SUPREME COURT OF QUEENSLAND

CITATION:	*R v LAL* [2018] QCA 179
PARTIES:	**R** **v** **LAL** (applicant)
FILE NO/S:	CA No 12 of 2018 DC No 1994 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 12 December 2017 (Farr SC DCJ)
DELIVERED ON:	3 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	20 June 2018
JUDGES:	Sofronoff P and Crow and Ryan JJ
ORDERS:	**1. The application for leave to appeal is granted.** **2. The appeal is allowed.** **3. The sentences imposed at first instance are set aside.** **4. In lieu thereof, the applicant is to be released upon his entering into a recognisance, in the sum of $500, on the condition that he be of good behaviour and appear for conviction and sentence if called upon at any time during the next two months.** **5. No convictions are recorded.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant was convicted, after a trial, of two offences of indecent treatment of a child under 12 – where the offences were committed when the applicant was a child but he was convicted as an adult – where the applicant was sentenced to imprisonment for four months for count 1 and nine months for count 2, to be served concurrently, wholly suspended, for an operational period of nine months – where those sentences carried convictions – where counsel for the applicant submitted that the applicant should have been sentenced to a period of probation to allow for an order that no convictions be recorded – whether the sentence

was manifestly excessive

CRIMINAL LAW – SENTENCE – SENTENCING OF JUVENILES – SENTENCING AS ADULT OR CHILD AND IMPRISONMENT – where the applicant was a juvenile of 15 years and seven months when he offended – where the applicant was convicted and sentenced 17 years later – where s 144 of the *Youth Justice Act* 1992 required the Court to have regard to the sentence that might have been imposed on the applicant if he had been sentenced as a child – where neither the prosecutor nor defence counsel referred the learned trial judge to examples of children sentenced as children, for like offending – where neither counsel referred the learned trial judge to the relevant principles contained in sections 4 and 109 of the *Juvenile Justice Act* 1992, which would have applied had the applicant been sentenced as a child, including that detention was a last resort – whether sentence, especially recording convictions, was manifestly excessive

Youth Justice Act 1992 (Qld), s 140, s 144

R v BCO [2016] 1 Qd R 290; [2013] QCA 328, considered
R v Briese; Ex parte Attorney-General (Qld) [1998] 1 Qd R 487; [1997] QCA 10, considered
R v Cay, Gersch and Schell; Ex parte Attorney-General (Qld) (2005) 158 A Crim R 488; [2005] QCA 467, considered
R v JO [2008] QCA 260, considered
R v PGW (2002) 134 A Crim R 593; [2002] QCA 462, considered
R v SBP [2009] QCA 408, considered
R v SBR [2010] QCA 94, considered

COUNSEL: A S McDougall for the applicant
C N Marco for the respondent

SOLICITORS: Sciacca & Associates for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Ryan J and the orders her Honour proposes.

[2] **CROW J:** I have read the reasons of Ryan J and agree with the orders her Honour proposes.

Introduction

[3] **RYAN J:** The applicant was convicted, after a trial, of two offences of indecent treatment of a child under 12. The first involved the applicant touching the complainant's vagina with his finger (count 1); the second with his tongue (count 2).

[4] He was sentenced to imprisonment for four months for count 1 and nine months for count 2, to be served concurrently, wholly suspended, for an operational period of nine months.

[5] Those sentences carried recorded convictions, with the consequence that the applicant became a "reportable offender" under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004.

[6] Regardless of whether convictions were recorded or not, having been found guilty of indecent treatment offences created by section 210 of the *Criminal Code,* the applicant became a "disqualified person" under the *Working with Children (Risk Management and Screening) Act* 2000.

[7] The applicant was a juvenile when he offended. He was convicted and sentenced about 17 years later, as a 32 year old. He had no other criminal convictions and a good employment history. He had served for four years in the Army Reserve and was studying nursing at QUT.

[8] The applicant applied for leave to appeal against the sentences imposed upon him, seeking in lieu thereof the penalty sought at first instance of probation with no convictions recorded.

Facts

[9] When the offences were committed (around November/December 2000), the applicant was aged about 15 years and seven months.[1] The complainant was his friend's little sister. She was about six years younger than the applicant.

[10] The offences were committed within moments of each other, on a backyard trampoline. The complainant said that the applicant called her over to the trampoline to "show [her] something":[2]

> "… I was sitting on the trampoline facing the pool, and he pulled my dress up and my underwear down to about halfway down my thighs, and he took a single finger and he put it between the outer lips of my vagina … and he pulled his finger from … the bottom to the top, and then he said "Does that feel nice?" and I didn't – I couldn't – I didn't say anything but I shook my head and I went to – to pull my dress back down, and then he put his hands – he stopped me from pulling my dress back down, and he put his hands on my shoulders and pushed me back so I was lying on my back on the trampoline with my legs still out in front of me and my dress still up, and my underwear still down. And he said "My sister likes it when I do this," and then he moved so that his was more in between my legs and he, with a similar action, licked – like, used his tongue just the once from the – from the bottom to the top and he said "Did you like that?" and I just shook my head and went to pull my dress down again, and that time, he didn't stop me and I pulled my dress down and pulled my underwear up and hopped off the trampoline and went inside."

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1 Record book, 26, 7.
2 Trial transcript 1-7, 5 – 20.

[11] During a pretext call, on 29 September 2015, the complainant told the applicant that she wanted to have "a quick chat about um that thing that happened when we were kids … the thing that happened on the trampoline out the back of my place when we were kids?" The applicant said he thought he remembered.[3]

[12] He also said that –

- "something" had occurred to him when he was "really young" and as a result, he guessed he "experimented" with a lot of kids at a "really really young age" because he had not processed what had happened to him;[4]
- he "obviously" had to apologise for "that" happening;[5]
- he behaved (as a child) in a sexual/inappropriate way with other children;[6]
- a "long time later", he realised it was "inappropriate";[7]
- he stopped when he was 14 or 15,[8] or "like even thirteen, fourteen";[9]
- he was 23 or 24 when he appreciated that something had happened to him;[10]
- he was "really sorry" if "that" "upset" the complainant – there was no justification for it;[11]
- he hoped he did not "fuck [her] up";[12]
- when it happened it was impulsive;[13] and
- the person who abused him (his cousin) was "a complete adult".[14]

[13] The "thing that happened on the trampoline" was not further described during the pretext call.

[14] In his evidence, the applicant said that the cousin who offended against him undressed him; put his penis into the applicant's mouth; touched the applicant's genitals; and inserted his fingers into the applicant's anus. The offending occurred while he and his sister were left in his cousin's care. He was four or five at the time. His cousin, whom he named in evidence, was 21 or 22.

[15] The trial was conducted for the defence on the basis that the applicant touched the complainant's vagina only once with his finger (not his tongue) and that it happened when he was under 14, raising capacity as an issue. The learned trial judge summed up the case to the jury in a way which did not require them to consider capacity but rather required them to be satisfied that the offences occurred between the dates alleged on the indictment, when the applicant was at least 15.[15]

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3 Transcript of pre-text call, p 10, 10 – 20.
4 Ibid, p 12, 58 – p 13, 3.
5 Ibid, p 13, 10 – 11.
6 Ibid: He made statements to this effect throughout the call, e.g. at page 14, 37 – 40.
7 Ibid, p 13, 20 – 25.
8 Ibid, p 14, 20.
9 Ibid, p 18, 40 – 42.
10 Ibid, p 14, 21- 22.
11 Ibid, p 14, 30 – 33.
12 Ibid, p 14, 56.
13 Ibid, p 20, 32.
14 Ibid, p 22, 12 – 14.
15 Trial transcript 2-13, 30 – 2-14, 10.

The sentence hearing

[16] Section 140(1) of the *Youth Justice Act* 1992 (*YJA*) applied to the applicant's sentence and he was sentenced by the learned sentencing judge as an adult for the offences he committed as a child.

