020 in the District Court at Townsville. The complainant's evidence was pre-recorded at a hearing in the District Court at Townsville on 12 July 2021. At the conclusion of that hearing, the learned trial judge ordered the transfer of the indictment to the District Court at Bowen for trial.

[3] That indictment was transferred to the District Court at Bowen and the trial was due to commence on 16 August 2021, when the trial judge noticed that there was an error in counts 15 and 16 on the indictment, which were charges of rape. Each count pleaded that the rape occurred over a period of some months, instead of alleging that the rape was committed on a date unknown between the dates specified in the count. The prosecutor did not have a commission to prosecute and, after taking advice, proposed that: (i) the trial proceed on the basis of the "proposed new indictment" which had been emailed from the Director of Public Prosecution's office in Townsville to him and the registrar, and (ii) that the prosecutor would not proceed further on the indictment that was currently before the Court.

[4] The prosecutor gave an undertaking to the Court that the new indictment which had been signed and was sitting in the DPP's office in Townsville would be sent to the registrar and would arrive in Bowen either that day or the next day. The trial judge proposed that the appellant would be arraigned on the copy of the signed indictment (**copy indictment**), and that when the original signed indictment (**original indictment**) was received in the court at Bowen, the original indictment would then form the indictment on which the appellant's trial proceeded. The appellant's counsel agreed to the course proposed.

[5] The appellant was arraigned on the copy indictment and pleaded not guilty to each of the 16 counts. The jury was empanelled and the appellant placed in the charge of the jury. In the absence of the jury, and on the basis of the document provided to the Court by the prosecutor (that indicated the Crown would not proceed further on the indictment presented in November 2020 that contained the error in counts 15 and 16), the appellant was discharged in respect of the November 2020 indictment. The trial then continued. On 17 August 2021, the prosecutor announced that the original indictment had now arrived from Townsville. As arranged the previous day, the original indictment was substituted for the copy indictment that had been used to commence the trial. The original indictment was endorsed by the trial judge's associate as having been presented at Bowen before the trial judge on 16 August 2021. The substitution of the indictment took place in the absence of the jury. No further arraignment occurred.

[6] The simple point agitated on the appellant's behalf by Mr Copley of Queen's Counsel is that there was a miscarriage of justice, because the trial was founded on a document which was not the indictment and therefore did not comply with s 560 of the *Code*. The appellant relies on *R v LT* [2006] QCA 534 at [27]-[29] to submit that s 560 is a provision of fundamental importance, as it is the legislative authority for the executive to bring serious charges against a person in the District Court, and a departure from the terms of s 560 means that the process of the trial was not lawfully commenced or engaged, resulting in a miscarriage of justice.

[7] Mr McCarthy of Queen's Counsel, appearing with Ms Georgouras of counsel on behalf of the respondent submit that the course adopted in the trial, set out in paragraphs [4] and [5] above, was procedural and adopted for efficiency in circumstances where there was no demur from the appellant's counsel, and further that the course taken had no effect on the process or quality of the trial. The respondent therefore argues that the combination of the original indictment being in existence at the time the copy indictment was presented to the trial judge, in conjunction with the prosecutor's indication that the original indictment would arrive at the Bowen courthouse no later than the next day, placed the Court in constructive possession of the original indictment, as if it had been presented when the copy indictment was presented, and there was therefore no miscarriage of justice. The respondent submits that the finding in *LT* of non-compliance with s 560(2) of the *Code* that resulted in the appeal being allowed can be distinguished on the facts.

[8] "Indictment" is defined in s 1 of the *Code* in general terms to mean "a written charge preferred against an accused person in order to [bring] the person's trial before some court other than justices exercising summary jurisdiction". The identification of what constitutes an indictment for the purpose of a trial in the District Court or the Supreme Court is found in specific terms in s 560 of the *Code*. Subsections (1) and (2) of s 560 of the *Code* provide:

> "(1) When a person charged with an indictable offence has been committed for trial and it is intended to put the person on trial for the offence, the charge is to be reduced to writing in a document which is called an indictment.
>
> (2) The indictment is to be signed and presented to the court by a Crown Law Officer, a Crown prosecutor or some other person appointed in that behalf by the Governor in Council."

[9] The ordinary meaning of s 560(2) of the *Code* is that the indictment is a written document which is signed by a person within the categories set out in that provision. There is no dispute about that, as there was no dispute about that in *R v Foley* [2003] 2 Qd R 88. The issue in *Foley* was whether the indictment was presented by a person not authorised to do so. In passing, the Court noted at [8] that the question was whether s 560(2) envisaged that a person described in that provision would "both sign and personally hand to the court" the indictment described in s 560(1) and it was conceded by the respondent in that case that required the indictment be "personally signed" by such a person. (In anticipation of the decision in *Foley*, s 560 of the *Code* was amended by the insertion of subsection (5) that permits a DPP presenter to present an indictment that is signed by a person authorised to sign the indictment under s 560 to the Court stated in the indictment. The definition of "DPP presenter" was inserted at the same time in s 559A of the *Code*, to describe a person, other than a Crown prosecutor, who is authorised in writing by the director of public prosecutions to present an indictment for the director – see *Criminal Proceeds Confiscation Bill 2002* – Amendments In Committee – Explanatory Notes.)

[10] Section 597C(1) of the *Code* provides:

> "On the presentation of the indictment or at any later time, the accused person is to be informed in open court of the offence with which he or she is charged, as set forth in the indictment, and is to be called upon to plead to the indictment, and to say whether he or she is guilty or not guilty of the charge."

[11] Section 597C(3) deems the trial to begin when the person is so called upon as provided in s 597C(1). Pursuant to s 604(1) of the *Code*, an accused person who pleads not guilty is "by such plea, without any further form, deemed to have demanded that the issues raised by such plea or pleas shall be tried by a jury, and is entitled to have them tried accordingly".

[12] There is only one possible interpretation of s 597C(1) of the *Code* in the context s 560(1) and (2), that the arraignment of an accused person that marks the commencement of the trial is on the indictment signed in compliance with s 560(2) which has been presented to the Court. It is a matter for the Legislature whether the longstanding prescription in relation to the requirements for the indictment and the circumstances of its presentation and the arraignment are altered. That has been done in some respects. Since March 2000, s 597C has permitted the Court, in the interests of justice, to allow the arraignment of the accused person to be done over an audiovisual link or audio link. An alternative method or process for presenting indictments was introduced by s 12 of the *Justice Legislation (COVID-19 Emergency Response—Proceedings and Other Matters) Regulation 2020* that was in operation between 19 March 2020 and 30 April 2022. There has been no legislative change, however, to the requirement of the original signed indictment (which has been presented to the relevant court in a compliant manner) being the document on which the arraignment then proceeds and the trial commences.

