SUPREME COURT OF QUEENSLAND

CITATION:	*R v Espray* [2018] QCA 322
PARTIES:	**R** **v** **ESPRAY, Richard Michael** (applicant)
FILE NO/S:	CA No 239 of 2018 DC No 51 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore – Date of Sentence: 31 August 2018 (Long SC DCJ)
DELIVERED ON:	20 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	15 November 2018
JUDGES:	Fraser and Morrison JJA and Crow J
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on his own pleas of guilty to grooming a child under 16, using electronic communication to procure a child under 16, indecent treatment of a child under 16 and abducting a child under 16 – where the applicant was sentenced to concurrent terms of imprisonment of 11 months, followed by two years probation (Counts 1 and 9), two years (Count 2 and 5), and two years and three months (Counts 6 and 8) with the terms of imprisonment on counts 2, 5, 6 and 8 suspended after 11 months, for an operational period of four years – where the applicant was 41 and 42 and the complainant was 12 and 13 at the time of the offending – where the applicant did not co-operate with the police investigation – where the applicant pleaded guilty once one additional count was removed but after the pre-recording of the complainant's evidence – where the applicant argued that his imprisonment should have been suspended after serving one-third of the term of imprisonment – where the custodial period was less than one-half and only two months longer than one-third of the term of imprisonment – where the applicant argued that the lack of touching should have been considered a mitigating factor – where the applicant argued the sentencing judge did not give

due consideration to the mitigating factors – where the applicant argued the sentencing judge incorrectly characterised some of the applicant's breaches of bail – whether the sentence is manifestly excessive

R v Conway (2012) 223 A Crim R 244; [2012] QCA 142, applied
R v Goodall [2013] QCA 72, considered
R v Kitson [2008] QCA 86, considered
R v Ungvari [2010] QCA 134, considered
R v Waszkiewicz [2012] QCA 22, cited

COUNSEL: The applicant appeared on his own behalf
N W Needham for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The applicant was convicted on his pleas of guilty to grooming a child under 16 (Count 1), using electronic communication to procure a child under 16 (Counts 2 and 5), indecent treatment of a child under 16 (Counts 6 and 8) and abducting a child under 16 (Count 9). He was sentenced to concurrent terms of imprisonment of 11 months, followed by two years probation (Counts 1 and 9), two years (Counts 2 and 5), and two years and three months (Counts 6 and 8). The terms of imprisonment on counts 2, 5, 6 and 8 were ordered to be suspended after 11 months, for an operational period of four years.

[2] The circumstances of the offences were set out in an agreed schedule of facts. An agreed schedule of evidence relating to count 9 was also in evidence.

[3] The applicant was 42 when he committed the offences and the complainant was then 13. The applicant met the complainant because she was a friend of the applicant's similarly aged daughter, they went to the same school, and the complainant's family moved into a house near the applicant's family home. The offending occurred after a breakdown of the applicant's marriage. The sentencing judge observed that this did not readily explain and did not excuse the applicant's inappropriate and salacious pursuit of a relationship with such a young girl.

[4] Count 1 charged an offence between 31 August 2015 and 25 January 2017, but the prosecutor explained that the prosecution case was that the applicant and the complainant first met in about March 2016 and a relationship was formed between the applicant and the complainant between then and September 2016. The complainant's father had become concerned by July 2016, when he confronted the complainant about the closeness of her relationship with the applicant. The complainant's father also spoke to the applicant and told him to take a step or two back from his daughter as he believed she had a crush on the applicant. The earliest communication between the applicant and the complainant referred to in the schedule of facts was found on the complainant's phone or iPad by her father on 8 September 2016. The complainant's father again spoke to the complainant and told the applicant to back off from his daughter. The applicant denied that anything untoward was going on. Thereafter the complainant's relationship with her father deteriorated whilst the applicant continued to communicate with the complainant.