[17] Section 144 of the *YJA* also applied, and the prosecutor drew his Honour's attention to sub-section (2):

> "**144 Sentencing offender as adult**
>
> (1) Subject to subsections (2) and (3), a court sentencing an offender as an adult under section 140, 141 or 143 has jurisdiction to sentence the offender in any way that an adult may be sentenced.
>
> (2) The court must have regard to –
>
> (a) the fact that the offender was a child when the child offence was committed; and
>
> (b) the sentence that might have been imposed upon the offender if sentenced as a child.
>
> (3) The court can not order the offender –
>
> (a) to serve a term of imprisonment longer than the period of detention that the court could have imposed on the offender if sentenced as a child; or
>
> (b) to pay an amount by way of fine, restitution or compensation greater than that which the court could have ordered the offender to pay if sentenced as a child.
>
> (4) Subsection (3) applies even though an adult would otherwise be liable to a heavier penalty which by operation of law could not be reduced."

[18] Apart from informing his Honour of the incorrect maximum penalty which would have applied had the applicant been sentenced as a child (it was seven years' detention, not five),[16] the prosecutor said nothing more about the sentence that might have been imposed upon the applicant had the applicant been sentenced as a child.

[19] Neither he nor defence counsel referred to examples of children sentenced, as children, for like offending. Neither he nor defence counsel referred to the relevant principles, contained in sections 4 and 109 of the *Juvenile Justice Act* 1992, which would have applied had the applicant been sentenced as a child – including that detention was a last resort.

[20] The prosecutor referred to the significant effect of the offending upon the complainant and the applicant's lack of remorse. He submitted that the applicant's expressions of regret and remorse during the pretext call were not genuine. He submitted

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16 The offences were "serious offences" under section 8 of the *Juvenile Justice Act* 1992 (JJA) (because they then attracted a maximum penalty of 14 years imprisonment). Section 121(2) applied. The prosecutor mistakenly referred to section 175(1)(g)(ii) of the *Youth Justice Act* 1992 which did not apply to serious offences (or at the time).

that the applicant's description of his conduct as "inappropriate" indicated that he had little insight.[17]

[21] The prosecutor referred his Honour to *FDL*, a decision of Rafter SC DCJ,[18] and to *R v SBQ*.[19]

[22] FDL was convicted, after a trial, of offences he committed as a 16 year old. The complainant was aged nine or 10. The offences occurred during a game of hide and seek. FDL exposed his erect penis to the complainant while they were hiding under a blanket (count 1 – exposing child under 12 to an indecent act) and touched the complainant's vagina for 30 seconds (count 2 – indecent treatment of a child under 12, as an alternative to rape, of which he was acquitted).

[23] FDL was 21 at trial and sentence. He had no previous convictions. He had three subsequent convictions for urinating in a public place; breaching a protection order; and breaching a probation order (which had been imposed for his breach of the protection order).

[24] Sections 140 and 144 of the *YJA* applied to his sentence. His Honour was referred to *R v PGW*[20] and *SBQ*. His Honour said: "The offences are serious, and there has been a significant consequence for the complainant and her mother … Nevertheless, as a juvenile offender, it is unlikely that you would have been sentenced to a period of detention". FDL was sentenced to three months' imprisonment (count 1) and 12 months' imprisonment (count 2), to be served concurrently, wholly suspended, for an operational period of 12 months.

[25] SBQ offended against two nine year old girls when he was 16. As a 19 year old he was tried and convicted of two offences of indecent treatment of a child under 12. He was sentenced, as an adult (applying sections 140 and 144 of the *YJA*), to 12 months' imprisonment, to be served by way of intensive correction in the community. He appealed against his convictions and sentence. He was successful in his sentence appeal.

[26] SBQ met the complainants, A and B, when he was at his grandmother's house. He played tiggy with them, during which he put his hand down B's pants and touched her "bottom" more than once. Under threat of being shot with a nail gun, A and B played spin-the-bottle with SBQ in a cubby house. During the game, B pulled her top up but did not remove it (as per B), *or* was left wearing only her underpants (as per A); and A pulled her top up (as per B) *or* removed it (as per A). Also during the game, SBQ touched B's vagina, over her clothes.

[27] SBQ was to be sentenced for causing A to remove her top (count 1) and for touching B's vagina over her clothes in the cubby (count 2). However, there was some confusion about the particulars of each count and the trial judge mistakenly included SBQ's touching B's bottom during tiggy in the particulars of count 2. Because of that error, SBQ was re-sentenced by the Court of Appeal to nine months' probation (count 1) and 12 months' probation (count 2), with no convictions recorded.

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17 Record book, p 16, 1 – 15.
18 Judgment delivered 18 April 2013.
19 [2010] QCA 89.
20 [2002] QCA 462. Now known as *R v PGW* (2002) 134 A Crim R 593.

[28] In describing that sentence as appropriate, Fraser JA[21] noted that SBQ fell to be sentenced as an adult under section 144 of the *Youth Justice Act* 1992 and referred to *R v PGW*. SBQ had no criminal history, but did have a subsequent conviction for burglary which he committed when he was 17. He could not be said to have been rehabilitated, but there was a suggestion that he had prospects. He had learning and other difficulties, but had been in full-time work. At [48], Fraser JA said:

> "If the appellant had been sentenced as a child, it is likely that a custodial sentence would not have been imposed and the prima facie position under s 184 of the *Juvenile Justice Act* 1992 would have been that a conviction was not to be recorded: *R v SBP* [2009] QCA 408 at [21]; *R v B* [1995] QCA 231. As the trial judge observed it was of considerable concern that the appellant had made a deliberate effort to get sexually close to the children and the offending was also aggravated by the threat of the nail gun. Nevertheless, bearing in mind the trial judge's finding that the appellant was a child at the time of the offences,[22] the court's obligation to adhere to the sentencing requirements of s 144(2) of the *Juvenile Justice Act* 1992, and the appropriateness of a sentence which provides for continuing supervision, I would accept the submission for the appellant that the sentence should be a period of probation with no conviction recorded."

[29] The prosecutor submitted that *SBQ* was less serious than the present matter and that a sentence of imprisonment was within range – perhaps up to 12 months.

[30] It may be noted that neither FDL nor SBQ could be said to have been rehabilitated.

[31] Defence counsel focused on the delay between the commission of the offences and the sentence. He asked his Honour to have regard to "the second tenet" of *R v L; Ex parte Attorney-General*[23] – in other words, to the applicant's rehabilitation during the delay. He asked his Honour to sentence the applicant by imposing a probation order and not recording convictions.

[32] Defence counsel informed his Honour that the applicant was enrolled in a nursing degree at QUT and asked his Honour to take into account that the applicant would need a "Blue Card" to work as a nurse. He referred to the applicant's good work history and his four years in the Army Reserve.

[33] Defence counsel referred his Honour to *NJL* (Bradley DCJ 11 June 2013) and *SNG* (Dearden DCJ 11 May 2010). He also relied on *SBQ*, submitting that it was more serious because it involved two complainants and a threat.

[34] His Honour observed that the probation imposed in *SBQ* was "understandable" because of SBQ's age.[24] The present applicant did not require probation.[25] Defence counsel submitted, in effect, that while the applicant did not require probation, were such an order made, his Honour had a discretion not to record convictions. Defence counsel agreed with his Honour that a good behaviour bond was not an appropriate penalty. He agreed with his Honour that a fine was not an appropriate penalty.[26]

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21 With whom Chesterman JA and Ann Lyons J agreed.
22 The trial judge had to find whether he was 16 or 17.
23 [1996] 2 Qd R 63.
24 Record book, p 18, 24 – 25.
25 Ibid, 29 – 43.
26 Ibid, p 18 – 20.