[13] In *LT*, the defendant pleaded not guilty to eight counts on the indictment when his trial commenced in Toowoomba. There was a mistrial and the indictment was transferred from Toowoomba to Brisbane for trial. In Brisbane the new prosecutor decided not to proceed on count 1 and to add a new count 9 that was handwritten on a copy of the Toowoomba indictment. Through oversight, the additional handwritten

count 9 was not signed by the prosecutor. The original indictment had not arrived from Toowoomba by the commencement of the trial in Brisbane. At the commencement of the trial, the defendant was re-arraigned from the copy of the indictment. He was not arraigned on count 1 to which he had already pleaded not guilty and he was arraigned on the additional count 9. Counts 2 to 9 were renumbered 1 to 8 for the purpose of the trial in Brisbane. (The Court in *LT* held (at [33]) that re-arraignment in Brisbane was unnecessary, as the trial in Brisbane, at least on counts 2 to 7 on the Toowoomba indictment, was properly characterised as a continuation of the Toowoomba trial.) The defendant was convicted of the eight counts that had originally been numbered counts 2 to 9 and, after being sentenced, the problem with the indictments was highlighted, when the prosecutor sought to endorse that the Crown would not proceed on the Toowoomba indictment. The defendant appealed on the basis of the issues with the indictment on which he was convicted.

[14] The Court in *LT* observed (at [30]) that the document on which the trial proceeded in Brisbane did not comply with s 560(1) of the *Code*, as it contained count 9 which had not been signed by a person authorised to prosecute the charge, and the defendant was not arraigned in accordance with s 597C because, so far as count 9 was concerned, it was not "set forth in the indictment", and the amendment of the Toowoomba indictment had never been duly made to include count 9. To the extent that the prosecution sought to rely on the Toowoomba indictment as the source of legal authority for the trial in Brisbane, the Court observed (at [30]) that the trial in Brisbane made no reference to count 1 of the Toowoomba indictment, although that charge was still pending against the defendant at the time the trial in Brisbane commenced. The Court concluded (at [35]) that, at the very least, the processes of trial were not lawfully engaged at all in relation to count 9. The Court also concluded (at [38]) that the consequences of the procedural errors in relation to count 9 could not be quarantined to the conviction on that count as the Court could not be satisfied that the defendant's prospects of acquittal on the other counts were not prejudiced by the irregular presence in the trial of the charge in count 9.

[15] Even though the facts in *LT* differed from the circumstances of the arraignment of the appellant in this matter and involved arguably even more egregious departures from s 560 and s 597C of the *Code*, the observations made by the Court in *LT* on the importance of compliance with s 560 and s 597C of the *Code* apply to the arraignment of the appellant and the commencement of his trial.

[16] It is not merely a matter of form that an accused person is arraigned on the original signed indictment which marks the commencement of the trial. As explained in *LT* at [27]-[29], the original signed indictment presented to the Court (in a permissible way) is fundamental under the *Code* to the proper engagement of the criminal trial process, as set out in s 597C and s 604:

> "[27] The importance of the provisions of s 560(1) and (2) of the *Criminal Code* is obvious. They contain legislative authority for the executive government of the State to bring serious charges in the Supreme and District Courts against subjects for breaches of State law. The formulation and presentation of such charges is a matter of fundamental importance in the administration of criminal justice. It has been consistently recognised that, as envisaged by Sir Samuel Griffith, those authorised to sign and present indictments – and so to enliven the judicial power to

> determine criminal guilt and impose punishment – perform functions which include those historically performed by the grand jury.
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> [28] Of equally fundamental importance is s 597C of the *Criminal Code*. It requires that the accused be informed in open court of the offence with which he or she is charged 'as set forth in the indictment'. It is only upon being so informed that a subject can be called upon to plead; and upon pleading not guilty, the accused is entitled, by virtue of s 604 of the *Criminal Code*, to be tried by jury in respect of the offences set forth in the indictment and no others.
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> [29] The provisions of the *Criminal Code* and the *Jury Act* to which we have referred are fundamental to the authority of a court to determine the criminal responsibility of a subject. At issue is not merely the question of fairness of process – important as that question is. The anterior question is whether the judicial process has been duly engaged to put the subject in jeopardy as to his or her liberty." (*emphasis in original and footnotes omitted*)

[17] The arraignment of the appellant on the copy indictment which was a document that was not signed personally by a person within the categories set out in s 560(2) of the *Code* meant that the trial was a nullity, even though the original indictment was substituted for the copy indictment during the course of the trial and there is no specific prejudice suffered by the appellant other than the non-compliance with s 560 and s 597C of the *Code*. Compliance with s 560(2) of the *Code* was not a matter that could be waived by the appellant's counsel. The appellant has therefore shown there was a miscarriage of justice. The respondent concedes if the Court were to accept that there were a miscarriage of justice, the proviso could not apply. The appeal must be allowed, the convictions set aside and a retrial ordered.

[18] As a postscript, it should be noted that the course that was adopted during the trial of using the copy indictment arose out of the view of the trial judge and the prosecutor that the prosecutor who did not have a commission to prosecute could not amend the November 2020 indictment to correct the error in counts 15 and 16. That was a mistaken view. The error in those counts fell within the description in s 572(1) of the *Code* of "it appears that any words that ought to have been inserted in the indictment have been omitted". The appellant could have been arraigned on the indictment (with the errors in counts 15 and 16) and the trial judge could have exercised the power under s 572(1) to order that the omitted words "on a date unknown" be inserted in counts 15 and 16. Although it is the usual practice for a prosecutor to apply to the Court for an order directing the amendment of an indictment in such a situation, the power that is exercised under s 572(1) is the power of the Court to order the amendment of the indictment. When an order is made under s 572(1), s 572(2) provides the indictment "is thereupon to be amended in accordance with the order of the court". A prosecutor at a trial who does not hold a commission to prosecute is not precluded from carrying out the trial judge's order in respect of amending the indictment where the amendment falls within s 572(1) of the *Code*. That a trial judge has the power to order the amendment of an indictment pursuant to s 572(1), even in the absence of an application by the prosecutor, was recognised by the majority in *Ayles v The Queen* (2008) 232 CLR 410 at [2], [50] and [80] in dealing with the South Australian provision equivalent to s 572(1) of the *Code*.

