SUPREME COURT OF QUEENSLAND

CITATION:	*R v GBD* [2018] QCA 340
PARTIES:	**R** **v** **GBD** (applicant)
FILE NO/S:	CA No 264 of 2018 DC No 2092 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport – Date of Sentence: 21 September 2018 (Smith DCJA)
DELIVERED ON:	7 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	23 November 2018
JUDGES:	Sofronoff P and Fraser JA and Mullins J
ORDERS:	**1. Grant the application for leave to appeal.** **2. Allow the appeal.** **3. Vary the sentence imposed in the District Court by substituting a period of three months for the period of four months imposed in the District Court as the period for which the applicant is to be imprisoned.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING OF JUVENILES – SENTENCING AS ADULT OR CHILD AND IMPRISONMENT – where the applicant was convicted on his plea of guilty to rape – where the applicant was sentenced to four months imprisonment to be released on probation for a period of two years – where the complainant was the applicant's four year old cousin – where the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act* 2016 (Qld) extends the benefits of the *Youth Justice Act* 1992 (Qld) to 17-year-olds but under s 5(1) of the *Youth Justice (Transitional) Regulation* 2018 (Qld) only where (a) there is a current proceeding for the offence and (b) the person is 17 years old on the commencement of the regulation – where the applicant was 17 years old when he committed the offence and the indictment was presented – where the sentencing judge determined that the applicant was to be sentenced as an adult because he turned 18 before the commencement of the amending legislation – where the applicant argued that

s 5(1)(b) of the *Youth Justice (Transitional) Regulation* 2018 (Qld) was invalid and the applicant therefore should have been sentenced as a child – whether the sentencing judge erred in sentencing the applicant as an adult – whether s 5(1)(b) of the *Youth Justice (Transitional) Regulation* 2018 (Qld) is invalid

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUND FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant is a lawful non-citizen – where the applicant was at risk of his visa being cancelled and being deported to New Zealand after completing the custodial part of his sentence – where the applicant had lived in Australia since he was eight and his family was in Australia – where the Minister was required to cancel the applicant's visa for not passing the character test due to the combined effect of ss 501(3A) and 501(6)(e) of the *Migration Act* 1958 (Cth) but could revoke that decision under s 501CA(4) after the applicant made representations to the Minister about the revocation – where the applicant argued that the sentencing judge failed to take into account that the rehabilitative component of the sentence would be frustrated if the applicant were held in immigration custody after the custodial part of the sentence were completed – where the respondent argued that although the sentencing judge did not expressly mention this factor, the judge had taken this into account – whether the sentencing judge erred by failing to properly consider the effect of s 501(3A) of the *Migration Act* 1958 (Cth) in determining the appropriate sentence

Migration Act 1958 (Cth), s 501(3A), s 501(6)(e), s 501CA(4)
Statutory Instruments Act 1992 (Qld), s 22, s 24, s 25
Youth Justice Act 1992 (Qld), s 6, div 15, s 387, s 388, s 390
Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016 (Qld)
Youth Justice (Transitional) Regulation 2018 (Qld), s 5, s 14

R v HMM [2018] QDC 206, overruled
R v Norris; Ex parte Attorney-General (Qld) (2018) 331 FLR 92; [2018] QCA 27, applied

COUNSEL: J J Allen QC, with K Prskalo, 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 Fraser JA and the orders his Honour proposes.

[2] **FRASER JA:** The applicant was convicted on his plea of guilty to rape and was sentenced to four months imprisonment, to be released on probation for a period of two years. Seven days of pre-sentence custody were declared to be time already served under the sentence. The sentencing judge required the applicant to submit to such medical, psychiatric or psychological treatment directed towards sexual offending as directed by an authorised Corrective Services officer and also directed that a copy of a report by a clinical psychologist, which was in evidence at the sentencing hearing, be forwarded to Corrective Services for the applicant's ongoing management whilst in custody and on probation.

[3] The applicant seeks leave to appeal the sentence on three grounds: (1) the sentencing judge erred in sentencing the applicant as an adult; (2) the sentencing judge erred by failing to properly consider the effect of s 501(3A) of the *Migration Act* 1958 (Cth) in determining the appropriate sentence; and (3) the sentence was manifestly excessive.

[4] The applicant contends that if the first ground is upheld the Court should resentence him to a probation order for a period of two years with no conviction recorded; and if ground 2 or 3 is upheld he should be resentenced to a probation order for a period of two years or, alternatively, an intensive correction order. The following reasons explain my conclusions that: ground 1 should be rejected; ground 2 should be upheld, so that it is necessary to resentence the applicant afresh; and upon that resentencing the same orders should be imposed save that the custodial period should be reduced from four months to three months. It is therefore not necessary to consider ground 3.

Circumstances of the offence, the applicant's personal circumstances, and the sentencing remarks

[5] The circumstances of the offence were set out in an agreed statement of facts. Two days after the applicant turned 17, in January 2017, he was alone in a garage area with his four year old cousin, the complainant, during a family gathering at the applicant's home. After the applicant asked the complainant if he could play with her vagina, he put his right hand underneath her underpants and, during a period of about one minute, rubbed her vagina and put his finger inside her vagina using a rubbing motion, so that his finger went in up to his fingernail before he pulled it out. The applicant stopped when told to do so by the complainant child. The complainant's mother entered the room and took the complainant into the house. In response to a direct question the complainant told her mother that the applicant had touched her vagina. The complainant's mother and two other relatives confronted the applicant. After initially denying that he had touched the complainant, he made admissions about touching her private place and he apologised to the complainant's mother and to the complainant in front of his parents. The complainant did not disclose any offending by the applicant when she was interviewed by police officers on the following day. On that day the applicant participated in a police interview and made full admissions. He was charged, remanded in custody and granted bail when he appeared before a magistrate.