[5] The applicant's communications with the complainant are redolent of his sexual interest in her. In the samples of the communications which remained available, there were express and implied references to a "boyfriend/girlfriend" relationship. The applicant expressed his jealousy about interactions between the complainant and "other boys". His manipulation of the young complainant with a view to acting on his sexual interest in her is clearly evident; he encouraged the child to rebel against her father, made personal remarks to the complainant about her mother, who had died some years before, and he interspersed strong criticism extending to abuse amongst expressions of affection. As the sentencing judge observed, the applicant took advantage of an obviously vulnerable young girl in circumstances where she had earlier lost her mother at a young age and was experiencing some difficulties in her relationship with her father as a single parent.

[6] The complainant's father unsuccessfully attempted to end the relationship between the complainant and the applicant, about which the complainant's father was naturally concerned. The sentencing judge correctly considered that the applicant's persistence and escalation of offending in the face of the complainant's father's interventions and protests was a serious aspect of the applicant's conduct and it further impacted upon the relationship of the complainant's father with his daughter.

[7] In counts 2 and 5, the applicant requested (and was given) photos taken by the complainant of her breasts and vaginal area and the applicant sent photographs of his genitals to the complainant. In the first of those offences, the applicant persisted in seeking the photograph even though the complainant had told the applicant that she had never sent nude photographs of herself before because it was illegal.

[8] In count 6 the applicant sent the complainant images of his penis. In count 8 the complainant used a mobile phone given to her by the applicant's daughter obviously to enable her to communicate with the applicant. The applicant sent her a picture of his semi-erect penis after she had sent him topless photographs of herself at his request.

[9] A day or two later the applicant committed the offence in count 9. The applicant was sentenced upon the basis that during the course of the kidnapping he did not engage in any sexual conduct with the complainant. The complainant gave evidence that she had decided to leave home that night because of issues she had with her father, she had been scared to go to sleep, and she asked the applicant's daughter for her and the applicant to pick her up because she did not feel comfortable. Without the complainant's father's knowledge or consent, the applicant and his daughter collected the complainant from outside her house. The applicant offered to take the complainant to a police station or to a friend's place or the complainant's step-mother. The complainant refused to go to those places. The applicant sent a text message to the complainant's father stating that his daughter was with the applicant. The applicant suggested the complainant message her father and she sent a message saying that she was safe. The applicant drove his daughter and the complainant to a hotel where he rented a room. The applicant telephoned the Department of Child Services and informed someone there that Child Services could speak to the complainant, they could not get her, but if she decided herself that she wanted to leave she could. Police telephoned the defendant and he told police where they were. When police attended the hotel the complainant told them she felt safe and wanted to sleep. The police later took the complainant with them.

[10] The sentencing judge accepted that the kidnapping occurred at the complainant's request, the applicant ensured that the complainant's father was informed that the complainant was with him and his daughter, and the situation was resolved by police within a matter of hours. The sentencing judge observed, however, that this conduct could not be isolated from the context of the applicant's sexual interest in the complainant and particularly the exchange of indecent images which occurred a night or two earlier, and the complainant's father's concerns and actions in respect of the applicant's pursuit of his daughter.

[11] The sentencing judge noted that the applicant had no relevant prior criminal history. He did not co-operate in the police investigation. In a police interview he denied sexualised conduct with the complainant and sought to explain away his contact with her. The applicant did not plead guilty until after the pre-recording of the complainant's evidence and the listing of the matter for a further pre-recording of the evidence of a child who was expected to give evidence of conduct which the prosecution contended revealed the applicant's awareness of his guilt of the offences. Some counts in the indictment were not proceeded with but there was in reality little substantial variance from the original indictment.