[19] The orders that should be made are:

1. Appeal allowed.

2. Convictions set aside.

3. Retrial ordered.

[20] **WILLIAMS J:** The appeal was heard on 27 July 2022 and orders were made on 2 August 2022 that the appeal be allowed, convictions set aside and a retrial ordered. I agree with orders 1 and 2 but consider the appropriate order is for a new trial rather than a retrial. Following are my reasons.

[21] On 18 August 2021, the appellant was convicted on 16 counts following a jury trial in the District Court at Bowen. The appellant appealed against his convictions on one count of maintaining an unlawful sexual relationship, four counts of rape, eight counts of indecent treatment of a child with a circumstance of aggravation that she was under 12 and three counts of indecent treatment of a child.

[22] Originally, the appellant appealed against conviction on the ground that the verdict was unsafe and unsatisfactory and also sought leave to appeal on the ground that the sentence was manifestly excessive.

[23] At the hearing of the appeal, the appellant abandoned the application for leave to appeal against sentence and sought leave to amend the Notice of Appeal by deleting ground 1 and substituting the following ground:

> "A miscarriage of justice occurred because the appellant was not arraigned on and not tried on an indictment presented in accordance with section 560 of the *Criminal Code*."

[24] Leave was granted and the appeal proceeded on that one ground of appeal.

[25] As the result of the confined ground of appeal, the facts of the offending are not relevant to this appeal. However, at a very general level, the appellant was alleged to have maintained an unlawful sexual relationship with his stepdaughter for a period of two and a half years.

[26] The key issue on this appeal is whether the statutory criteria in s 560(2) of the *Criminal Code (Qld)* (Criminal Code) had been complied with.

[27] It is necessary to consider the facts in relation to the indictment and arraignment of the appellant on the first day of the trial and also what occurred on the second day of the trial.

Relevant facts

[28] In November 2020 Indictment 611 of 2020 was presented in the District Court in Townsville (**Indictment 611 of 2020**).[1] On 12 July 2021, Indictment 611 of 2020 was transferred from Townsville to Bowen, for a trial listed to commence on 16 August 2021.[2]

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1 AB 130 line 9.
2 AB 174 lines 26-37.

[29] As a preliminary matter, the trial judge raised a matter of law in respect of counts 15 and 16.[3] Both count 15 and count 16 were single particularised counts of rape. The trial judge suggested that the words "on a date unknown" should be added at the beginning of each charge so that it was plain it was not an on-going offence in the stated period. The identified amendment was not opposed by defence counsel.[4]

[30] The prosecutor, Mr Collins, did not hold a commission to prosecute and consequently indicated that the amendments had to be made by someone in Townsville. Mr Collins referred to a process recommended by the principal Crown prosecutor to facilitate this, including that "it can be emailed back".[5]

[31] The original Indictment 611 of 2020 was returned to Mr Collins so that arrangements could be made for the amendments to counts 15 and 16.[6]

[32] Following a brief adjournment, the prosecutor told the trial judge that he had a document indicating that the Crown would "no longer proceed with" Indictment 611 of 2020, "and in its place will proceed with an indictment which has been amended as … discussed".[7]

[33] The new indictment[8] had been signed (**Original Replacement Indictment**) and was in Townsville.[9] Mr Collins offered an undertaking to the Court that the Original Replacement Indictment "will be sent to the registrar of this court either to arrive today or tomorrow".[10]

[34] Mr Collins then presented the document indicating that "the Crown will no longer proceed with" Indictment 611 of 2020. Mr Collins said he had a copy of the "proposed new indictment", "a copy of which has been emailed to myself and to the registrar"[11] (**Copy Replacement Indictment**).

[35] The trial judge acknowledged that "this is somewhat unconventional", and asked defence counsel whether he was "content to proceed on this basis".[12] His Honour noted that:

(a) the Original Replacement Indictment was in Townsville;

(b) the Original Replacement Indictment would be forwarded to the Bowen Registry; and

(c) the Original Replacement Indictment "will then form the indictment that the defendant proceeds to [trial] on".[13]

[36] The trial judge then asked defence counsel "but for the purposes of today, are you content for the defendant to be arraigned on a copy of the indictment?".[14]

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3 AB 181 line 39 to AB 182 line 6.
4 AB 182 line 12.
5 AB 182 lines 23-36.
6 AB 182 line 45 to AB 183 line 2.
7 AB 183 lines 30-34.
8 The replacement indictment was the same as indictment 611 of 2020 but with the words "on a date unknown" added to counts 15 and 16.
9 AB 183 line 39.
10 AB 183 lines 38-40.
11 AB 183 line 44 to AB 184 line 3.
12 AB 184 line 6-7.
13 AB 184 line 22.
14 AB 184 lines 20-24.

[37] Defence counsel agreed, saying that the amendment was in response to an oversight and that "if that other document is forwarded forthwith by the Crown office, then we should expect … to receive [it] very shortly anyway".[15] He added:

> "So we'll have the original indictment[16] if not later today, then, certainly, you would expect by tomorrow. So in the interests of getting this matter underway, I've got no difficulty." [17]

[38] The trial judge then said that the jury would be empanelled and the case could proceed to the opening, after which:

> "I'll then deal with the nolle of the existing indictment[18], again, noting that the defendant is to be arraigned upon the – a copy of that indictment which has been emailed through from the District Court registry this morning[19] and, again, making clear that the extent of any change between the existing indictment[20] and the fresh indictment[21] consists of the inclusion of those further words and only in respect to counts 15 and 16." [22]

[39] The appellant was arraigned on the Copy Replacement Indictment.[23]

[40] Later that morning, the trial judge said that "out of an abundance of caution" he granted leave to amend Indictment 611 of 2020 and acknowledged that the amendment occurred before the arraignment.[24] His Honour then continued, referring to the circumstances of using the Copy Replacement Indictment, and discharging the appellant on Indictment 611 of 2020:

> "And we've spoken already about the practicalities of having to make that amendment in the form of a signed indictment being emailed to the court[25] with a view that the original of the signed indictment[26] will be substituted for the emailed copy of that indictment[27]. No objection was taken to that course and it has become necessary only because Bowen is some two hours south of Townsville – it's the circuit centre – and in circumstances where you did not have [indistinct] to prosecute, Mr Collins.
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> Thirdly, it's important that the defendant proceed to trial only on the one indictment so, in those circumstances, noting that the defendant has been arraigned and has entered pleas of not guilty on the amended indictment[28], I therefore – and the Crown having indicated it will not

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15 AB 184 lines 26-30.
16 Original Replacement Indictment.
17 AB 184 lines 34-36.
18 Indictment 611 of 2020.
19 Copy Replacement Indictment.
20 Indictment 611 of 2020.
21 Copy Replacement Indictment.
22 AB 184 line 45 to AB 185 line 3.
23 AB 185 line 11 to AB 189 line 40.
24 AB 193 lines 10-16.
25 Copy Replacement Indictment.
26 Original Replacement Indictment.
27 Copy Replacement Indictment.
28 Copy Replacement Indictment.

> further proceed in respect to indictment number 10 of '20[29], the defendant is discharged in respect of that indictment[30].'"[31]

[41] On day 2 of the trial the prosecutor raised with the Court reg 12 of the *Justice Legislation (COVID-19 Emergency Response – Proceedings and Other Matters) Regulation 2020* (Qld)[32] and indicated he was getting further instructions on it.

[42] The trial judge observed:

> "Well, that's – well, I suspect we're well past that in any event. The defendant was arraigned in front of the jury on the amended indictment[33]. The amendments were really of a technical nature to ensure that each of counts 15 and 16 alleged a single act as opposed to a course of conduct. The original indictment[34], I assume, might be here today."[35]

[43] The trial judge further noted that the procedure under reg 12 of the *Justice Legislation (COVID-19 Emergency Response – Proceedings and Other Matters) Regulation 2020* (Qld) may have "addressed the situation" but that was not the course that had been adopted the previous day.[36]

[44] The Original Replacement Indictment had not yet arrived from Townsville and was thought to be unlikely to get there that day.[37] His Honour remarked that "it should be here by tomorrow" and noted that the course adopted was with the consent of defence counsel.[38]

[45] Later that morning, Mr Collins informed the Court that the Original Replacement Indictment had arrived at the Court in Bowen and he proposed to present it to the Court.[39] The following exchange occurred between the trial judge and counsel:

> "HIS HONOUR: So it's just really a case of you handing that up and that will be substituted for the emailed copy so the original will now be before the court.
>
> MR COLLINS: Thank you, your Honour.
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> HIS HONOUR: You've got no objection to that course, Mr Pack?
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> MR PACK: No. My friend did raise the question mark as to what your Honour's practice was, whether it would be necessary to re-arraign my client or not, given effectively that it's simply repetition of a document, but - - -
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> HIS HONOUR: Well, seems to me he's been arraigned on the indictment, albeit the emailed copy of the original, on the understanding that once the original was received, it would be substituted for the copy which is presently before the court.

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29 Incorrect reference. Reference should be to Indictment 611 of 2020.
30 Indictment 611 of 2020.
31 AB 193 lines 18-29.
32 In force until 30 April 2022.
33 Copy Replacement Indictment.
34 Original Replacement Indictment.
35 AB 216 lines 15-19. The arraignment occurred on the Copy Replacement Indictment.
36 AB 216 lines 40-42.
37 AB 216 line 21.
38 AB 216 line 24-30.
39 AB 224 lines 33-40.

> MR PACK: Yes, your Honour.
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> HIS HONOUR: So there would be no requirement in those circumstances, I would have thought, for the defendant to be re-arraigned.
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> MR PACK: Thank you, your Honour. Grateful for the indication.
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> HIS HONOUR: You have no difficulty with that course, Mr Pack?
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> MR PACK: Your Honour's approach is the approach I would have submitted is the appropriate one to adopt. Thank you, your Honour.
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> HIS HONOUR: Yes. Yes. Thank you. So the original now – so I'll indicate that the indictment was presented yesterday. So whilst the original indictment wasn't before the court, it was the indictment which was amended yesterday and signed yesterday and the indictment – the original of the indictment which has now just been handed to me, being a substitute or simply replacing the indictment that was presented yesterday, should also be marked the same day as yesterday. Agree with that?
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> MR COLLINS: Thank you, your Honour. Yes.
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> HIS HONOUR: No objection to that, Mr Pack?
>
> MR PACK: No."[40]

[46] The Original Replacement Indictment was allocated as No 8 of 2021. A copy of the Original Replacement Indictment with the Associate's endorsement of it having been presented on 16 August 2021 consistent with the trial judge's comments above is at AB 5.

[47] There is no suggestion that the Copy Replacement Indictment was anything other than a complete copy of the Original Replacement Indictment.

Appellant's position

[48] The appellant contends there has been a miscarriage of justice because there was non-compliance with the statutory requirements of s 560 of the Criminal Code.

[49] This contention necessarily raises that the purported trial occurred:

(a) based on a document which was not the Original Replacement Indictment, being the relevant "indictment" in s 560 of the Criminal Code; and

(b) where the Original Replacement Indictment had not been presented to the Court on or before the arraignment.

[50] Further, it is contended that s 560 is a fundamental provision and non-compliance with the section means that the trial was not lawfully commenced or engaged.[41] The appellant relies on the decision in *R v LT*[42] in support of his contentions.

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40 AB 224 line 42 to AB 225 line 33.

41 Section 597C(3) of the Criminal Code provides that the trial is deemed to begin and the accused person is deemed to be brought to trial when the person is called upon. Under section 597C a person is called upon when "on the presentation of the indictment or at a later time" the accused is called upon to plead to the indictment and say guilty or not guilty (the arraignment).

42 [2006] QCA 534 at [27]-[29].

[51] It is not contentious that s 560 of the Criminal Code requires the charges to be reduced to writing in a document. That was done.

[52] Section 560(2) provides that the indictment is to be signed and presented by one of three categories of persons. The Original Replacement Indictment was signed and it is not disputed that Mr Collins was authorised as a DPP presenter to present an indictment to the Court.