[6] The sentencing judge noted that the case against the applicant was based on his admissions. The sentencing judge therefore took into account the principles in *AB v The Queen*,[1] in which Hayne J observed that:

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1 (1999) 198 CLR 111.

> "An offender who confesses to crime is generally to be treated more leniently than the offender who does not. And an offender who brings to the notice of the authorities criminal conduct that was not previously known, and confesses to that conduct, is generally to be treated more leniently than the offender who pleads guilty to offences that were known … the offender who confesses to what was an unknown crime may properly be said to merit special leniency. That confession may well be seen as not motivated by fear of discovery or acceptance of the likelihood of proof of guilt; such a confession will often be seen as exhibiting remorse and contrition."[2]

[7] There was a registry committal but after the presentation of the indictment in August 2017 the applicant unsuccessfully applied to have his police record of interview excluded from evidence. In those circumstances the sentencing judge did not regard the plea of guilty as an early plea but took the plea into account as showing cooperation in the administration of justice, sparing the cost of a trial, and, importantly, sparing the complainant from having to give evidence.

[8] The sentencing judge referred to the profound impact of the offending upon the complainant and her mother as set out in a victim impact statement. The complainant experienced psychological difficulties which were manifested in her artworks depicting her dislike of herself. She was hypervigilant about her safety, compulsively locked doors and windows in her home, wore multiple layers of clothing, and feared men. In the first six months after the offence the complainant experienced nightmares and bedwetting and was afraid of bad people or the applicant getting her in the night. She had difficulty concentrating at school and in accepting boundaries and limits. The complainant's mother suffered sleep disturbances, her eating routine had been affected, she had been prescribed antidepressants, and she had real concerns for her daughter's future.

[9] The applicant was born in New Zealand and lived in a small village in the Cook Islands before coming to Australia when he was about eight. A clinical psychologist opined that the applicant presented as suffering from intellectual difficulties. Testing about five years before the offence had determined that the applicant's full scale IQ was in the extremely low range. Upon assessment about nine months before the offence, the applicant's perceptual reasoning index score was in the extremely low range (first percentile) and that and his other scores suggested that he was likely to continue to experience a lot of difficulty in keeping up with his peers in non-verbal problem solving, working memory and visual processing tasks. His overall general adaptive functioning, and scores for conceptual, social and practical domains, all fell within the extremely low range.

[10] The psychologist reported the applicant's statements that he had found it difficult to stop himself from watching pornography on his phone, he had not wanted to cause any harm to the complainant, he demonstrated embarrassment and remorse for his actions, he was aware that his actions were wrong, and he had a simple understanding that the other person to sexual activity must consent to engaging in it. The applicant also told the psychologist that he had asked the complainant to touch his penis and placed her hand on the outside of his clothes, and she did not want to do so. The sentencing judge acknowledged that the applicant was not to be

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2 (1999) 198 CLR 111 at [113].

sentenced for that act but it could be regarded as putting the charged act in context,[3] and the fact that the applicant voluntarily disclosed this act was to his credit.

[11] The psychologist expressed the opinion that the applicant understood that his actions were wrong at the time. His intellectual difficulties would not cause him to sexually offend, but his impairments reduced his ability to consider the consequences of his actions and engage in moral reasoning to a level of similar aged peers. Because of his cognitive difficulties, he had greater difficulty understanding higher order concepts such as the potential for trauma and emotional harm to the victim. When that was explained to the applicant he had the capacity to understand it. At the interview the applicant was able to understand the potential harm caused to the complainant and the longer term consequences the offence might have upon her, as well as the impact upon his family and his own future. The psychologist recommended that the applicant engage with a mental health professional. The applicant did not present with a conduct disorder or mental illness but would be impressionable and required positive pro-social influences to provide guidance as he matured.

[12] The applicant's 40 year old sister informed the sentencing judge that when the applicant disclosed what he had done he was really ashamed, was hitting himself, and said he wanted to take his own life. She also informed the sentencing judge that if the applicant were deported no family member would be able to move with him.

[13] The sentencing judge decided that the applicant should be sentenced as an adult rather than a child. (The sentencing remarks upon that topic are summarised in my discussion of ground 1.) But because the applicant was 17 when he committed the offence and he would have been sentenced as a child if the indictment had been presented on or after 12 February 2018, when the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act* 2016 (Qld) commenced, the sentencing judge considered it appropriate to have regard to comparable sentencing decisions involving juveniles. (I refer to the various sentencing decisions mentioned by the sentencing judge in my remarks about resentencing the applicant.) The sentencing judge acknowledged, however, that the principle in s 150 of the *Youth Justice Act* 1992 (Qld) that a sentence of imprisonment is one of last resort did not apply.

[14] The evidence revealed that the applicant is a lawful non-citizen with a valid visa who is at risk of his visa being cancelled and being deported to New Zealand after completing any custodial part of his sentence. The sentencing judge referred to the decision in *R v UE*[4] that the prospect of deportation of an offender is a proper matter for consideration and that proof that deportation will be a hardship for the offender is required. The sentencing judge concluded that it was not definite that the applicant would be deported but the possibility that he might be should not be ignored; and that deportation would cause hardship to the applicant because of his young age, his family was in Australia, he had been here since he was very young, and also because of his mental state. These conclusions are not challenged, but ground 2 concerns a related issue.