[35] After an adjournment to consider the appropriate penalty, his Honour imposed the sentences as above. In his sentencing remarks, his Honour said[27] –

- the applicant was in the region of 15 years and seven months when he offended;
- the applicant had not exhibited any remorse;
- any "good work" done during the pretext call by the applicant's apologies was undone by his embarking on the trial process – including by denying the count 2 offending;
- the applicant's defence had been tailored to meet the comments he made during the pretext call and was bound to fail;
- there had been no cooperation with the administration of justice – the applicant would not be sentenced more heavily by exercising his lawful right to have his guilt proven at trial, but it was a very relevant consideration in the determination of the appropriate degree of leniency that might be shown to him;
- the applicant had no other criminal convictions;
- the offending had a reasonably significant psychological and emotional adverse effect upon the complainant;
- the applicant had a good employment record; and
- for the 17 years since the offences, the applicant had committed no offence and had demonstrated that he was not likely to reoffend similarly.

[36] His Honour saw no reason to require probation. The applicant was unlikely to benefit from it: "So the rehabilitative aspect, which is the principle consideration arising on a probation order, is non-existent in this matter and for that reason, it seems to me to be a most inappropriate order in the circumstances and not one that should be imposed."[28]

[37] His Honour considered the offending too serious for the imposition of a good behaviour bond. The applicant was an unlikely reoffender, so personal deterrence was of little relevance. His Honour continued:[29]

> "General deterrence is, of course, a continuing issue. The Courts see cases of this nature on a reasonably frequent basis and sentences are imposed on each and every occasion, in part to send a message to members of the community that behaviour of this nature is not to be tolerated. There is also the public denunciation and, to a lesser degree, punishment aspect of the sentencing process in a matter such as this. I, of course, do not lose sight of the fact that, at the time you committed these offences, you were under 16 years of age, but under our law, pursuant to section … 140 of the *Youth Justice Act*, you are to be treated and sentenced as an adult here today.

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27 Ibid, p 26.
28 Ibid, page 27, 6 - 9.
29 Ibid, p 27.

> … [the applicant] must be treated as an adult under section 140 and under … subsection two of section 144, I must have regard to the fact that you were a child when the offence was committed and have regard to the sentence that might have been imposed on you if sentenced as a child, and I do. It seems to me that, in all likelihood, if you had been sentenced close to the age you were when the offending conduct occurred, then there might well have been some justification for a probation order at that stage and some perceived need for it. But as I say, that no longer applies. As a child, you would still have exposed yourself to the potential of a detention order for offending of this nature, particularly after pleas of not guilty."

[38] As noted above, although his Honour was required, by legislation, to take into account the sentence that might have been imposed on the applicant had he been sentenced as a child, neither counsel referred his Honour to cases in which children had been sentenced as children for non-penetrative sexual offending. Of the cases to which his Honour was referred, SBQ was sentenced as a 19 year old; FDL was sentenced as a 21 year old, SNG was sentenced as an adult;[30] and NJL was sentenced as a young adult.[31]

[39] Also, even though *R v PGW* was referred to in *SBQ*, *FDL* and *SNG*, and was appellate authority providing guidance for sentencing courts in the application of section 144 of the *YJA*, his Honour was not taken to it by either counsel.

Submissions on the application for leave to appeal against sentence

[40] The applicant submitted that the sentence imposed was manifestly excessive. He did not nominate any specific error.[32] He contended for a sentence "involving probation" without a recorded conviction.[33] As had occurred at the sentence hearing, the applicant relied upon the delay and *L*, and referred to the decisions to which his Honour was referred at first instance.[34] He complained that his Honour had not referred to the applicant's own childhood sexual abuse in exercising his sentencing discretion.

[41] The applicant acknowledged that his Honour was not referred to *R v PGW* at first instance. He now placed reliance upon it. The applicant also referred to *R v Briese*[35] for its statements about recording a conviction.

[42] The respondent submitted that the sentence was not manifestly excessive. The respondent identified the error made by the prosecutor about the maximum penalty which, it was submitted, favoured the applicant; was not material; and ought not to enliven the discretion to re-sentence. The respondent submitted that the cases of *R v CCC*, *PGW* and *SBQ* were not comparable because they were decided against lower maximum penalties.

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30 His age was not stated.

31 It may be inferred: he offended as a 17 year old and pleaded guilty "quickly", but it had taken some time for the matter to reach the sentencing court.

32 Outline of submissions for the appellant/applicant, paragraph 5.

33 Ibid, paragraph 3.

34 Ibid, paragraphs 8, 9, 10, 13 – 19.

35 [1998] 1 Qd R 487.

[43] Neither the applicant nor the respondent took this court to sentencing decisions involving offenders who had been dealt with as children for offending similar to the applicant's.

***R v PGW*,[36] published as *R v PGW*[37]**

[44] When he was 36 years old, PGW pleaded guilty to five counts of indecent treatment of a child under 12. He was 15 years old when the offences were committed and the complainant was his seven to eight year old step brother. The offences involved touching the genital area, simulated intercourse, oral intercourse and mutual masturbation. The complainant suffered for years after the offending. He had been in hospital three times and had tried to kill himself.

[45] The learned sentencing judge did not refer to the terms of the equivalent of section 144 of the *YJA*[38] but her Honour accepted the prosecutor's contention that, had the applicant been dealt with as a child, the court's focus would have been on rehabilitation, not custody. PGW was sentenced at first instance to 12 months' imprisonment, wholly suspended, for 18 months.

[46] PGW successfully appealed. The wholly suspended sentence was set aside and in lieu thereof, PGW was released upon entering into a recognisance, without surety, in the amount of $1,000 on conditions that he be of good behaviour and appear for conviction and sentence if called on at any time during the period of three years, under section 19(1)(b) of the *Penalties and Sentences Act* 1992 (*PSA*).

[47] In allowing the appeal, de Jersey CJ said:[39]

> "Unfortunately, in this case, the learned judge was not given proper assistance. While I believe the judge would have had in mind the approach dictated by s 107B of the *Juvenile Justice Act*, specific reference should have been made to it by counsel for both parties. The fact is that defence counsel before the learned sentencing judge accepted the course proposed by her Honour – which, in fact, she followed – was appropriate.
>
> But it does seem to me that insufficient attention was given to what I regard as the unique aspect of the case, and that is that both actors – the offender and the victim – were, in law, children. It is a very unusual case in that it concerns the prosecution, after 20 years or so, of a person who was but an adolescent at the time of offending.
>
> The case has no relation to the prosecution, even after many years, of adults who prey on children. This is a case where, had the applicant been sentenced as a child, he would not have been placed in custody. That was the position taken before the learned sentencing judge and it was the correct position. By force of the *Juvenile Justice Act* the sentencing court was statutorily obliged to recognise that circumstance.
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> The question which the sentencing judge should have addressed was why therefore should the applicant now be sentenced to a term of

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36 [2002] QCA 462.
37 (2002) 134 A Crim R 593.
38 Previously section 107B of the *Juvenile Justice Act* 1992.
39 *PGW*, op cit, [13] – [19].

> custody, albeit suspended. It was accepted that the applicant has not subsequently been convicted or subsequently misconducted himself and, as it was put, that he should be taken as fully rehabilitated.
>
> While it is true that the sentencing judge, from her perspective, knew a matter which would not have been known had the applicant been sentenced as a child, that is the serious effect on the victim, and that is not to be overlooked or understated, the fact is that it is highly unlikely that a 15 year old boy who, as put by the sentencing judge, was sexually experimenting with the younger victim, would reasonably have foreseen such consequences for him.
>
> Now, it is also true that society rightly and reasonably expects punitive and deterrent responses from the court in cases of sexual misconduct, but this case is, as I have said, unique for the circumstance that both offender and victim were, at the time, in law, children and, in development, comparatively immature.
>
> In all these circumstances I can see no justification for the sentencing court's having taken a stronger line when dealing with the applicant as an adult.
>
> The distinction to be drawn ultimately between this case and *CCC* is the important distinction that in that case rehabilitation had not been complete, in that CCC had substantially reoffended.[40]"

[48] His Honour also said that having regard to the sentence that might have been imposed on the offender as a child did not tie the court to that sentence. Circumstances may warrant imposing a sterner penalty than would have been visited upon the child.[41]

[49] McPherson JA agreed with the Chief Justice – noting the case was an especially unusual and difficult one.

