SUPREME COURT OF QUEENSLAND

CITATION:	*R v Nelson* [2018] QCA 53
PARTIES:	**R** **v** **NELSON, Anthony** (applicant)
FILE NO/S:	CA No 209 of 2016 DC No 544 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport – Date of Sentence: 28 July 2016 (Everson DCJ)
DELIVERED ON:	Date of Orders: 17 November 2017 Date of Publication of Reasons: 27 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 2017
JUDGES:	Sofronoff P and Fraser JA and Henry J
ORDERS:	**Date of Orders: 17 November 2017** **1. Application for leave to adduce evidence refused.** **2. Application for leave to appeal against sentence refused.** **3. A warrant issue for the arrest of the applicant.** **4. The warrant lie in the registry for seven days.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – GENERALLY – where application to adduce further evidence on appeal – where evidence to be adduced included a psychological report – whether application to adduce further evidence should be granted – where the applicant seeks to give and call new evidence to establish that he had a brain injury at the time of the offending and was diagnosed with a condition affecting the metabolism of alcohol CRIMINAL LAW – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – where the applicant pleaded guilty to two counts of indecent dealing with a child – where a sentence of six months' imprisonment was imposed on each count to be served concurrently, suspended after serving two months for an operational period of one year

Makita (Aust) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305, cited
R v Davidson: Ex parte Attorney-General (Qld) [2009] QCA 283, cited
R v Maniadis [1997] 1 Qd R 593; [1996] QCA 242, cited
R v Roberts [2009] QCA 22, cited
R v Theohares [2017] 1 Qd R 211; [2016] QCA 51, cited

COUNSEL: L Ackerman for the applicant
J A Wooldridge for the respondent

SOLICITORS: Pharmacis Canning Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Henry J.

[2] **FRASER JA:** I agree with the reasons for judgment of Henry J.

[3] **HENRY J:** The applicant pleaded guilty to two counts of indecent dealing with a child. On each count he received concurrent sentences of six months' imprisonment, suspended after serving two months for an operational period of one year.

[4] He applied for leave to appeal the sentence and for leave to adduce evidence. His eventual grounds in the application for leave to appeal were:

1. The sentence was, in all the circumstances, manifestly excessive.
2. The learned sentencing judge erred when not finding exceptional circumstances in accordance with s 9(4) *Penalties and Sentences Act* 1992 (Qld).
3. The sentencing discretion miscarried because evidence now available, namely evidence of the applicant's exaggerated cortical disinhibition at the material time, was not adduced at the sentence hearing.

Grounds 1 and 2, as argued, were premised on the success of ground 3, which was in turn premised on the success of the application to adduce evidence.

[5] On the hearing of the applications on 17 November 2017 this court ordered:

1. Application for leave to adduce evidence refused.
2. Application for leave to appeal against sentence refused.
3. A warrant issue for the arrest of the applicant.
4. The warrant lie in the registry for seven days.

[6] These are my reasons for joining in those orders.

Facts

[7] The complainant girls, aged 14 and 15, and some of their other friends attended the home of the applicant's niece for a sleepover.

[8] The applicant, his brother and another adult male friend were also present at the house. They drank alcohol during the evening and played music which they and the children listened and danced to. Each of the complainants consumed alcohol, although it was not alleged the applicant was responsible for that. He was observed to be intoxicated.

[9] The girls went to bed at about 4 am. The applicant and his brother entered the girls' room several times, banging on pots and pans and throwing a stink bomb to wake them up.

[10] Some time later the applicant returned to the room and lay on top of the 14 year old complainant and one of the other girls who was laying in the same bed. Most of the children and the applicant then left the room but the 14 year old complainant remained, attempting to get back to sleep. The applicant re-entered the room soon after and lay on top of her, stroking her face and asking to kiss her. She refused, saying she was 14. The applicant attempted to kiss her but she turned her head away, telling him to get off her. He grabbed her hands and put them above her head and put his hand inside her shirt, cupping her left breast before running his finger underneath the other side of her bra. He fleetingly ran his nail along her right breast before she pulled away. She threatened to scream and he dared her to. He eventually arose from her. She went to the lounge room and complained to some of her friends.

[11] The applicant subsequently laid down next to the 15 year old complainant. He rubbed her on the outside of her clothes from the bottom up to her back. When she sat up he pushed her back onto the bed and lay on top of her, holding her wrists when she tried to cover her face. He told her she was a princess and was sexy. He lay on top of her, tried to kiss her and held her wrists when she tried to cover her face. She threatened to scream if he did not get off her and he dared her to do so and gave her "a look". He refused her requests to desist until she had repeatedly hit at and pushed him and told him that what he was doing was wrong. When he finally left the room the complainant told her friend what had occurred. In the morning the complainant complained to others and complained to one of the adults present and the applicant was asked to leave.

[12] When departing, the applicant was noticed to still be drunk and was heard to say that there had been a misunderstanding in that he had fallen on one of the girls.