[15] The sentencing judge remarked that an aggravating feature of the offence was that it was a domestic violence offence: *Penalties and Sentences Act* 1992 (Qld) s 9(10A). The sentencing judge referred to other aggravating features of the offence pointed

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3 See *R v D* [1996] 1 Qd R 363.

4 [2016] QCA 58.

out in the prosecutor's submissions: there was a 13 year age difference between the applicant and the complainant; the complainant was only four and was vulnerable; there had been a significant effect on the child; the offence occurred in the child's home;[5] it involved a breach of trust by the applicant; and the offending was not momentary. The sentencing judge also referred to matters in the applicant's favour identified by the prosecutor: the applicant's admission to family members; his admissions to police of the offending, upon which the charge was based; the applicant apologised to the child; he was very young; and he desisted from offending when the complainant told him to stop.

[16] The sentencing judge took into account the principles mentioned in *R v Dullroy; Ex parte Attorney-General (Qld)*.[6] In that case reference is made to the common law principle that because "imprisonment is likely to expose a youth to corrupting influences … thus defeating the very purpose of the punishment imposed … reformation is always an important consideration and, in the ordinary run of crime, the dominant consideration in determining the appropriate punishment to be imposed".[7] The 1997 amendments to the *Penalties and Sentences Act* enacted the provision (now found in s 9(2A)) that the principle that a sentence of imprisonment should only be imposed as a last resort does not apply in sentences for offences involving violence. In *Dullroy*[8] White J (with whom McMurdo J agreed) approved the observation by Byrne J that the 1997 amendments "reflect a legislative conviction that less hesitation by the courts in requiring a violent offender to undergo the rigours of imprisonment conduces to the protection of the community … [but] youth remains a material consideration; for the rehabilitation of youthful, even violent, offenders, especially those without prior, relevant convictions, also serves to protect the community. And among the matters to which the court is required … to pay primary regard are 'the past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed' (g),[9] and 'the antecedents, age and character of the offender' (h)[10]". That has an analogical application in relation to s 9(4)(a), concerning offences of a sexual nature committed in relation to a child, but as the sentencing judge recognised it is necessary to have regard to the particular terms of that provision together with s 9(4)(b) and s 9(6) of the *Penalties and Sentences Act*: under s 9(4)(a), the principles in s 9(2)(a) that a sentence of imprisonment should only be imposed as a last resort and a sentence that allows the offender to stay in the community is preferable, do not apply, and s 9(4)(b) provides that the offender must serve an actual term of imprisonment unless there are "exceptional circumstances".

[17] The sentencing judge referred also to s 9(5) (which empowers the court to have regard to the closeness in age between the offender and the child in deciding whether there are exceptional circumstances) and noted that the applicant was 17 and the child was four at the time of the offence. The sentencing judge had regard

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5 Upon the agreed facts the offence occurred in the applicant's home during a family gathering.

6 [2005] QCA 219.

7 *R v Taylor; Ex parte Attorney-General (Qld)* (1999) 106 A Crim R 578 per McPherson JA at 583, quoting from *R v Price* [1978] Qd R 68 at 70-71, in turn quoting from *Lahey v Sanderson* [1959] Tas SR 17 (Burbury CJ).

8 [2005] QCA 219 at [33], quoting from *Lovell v The Queen* [1999] 2 Qd R 79 at 83 (Byrne J, with whom Davies JA and, generally, Pincus JA agreed).

9 In relation to the present form of s 9(4), compare s 9(6)(f): "the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community".

10 In relation to the present s 9(4), see s 9(6)(g): "the offender's antecedents, age and character".

primarily to the matters mentioned in s 9(6), which includes the effect of the offence on the child, the child's age, the need to protect children from the risk of the offender reoffending and to deter similar behaviour by other offenders, the offender's prospects of rehabilitation, the offender's antecedents, and any remorse or lack of remorse of the offender.

[18] The sentencing judge referred to *R v Tootell; Ex parte Attorney-General (Qld)*,[11] in which it was held that, for the purposes of s 9(4)(b) of the *Penalties and Sentences Act*, it is necessary to take into account all of the material circumstances of the case, including those described in s 9(6), with the mitigating circumstances being considered in the context of matters such as the seriousness of the offending and the need for deterrence in deciding whether they amount to "exceptional circumstances".[12] The primary judge concluded that the circumstances were not exceptional and the applicant was required to serve some period of imprisonment despite his youth because this was a serious crime, the child was very young, the offending was not momentary, the maximum penalty was life imprisonment, and upon the evidence the offence caused a significant effect upon the complainant. The sentencing judge concluded that, having regard also to the mitigating factors which are not insignificant – particularly the applicant's mental state, his young age, his co-operation, the risk of deportation, and the unusual circumstances of the case – a "prison probation order" was appropriate.

Ground 1: The learned sentencing judge erred in sentencing the applicant as an adult

[19] The sentencing judge referred to ss 387 and 390 of the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act* 2016 and regulation 10 of the *Youth Justice (Transitional) Regulation* 2018 and concluded that because the indictment was presented and the applicant turned 18 before the amending legislation commenced on 12 February 2018, he was to be sentenced as an adult.

