SUPREME COURT OF QUEENSLAND

CITATION:	*R v CCF* [2018] QCA 285
PARTIES:	**R** **v** **CCF** (applicant)
FILE NO/S:	CA No 93 of 2018 DC No 364 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 21 March 2018 (Farr SC DCJ)
DELIVERED ON:	Date of Orders: 18 October 2018 Date of Publication of Reasons: 23 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	18 October 2018
JUDGES:	Sofronoff P and Morrison and McMurdo JJA
ORDERS:	**Orders delivered 18 October 2018:** **1. Leave to appeal granted.** **2. Allow the appeal.** **3. Vary the order made on count 2 of the indictment by ordering that a conviction not be recorded.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the applicant was convicted of two offences of indecently dealing with a child under 16 years – where the applicant was aged 16 at the time of the first offence and was 17 or 18 at the time of the second offence – where the complainant was the same person for both offences and was about five years younger than the applicant – where the applicant was convicted and sentenced approximately 20 years after the offending occurred – where the sentencing judge ordered that no conviction be recorded in relation to the first offence, but that a conviction be recorded in relation to the second offence – where the applicant sought leave to appeal only in relation to the sentence imposed for the second offence – where the sentencing judge was obliged to consider the matters prescribed by s 12(2) *Penalties and Sentences Act* 1992 (Qld) in deciding whether or not to record a conviction, and those

matters include the impact that recording a conviction would have on the offender's economic or social wellbeing or chances of finding employment – where the applicant would face disadvantage in his profession as a nursing assistant in the event that he is unable to obtain a blue card – where the sentencing judge did not consider the effect of a recorded conviction on the applicant's employability – whether the sentencing judge should have ordered that a conviction be recorded in relation to the second offence

Evidence Act 1977 (Qld), s 132C
Penalties and Sentences Act 1992 (Qld), s 12(2)
Youth Justice Act 1992 (Qld), s 144(2)

COUNSEL: K E McMahon for the applicant
M J Hynes for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of McMurdo JA.

[2] **MORRISON JA:** I have had the benefit of reading the reasons of McMurdo JA. Those reasons reflect my own as to why I joined in the orders made at the hearing.

[3] **McMURDO JA:** At the end of the hearing of this case, the Court ordered that leave to appeal be granted, the appeal be allowed, and that the orders made for count two on the indictment be varied by ordering that a conviction not be recorded. These are my reasons for agreeing with those orders.

[4] After a trial by a jury in the District Court, the applicant was convicted of two offences of indecently dealing with a child under 16 years. It was the same complainant in each case, who was about eleven and a half years old at the time of the first offence and a year older at the time of the second offence. The exact dates of the offences were unknown, but the applicant was sentenced upon the basis that he was aged 16 at the time of the first offence and was 17 or 18 on the second occasion.

[5] On the first charge, he was ordered to perform 150 hours of unpaid community service and a conviction was not recorded. On the second charge, he was ordered to perform 50 hours of community service but for this offence a conviction was recorded. He applied for leave to appeal against the second sentence, challenging the judge's decision to record a conviction.

[6] The first offence occurred when the complainant was at his grandmother's house. The applicant was a member of the same extended family, and was then living there. The applicant told the complainant that he would give him a toy if he let the applicant suck his penis, which the applicant then proceeded to do.

[7] About 12 months later the applicant and the complainant were in a group on a family holiday and they were staying together in a cabin. The complainant was taking a shower and the applicant joined him and tried to grab hold of the

complainant's penis. He momentarily touched it before the complainant slapped his hand away.

[8] More than once in his sentencing reasons, the judge said that the second offence had been committed at the first opportunity available to the applicant after the commission of the first offence. The judge accepted the evidence of the complainant at the trial that he had been keeping his distance from the applicant because of what had occurred on the first occasion. For the applicant, it was argued this that finding was an error by the judge, because there was evidence to the contrary and the judge should not have been satisfied of this fact with the degree of satisfaction required by s 132C of the *Evidence Act* 1977 (Qld).

[9] There was evidence from the complainant's mother that the complainant was at the grandmother's house practically every day during the relevant period and evidence from the applicant's aunt that the applicant lived at that house at times during the same period. The complainant's mother also said that she had seen the applicant there during that time. However the judge's finding was that there had been no opportunity for further offending until the occasion the subject of the second count. That finding was not inconsistent with the evidence from which it would be inferred that at times they were in the same house. It is not demonstrated that the judge erred in making this finding.