[13] About a month later the applicant was assaulted by the father of one of the complainants after being chased and tackled at a sports ground. He was repeatedly punched and kicked, causing two fractures to his jaw. His ensuing medical treatment required the placement of titanium plates and screws in order to stabilise the injury. He continues to experience aching in his jaw and his teeth are still not aligned properly. The applicant was also subject to threats on Facebook prompted by the above-mentioned father of one of the complainants.

[14] When the applicant was eventually spoken to by the police in relation to the allegations of indecent dealing, he declined to be interviewed.

[15] The applicant was 36 years old at the time of the offending and was 38 at the time of sentence. He has a criminal history in both Queensland and New South Wales, including for multiple property offences and five assaults, one of which was assault occasioning bodily harm. He had not previously been convicted of a sex offence nor had he previously been sentenced to a term of imprisonment.

[16] Victim impact statements from the complainants and their mothers described the significant adverse impact of the offences upon the complainants. Each has sought assistance through counselling. Each of them no longer trust in men, are anxious in

social settings and suffer recurring nightmares. Each of them have engaged in acts of self-harm.

[17] The applicant was committed for trial following a full hand-up committal on 1 July 2015. An indictment was presented against him on 4 December 2015. He pleaded guilty to the charges in that indictment on the day the matter was listed for a prerecording of the complainants' testimony.

[18] The applicant was educated to year 10 standard and has worked in the construction industry since then. At the time of sentence he had a half interest in a roof restoration business. He is married with three children. References tendered on his behalf referred to him as a hard working family man who had invested much unpaid time over the years coaching junior sport. The offending behaviour was described in the reference material as being out of character.

The sentence

[19] The learned sentencing judge treated the applicant's pleas of guilty as being early pleas. His Honour took into account the serious impact which the offending had had upon the complainants. He noted the applicant's significant history of repeated criminal offending needed to be balanced with the references speaking of his otherwise good character.

[20] His Honour alluded to s 9(4) of the *Penalties and Sentences Act* 1992 (Qld) requiring the applicant to serve an actual term of imprisonment for offending of this type unless there are exceptional circumstances. His Honour noted the significant disparity in age between the applicant and the complainants. He noted the offending was of a relatively low level nature. However, he also noted that the offending was brazen and persistent in that it involved restraint in the face of their resistance.

[21] His Honour took into account the retribution which had been inflicted upon the applicant for his offending behaviour by the father of one of the complainants and the adverse physical consequences thereof. His Honour noted, further to that extra-curial punishment, that the applicant had been the subject of threats on Facebook.

[22] His Honour acknowledged extra-curial punishment had been present as a factor in cases where exceptional circumstances had been found, referring to *R v Theohares* [2016] QCA 51[1] and *R v Davidson; Ex parte Attorney-General (Qld)* [2009] QCA 283.[2] However he also referred to *R v Roberts* [2009] QCA 22[3] as an example of a case in which extra-curial punishment had been present, but exceptional circumstances had not been found. He explained extra-curial punishment was but one consideration amidst a variety of considerations to be considered in determining whether or not exceptional circumstances were present and concluded exceptional circumstances were not present.

The application for leave to appeal the sentence

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1 *R v Theohares* [2017] 1 Qd R 211.
2 *R v Davidson; Ex parte Attorney-General (Qld)* [2009] QCA 283.
3 *R v Roberts* [2009] QCA 22.

[23] The application for leave to appeal the sentence turned entirely upon the potential significance of the evidence it sought to adduce in the application for leave to appeal sentence.

[24] The applicant's counsel properly acknowledged, of what appears to have been a moderate sentence below, that on the materials then before the learned sentencing judge no criticism could be made of His Honour's approach or of the sentence imposed. Those concessions were properly made. The sentence imposed below involved no error.

[25] The applicant's approach was to contend, by reference to the proposed additional evidence, that exceptional circumstances had been established so that this court ought substitute a lesser sentence than that imposed below by wholly suspending the term of imprisonment of six months.

The application to adduce additional evidence

[26] Section 671B of the *Criminal Code* relevantly provides:

> "**671B Supplemental powers**
>
> (1) The court may, if it thinks it necessary or expedient in the interests of justice – …
>
> (c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent, but not a compellable, witness …"[4]

[27] In *R v Maniadis*[5] Davies JA and Helman J noted the terms of s 671B did not preclude the Court of Appeal from admitting new evidence which is not "fresh evidence" and observed:

> "In the end, the reception of such evidence will depend on whether, if it were excluded, there would be a miscarriage of justice…"[6]

In agreeing with their Honours, Fitzgerald P emphasised the importance of the "interests of justice" criterion in s 671B.[7]

[28] The affidavit material filed in support of the application to adduce evidence fell into two categories. The first was the opinion of psychologist and psychopharmacologist Professor Ian Coyle and the second was evidence explaining why that opinion and material in support of it had not been adduced at the time of sentence. The explanation given was uncontroversial. It is the opinion of Professor Coyle and its significance which requires scrutiny.

[29] Professor Coyle did not interview the applicant or have him tested. His expert report is premised entirely upon a review of medical records relating to a motor vehicle accident the applicant had on 30 October 2005, an aneurysm suffered by him in 2013 and his diagnosis with hepatitis C.