[20] The applicant was 17 years old when he committed the offence, when he was charged, and when an indictment was presented against him in the District Court. As the law stood at those times, the applicant was not a "child" but an "adult" within the meaning of those terms as they were then defined in the *Youth Justice Act*; "child" was then defined to mean "(a) a person who has not turned 17 years; or (b) after a day fixed under section 6–a person who has not turned 18 years", and "adult" was defined to mean "a person who is not a child". Section 6 of the *Youth Justice Act* then provided:

> "**6 Child's age regulation**
>
> (1) The Governor in Council may, by regulation, fix a day after which a person will be a child for the purposes of this Act if the person has not turned 18 years.
>
> (2) A person of 17 years who commits an offence before the commencement of the regulation will not be taken, after the commencement, to have committed the offence as a child in a subsequent proceeding for the offence.

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11 [2012] QCA 273.

12 [2012] QCA 273 at [25].

(3) A court that sentences a person to whom subsection (2) applies for the offence mentioned in the subsection must have regard to the sentence that might have been imposed if the person were sentenced as a child.

(4) The court can not order the person–

(a) to serve a term of imprisonment longer than the period of detention that the court could have imposed on the person if sentenced as a child; or

(b) to pay any amount by way of fine, restitution or compensation greater than that which the court could have ordered the person to pay if sentenced as a child.

(5) Subsection (3) applies even though an adult would otherwise be liable to a heavier penalty which by operation of law could not be reduced.

(6) To avoid any doubt, it is declared subsections (2) to (5) only apply to a person mentioned in subsection (1) who is sentenced after the commencement of the regulation mentioned in the subsection."

[21] As s 6(6) makes clear, subsections (2) to (5) were capable of application only after the commencement of the regulation contemplated by s 6(1). No such regulation was made before s 6 was omitted by the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act* 2016 (Qld). That Act commenced on 12 February 2018.[13]

[22] In the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act*:

(a) Section 4 omitted s 6 of the *Youth Justice Act*.

(b) Section 6 omitted the definitions of "adult" and "child" in the *Youth Justice Act*, with the result that the definitions in the *Acts Interpretation Act* of "adult" ("an individual who is 18 or more") and "child" ("an individual who is under 18") now apply to those terms where they are used in the *Youth Justice Act*.

(c) Section 5 amended the *Youth Justice Act* by introducing into part 11 a new division 15 containing transitional provisions for the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act*.

[23] Before the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act* commenced the applicant had turned 18, he had been charged with the offence, he had been committed for sentence, and an indictment had been presented against him in the District Court. Apart from any application of the transitional provisions, the beneficial provisions of the *Youth Justice Act* would not apply in the applicant's sentence because his liability to be sentenced as an adult

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13 *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment (Postponement) Regulation* 2017 (Qld) made on 15 September 2017 pursuant to s 15DA(3) of the *Acts Interpretation Act* 1954 (Qld).

under the pre-existing law had accrued before the commencement of the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act*.[14] So much was common ground in the parties' arguments.

[24] The relevant transitional provisions are s 388(1) and s 390. Section 388(1) empowers the Governor in Council to make a transitional regulation under division 15. The applicant relies upon s 390:

> "**390 Current proceedings for offences by 17-year-olds**
>
> (1) This section applies in relation to an offence committed, or alleged to have been committed, by a person when the person was 17 years old if there is a current proceeding for the offence.
>
> (2) A transitional regulation may provide for the person to be treated as a child in relation to the offence and, for that purpose, provide for the application of this Act or another Act to the person.
>
> (3) The matters for which the transitional regulation may provide include the following–
>
> (a) removing the current proceeding to the Childrens Court for hearing and determining under this Act;
>
> (b) if the current proceeding is not removed to the Childrens Court for hearing and determining under this Act–applying a provision of this Act to the proceeding;
>
> (c) applying a provision about bail under part 5 to the person;
>
> (d) if the person is being held on remand, or otherwise being held in custody, in a corrective services facility on the commencement–
>
> (i) providing for the transfer of the person to a detention centre; or
>
> (ii) applying a provision of this Act to the person as if the person were being held on remand in the chief executive's custody, or otherwise held in custody in a detention centre;
>
> (e) applying a provision of this Act to any sentencing for the offence.
>
> (4) A court may, on application by the person, the prosecution or the chief executive or on its own initiative, make an order or give directions it considers necessary to

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[14] See *Acts Interpretation Act*, s 20(2)(c) and (e), s 20(3) and *R v PAZ* [2018] 3 Qd R 50 at [136] – [147].

facilitate the application of this Act or another Act to the person under the transitional regulation.

(5) In this section–

current proceeding–

(a) means a proceeding started but not finally dealt with before the commencement; and

(b) includes a proceeding in which a person has been convicted, within the meaning of the *Penalties and Sentences Act 1992*, but not sentenced before the commencement."

[25] The *Youth Justice (Transitional) Regulation* 2018 (Qld) was made under s 388(1) and commenced immediately after the commencement of the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act*. The applicant argues that the sentencing judge erred by not giving him the benefit of ss 14 and 15 in part 2 of the Transitional Regulation. Part 2 is headed "Current proceedings for offences by 17-year-olds". (The definition of "current proceeding" in the Transitional Regulation incorporates the definition in s 390(5) of the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act*.) For present purposes, the critical provision is s 5, which is the first section in division 1 of part 2 of the Transitional Regulation. Section 5(1) provides:

"**5 Application of part**

(1) This part applies in relation to an offence committed, or alleged to have been committed, by a person when the person was 17 years old if–

(a) there is a current proceeding for the offence; and

(b) the person is 17 years old on the commencement."