[12] The sentencing judge considered the plea of guilty to be significant. It indicated a preparedness to co-operate with and facilitate the course of justice. The sentencing judge accepted that the applicant seemed to have gained some insight into the essential culpability of his behaviour, save in respect of the circumstances of the abduction and the impact of the applicant's behaviour in complicating the relationship of the complainant with her father, and the applicant had expressed some remorse. (The applicant wrote a letter expressing his remorse, referring to having been depressed because of losing a child and his marriage breaking down, and apologising to the complainant and her family; he also stated that he believed that he had been helping the complainant on the night of the abduction but with the benefit of hindsight realised that he should have taken the complainant to the police.) The sentencing judge noted that the applicant still enjoyed the support of his family. He had obtained psychological therapy to address some identified issues, but that had not meaningfully developed until his more recent incarceration. The sentencing judge referred to the report of the psychologist and to the absence of any clearly identified cogent causes or links between any diagnosis by the psychologist and the applicant's offending behaviour. The sentencing judge accepted the psychologist's recommendation that the applicant's treatment occur in the community and remarked that this might occur under the supervision and restraint of a probation order.

[13] The applicant, who represented himself in this Court, argued that the imprisonment should have been suspended after he had served one-third of the term imposed on counts 2, 5, 6 and 8 and the sentencing judge did not offer any explanation why that did not occur. The custodial period is less than one-half and only two months longer than one-third of the term of imprisonment. Custodial periods are commonly one-third of the term of imprisonment in cases in which an offender pleads guilty and is remorseful, but that is not required by any rule and nor is any express explanation for a departure from that common sentence structure necessarily required: see *R v Ungvari* [2010] QCA 134 at [30] and *R v Kitson* [2008] QCA 86 at [17]. The explanation for the sentence structure in this case is ascertainable from the sentencing remarks: the applicant's plea of guilty was late; the complainant was required to give evidence at a pre-trial hearing; on more than one occasion the

applicant breached a bail condition concerning contact with the complainant; the offending was not an isolated act but persisted over a long period of time; the applicant still did not have complete insight into his offending; and he benefitted by the certainty of suspension rather than parole eligibility.

[14] The applicant argued that the sentencing judge did not give adequate weight to the discontinuance of count 3 (which had charged indecent dealing involving an alleged touching of the complainant) and the fact that there was no such touching should have been considered as a mitigating factor. Rather, such an indecent dealing would have made the applicant's offending even more serious and merited a more severe punishment. The presence of that count on the indictment did not preclude the sentencing judge from treating the applicant's pleas of guilty as late: see *R v Conway* [2012] QCA 142 at [31].

[15] The applicant argued that the sentencing judge did not give due consideration to the mitigating factors leading to the offending. In this regard the applicant referred to a page of the psychologist's report which records the breakdown in the applicant's relationship with his wife. The sentencing judge was correct in concluding that this did not explain or excuse the applicant's offending. It is not a mitigating factor.

[16] The applicant argued that the sentencing judge erred in stating that breaches of bail on two dates were constituted by the applicant having contact with the complainant, when those breaches in fact concerned only late reporting. There were four breaches of bail, on 12 April, 28 June, 20 August, and 28 October 2017. The sentencing judge described all of those breaches as relating to the applicant having contact with the complainant child. That was true of the third and fourth breaches but the first two breaches related to failures to report as required. In circumstances in which the inappropriate continuing contact with the complainant child to which the sentencing judge referred did occur, the error in relating that conduct also to the two earlier breaches did not have a material influence on the sentence.

[17] The applicant argued that the sentencing judge related the revocation of the applicant's bail to an admission of guilt, whereas the bail revocation was not challenged by the applicant because he accepted his charges and wanted to start his inevitable sentence. The sentencing judge referred to the applicant's history of breaching the bail conditions, and his attempts to avoid the further pre-recording of the complainant's evidence by seeking to have indirect contact with her through his daughter and friends of his daughter, only as evidence of his lack of co-operation up until that point in time. The sentencing judge also did not rely upon any breach of bail as increasing the applicant's culpability for the offences for which he was sentenced.