[10] The judge referred to the complainant's victim impact statement, which he said demonstrated the adverse effects of the applicant's behaviour. His Honour said that on each occasion, the applicant "would have appreciated the inappropriateness of behaving in such a way" and he described the applicant as being in "some position of trust", given the age gap between the two, which was breached by the commission of the offences.

[11] The judge took into account the fact that the applicant was a child when the first offence was committed and the sentence which might have been imposed on him had he been sentenced as a child, consistently with s 144(2) of the *Youth Justice Act* 1992 (Qld). He said that had he been sentenced as a child for the first offence, a term of detention would have been unlikely, as would have been the recording of a conviction. To give effect to s 144, his Honour said, no conviction would be recorded in respect of the first offence.

[12] The judge then explained his decision to record a conviction on the second offence, by referring to the following considerations: the applicant was an adult at the time of that offence, it was the second offence against the same complainant who was in a vulnerable situation at the time, the applicant had had 12 months to think about his prior conduct and to decide not to repeat it and the second offence occurred "at the first available opportunity".

[13] In considering whether to record a conviction, the sentencing judge was obliged to consider the matters prescribed by s 12(2) of the *Penalties and Sentences Act* 1992 (Qld), namely the nature of the offence, the offender's character and age and the impact that recording a conviction would have on the offender's economic or social wellbeing or chances of finding employment. The judge did describe the nature of the offence and the offender's character and age, although he did not do so when giving consideration to the particular question of whether to record a conviction. He made no reference to the effect of recording a conviction on the offender's

wellbeing or chances of finding employment. The judge was addressed by defence counsel on the potential consequences for the applicant's employment from the recording of a conviction. The submission was that a conviction would "obviously have a significant impact on his ability to continue that profession insofar as it involves children", referring to his profession as a nursing assistant for which he would require a Blue Card for work involving children. In my view, it was apparent that the judge did not consider the matters prescribed by s 12(2).

[14] It was submitted for the respondent that, in effect, it should not be inferred that the judge overlooked the effect of recording a conviction on the offender's chances of finding employment, simply because the judge did not mention that consideration in his sentencing reasons. It was submitted, correctly, that a sentencing judge need not make specific reference to every submission when expressing the reasons for a sentence. And on occasions, what is said by a judge in the course of argument can make it sufficiently clear that something has been considered, although it is not specifically discussed in the reasons themselves. But that did not happen in the present case. In this matter, the judge referred to what he saw as the material considerations, but made no mention of the effect on the applicant's employability. Section 12(2) required that matter to be considered and the necessity for a court to give reasons for its decision required the consideration of that matter to be demonstrated in the sentencing remarks, if not clearly demonstrated during the argument. It must be inferred that the matter was not considered.

[15] Therefore it was for this Court to consider the question of whether a conviction should be recorded. The nature of the offence, as the judge said, fell "towards the lower end of the scale of seriousness". It involved a momentary touching. As the judge also said, his offending had "some degree of immature sexual experimentation about it".

[16] The applicant was 17 or 18 years of age at the time. He was obviously immature. His conduct was discreditable but it has to be seen in the context of the way he has lived his life in the 20 years since the offence. He has not reoffended, has married and has had children and has been in consistent employment, notwithstanding that he has some speech and hearing difficulties.

[17] The conviction will have an impact on his prospects of finding employment, because it will limit the work which he is able to do. It cannot be supposed that he is a danger to children: the judge said that he had "rehabilitated from this type of conduct".

[18] The applicant swore an affidavit for the hearing in this Court, which the respondent agreed could be received if this Court was itself exercising the discretion under s 12. The affidavit provided more detailed evidence of the effect of a recorded conviction upon his employability, showing that the absence of a Blue Card could affect his work more generally than just with children. It also contained evidence of difficulties from a recorded conviction in his participation in the activities of his church, in which his own children are involved and in which he has been asked to volunteer. That evidence is relevant, but even on that which was before the sentencing judge, I would have been persuaded that a conviction should not be recorded.

[19] For these reasons, it was my view that the sentence should be varied by ordering that a conviction not be recorded on the second count.