[26] The applicant committed the offence when he was 17 and there was a "current proceeding for the offence", but the effect of paragraph (b) of s 5(1) was that part 2 of the Transitional Regulation, including ss 14 and 15, did not apply in relation to the applicant because he was 18 years old before the commencement of the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act*.

[27] The applicant seeks to overcome that obstacle by arguing that paragraph (b) of s 5(1) is invalid and s 5(1) should be construed as though that paragraph were omitted. The argument is based upon the decision in *R v HMM*.[15] In that case Long SC DCJ held that an offender was entitled to the benefit of s 10(2) in division 2 of part 2 of the Regulation, which applies if before the commencement the person had been committed for trial or sentence and an indictment for the offence had not been presented to the Supreme Court or the District Court: s 10(1). Section 10(2) provides that "[o]n the commencement, the person must be treated as a child in relation to the offence and, for that purpose, the Act and other Acts apply to the person" (subject to an exception in s 10(3)). His Honour also held to be invalid the requirement in ss 11(3) and 12(3) of the Transitional Regulation that the person still be 17 years

15 [2018] QDC 206 at [42], [52].

old, that being one of the conditions of the entitlement of the person or the Director of Public Prosecutions to apply to reopen a proceeding in which the person was committed for trial (s 11) or for sentence (s 12).[16]

[28] In my respectful opinion those conclusions are incorrect. Before explaining that opinion, I will briefly refer to the consequences for the application in this court if the applicant's argument were accepted.

[29] Section 14 of the Transitional Regulation applies in relation to a current proceeding that (as is the case here) is otherwise not dealt with under division 2 of part 2 of that regulation: s 14(1). Sections 14(2) – (4) provide:

> "**14 Transfer of other current proceedings to Childrens Court**
>
> (2) The court dealing with the current proceeding must, by order, transfer the proceeding to the Childrens Court under section 15 at the person's first court appearance for the proceeding after the commencement.
>
> (3) On the transfer of the current proceeding, the person must be treated as a child in relation to the offence and, for that purpose, the Act and other Acts apply to the person.
>
> (4) The proper officer of the court must give a copy of the order to the parties to the proceeding and the chief executive."

[30] Section 15 provides for proceedings transferred under s 14 (and other sections) to be transferred to the Childrens Court constituted by a judge or constituted by a magistrate, depending upon which court is to transfer the proceedings and whether or not the offence is an indictable offence that is not a "serious offence".

[31] If those provisions applied in the applicant's case he would obtain the benefit of provisions of the *Youth Justice Act* which include:

(a) Section 134 in division 11 of part 6 (which substantially reflects s 14(3) of the Regulation) that, subject to the division, "the offender must be treated as a child for the purposes of this Act in relation to a child offence committed by the offender".

(b) The provisions in division 1 of part 7 concerning sentencing, including:

(i) Section 150(1)(c), which provides that in sentencing a child for an offence a court must have regard to "the special considerations stated in sub-section (2)".

(ii) Section 150(2)(a), (b) and (e), which provide that the age of the child is a mitigating factor, a non-custodial order is better than detention in promoting a child's ability to reintegrate into the community, and "a detention order should be imposed only as a last resort and for the shortest appropriate period".

(iii) Section 155, which requires that a court sentencing a child must disregard minimum penalty requirements in any other Act and treat specified penalties for an offence as instead providing for maximum penalties.

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16 [2018] QDC 206 at [44] and [52].

[32] If ss 14 and 15 applied in the applicant's case the application for leave to appeal should be granted, the appeal should be allowed, and the sentence imposed upon the applicant should be set aside, upon the ground that the sentencing judge erred by not transferring the proceeding in the District Court to the Childrens Court constituted by a judge.[17] If that was an error, the applicant was wrongly deprived of the benefit of being sentenced as a child in the Childrens Court. In that event it would be necessary to decide whether (as both parties submitted) this Court is empowered by s 668E(3) of the *Criminal Code* to impose upon the applicant the sentence which was "warranted in law and should have been passed" if the sentencing judge had transferred the proceeding to the Childrens Court and the applicant had been sentenced as a child in that court. Because I conclude that paragraph (b) of s 5(1) of the Transitional Regulation is valid, so that ss 14 and 15 did not apply to the applicant, it is not necessary to decide that issue.

[33] The reason for Long SC DCJ's conclusion that paragraph (b) of s 5(1) is invalid is that his Honour derived from s 390 and other transitional provisions and the explanatory notes for the Bill which became the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act* a legislative purpose that the change in the upper age limit for child offending was to apply to all 17-year-old offenders who had not been sentenced before the commencement of that Act, whether they were 17 or older at that time.[18]

[34] There is no expression in the Act of such a statutory purpose in relation to 17-year-old offenders who were 18 or older at the commencement and against whom proceedings started before the commencement. Instead, s 388 delegates to the Governor in Council legislative power to make a transitional regulation under division 15 of part 11 and s 390(2) provides that the transitional regulation "may" provide for "the person" described in s 390(1) – meaning "a person" who committed or is alleged to have committed an offence "when the person was 17 years old if there is a current proceeding for the offence" – to be treated as a child in relation to that offence, and for that purpose the transitional regulation "may" provide for the application of the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act* or another Act to that person.