[53] The appellant contends that the statutory requirements in s 560(2) were not complied with: that is, the Original Replacement Indictment was not presented to the Court as required by s 560 prior to the arraignment of the appellant and the commencement of the trial. The Original Replacement Indictment was not received by the Court until the second day of trial.[43]

[54] It is also contended, that the exchanges between the trial judge and counsel illustrate that none of them regarded the document that the appellant was required to enter pleas to[44] as the "indictment" for the purposes of s 560 or s 597C of the Criminal Code or s 51 of the *Jury Act 1995* (Qld).[45]

[55] The exchanges support the position that it was understood that the "indictment" was the Original Replacement Indictment which was in Townsville and was to be delivered to the Court in Bowen. It is contended in these circumstances that the document upon which the appellant was arraigned was not the "indictment", as that was yet to arrive from Townsville.

[56] It is also apparent from the exchange that occurred on the second day of trial, that the Original Replacement Indictment which had arrived from Townsville was to be substituted for the document that the trial had proceeded on until that time.[46]

[57] The appellant contends that s 560 of the Criminal Code does not contemplate anything other than the "indictment". There is no 'interim' or 'holding' document such as a copy by which the process can be commenced and then the "indictment" substituted in.

[58] Ultimately it is submitted by the appellant that a trial proceeding on a copy of an indictment yet to be presented was not a proceeding on an indictment in accordance with s 560 of the Criminal Code.

[59] Here, that means a trial proceeding[47] on the Copy Replacement Indictment, where the Original Replacement Indictment had not been presented, was not a proceeding on an indictment for the purposes of s 560 of the Criminal Code.

[60] The appellant also points to the *Justice Legislation (COVID-19 Emergency Response—Proceedings and Other Matters) Regulation 2020* (Qld) in support of this contention. Reference is made to Division 3 which deals with modifications to the

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43 For the purposes of the appeal, it is not necessary to conclusively determine whether in fact the Original Replacement Indictment was actually presented to the Court on the second day of trial, 17 August 2021. The trial judge considered it was not given his understanding of the course that had been adopted. By then the appellant had been arraigned and the trial purportedly commenced in any event.

44 Being the Copy Replacement Indictment.

45 Section 51 of the Jury Act the judge must ensure that the jury is informed of the charge "contained in the indictment".

46 Which could only have been the Copy Replacement Indictment.

47 Or perhaps more accurately a "purported trial".

Criminal Code during the COVID-19 emergency response period. This includes s 12, which sets out an alternative method or process for presenting indictments in respect of ss 560 and 561 of the Criminal Code where the original signed document could not be physically handed to the Court in person.[48]

[61] The appellant contends that this regulation provides for a particular procedure for the presentation of a copy of an indictment in particular circumstances under the COVID-19 emergency arrangements. By these regulations, it is submitted that Parliament has recognised that s 560 is not efficacious to achieve that result otherwise.

[62] Consistent with the interpretation of "indictment" in s 560 of the Criminal Code, s 12 also makes it clear that the "indictment" is the original signed document which is presented except as permitted under the regulations.

[63] Ultimately, the appellant seeks orders that the appeal be allowed and the convictions be set aside. The appellant accepts that it is also open for this Court to order a new trial on Indictment 8 of 2021.

Respondent's position

[64] The respondent's position is that if the Copy Replacement Indictment, with the Original Replacement Indictment provided later in identical terms, is sufficient authority for the appellant to have been called upon to plead to, then the appeal must fail.

[65] Further, the respondent submits that the trial judge implicitly, if not explicitly, ordered for the indictment to be amended to correct an identified error, namely the omission of the words "on a date unknown" in counts 15 and 16.

[66] The respondent contends that there is a clear power in s 572 of the Criminal Code for the Court to direct an amendment of an indictment and it is submitted this is not limited to the authority of the prosecutor to prosecute. However, it is accepted that course was not what occurred here.

[67] The respondent further accepts that if it is determined that the proceeding on the authority of the Copy Replacement Indictment was an error giving rise to a defect in the constitution of the Court, then there is no room for the application of the proviso in s 668E of the Criminal Code.

[68] It is contended that the course adopted here was procedural and was for the efficient conduct of the trial in circumstances where there was no demur from the appellant.

[69] The respondent also refers to the authority of *R v LT*[49] and seeks to distinguish that decision. It is submitted that here the appellant was tried on an indictment, being a document signed by a Crown Prosecutor, and was not tried for an offence not contained in the document.

[70] For the purpose of the statutory requirements in s 560 of the Criminal Code the respondent contends that:

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48 For example, s 12(4) and (5) provides for the presentation of an indictment by audio visual link or audio link where a true copy of the signed indictment is given to the court electronically. The requirement under section 560 or 561 of the Code for the original signed indictment to be presented to the court is taken to be satisfied if the copy of the indictment is endorsed by a judge of the court.

49 [2006] QCA 534.

(a) the charges had been reduced to writing in a document and the document had been duly signed by a Crown Prosecutor;[50]

(b) the prosecutor informed the Court and the appellant of the information of which the appellant was charged by providing the Court with a copy of the indictment[51] at the commencement of the trial;

(c) an officer of the Court gave an undertaking to provide the Court with possession of the original form of that document;[52]

(d) the Prosecutor ostensibly placed the Court in constructive possession of the indictment,[53] and in these circumstances, the indictment[54] was presented; and

(e) the copy[55] and the original form of the indictment[56] were identical in terms.

[71] This contention, properly understood, can only in effect be a form of 'constructive presentation' of the Original Replacement Indictment for the purposes of the statutory criteria in s 560(2) of the Criminal Code.[57]

[72] In these circumstances, the respondent submits that there has been no miscarriage of justice and the appeal against the conviction should be dismissed.