[50] Mullins J, also agreeing, said:[42]

> "There is no doubt that if the applicant had been sentenced while he was still a child the sentence would have been non-custodial. Taking into account the additional matters that were known to the sentencing judge at the time of sentencing, I am not persuaded that a custodial sentence was within the sentencing range at the time of sentencing."

[51] Had the learned sentencing judge in the present matter been referred to *PGW*, his Honour would have appreciated the need to consider, in the exercise of his sentencing discretion, whether anything in the circumstances justified the applicant being treated more harshly than he would have been had he been sentenced as a child.

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40 CCC was sentenced as a 43 year old to offences he committed when he was aged 13 – 16. There were six complainants, aged between seven and 13. He exerted pressure upon them in the course of his offending, which included mutual masturbation, oral sex and simulated intercourse. There was no penetration or violence. He had subsequent convictions. He was sentenced to 12 months' imprisonment, suspended after three months, for an operational period of two years: [2001] QCA 39.

41 *PGW*, op cit [11].

42 *PGW*, op cit [24].

[52] *PGW* also provided a "yardstick" against which to determine an appropriate penalty for the applicant's less serious offending.

Error at first instance

[53] His Honour should have been referred to *R v PGW* for the guidance it provides to sentencing courts dealing with an offender in accordance with section 144 of the *YJA*. It has been considered or applied many times at first instance in comparable cases, resulting often in orders under section 19(1)(b) of the *Penalties and Sentences Act* 1992, including in cases involving more serious offending than the applicant's.[43]

[54] In the absence of assistance from counsel, and not having been referred to relevant authority, his Honour erred in his approach to section 144 of the *YJA*, and in particular the application of section 144(2)(b).

[55] While his Honour had regard to the sentence that might have been imposed upon the applicant had he been sentenced as a child (namely, probation), and discounted its present utility for the rehabilitated applicant, his Honour did not consider whether there was a reason to sentence the applicant more harshly as an adult.

[56] Also, in the absence of assistance, his Honour erred in concluding that the applicant would have "exposed himself [as a child] to the potential of a detention order for offending of this nature, particularly after pleas of not guilty". That is not borne out upon a consideration of comparable cases, nor upon the application of the relevant principles which would have applied to the applicant's sentence as a child. These matters are discussed below.

Exercising the sentencing discretion afresh

[57] Having identified error, it falls to this court to exercise the sentencing discretion afresh.

[58] In addition to sections 140 and 144 of the *YJA* and the guidance provided by *PGW*, the following matters are relevant (but not exclusively so) to the exercise of the discretion, and will be considered in turn:

- the *Juvenile Justice Act* 1992 (as at 2001);
- sentences imposed upon juveniles for like offending;
- the guidance provided by *R v Briese*;
- the consequences of the finding of guilt;
- the consequences of the recorded convictions; and

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[43] Examples include *CIJ* (Chowdhury J, 3 May 2018); *ODY* (Fantin DCJ, 5 April 2018); *DPA* (Rafter SC DCJ, 27 March 2013); *BMM* (Bradley DCJ, 7 June 2012): *BJR* (McGill SC DCJ, 25 May 2012); *BJT* (Dorney QC DCJ, 15 February 2012); *SNG* (Dearden DCJ, 11 May 2010 – to which the learned sentencing judge was referred, as noted); *NJC* (Dearden DCJ, 18 May 2006); *JGM* (Dearden DCJ, 10 October 2005); *MRD* (Dearden DCJ, 25 July 2005). The offending in *CIJ* was particularly serious. The nine year old complainant was sexually abused by CIJ's 16 year old friend. The complainant asked CIJ, also 16, for help. Instead, using disgusting language, he caused her to fellate him and then to masturbate him to ejaculation. CIJ was sentenced as a 52 year old. After pleading guilty, he was released on a $1,000 recognisance, conditioned that he be of good behaviour for two years.

- *R v PGW* and other yardstick authorities.

The *Juvenile Justice Act* 1992

[59] Had the applicant been sentenced as a child soon after the offence was committed (that is, soon after November or December of 2000),[44] the principles of juvenile justice set out in section 4 of the *Juvenile Justice Act* 1992 (*JJA*);[45] the sentencing principles set out in section 109 of the *JJA*; and sections 165, 124 and 125 of the *JJA* would have applied to him.

[60] The principles of juvenile justice included a principle that a child should be detained in custody for an offence on sentence only as a last resort: section 4(c)(i). Indeed, that principle still applies.[46]

[61] Also, the principles of juvenile justice encouraged and prioritised rehabilitation in various ways, including in accordance with section 4(f), which provided:

> "(f) a child who commits an offence should be —
>
> (i) held accountable and encouraged to accept responsibility for the offending behaviour; and
>
> (ii) dealt with in a way that will give the child the opportunity to develop in responsible, beneficial and socially acceptable ways …"

[62] That approach still applies.[47]

[63] Of the section 109 sentencing principles,[48] the following would have been relevant to the applicant:

> "**(1)** In sentencing a child for an offence, a court must have regard to—
>
> (a) subject to this Act, the general principles applying to the sentencing of all persons; and
>
> (b) the general principles of juvenile justice; and
>
> (c) the special considerations stated in subsection (2); and
>
> (d) the nature and seriousness of the offence; and
>
> (e) the child's previous offending history; and
>
> (f) any information about the child, including a presentence report, provided to assist the court in making a determination; and
>
> …
>
> (h) any impact of the offence on a victim; and

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44 Based on his Honour's finding that the applicant was about 15 years and seven months when he offended.

45 The *YJA* contains a "Charter of Youth Justice Principles" in schedule 1, which are more extensive that the principles of the *JJA* – although their themes are similar.

46 That principle remains in paragraph 17 of the Charter of youth justice principles in Schedule 1 of the *YJA*.

47 That principle remains in paragraph 8 of the Charter of youth justice principles in Schedule 1 of the *YJA*.

48 See now s 150 of the *YJA*.

…

(k) the fitting proportion between the sentence and the offence.

(2) Special considerations are that—

(a) a child's age is a mitigating factor in determining whether or not to impose a penalty, and the nature of a penalty imposed; and

(b) a non-custodial order is better than detention in promoting a child's ability to reintegrate into the community; and

…

(e) a detention order should be imposed only as a last resort and for the shortest appropriate period.

(3) In sentencing a child for an offence, a court may receive any information it considers appropriate to enable it to impose the proper sentence or make a proper order in connection with the sentence…"

[64] Section 165 of the *JJA* would have applied – ensuring that detention was only ordered if no other sentence was appropriate (as is still the case):[49]

"**165 Detention must be only appropriate sentence**

A court may make a detention order against a child only if the court after –

(a) considering all other available sentences; and

(b) taking into account the desirability of not holding a child in detention;

is satisfied that no other sentence is appropriate in the circumstances of the case."

[65] Sections 124 and 125 of the *JJA*, dealing with the recording of a conviction for offending committed by juveniles, would have applied to the applicant were he sentenced as a child. The primary, or *prima facie*, position was that a conviction was not to be recorded against a child offender: section 124(1). That is still the case.[50]

[66] Considerations to which a court must have had regard were set out in section 125:

"**125 Considerations whether or not to record conviction**

(1) In considering whether or not to record a conviction, a court must have regard to all of the circumstances of the case, including –

(a) the nature of the offence; and

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49 Section 208 *YJA*.

50 Sections 183 and 184 *YJA*: *R v B* [1995] QCA 321; *R v JO* [2008] QCA 260; *R v SBP* [2009] QCA 408; *R v SBR* [2010] QCA 94 and *R v TX* [2011] QCA 68.

(b) the child's age and any previous convictions; and

(c) the impact the recording of a conviction will have on the child's chances of –

(i) rehabilitation generally; or

(ii) finding or retaining employment.