[35] The delegated legislative power created by s 388 might not have been exercised at all with reference to s 390, in which event no person described in s 390(1) would have been treated as a child. At the other extreme, the delegated legislative power might have been exercised to cause to be treated as a child every person described in s 390(1).

[36] The effect of the applicant's argument is that the delegated legislative authority does not extend to a transitional regulation falling between those extremes that makes the contemplated provision only for a class of the persons having the attributes of "a person" described in s 390(1). That construction treats s 390(2) as providing that a transitional regulation may only provide for **every** person who has the attributes of "a person" described in s 390(1) to be treated as a child and thus (by virtue of s 134, subject only to division 11 of part 6) to have the benefit of the provisions of the

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17 Transitional Regulation, s 15(2)(a)(ii), which would apply because the applicant committed an indictable offence that was a "serious offence", a term defined in s 8(1) of the *Youth Justice Act* as comprehending a "life offence", meaning "an offence to which a person sentenced as an adult would be liable to life imprisonment".

18 [2018] QDC 206 at [42] – [52].

Youth Justice Act that apply in relation to an offence committed by a child. But s 390(3)(e) makes it clear that it is left to the executive government to decide whether any, and if so which, provisions of the *Youth Justice Act* should apply in sentencing for the offence, and the examples in s 390(3)(a) and (b), and in s 390(3)(d)(i) and (ii), contemplate that very different provisions about the same topic might be made about persons each of whom has the attributes of "a person" described in s 390(1).

[37] It is also necessary to bear in mind the interpretative provisions of the *Statutory Instruments Act* 1992 (Qld). Section 22 of that Act provides that if an Act authorises or requires the making of a statutory instrument under the "authorising law" (which is the case under s 388), "the power enables a statutory instrument to be made with respect to any matter that– (a) is required or permitted to be prescribed by the authorising law or other law; or (b) is necessary or convenient to be prescribed for carrying out or giving effect to the authorising law". It is difficult to accept that the effect of paragraph (b) of s 5(1) of the Transitional Regulation is that the sections of the Transitional Regulation I have mentioned are not provisions "with respect to" or "necessary or convenient to be prescribed for carrying out" s 388 in relation to the topic described in s 390(1).

[38] Such a conclusion would not follow merely because the regulation makes provision only for one class of the persons who have the attributes of "a person" described in s 390(1): s 24 of the *Statutory Instruments Act* provides that a statutory instrument may "apply generally to all persons and matters or be limited in its application to…particular classes of persons or matters" or "apply generally or be limited in its application by reference to specified exceptions or factors", and s 25 provides that a statutory instrument may "(a) make different provision in relation to– (i) different persons or matters; or (ii) different classes of persons or matters; or (b) apply differently by reference to specified exceptions or factors".

[39] The other transitional provisions are ss 387, 389, and 391. Section 387, which applies "to a person who, as a 17-year-old, committed an offence before the commencement if a proceeding against the person for the offence had not been started before the commencement", provides that "[f]or this Act or another Act, the person is taken to have committed the offence as a child". The absence of any analogous provision in s 390 militates against a conclusion that it confined the delegated legislative authority to a regulation that confers that same benefit upon every person who has the attributes of "a person" described in s 390(1).

[40] Section 389 provides, so far as is presently relevant:

> "**389 Uncompleted sentences for offences by 17-year-olds**
>
> (1) This section applies if–
>
> (a) a person, as a 17-year-old, committed an offence before the commencement; and
>
> (b) the person is still 17 years old on the commencement; and
>
> (c) a sentence for the offence was imposed but not completed before the commencement.
>
> (2) A transitional regulation may provide for the application of this Act or another Act to the person as if the sentence

> or a subsequent order about the sentence were a corresponding child sentence or order."

[41] The presence of paragraph (b) in s 389(1) restricts the application of s 389 to a person who is 17 years old on the commencement. The absence from s 390(1) of an analogous provision means that the delegated legislative power described in s 390(2) is not similarly restricted, but it does not confine the discretionary character of that power or displace the interpretative provisions in the *Statutory Instruments Act*.

[42] The remaining transitional provision, s 391, has no bearing upon the question – it states only that a transitional regulation may provide for administrative arrangements to facilitate the operation of the regulation, and its sets out examples of matters for which the transitional regulation may provide.

[43] Accordingly, the statutory text does not support the applicant's argument that paragraph (b) of s 5(1) is outside the scope of the delegated legislative authority.

[44] The explanatory notes relevantly provide:

> "**Policy Objectives and the reasons for them**
>
> The objectives of the Bill are to:
>
> - Increase the upper age of who is a child for the purposes of the *Youth Justice Act 1992*, from 16 years to 17 years; and
> - Establish **a regulation-making power to provide transitional arrangements for the transfer of 17-year-olds from the adult criminal justice system to the youth justice system**.
>
> …
>
> The benefits of including 17 year-olds in the youth justice system are nationally and internationally recognised. Children and young people's neurological and cognitive development is immature and incomplete to a degree, warranting a criminal justice system that responds to this group in a developmentally appropriate manner.
>
> …
>
> **Achievement of policy objectives**
>
> The Bill will include 17 year-olds as 'children' for the purposes of the YJ Act. It will achieve this by omitting the definition of *child* at Schedule 4 of the YJ Act, with the effect that the definition in the *Acts Interpretation Act 1954* will apply and a child will be 'an individual who is under 18.'
>
> To give operational effect to the change, the Bill will establish **regulation-making powers to direct the efficient and coordinated transfer of all 17-year-olds (both sentenced and not yet sentenced) from the adult criminal justice system to the youth justice system**. This approach is necessary due to the complex operational issues associated with transitioning 17-year-olds into the youth justice system and the need for a whole of government, multi-

faceted response. To ensure parliamentary oversight, the regulation making power, along with any regulation made under it, will expire two years after commencement of the Bill.