Consideration

[73] Section 560 of the Criminal Code relevantly states as follows:

> "**560 Presenting indictments**
>
> (1) When a person charged with an indictable offence has been committed for trial and it is intended to put the person on trial for the offence, *the charge is to be reduced to writing in a document which is called an indictment*.
>
> (2) *The indictment is to be signed and presented to the court* by a Crown Law Officer, a Crown prosecutor or some other person appointed in that behalf by the Governor in Council.
>
> ….
>
> (5) Also, if an indictment is signed by a person authorised to sign the indictment under this section, a DPP presenter may present the indictment to the court stated in the indictment." (emphasis added)

[74] Section 572 of the Criminal Code deals with amendments of indictments and states:

> "**572 Amendment of indictments**
>
> (1) If, on the trial of a person charged with an indictable offence, there appears to be a variance between the

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50 Original Replacement Indictment.
51 Copy Replacement Indictment.
52 Original Replacement Indictment.
53 Original Replacement Indictment.
54 Original Replacement Indictment.
55 Copy Replacement Indictment.
56 Original Replacement Indictment.
57 It logically follows that the respondent does not content there was strict compliance with the statutory requirements of s 560(2) of the Criminal Code.

> indictment and the evidence, or it appears that any words that ought to have been inserted in the indictment have been omitted, or any count that ought to have been included in the indictment has been omitted, or that any words that ought to have been omitted have been inserted, the court may, if it considers that the variance, omission, or insertion, is not material to the merits of the case, and that the accused person will not be prejudiced thereby in the person's defence on the merits, order the indictment to be amended, so far as it is necessary, on such terms (if any) as to postponing the trial, and directing it to be had before the same jury or another jury, as the court may think reasonable.
>
> ….
>
> (2) The indictment is thereupon to be amended in accordance with the order of the court.
>
> (3) If the court is satisfied no injustice will be done by amending the indictment, the court may make the order at any time before, or at any stage of, the trial on the indictment, or after verdict.
>
> (4) When an indictment has been amended, the trial is to proceed, at the appointed time, upon the amended indictment, and the same consequences ensue, in all respects and as to all persons, as if the indictment had been originally in its amended form.
>
> (5) If it becomes necessary to draw up a formal record in any case in which an amendment has been made, the record is to be drawn up setting out the indictment as amended, and without taking any notice of the fact of the amendment having been made."

[75] Whilst the trial judge after the arraignment stated that he granted leave to amend the indictment by adding the identified words to counts 15 and 16, the amendment option was not followed. Rather than an amendment being made to Indictment 611 of 2020, the Replacement Indictment was prepared and a *nolle prosequi* was entered in respect of Indictment 611 of 2020. In these circumstances, it is not necessary on this appeal to further consider the appropriate process for the amendment of Indictment 611 of 2020.

[76] The respondent invited the Court to comment on who, on behalf of the prosecution, could endorse an amendment directed by a trial judge. It is not appropriate to make comment in this regard. Section 572 is not relevant to the determination of the appeal and any comments would be hypothetical. Further, s 572 operates on its terms "on the trial of a person charged". Here, it is contentious as to whether there was a trial properly commenced such as to enliven the provision in any event. There is also a risk that commenting on such procedural matters "blurs" the functions of prosecutor and judge.[58] Who may endorse an amendment on an indictment on behalf of the prosecution is a policy matter for the Director of Public Prosecutions.

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58 *Barton v the Queen* (1980) 147 CLR 75 at 110, 111.

[77] Section 597C of the Criminal Code deals with the arraignment of the accused and states:

> "**597C Accused person to be called on to plead to indictment**
>
> (1) *On the presentation of the indictment or at any later time*, the accused person *is to be informed in open court of the offence with which he or she is charged, as set forth in the indictment, and is to be called upon to plead to the indictment*, and to say whether he or she is guilty or not guilty of the charge.
>
> (2) If the indictment contains more than one count, a plea to any number of counts may, with the consent of the accused person, be taken at one and the same time on the basis that the plea to one count will be treated as a plea to any number of similar counts on the same indictment.
>
> (3) The *trial is deemed to begin and the accused person is deemed to be brought to trial when the person is so called upon*.
>
> …." (emphasis added)

[78] On the current facts, the issue arises whether the accused was arraigned on "the indictment" for the purposes of s 560(2) of the Criminal Code. That could only be an indictment that meets the statutory criteria in s 560(2): namely, "signed and presented to the court". The appellant's position is that the Copy Replacement Indictment could not meet the statutory criteria as it was not the "signed" indictment and the Original Replacement Indictment was not in Bowen until the second day of trial, after the appellant had already been arraigned. The respondent relies upon its contention that the arraignment on the Copy Replacement Indictment was sufficient where the Original Replacement Indictment was 'constructively' before the Court[59] on the first day, prior to the arraignment of the appellant.

[79] Both the appellant and the respondent seek to rely on the Court of Appeal decision in *R v LT*.[60] In *R v LT* the principal ground of appeal was that the indictment on which the appellant was convicted was only presented after the jury had given its verdict.

[80] The relevant facts include:

(a) On 25 July 2006 the appellant was arraigned in Toowoomba on an indictment signed and presented to the District Court on that day. A trial commenced and a mistrial was "declared" and the jury discharged. The matter was transferred to Brisbane.

(b) On 1 August 2006, the trial was re-scheduled and a new prosecutor indicated that the Crown would not be proceeding on count 1 and that a new count 9 would be added to the indictment. Then the prosecutor took a copy of the original indictment that had been presented in Toowoomba, and caused count 1 to be deleted and count 9 to be handwritten on that document. The new prosecutor did not sign the document. That document was handed to the Court.

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59 See contention discussed at [70] and [71] above.

60 [2006] QCA 534.

(c) The appellant was arraigned on the basis that count 1 of the Toowoomba indictment was not included and count 9 was included. Further after the arraignment, leave was granted to "amend" the indictment to add count 9. It seems that at no stage was count 1 actually deleted from the Toowoomba indictment. Further, count 9 was not signed by the prosecutor.

(d) The original Toowoomba indictment was not physically in Court on 1 August 2006 when the second trial allegedly commenced. It arrived some time later.

(e) On 4 August 2006 after the appellant had been convicted and sentenced, the prosecutor informed the Court that he was endorsing the Toowoomba indictment and that the Crown would not proceed further on that indictment on the assumption that the replacement indictment had been presented on 1 August 2006.

(f) The trial judge proceeded on the understanding that the indictment on which the appellant had been convicted was that "presented" in Brisbane on 1 August 2006.