(2) Except as otherwise provided by this or another Act, a finding of guilt without the recording of a conviction is not taken to be a conviction for any purpose."

[67] *R v JO*[51] is but one illustration of the approach to be taken in the exercise of the discretion to record, or not record, a conviction against a child – namely, conscious of the primary position that no conviction is to be recorded and giving (where appropriate) precedence to a child's rehabilitation.

[68] JO was 13 years old when he offended and 14 at sentence. With a knife in one hand, and masturbating with the other, he woke his 17 year old sister and demanded sex, threatening to kill her. Eventually, she got the knife from him and ran. He followed her. She told him to leave her alone and ran to a neighbour. He was sentenced at first instance to three years' probation and a conviction was recorded. He successfully appealed against the recording of the conviction.

[69] Counsel for the Crown argued, at the appeal, that the circumstances of the offence were so serious that the community's interest in knowing the truth about the applicant's background warranted the recording of the conviction. If a conviction were not recorded, she argued, any Court sentencing the applicant as an adult could not be informed of the prior offence. Counsel referred to the question posed by the Chief Justice in *R v Cay, Gersch and Schell; Ex parte Attorney-General (Qld)*:[52]

> "is there sufficient reason to contemplate subsequently denying persons, with an otherwise legitimate interest in knowing the truth, knowledge of the offender's true circumstances?"

and submitted that it should be answered in the negative.

[70] Holmes JA (as her Honour then was)[53] did not think that the *Cay* question assumed the same importance in the case of juvenile offenders.[54] Her Honour referred to the observations of the President in *R v L*:[55]

> "The exercise of discretion as to whether or not to record a conviction under the *Juvenile Justice Act* 1992 involves somewhat different considerations from those for adult offenders under the *Penalties and Sentences Act* 1992. See sections 3, 9 and 23 of that Act and compare sections 3, 4, 109, 124 and 125 of the *Juvenile Justice Act* 1992. Unlike the position for adult offenders, section 124(1) of the *Juvenile Justice Act* 1992 proceeds from the primary position that a conviction is not to be recorded against a child offender": see *R v [B]*, CA No 551 of 1994, 9 June 1995."

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51 [2008] QCA 260.
52 [2005] QCA 467, [11].
53 With whom Mackenzie AJA and Douglas J agreed.
54 *JO*, op cit, at [12].
55 [2000] QCA 448.

[71] At [13] and [14], Holmes JA said:

> "[13] I think, in any event, that the question posed in *R v Cay* ought in this case to be answered in the affirmative. The applicant was 13 at the relevant time and had not offended previously. It may be the case that he does not offend again as a juvenile or an adult; at any rate, one cannot proceed on the assumption that he will. On that basis, it is difficult to see that the community would have an interest in knowing of this offence, committed at a particularly vulnerable time in his development and in circumstances where guidance and assistance seem to have been lacking. And as his counsel pointed out, the probation order will run until he is 17. Were he to breach it by re-offending of a serious kind during that period, it would be open to the court re-sentencing on this offence to record a conviction which would then be made known to any court which might sentence him as an adult. If, of the other hand, he has not re-offended in any similar way by the time he reaches adulthood, the significance of the offence will by then be very much diminished.
>
> [14] Some offences committed by children are, of course, inherently so serious that a conviction must be recorded … But it does not follow that every offence which can, in general terms, be described as serious requires the recording of a conviction."

[72] In *JO*, her Honour was unconvinced that the circumstances of the offending were so serious as to necessitate the recording of a conviction. The importance of rehabilitation was a strong consideration in the applicant's favour. Also, while the applicant had limited employment prospects because he suffered many difficulties,[56] the additional burden of a conviction could hamper them. Her Honour concluded that, having regard to the authorities and to the statutorily prescribed conditions, the recording of a conviction was not within a sound exercise of the sentencing discretion.

[73] Her Honour's observation in *JO*, about the diminished significance of a juvenile offender's conduct were they not to offend again, is particularly relevant to the applicant. Also, in the present case the "*Cay* question" falls to be considered in the light of the operation of the *Working with Children (Risk Management and Screening) Act* 2000, which is discussed below.

Sentences imposed upon juveniles for like offending

[74] The difficulty in obtaining sentencing remarks for sentences imposed upon juveniles in 2000 – 2001 is acknowledged. Nevertheless his Honour would have been assisted by information about the sentencing trend revealed in similar (or more serious) cases from 2004 onwards, which are easily available.[57]

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56 Including learning delays, emotional and behavioural problems, vulnerability to bullying and influence, and perhaps an emerging psychiatric disorder.

57 On QSIS.

[75] The sentences summarised in **Attachment A** to this judgment are some of many imposed for similar offending from 2004 onwards. They demonstrate that the sentence the applicant was likely to receive, had he been sentenced as a child from 2004 onwards, was one designed to encourage his rehabilitation, by way of probation, providing him with support, guidance and specialised psychological treatment,[58] and by not recording convictions. There is no reason to think that the sentences which might have been imposed in 2001 would have been any harsher.

[76] The imposition of such a sentence is consistent with the application of the relevant principles of juvenile justice and sentencing, and the primary position under the *JJA/YJA* that a conviction is not imposed for juvenile offending.

[77] It is acknowledged that all but one of the sentences listed in Attachment A followed pleas of guilty. However, many concerned more serious offending than the present offending. Unsurprisingly, the periods of probation imposed, and the conditions imposed, varied from case to case, depending on the circumstances of each case and of each offender – including whether an offender had accepted responsibility for their offending or not.

[78] It is difficult to find Court of Appeal decisions concerning sentences imposed on children for non-penetrative sexual offending. That is not surprising given the usual outcome at first instance for such an offence. Nevertheless, appellate decisions involving more serious offending reinforce the point that, had the applicant been sentenced as a child, his rehabilitation would have been prioritised. His was not a case warranting "last resort" detention and he was likely to have been admitted to a period of probation with no convictions recorded. *JO*, discussed above, is one example of such an appellate decision. *BCO*,[59] *SBP*[60] and *SBR,*[61] discussed below, are others.

R v PGW **as a yardstick decision**

[79] Apart from the guidance it provides about the correct approach to section 144 of the *YJA*, treating *PGW* as a "yardstick" decision suggests that the sentence imposed at first instance in the present case was manifestly excessive.

[80] PGW and the present applicant were about the same age when they offended. They were both in their thirties when they were sentenced. Neither had re-offended since the offences were committed. PGW's offending was more serious than the present applicant's. The complainants in both matters suffered terribly. PGW pleaded guilty: the applicant did not.

[81] The respondent submitted that *PGW* was not a useful comparable case because the sentence was imposed against a lower maximum penalty (two years' detention) than that which applied in the present case (seven years' detention). The respondent made the same point about *CCC* and *SBQ*.

[82] It may be observed that, as the cases referred to throughout this judgment and in the attachment show, notwithstanding the increase in maximum penalties, the sentences

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58 In appropriate cases, as a condition of their probation, juvenile offenders are required to attend for treatment at the Griffith Youth Forensic Service, which provides specialist forensic psychological treatment services to youth sentenced in courts in relation to sexual offence matters: https://www.griffith.edu.au/arts-education-law/griffith-youth-forensic-service/about-us.

59 [2013] QCA 328; [2016] 1 Qd R 290.

60 [2009] QCA 408.

61 [2010] QCA 94.

imposed upon first-time juvenile offenders for sexual offences like those committed by the applicant (and for more serious sexual offences) have not increased. That reflects a consistent application over the years of the sentencing principles which apply to juveniles, which have remained constant over time; and which prioritise rehabilitation over punishment and provide for detention only as a last resort. In that context, the increase in maximum penalty is primarily of relevance to those juvenile offenders whose conduct is so serious as to warrant detention.[62] That is not the case here.