…

Notes on provisions

…

Clause 4 omits section 6 (Child's age regulation). Section 6 provides a regulation-making power to increase the age of a 'child' for YJ Act purposes to a person who has not turned 18 years. The provision will be redundant as a result of amendments made under the Bill.

…

Section 387 concerns offences committed by 17-year-olds before commencement if offence proceedings have not started.

Subsection 387(1) establishes that this section applies to a person who, as a 17-year-old, committed an offence before the commencement if a proceeding against the person for the offence has not been started before the commencement.

Subsection 387(2) declares that, for this Act or another Act, the person is taken to have committed the offence as a child. Other Acts include, for example, the *Police Powers and Responsibilities Act 2000*.

Part 6, division 11 (Child offenders who become adults) of the YJ Act will apply if the person has turned 18, or when the person turns 18.

…

Paragraph 389(3)(c)(i) provides for a regulation to prescribe, for example, the operational arrangements and responsibilities necessary for effecting transfers from adult correctional facilities to youth detention centres.

The Government's clear policy intent is to transition all 17-year-olds to the youth justice system. However, paragraph 389(3)(c)(ii) has been included to provide flexibility should, during the transitionary period, exceptional circumstances mean a young person's individual needs would be better met by the location or resources of a specific corrective services facility…

…

Paragraph (a) [of s 389(4)] is intended to ensure judicial oversight of the transition of 17-year-olds into the youth justice system, allowing the courts to provide guidance and to resolve issues. The appropriate court to make an order or give a direction will depend on the circumstances and may be the court hearing a proceeding; sentencing court, either at the time of sentencing or at a later date; or the Childrens Court. The scope is deliberately broad, to

> allow the courts to resolve issues about any aspect of the transition – for example, in relation to when or how a 17-year-old is to be transported to a detention centre.
>
> …
>
> **Subsection 390(1) provides that this section applies in relation to a person who, as a 17-year-old, committed an offence before the commencement, for which proceedings are on foot at commencement. This group of individuals will generally be 17-year-olds currently in the adult criminal justice system, whose court matters have not yet been finalised at the time of commencement.**
>
> **Subsection 390(2) allows a transitional regulation to provide for the application of the YJ Act or another Act to the person as if the person committed the offence as a child.** The main purpose of this provision is to facilitate the proceedings continuing under the YJ Act, but Acts other than the YJ Act that may be relevant include the *Childrens Court Act 1992* and the *Bail Act 1980*.
>
> …
>
> Paragraph 390(3)(d) has the same policy rationale as paragraph 389(3)(c), explained above.
>
> …
>
> Subsection 390(4) authorises a court, on application by the person, the prosecution or the chief executive or on its own initiative, to make an order or give directions it considers necessary to facilitate the application of this Act or another Act to the person under the transitional regulation. This provision has the same policy rationale as subsection 389(4)(a) explained above, allowing the courts to provide guidance and to resolve issues."

[45] Two major points of relevance emerge from that document, particularly with reference to the passages I have emphasised. The first is that, consistently with the text of s 390(2), the note about that provision states that it "allows", rather than requires, a transitional regulation applying the *Youth Justice Act* to a person who committed an offence as a 17-year-old. Secondly, although the same note contemplates that some individuals to whom s 390(1) applies and for whom a transitional regulation under s 390(2) is allowed to provide will no longer be 17 ("the group … will **generally** be 17-year olds"), such persons do not fall within the repeated expressions of the policy to transition "17-year-olds" to the youth justice system. The combination of those points is opposed to the construction advocated for the applicant.

[46] The explanatory notes also include the following statements:

> "There are no alternative ways of achieving the policy objectives.
>
> Section 6 of the YJ Act provides a regulation-making power to increase the age of a 'child' to a person who has not turned 18 years. The regulation would only apply prospectively, to 17-year-olds who

> commit offences after commencement of the regulation, and would not have the effect of transitioning 17-year-olds who are currently in the adult criminal justice system to the youth justice system. Activation of section 6 will not achieve the Government's policy objective."

[47] Section 6 of the *Youth Justice Act* (which was omitted by the *Youth Justice and other Legislation (Inclusion of 17-year-old Persons) Amendment Act*) is set out in [20] of these reasons. If, as seems to be the case, s 6(2) comprehended a 17-year-old offender who was sentenced after the commencement of the regulation although the proceeding against that offender commenced before the commencement, paragraph (b) of s 5(1) of the *Youth Justice* (*Transitional) Regulation* deprived the applicant and other persons in his position of the benefits that ss 6(3) – (5) would have provided if the regulation contemplated by s 6(1) had instead been made. The statement in the explanatory note that "the regulation would only apply prospectively, to 17-year-olds who commit offences after commencement" is accurate. No express reference was made to persons who committed an offence as a 17-year-old and turned 18 before the commencement but such persons do not fall within the expressed policy of "transitioning 17-year-olds who are currently in the criminal justice system to the youth justice system" and the last sentence of that part of the explanatory note is consistent with the policy not comprehending the extension of the benefits in ss 6(3) – (5) to such persons.