[81] McMurdo P, Keane JA and Chesterman J in a joint judgment of the Court of Appeal stated as follows:

> "[27] The importance of the provisions of s 560(1) and (2) of the *Criminal Code* is obvious. They contain legislative authority for the executive government of the State to bring serious charges in the Supreme and District Courts against subjects for breaches of State law. The formulation and presentation of such charges is a matter of fundamental importance in the administration of criminal justice. It has been consistently recognised that, as envisaged by Sir Samuel Griffith, those authorised to sign and present indictments – and so to enliven the judicial power to determine criminal guilt and impose punishment – perform functions which include those historically performed by the grand jury.[61]
>
> [28] Of equally fundamental importance is s 597C of the *Criminal Code*. It requires that the accused be informed in open court of the offence with which he or she is charged 'as set forth in the indictment'. It is only upon being so informed that a subject can be called upon to plead; and upon pleading not guilty, the accused is entitled, by virtue of s 604 of the *Criminal Code*, to be tried by jury in respect of the offences set forth in the indictment **and no others**.
>
> [29] The provisions of the *Criminal Code* and the *Jury Act* to which we have referred are fundamental to the authority of a court to determine the criminal responsibility of a subject. At issue is not merely the question of fairness of process – important as that question is. The anterior question is whether the judicial process has been duly engaged to put the subject in jeopardy as to his or her liberty.[62] In *Maher v The Queen*, it was said by the High Court:[63]

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61 *R v Webb* [1960] Qd R 443 at 446 – 447; *Cth DPP v Fukusato* [2002] QCA 20 at [96]; *R v Foley* [2002] QCA 522 at [10]-[12]; *R v Dexter* [2002] QCA 540 at [66]-[68], [81].

62 *R v Cockrell; ex parte Cth DPP* [2005] QCA 59.

63 (1987) 163 CLR 221 at 233.

> 'The provisions of the *Jury Act* and of the Code which govern the constitution and authority of the jury as the tribunal of fact in a criminal trial are mandatory, for the entitlement to trial by jury which s 604 of the Code confirms is trial by a jury constituted in accordance with the *Jury Act* and authorized by law to try the issues raised by the plea of not guilty. A failure to comply with those provisions may render a trial a nullity, at least in the sense that the conviction produced cannot withstand an appeal: see *Crane v Public Prosecutor* ([1921] 2 AC 299). In any event it involves such a miscarriage of justice as to require the conviction to be set aside'." (emphasis in original)

[82] Count 9 was never included in a signed indictment. In respect of the other counts (except for count 1), there was an attempt to try to rely on the Toowoomba indictment to support the conviction, even though it was indicated the Crown would not pursue the charges on that indictment. The Court described this contention as giving rise to "an uneasy sense that one is reading one of the darker episodes from a novel of Franz Kafka".[64]

[83] However, the fact that the appellant was arraigned on a different set of charges was seen to be "objectively a powerful indication that a new trial had begun on a fresh indictment though one that did not meet the statutory criteria".[65]

[84] Their Honours stated at [35]:

> "The present case is not one where the errors of 1 August 2006 are inconsequential, either in terms of the proper constitution of the court, or in terms of possible prejudice to the appellant. As to the former, this was not the case of a 'badly drawn indictment', or even of the improper joinder of several counts in one indictment contrary to s 567(2) of the *Criminal Code*.[66] At the very least, it must be acknowledged that the processes of trial were not lawfully engaged at all in relation to count 9. There were errors which, to adopt the words of the High Court in *Weiss v The Queen*,[67] were 'such a serious breach of the presuppositions of the trial as to deny the application of the common form criminal appeal provision with its proviso'."

[85] In the circumstances, the procedural error in relation to count 9 could not be quarantined to the conviction on that count. The Court concluded that the convictions on all counts must be set aside and there should be a new trial on all counts.

[86] Whilst *R v LT* included a non-compliance with s 560(1) of the Criminal Code, the principles discussed in respect of s 560 of the Criminal Code, generally and in particular s 560(2), and s 597C are applicable in the current appeal.

[87] The appellant also refers to the Court of Appeal decision in *R v Cockrell*.[68] The Court held that criminal proceedings were a nullity where the indictment was presented by an unauthorised person.

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64 At [32].
65 At [33].
66 Cf *R v Phillips & Lawrence* [1967] Qd R 237 at 277-279.
67 [2005] HCA 81; (2005) 80 ALJR 444 at 455 [46].
68 [2005] 2 Qd R 448.

[88] That case concerned circumstances where there was an indictment duly signed by a person authorised to do so but at the time of the trial the indictment had not been validly presented to the Court. While it had been handed to the Court, it had not been done by a person authorised by s 560 of the Criminal Code.

[89] Consequently, there was no presentation of the indictment and therefore there was no valid verdict. In the circumstances, Jerrard JA and Mackenzie J found that the Court of Appeal had power under s 669 of the Criminal Code to order a new trial.[69]

[90] The Court of Appeal in *R v Foley*[70] also considered the operation of s 560 of the Criminal Code.[71] The primary issue was whether an indictment was properly presented where it had been presented by a clerk in the Office of the Director of Public Prosecutions. The clerk purported to present an indictment signed by the Director of Public Prosecutions by handing the indictment to the Court saying "Your Honour, I present an indictment in respect of the accused […] charging him with one count of […]".

[91] The Court was required to interpret s 560 of the Criminal Code as it then was. Section 560 has subsequently been amended to broaden the class of persons authorised to present indictments. The Court's comments in relation to what constitutes the requirement in s 560(2) of the Criminal Code that the "indictment is to be signed and presented to the Court" remain relevant.

[92] In this regard, the Court, constituted by de Jersey CJ, Davies JA and Jones J, stated:

> "[8] The critical question on this first ground is the meaning of s 560(2) and, in particular, whether that subsection envisages that a person described therein would both sign and personally hand to the court the indictment described in subs. (1). It was conceded by the respondent that it requires that the indictment be personally signed by such a person.
>
> [9] The ordinary literal meaning of the phrase "presented to the court", in the context of s 560(2), is that it also requires a person of the kind described to present that document personally to the court. The Oxford English Dictionary meaning of the transitive verb "present" is 'to make present to, bring in to the presence of', and in law, "to bring or lay before a court". And the linking of that phrase with "signed" means that if, as the respondent conceded, "signed" means personally signed, the phrase also means personally presented. So it follows that, on its ordinary literal meaning, the subsection requires such a person personally to lay the document before the court."