R v Briese

[83] During submissions at first instance, the applicant's counsel agreed with his Honour that it was not proper for his Honour to first decide whether or not to record a conviction and then allow that decision to dictate the type of sentence to impose: both matters had to be considered together.[63] Counsel did not have relevant authority to hand. He does now – *R v Briese* – and relies upon it for that point.

[84] *Briese* concerned s 12 of the PSA: "Court to consider whether or not to record a conviction".

[85] Thomas and White JJ said, of the nature of the s 12 discretion:[64]

> "In the sentencing process a court must consider all available sentencing options and impose that option or combination of options that is most appropriate in a particular case. In the end, it is the total of the order that matters to the offender and the community alike. It is impossible in our view to consider the discretion that is involved in s 12 in isolation from the particular sentencing option that is being considered under ss 16, 22, 29, 34, 44, 90, 100, 111, 143, 152 or any other section. And it is likewise inappropriate to consider those sentencing options in isolation from the circumstance whether the conviction will be recorded or not. The combined effect of the orders needs to be looked at before a court decides that a sentence is appropriate. If it is not appropriate the court should not make it and should look for some other option or combination of options …"

[86] *Briese* has other relevance to the present matter. In that case, their Honours considered the consequence of the impact of a recorded conviction upon an offender and the benefit to an offender of a conviction not being recorded, and observed that recording a conviction might continue to punish an offender well after appropriate punishment had been received:[65]

> "It is therefore obvious that the effect of such an order is capable of considerable effect in the community. Persons who may have an interest in knowing the truth of matters include potential employers, insurers and various government departments … For present purposes it is enough to note that the making of an order under s 12

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62 Even in the case of adult offenders, it does not necessarily follow from the fact of an increase in the maximum penalty for an offence that *all* such offences committed after the increase should attract a higher penalty than they previously would have. Those at the more serious end of the spectrum may be expected to attract higher penalties but that is not necessarily so for those at the lower end. See *R v Samad* [2012] QCA 63 at [30] and *R v Murray* [2014] QCA 250 at [16].

63 Record book, p 19, 5 – 22.

64 *Briese*, op cit, at 489 – 490.

65 *Briese,* op cit, at 491.

> has considerable ramifications of a public nature, and courts need to be aware of this potential effect. In essence a provision of this kind gives an offender the right to conceal the truth, and it might be said to lie about what has happened in a criminal court.
>
> On the other hand, the beneficial nature of such an order needs to be kept in view. It is reasonable to think that this power has been given to the courts because it has been realised that social prejudice against conviction of a criminal offence may in some circumstances be so grave that the offender will continually be punished in the future well after appropriate punishment has been received. The potential oppression may stand in the way of rehabilitation, and it may be thought to be a reasonable tool that has been given to the courts to avoid undue oppression."

[87] The applicant has matured into a law-abiding, productive member of the community.

[88] Not only is there a real risk that the findings of guilt *per se* will hinder the applicant in his contemplated future employment as a nurse (see below) but there is also a real risk of additional social prejudice attaching to the *recording* of convictions, including by his becoming a "reportable offender"[66] (see below).

The consequences of the findings of guilt under the *Working with Children (Risk Management and Screening) Act* 2000

[89] The applicant will be hindered in his contemplated future employment because of the application of the *Working with Children (Risk Management and Screening) Act* 2000 (the *WWCA*), regardless of the penalty imposed by the court for his offending.

[90] The object of the *WWCA* is –[67]

> "to promote and protect the rights, interests and wellbeing of children and young people in Queensland through a scheme requiring –
>
> (a) the development and implementation of risk management strategies; and
>
> (b) the screening of persons employed in particular employment or carrying on particular businesses."

[91] The screening process is often referred to as a Blue Card check. Very briefly, a person must hold a Blue Card before they may work with children. It is reasonable to assume that, as a nurse or a nursing student, the applicant would be required to work with children.

[92] However, the applicant is a "disqualified person"[68] under the *WWCA* because he has been convicted of a "disqualifying offence" (indecent treatment of a child).

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66 Although s 9(9) of the *Penalties and Sentences Act* 1992 provides that a court must not have regard to the s 179C offender levy or the potential that an offender may become a "dangerous prisoner" in sentencing an offender, it does not say that the court must not have regard to the potential that an offender may become a reportable offender.

67 Section 5.

68 Section 169.

"Convicted" includes a finding of guilt, whether or not a conviction is recorded. In other words, it is the findings of guilt *per se* which render the applicant a disqualified person.

[93] A disqualified person may not apply for a Blue Card. It is an offence to do so.

[94] However, a disqualified person may apply to the chief executive for an "eligibility declaration"[69] which allows a disqualified person to apply for a Blue Card. Sections 222 to 229 of the *WWCA* govern the chief executive's decision. Among the matters to which the chief executive must have regard are when the offence was committed[70] and "the penalty imposed by the court and if the court decided not to impose an imprisonment order for the offence … the court's reasons for its decision".[71]

[95] An eligibility declaration may only be issued if the case is an exceptional one and the best interests of children will not be harmed by allowing the person seeking the declaration to apply for a Blue Card.

[96] It is reasonable to assume that the age and circumstances of the offences will tell in favour of the making of an eligibility declaration, but the imposition of the sentences of imprisonment will tell against it.

[97] Unless and until an eligibility declaration is made in his favour, the applicant cannot apply for a Blue Card; and unless and until a Blue Card is issued to him, the applicant is not able to work with children as a student nurse or a nurse.

[98] The operation of the *WWCA* in the applicant's case is relevant to the "*Cay* question." Those with a "legitimate interest in knowing the truth" will know it. Whether convictions are recorded or not, the applicant will be "screened" (in the course of seeking an eligibility declaration and, if the declaration is made, in the course of applying for a Blue Card) to determine whether he may work with children.

[99] None of this information was provided to his Honour. All his Honour was told was that the applicant needed a Blue Card to work as a nurse and defence counsel's submissions implied that, were a conviction not recorded, the applicant would be able to obtain a Blue Card. Defence counsel appears not to have appreciated that, whether a conviction was recorded or not, the applicant still faced Blue Card hurdles.

The consequences of recorded convictions under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004

[100] Additionally, because the sentences imposed at first instance carried recorded convictions, the applicant is a "reportable offender" under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004 (the *ORA*).

[101] The learned sentencing judge recognised that the applicant had demonstrated, over a lengthy period of time, that he was unlikely to commit other sexual offences against

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69 Section 178.
70 Section 226(2)(a)(iii).
71 Section 226(2)(a)(v).

children.[72] However, defence counsel did not take his Honour to this legislation or its consequences during his submissions on sentence.

[102] The purposes of the *ORA* are set out in s 3 and include, in subsection (1A) –

> "(a) to provide for the protection of the lives of children and their sexual safety; and
>
> (b) to require particular offenders who commit sexual, or particular other serious, offences against children to keep police informed of the offender's whereabouts and other personal details for a period of time after the offender's release into the community –
>
> (i) to reduce the likelihood that the offender will re-offend; and
>
> (ii) to facilitate the investigation and prosecution of any future offences that the offender may commit."

[103] A "reportable offender" is a person who is sentenced for a reportable offence: s 5(1)(a) of the *ORA*. A "reportable offence" includes an offence of indecent treatment of children under 16 (a "prescribed offence"): schedule 1 and s 9 of the *ORA*. However, a person mentioned in s 5(1)(a) is not a reportable offender only because the person was convicted of a prescribed offence if the conviction was not recorded: s 5(2)(a) of the *ORA*.

[104] Under the *ORA*, as a reportable offender, the applicant is required to comply with the reporting obligations contained in Part 4 of the Act for two and a half years.[73] The regime was described as "onerous" by McMurdo P[74] in *R v SBP*.[75] Also, while he remains a reportable offender, it is an offence for the applicant to travel overseas without the permission of "a competent authority" (here, the Commissioner of Police).[76]

[105] As the learned sentencing judge recognised, the applicant posed no appreciable risk of reoffending. Children do not need protection from him. In those circumstances, the imposition of the obligations of the *ORA* are not necessary in the public interest.