[18] The applicant argued that the sentencing judge failed to give adequate weight to the evidence of the complainant concerning count 9 which is summarised [9] of these reasons. The sentencing judge took that evidence into account. It was also appropriate for the sentencing judge to take into account that this offence occurred in the context of the then recent exchange of indecent images which is the subject of count 8 and despite the complainant's father's expressed concerns about the applicant's relationship with the complainant. As the sentencing judge observed, the applicant's conduct in this context served to underline the vulnerability of the child the applicant sought to exploit.

[19] The applicant argued that the sentencing judge did not adequately discount the sentence to take account of the mitigating factors and that the sentence is therefore manifestly excessive. The weight to be given to mitigating factors in the sentence was in the first instance a matter for the sentencing judge. There is nothing in the sentencing remarks which suggests that adequate weight was not given to them.

[20] Counsel for the respondent submitted that some support for the sentence was to be found in *R v Goodall* [2013] QCA 72. In that case an offender was sentenced to two years imprisonment with parole eligibility after one-third of that term for three counts of using electronic communications to expose a child under 16 years of age to indecent matter. On appeal the offender was resentenced on two counts to two years imprisonment suspended after six months for an operational period of three years and on the third count to six months imprisonment followed by probation for one year. The conduct in those offences was markedly worse than the conduct in the present case in counts 2 and 5 and counts 6 and 8. That offender and a twelve year old boy communicated by an instant message programme using live webcams. On three occasions they stripped naked and masturbated in view of each of other. It must be kept in mind, however, that the maximum penalty for the offences in *Goodall* was five years imprisonment, whereas in the present case the maximum terms of imprisonment were five years for count 1, ten years for counts 2 and 5, 14 years for counts 6 and 8, and seven years for count 9. Although the child in *Goodall* was only 12 he apparently looked 15 or 16 and he told the offender that he was 14 or 15. Furthermore, that offender, who also had no previous convictions, expressed remorse and changed his behaviour when contacting people online by avoiding sexual conversations and ensuring those people were adults, entered a timely plea of guilty, and co-operated with police by giving a full account of what he had done. Douglas J, with whose reasons Holmes and Gotterson JJA agreed, referred to the absence of any significant evidence that the offender had procured that child to behave as he did or acted in a predatory fashion as being considerations favouring an earlier parole eligibility date than was fixed by the sentencing judge. In this case the applicant was guilty of the grooming offence, involving serious misconduct over more than four months, in addition to the specific offences carrying longer terms of imprisonment than the offences in *Goodall*. That decision does supply some support for the sentence imposed upon the applicant. The applicant's sentence is also consistent with the decisions in *R v Costello* [2011] QCA 39 and *R v Oxenham* (Wolfe DC CJ, 28 July 2008, unrep, referred to in *Costello* at [39]) and *R v HBL* [2014] QCA 270 (concerning the sentence for count 9).

[21] The sentencing judge was not referred to those cases but was referred to a different case, *R v Waszkiewicz* [2012] QCA 22. The applicant argued that the sentencing judge erred in distinguishing that case, which involved worse conduct in many respects. The sentencing judge observed only that some particular guidance might be taken from that case, but a particular feature of the applicant's offending and culpability lay in his persistence in his offending despite the interventions of the child's father and his attempts to dissuade him from his reprehensible conduct. The only issue in *Waszkiewicz* was whether a parole release eligibility date was rendered illusory by the practical inability of that offender to be released on parole: see [2012] QCA 22 at [5], [28] – [31] and the conclusion in [35]. The refusal of the application for leave to appeal in that case is of no assistance in deciding whether the applicant's sentence is manifestly excessive.

[22] The 42 year old applicant's manipulative and persistent attempts to corrupt a 13 year old child over a lengthy period made his offending very serious. The sentencing judge did not err in any of the respects for which the applicant contended. The sentence is not manifestly excessive.

[23] The application should be refused.

[24] **MORRISON JA:** I agree with the reasons of Fraser JA and with the order proposed by his Honour.

[25] **CROW J:** I agree with the reasons of Fraser JA and with the order proposed by his Honour.