[93] Their Honours went on to comment that there was support for this construction in the historical context including consideration of *Sir Samuel Griffith's Draft Code*.[72]

[94] The Court stated at [18]:

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69 McMurdo P dissented on that issue. Further, Jerrard JA found while there was power, it was inappropriate to order a new trial as the applicant had already served all of the actual custody which could result from a resentence.

70 [2003] 2 Qd R 88; [2002] QCA 522.

71 Section 561 in respect of ex officio indictment was also considered but that is not relevant to the current appeal.

72 See paragraph [10] and also footnote 4.

> "It would be curious if, given its plain wording and its historical context, s. 560(2) were to be construed in a way which required the signing by a person described therein to be personal but the presentation by that person not to be so. In our opinion it requires both the signing and presentation to the court to be by a person described in s. 560(2) as expanded by s. 24 of the *Director of Public Prosecutions Act*."[73]

[95] In *R v Ferguson; Ex parte Attorney-General (Qld)*[74] the Court of Criminal Appeal considered a reference by the Attorney-General under s 669A of the Criminal Code in relation to a point of law concerning the application of s 563 of the Criminal Code in relation to the entry of a *nolle prosequi*. In determining that question, the Court was required to consider whether an indictment was "pending" within the meaning of s 563 of the Criminal Code. The Court held that an indictment was pending at all times between its presentation in Court and the verdict of the jury upon it.

[96] Connolly J and Ambrose J expressly recognised that indictments are not presented or filed in the registry but are presented to the Court.[75] The reasoning supports an interpretation requiring the physical presentation of the signed indictment to the Court in the context of s 560(2) of the Criminal Code.

[97] The statutory requirements in s 560(2) of the Criminal Code that the original signed written document containing the charge or charges be presented to the Court by an authorised person is a precondition to arraigning the accused under s 597C of the Criminal Code and the commencement of the trial.

[98] It is not disputed that Mr Collins was authorised to present an indictment to the District Court. It is accepted that he was a "DPP presenter" for the purposes of s 560.

[99] Further, it is not controversial that the respondent was not proceeding on Indictment 611 of 2020 which was originally presented in November 2020 in Townsville. Whilst Indictment 611 of 2020 was in the Courtroom on the first day of trial, it was not proceeded on, and no one thought otherwise.[76]

[100] The appellant was arraigned on the Copy Replacement Indictment and the trial purportedly proceeded on the basis of that document, until the Original Replacement Indictment arrived on the second day of the trial and it was "substituted" for the Copy Replacement Indictment.

[101] The Original Replacement Indictment was not physically in the Courtroom on the first day of the trial. It was known to be in Townsville.

[102] At best, the Original Replacement Indictment was somehow 'constructively' before the Court by the combination of:

(a) The Copy Replacement Indictment being given to the Court;

(b) The Original Replacement Indictment being in existence in Townsville; and

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73 This has been amended to now include that a "DPP presenter" may present the indictment to the Court.

74 [1991] 1 Qd R 35.

75 Page 37 lines 10-11 and page 43 lines 15-17.

76 Although the granting of leave to amend Indictment 611 of 2020 is somewhat contrary to this, it is not contended that Indictment 611 of 2020 supports the convictions.

(c) The prosecutor giving an undertaking as an officer of the Court that the Original Replacement Indictment would be sent to the Court to be "substituted" for the Copy Replacement Indictment.

[103] The statutory requirements in s 560 of the Criminal Code cannot be interpreted as providing for anything other than the original signed indictment being presented to the court. Further, this is consistent with the historical significance of the presentation of indictments.

[104] When s 560 of the Criminal Code was drafted it was no doubt only contemplated that an indictment with an original signature would be presented. The fact that now it is possible to readily produce photocopied or scanned copies of documents does not detract from the interpretation of s 560(2) requiring that the indictment, being the written form of the charge, is to be signed with some form of original signature[77] and presented to the Court.

[105] At best, what occurred in Court on 16 August 2021 was that the appellant was purportedly arraigned on a piece of paper handed to the Court which recorded the charges that were in the Original Replacement Indictment and the purported trial commenced on that basis. The statutory requirements in s 560 of the Criminal Code had not been complied with prior to the purported arraignment.

[106] Without the Original Replacement Indictment being presented to the Court, the arraignment of the appellant could not properly occur and, accordingly, the trial could not commence under s 597C of the Criminal Code.

[107] The issue also arises as to whether the purported consent of defence counsel at trial waived or remedied any deficiencies in respect of the requirements in s 560(2) of the Criminal Code.

[108] Consistent with the comments of the Court of Appeal in *R v LT*,[78] what has occurred here is a fundamental non-compliance with s 560(2) of the Criminal Code which goes to the authority of the Court to determine the criminal responsibility of a subject. It goes beyond merely the question of fairness of process and is not simply procedural.

[109] Keane JA in *R v WAH*[79] relevantly observed at [57] as follows:

> "It may be accepted that there are formal deficiencies in the trial process which cannot be waived by an accused:[80] the decision of this Court in *R v LT*[81] is an illustration of such a case."

[110] In *R v WAH* the irregularity as to the timing of the *nolle prosequi* in respect of the first indictment did not mean the appellant was not properly put in the charge of the jury at his trial. That can be distinguished here. The failure to comply with the statutory criteria in s 560 of the Criminal Code resulted in the purported arraignment and all that happened after that being affected such that the criminal trial process was not properly engaged. What transpired was not a proceeding lawfully commenced in accordance with the requirements of s 560 of the Criminal Code.

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77 The definition of "signed" in Schedule 1 of the *Acts Interpretation Act 1954* (Qld) includes the attaching of a seal and the making of a mark.

78 [2006] QCA 534.

79 [2009] QCA 263.

80 Cf *Abdul Rahman v The King-Emperor* (1926) 54 LR Ind App 96 at 104.

81 [2006] QCA 534.

[111] The failure to comply with the statutory criteria in s 560(2) renders the trial a nullity in the sense that the convictions produced cannot withstand an appeal as, in effect, there has been no trial. Further, as was accepted by the parties, the proviso in s 668E(1A) of the Criminal Code has no application.

[112] The consequence of the trial being a nullity is that it is not strictly a retrial as there was no valid trial. However, the Court has power to order a new trial and, in the circumstances, it is appropriate to order a new trial on all counts.

[113] Accordingly, the appropriate orders are:

1. Appeal allowed.

2. Convictions set aside.

3. A new trial on all counts.