[106] Similarly, the application of the regime to SBR (*R v SBR)*,[77] who was sentenced as a 17 year old[78] for his sexual offending as a younger teen, was not considered to be in the public interest.

[107] SBR pleaded guilty to three offences of indecent treatment of a child under 12 and one of rape. The complainant was his sister. She was aged between seven and 10 when he offended against her. SBR was then aged between 13 and 15. His offending included pulling her pants down and licking her vagina; exposing his penis to her and asking her to touch it, which she did; briefly lying on top of her, with his pants and underpants pulled down slightly and his penis erect while she

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72 Record book, p 26, 42 - 46.
73 Section 37. The length of the reporting period is halved when the person was a child when they offended.
74 With whom Atkinson and Lyons JJ agreed.
75 [2009] QCA 408, [20].
76 Section 271A.1 *Criminal Code* 1995 (Commonwealth).
77 [2010] QCA 94.
78 That is, as a child, *cf* s 140 *YHA*.

was naked; and inserting his fingers into her vagina, from which she noticed bleeding when she went to the toilet.

[108] He was sentenced at first instance to two years' probation for the indecent treatment offences and to four months' detention and 12 months' probation for the rape. A conviction was recorded for the rape only. He successfully appealed against the recording of a conviction.

[109] Muir JA[79] found it impossible to resist the conclusion that the primary judge's focus on the seriousness of the offence of rape caused his Honour to give insufficient weight to "all the circumstances of the case" and the other matters which s 184(1) of the *YJA* required to be considered. His Honour said (not all footnotes included):[80]

> "[21] Amongst the matters required to be considered by s 184(1) was the applicant's youth. He was no older than 15 and his social, emotional and moral development appears to have been impeded by his home environment. The incestuous nature of this offending against the applicant's vulnerable younger sister, whilst increasing its gravity, also provided part of the background against which a troubled youth, who was poorly supervised and directed by his parents, fell into unlawful sexual experimentation.
>
> [22] The Report holds out good prospects of rehabilitation. The latest date on which the rape offence was committed was 29 January 2007 and there was no suggestion of reoffending or of any other inappropriate sexual conduct between then and 30 November 2009, the date of sentencing. The applicant cooperated fully with the authorities. There was no denial of the complaints made against him and he disclosed the conduct constituting count 1. He had no criminal history. The rape was digital and unaccompanied by violence or coercion, except for the use of the force inherent in the insertion of the applicant's fingers. There was no victim impact statement or other evidence to suggest that the impact of the offending conduct on the complainant exceeded what would normally be expected in such circumstances.
>
> [23] This was not a case in which the evidence suggested that the applicant posed an appreciable risk of re-offending, whether within his family or otherwise. It was not in the public interest that the applicant become a reportable offender under the *Child Protection (Offender Reporting) Act* 2004 (Qld) but it is in the interest of the applicant and of the community that the applicant's good prospects of rehabilitation and of 'finding and retaining employment'[81] not be impeded unnecessarily. I do not doubt that the recording of a conviction would impinge adversely on his prospects. Accordingly, the consideration favouring a decision not to record a conviction far outweighed those supporting the recording of a conviction and a review of

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79 McMurdo P and Holmes JA agreeing.

80 *SBR*, op cit, at [21].

81 Section 184(1)(c) *JJA*.

recent decisions provides examples of convictions not being recorded where the offending conduct has been at least as serious as that of the applicant.[82]

Conclusion

[24] For all of the above reasons, despite the breadth of the discretion vested in the primary judge, the exercise of the primary judge's discretion miscarried and must be re-exercised by this Court. The appeal against sentence is limited to the setting aside of the recording of the conviction and, as the term of imprisonment imposed has already been served, I will refrain from commenting on the appropriateness of that part of the sentence, beyond observing that it is difficult to reconcile with the 'special consideration' that 'a detention order should be imposed only as a last resort,' the other 'special considerations' in s 150(2) of the Act and with the statements of principle in the authorities in relation to the sentencing of youthful offenders."

[110] The reporting regime was considered unnecessary in SBR's case because, in the short period of time between his offending and sentence, nothing *suggested* that he posed an appreciable risk of re-offending and his *prospects* for rehabilitation were good. The present applicant has *demonstrated* no risk of re-offending and *has* rehabilitated. He may make, therefore, a stronger claim than SBR's that there is no public interest served by rendering him a reportable offender.

[111] The Court of Appeal reached similar conclusions in the cases of *SBP* and *R v BCO*[83] who were sentenced as children. In *BCO*, one of the factors treated by the Court of Appeal[84] as counting against recording a conviction was that rendering BCO a reportable offender was at odds with his being assessed as a low to moderate risk of sexual recidivism.[85] It is similarly, if not more so, "at odds" for the present applicant.

The appropriate sentence

[112] The serious aspects of the applicant's offending included that he was six years older than the complainant. He offended against her a second time after she had indicated, by attempting to pull her dress down, that she wished to leave, and after pushing her onto her back. He isolated the complainant from her brother, who had been playing with them, and used a ruse to normalise his conduct ("my sister likes it …").

[113] The touching, with finger and tongue, was brief and involved no penetration. The complainant was significantly affected by it.

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82 *R v Cay, Gersh and Schell; Ex parte Attorney-General (Qld)* [2005] QCA 467; *Director of Public Prosecutions v Candaza* [2003] VSCA 91; *R v B* [1995] QCA 231; *R v B* [2003] QCA 24 and *R v DAU; Ex parte Attorney-General (Qld)* [2009] QCA 244.

83 [2016] 1 Qd R 290.

84 Mullins J, with whom McMurdo P and Morrison JA agreed.

85 *BCO*, op cit, at [24].

[114] The applicant had been sexually abused himself and it is reasonable to assume, as the applicant so assumed, that his own abuse contributed to, if not caused, his inappropriate and unlawful sexual conduct during his childhood. As he matured though, the applicant became a law-abiding and productive member of the community.

[115] Sentencing the applicant is difficult. He is an adult to be dealt with for sexual offences committed upon a child – but he was himself a child, albeit an adolescent, and a victim of child sexual abuse, when the offences were committed 17 years ago.

[116] Had the applicant been sentenced as a child, he would have been sentenced to a period of probation with no conviction recorded, to encourage his rehabilitation.

[117] However, as the learned sentencing judge recognised, the applicant, as an adult, did not require guidance or support to rehabilitate – rehabilitation had been achieved long ago. He posed no risk to children and there was no call for personal deterrence.

[118] The question that is very relevant to the exercise of the sentencing discretion is whether there is anything in the circumstances of this case warranting the imposition of a more severe penalty in 2018 than that which would have been imposed upon the applicant had he been sentenced as a child in 2001.

[119] The answer to that question cannot include that the applicant, as an adult, made a decision to require the prosecution to prove his guilt at trial. As was explained in *Siganto v The Queen*,[86] the applicant was entitled to plead not guilty, and defend himself, without thereby attracting the risk of the imposition of a penalty more serious than would otherwise have been imposed. But of course, he cannot claim in mitigation that he, by pleas of guilty, demonstrated his remorse in such a way as to spare the complainant the "painful procedure of giving evidence".

[120] Further, the answer to that question must take into account, among other things, that the applicant is a disqualified person under the *WWCA* because of the findings of guilt *per se*. Those who need to know about his offending – those screening him for working with children – will know about it, without the court doing anything further. His obtaining a Blue Card to study for, and work in, his desired profession will not be straightforward. The social and occupational consequences of the findings of guilt will follow him into his future – whether convictions are recorded or not.

[121] Another relevant consideration is whether the social prejudice and other consequences of a *recorded* conviction, which include his becoming a reportable offender, punish the applicant beyond the punishment warranted by his offending.