[30] Professor Coyle's report advanced the following opinion, of relevance to the applicant's level of culpability:

> "10. In my opinion, the conjoint effect of the motor vehicle accident that Mr Nelson was involved in, in 2005 and its

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4 The reference in s 671B to the court is to the Court of Appeal.
5 [1997] 1 Qd R 593.
6 Ibid p 597.
7 Ibid p 594.

> sequalae and the PCOM aneurysm and subsequent emergency neurosurgery in 2013 interacted with his reduced capacity to metabolise and tolerate alcohol caused by his then undiagnosed hepatitis C. This combination of factors caused exaggerated cortical disinhibition at the material time.
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> 11. This is not to say that Mr Nelson lacked volitional control. However, the cortical disinhibition arising from the abovementioned factors would have very greatly lessened his appreciation of the behaviour he engaged in and its possible consequences when he indecently dealt with [the complainants] on 17 May 2014."

[31] The records to which Professor Coyle had regard in arriving at the above opinion appear to provide a merely speculative foundation for it. In respect of the 2005 motor vehicle accident, in which the applicant's motorcycle collided with a tree, Professor Coyle opined it was "beyond doubt that loss of consciousness and retrograde amnesia, particularly if it is for a prolonged period of time, before the event is strongly indicative of brain injury to one degree or another". This opinion appears to have been prompted by this note in the nursing assessment data section of the treating emergency department's record:

> "Had an accident last night approx 2330 60 km into a tree, ETOH last night, now dizzy, vomiting, throbbing headache, GCS 15, still cannot recollect the incident, bystanders took him home, grazes on back, right leg pain, no helmet."

[32] That note, whilst certainly suggestive at least of short term amnesia in respect of the event itself, did not suggest the applicant had amnesia in respect of a prolonged period of time before the event. Moreover, a subsequent brain CT scan was normal.

[33] In respect of the applicant's aneurysm Professor Coyle's report noted the applicant had been admitted to hospital on 30 November 2013 with a suspected subarachnoid haemorrhage and neurosurgery was thereafter performed to repair a posterior communicating artery aneurysm. Prior to the applicant's discharge on 16 December 2013 an assessment called the Montreal Cognitive Assessment was administered. The applicant scored 25/30. Professor Coyle noted the cut-off point for that test was a score of 26 and accordingly opined the applicant's score was "indicative of significant cognitive impairment pursuant to the cerebrovascular insult". The report contained no expression of opinion as to the likely permanence of that impairment, for instance, whether the repetition of such testing after a further period of time might have given rise to a worse, similar or better test score.

[34] Finally, as to the applicant's diagnosis with hepatitis C, Professor Coyle noted hepatitis C can significantly affect the metabolism of alcohol. The Professor's report indicates he wrongly understood the applicant was diagnosed with hepatitis C on 6 April 2016. In fact he had been diagnosed in 2004.

[35] The applicant's counsel asserted the above shortcomings could be addressed were Professor Coyle called as a witness. It was not apparent why, in an application of the present kind, the affidavits filed in support of it did not depose in full to the evidence proposed to be adduced. Nor was it apparent that in an application of the present kind there ought be any relaxation of the elementary requirement that evidence tendered as expert opinion evidence should identify a proper foundation for the

opinion advanced.[8] In the end result it unnecessary to reach a concluded view about those matters.

[36] That was because, even if it be accepted that the above shortcomings would be adequately remedied were Professor Coyle to give oral evidence, there was another shortcoming with the proposed evidence. An affidavit by the applicant deposed that prior to reading the report of Professor Coyle, he had never been advised by a medical professional that he suffered a brain injury in his motorcycle accident in 2005 or that he suffered significant cognitive impairment as a result of his aneurysm in 2013. However, the applicant did not depose, and there is no other evidence that, he was unaware of the effects of alcohol upon him.

[37] The causative contribution of alcohol is critical in giving rise to the "exaggerated cortical disinhibition" theorised by Professor Coyle. The applicant was intoxicated at the time of the offending. It may very well be he behaved with significantly less disinhibition than he would have if he had not consumed alcohol but there is no evidence to suggest he was unaware in consuming alcohol that it would have a significant disinhibiting effect upon him. It was not suggested, for example, that the night of the offences, in May 2014, was the first time he had consumed alcohol to such an extent since his aneurism in November 2013. Put differently, it was not proposed to demonstrate by the additional evidence that on the occasion of the offending the applicant's experience of the effects of alcohol upon him was different to his past experience of its effects.

[38] Looked at in that light, even if Professor Coyle's opinion were accepted, it would not logically result in a conclusion that the applicant's level of culpability was any different than was known at the time of sentence. It followed it was not necessary or expedient in the interests of justice to receive the additional evidence.

Conclusion

[39] That conclusion had the consequence the application for leave to appeal sentence was also refused, it having been correctly conceded that, by reference to the information before the court at the time of sentence, there was no error.

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8 *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, 744.