[122] Taking into account all relevant matters, a harsher sentence than that which might have been imposed upon the applicant had he been sentenced as a child is not warranted. Nothing calls for his rehabilitation or support (*cf* probation). Nothing suggests that he must account for himself into the future (*cf* a bond, or as a "reportable offender"). Nothing suggests that a recorded conviction should follow him – it is unlikely that he will sexually re-offend against children, and he is, regardless, a disqualified person.

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86 (1998) 159 ALR 94 at [22]. See also *Cameron v the Queen* (2002) 187 ALR 65.

[123] Notwithstanding the finding that a harsher penalty is not warranted, the delay in the applicant's prosecution for this offending means that his social and occupational standing has in fact been affected to a greater extent than it would have been had he been sentenced as a child.

[124] Following *PGW*, bonds under section 19(1)(b) of the *PSA* are commonly imposed in these circumstances, including for more serious offending – even though they require an offender to demonstrate good behaviour into the future, notwithstanding years of good behaviour already demonstrated. Nevertheless, orders under section 19 of the *PSA* are, in my view, the best response available in cases of this kind where probation is unnecessary.

[125] In accordance with section 17(1) of the *PSA*, orders under section 19 may be made if a court considers it appropriate that "no punishment or only a nominal punishment … be imposed upon an offender". Section 18 of the *PSA* sets out the matters to which the court must have regard before making an order under section 19. They include "anything else to which the court considers it proper to have regard".

[126] Having regard to all proper matters, including the applicant's age when the offences were committed, his rehabilitation and demonstrated good character thereafter, and the social and occupational consequences of the findings of guilt *per se*, only nominal punishment, in addition to those consequences, should be imposed upon the applicant.

[127] That is not to suggest that the complainant has not been criminally wronged. She has been, and she has suffered because of it.

[128] Having pleaded not guilty, notwithstanding his apologies during the pretext call, the applicant cannot claim to have demonstrated remorse by sparing the complainant the necessity of having to give evidence. In those circumstances, the most lenient order available under section 19 – a section 19(1)(a) order releasing him absolutely – is not appropriate. However, the applicant has been subject to the terms of suspended imprisonment since they were imposed,[87] that is for about seven months, and that must be taken into account in re-sentencing him now.

[129] In all of the circumstances, it is my view that the appropriate orders are as follows:

1. The application for leave to appeal is granted.
2. The appeal is allowed.
3. The sentences imposed at first instance are set aside.
4. In lieu thereof, the applicant is to be released upon his entering into a recognisance, in the sum of $500, on the condition that he be of good behaviour and appear for conviction and sentence if called upon at any time during the next two months.
5. No convictions are recorded.

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87 And to the ORA regime.

ATTACHMENT A: SENTENCES IMPOSED UPON JUVENILES AS JUVENILES

R v BDW (O'Brien DCJ, then President of the Children's Court, 15 November 2004):

- 7 x indecent treatment of a child under 12;
- complainant aged 7;
- defendant aged 14 when offences committed; 17 at sentence;
- offences committed while in foster care, and occurred over a few months – but otherwise not described;
- pleas of guilty;
- 3 years' probation including a condition that he attend the Griffith Youth Forensic Service; no convictions recorded.

R v JCA (Newton DCJ, 22 July 2005):

- 2 x indecent treatment of a child under 12; 4 x attempted indecent treatment of a child under 12;
- more than one complainant;
- other offenders involved who had not be brought to justice;
- offences not described – but the circumstances suggested that "the sexual nature of what happened was really a lesser feature … than the bullying side of the offences";
- convicted after a trial;
- no criminal history;
- 2 years' probation; 150 hours community service; no convictions recorded.

R v HBI (Newton DCJ, 7 December 2005)

- 2 x indecent treatment of child under 12;
- complainant aged 10;
- defendant "played a game with her" during which he kissed her breast and "in the region of her vagina";
- plea of guilty;
- no previous convictions;
- had been undergoing counselling for sexual abuse for about 6 months before sentence;
- 12 months' probation; no convictions recorded.

R v BKE (Rafter SC DCJ, 23 August 2007):

- indecent treatment of child under 12;
- complainant aged 6 years and 4 months;
- defendant aged 14 years and nine months when offence committed; 15 years old at sentence;
- defendant joined in a soccer game at a park in which the complainant and his father and others were playing – they were unknown to the each other;
- under the pretence of looking for a dog, the defendant led the complainant by the hand out of the view of his father and other adults; pulled the complainant's t-shirt up; exposed his (the defendant's) erect penis; asked the complainant to touch it, and when he declined, placed the complainant's hand on it;

- plea of guilty;
- no prior criminal history, but committed an offence of committing an indecent act in a public place (masturbating above the female toilet at Southbank) while on bail for the present offence;
- initially denied the offence – then claimed the complainant initiated it;
- 18 months' probation including a condition that he undergo medical, psychological or psychiatric treatment as directed by the Chief Executive: no conviction recorded.

R v GKL (Richards DCJ, 8 March 2007)

- indecent treatment of a child under 12;
- complainant was 8 year old cousin;
- defendant was 15;
- caught by grandmother on top of complainant;
- plea of guilty;
- 12 months' probation, no conviction recorded.

R v BDA (Dearden DCJ, 25 September 2009)

- 2x rape; 1 x indecent treatment of a child under 12;
- complainant was 5-year-old cousin;
- defendant was 15;
- offence occurred in presence of 9-year-old cousin;
- instructed 9-year-old to lick complainant's vagina; inserted finger into complainant's vagina; licked it; caused complainant to fellate him until he ejaculated;
- pleas of guilty;
- initially denied offending;
- defendant a victim of sexual offending by a predatory older male;
- very difficult life;
- 3 years' probation for counts 1 and 2 (rape and indecent treatment) including a condition that he attend the Griffith Youth Forensic Service; 12 months' detention with three months' conditional release for count 3 (rape); no convictions recorded.

R v GCL (Rafter SC DCJ, 6 October 2009)

- 3 x indecent treatment of a child under 12; 1 x attempted indecent treatment of a child under 12;
- complainant was a 6 year old boy who had been playing football with the defendant;
- defendant aged 14 when offences committed; 15 years old at sentence;
- the defendant led the complainant to a caravan and showed him DVD covers which portrayed naked men touching each other; the defendant removed his clothing; the complainant removed all of his clothing except for his shirt; the defendant touched the complainant's penis; the complainant touched the defendant's penis; the defendant asked the complainant to suck his penis; the complainant refused; the defendant became angry;
- pleas of guilty;
- no prior history;

- offending had a significant impact on the complainant and his family;
- defendant jealous of friends who had engaged in sexual acts with older girls;
- 18 months' probation including a condition that he attend the Griffith Youth Forensic Service "and maintain a rate of progress that is satisfactory to the treatment program"; no convictions recorded.

R v PDA (Devereaux SC DCJ, 8 March 2010):

- 3 x indecent treatment of a child under 12;
- complainant was a very young boy (aged 3 – 5 years old), the child of family friends;
- defendant aged between 14 and 16 when offences committed;
- offending included asking the child to pull down his (the child's) pants; exposing his penis to the child; putting his penis in the child's mouth;
- early pleas of guilty;
- Grade 12 student, casually employed, at sentence;
- no criminal history;
- offending had "powerful negative effect" on child and his family;
- defendant had unsettled background and was confused about his own sexual identity;
- defendant had been seeing a counsellor for nine months before sentence; had a high level of awareness of impact of offending and a strong desire to repair the harm; accepted responsibility; felt shame; had been "set upon" when found offending; suffered stigmatisation and scorn from others and physical and emotional separation from family and extended family;
- Devereaux SC DCJ referred to *R v SBP* [2009] QCA 408 at paragraph [28] in which McMurdo P said: "It is self-evident that a conviction for an offence of, in this case, attempted rape of a seven year old child, will be an additional handicap to his rehabilitation generally and to his finding employment";
- 3 years' probation including a condition that he attend the Griffith Youth Forensic Service or other appropriate counselling service; no convictions recorded.