[48] The applicant's argument must rely mainly upon the statement in the note about s 390(2) that the "main purpose" of that provision is "to facilitate the proceedings continuing under the YJ Act". That must be understood in the context of the unconditioned delegated legislative authority given by s 390(2), which is consistent with the immediately preceding sentence of the notes. It was within the power of the executive government to exercise or not exercise that authority, or to exercise it differently as between different classes of persons falling within its scope. The authority is not confined to the making of one regulation at one time that deals with all 17-year-old offenders or of regulations which afford the same rights to all such persons. After the making of the Transitional Regulation it remained open to the executive government to make a regulation affording to 17-year-old offenders who had turned 18 before the commencement the same or different rights as those which were conferred by part 2 of the Transitional Regulation only upon persons who remained 17 on the commencement. The fact that no such regulation has been made does not affect the validity of the Transitional Regulation.

[49] For those reasons, the explanatory notes also do not support the applicant's argument.

[50] Because I conclude that paragraph (b) of s 5(1) is not invalid upon the ground upon which the applicant relies it is not necessary for me to decide whether, if that paragraph were invalid, it could be severed such as to leave intact the balance of part 2 of the Transitional Regulation.[19]

Ground 2: The learned sentencing judge erred by failing to properly consider the effect of s 501(3A) of the *Migration Act* 1958 (Cth) in determining the appropriate sentence

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[19] That would require consideration of s 21 of the *Statutory Instruments Act*. Neither party made submissions upon that provision. This topic was not discussed in *R v HMM*.

[51] Section 501(3A) of the *Migration Act* relevantly provides that the Minister must cancel a visa that has been granted to a person if the Minister is satisfied that the person does not pass the character test because of the operation of paragraph (6)(e) and the person is serving a sentence of imprisonment, on a full time basis in a custodial institution, for an offence. Section 501(6)(e) relevantly provides that a person does not pass the character test if the person has been convicted of one or more sexually based offences involving a child or the person has been found guilty of such an offence even if the person was discharged without a conviction. (The Minister also has a discretionary power to cancel a visa granted to a person if the Minister reasonably suspects that the person does not pass the character test and the Minister is satisfied that cancellation is in the national interest: s 501(3).) Other cases in which a person does not pass the character test include those in which the person has a "substantial criminal record", which includes a case where the person has been sentenced to a term of imprisonment of 12 months or more (s 501(6)(a) and s 501(7)). Upon the Minister cancelling a visa under s 501(3A), the Minister must give the person notice under s 501CA of the *Migration Act* of that decision and invite the person to make representations about its revocation (s 501CA(3)). The Minister may revoke the original decision if the person makes such representations and the Minister is satisfied either that the person passes the character test or that there is another reason why the original decision should be revoked (s 501CA(4)). Section 501CA(6) makes lawful any detention of the person during any part of the period from when the original decision was made until its revocation.

[52] *R v Norris*; *Ex Parte Attorney-General (Qld)*[20] is authority for the following conclusions:

(a) The legislative intent underlying the *Migration Act* and reflected in s 501CA(6) is that a person who fails the character test and is released from criminal custody would remain in immigration detention whilst revocation of a decision by the Minister to cancel the person's visa is pursued.[21]

(b) Street CJ's conclusion in *R v Chi Sun Tsui*[22] that "the prospect of deportation is not a relevant matter for consideration by a sentencing judge, in that it is the product of an entirely separate legislative and policy area of the regulation of our society" is "explained by, and limited to, the statutory context in which it arose and the particular issue which the court was addressing – that of the fixing of a non-parole period" under the New South Wales law applicable in that case.[23]

(c) The prospect of deportation may be a relevant factor to be considered in mitigation of a sentence where it makes the period of incarceration more onerous and also where, upon release, the fact of imprisonment will deprive the offender of the opportunity of permanently residing in Australia, providing that the prospect of deportation or its impacts are not merely speculative.[24]

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20 [2018] QCA 27.

21 [2018] QCA 27 at [14].

22 (1985) 1 NSWLR 308 at 311C-E.

23 *Guden v The Queen* (2010) 28 VR 288 at 293 [19] (Maxwell P, Bongiorno JA and Beach AJA), approved in *R v UE* [2016] QCA 58; *R v Schelvis* [2016] QCA 294; *R v Pearson* [2016] QCA 212; *R v Lincoln* [2017] QCA 37; and *R v Norris; Ex parte Attorney-General (Qld)* [2018] QCA 27 at [41] – [42].

24 [2018] QCA 27 at [41], referring to *R v UE* [2016] QCA 58 at [16] – [17].

(d) Even if the evidence before the sentencing judge does not justify a finding that deportation would harm the offender in either of those two ways, a sentencing judge should take into account when imposing a sentence the relevance of likely deportation on the efficacy of court ordered parole and the potential consequences of that for the offender.[25]

(e) A sentencing judge should not adjust a sentence or impose a lesser sentence for the purpose of defeating, avoiding or circumventing the operation of the provisions in the *Migration Act*.[26]

(f) That principle is not infringed by the adjustment of a sentence to take into account the risk of interruption to an offender's rehabilitation that immigration detention beyond a fixed release date would entail.[27]

[53] The applicant argued that, whilst the sentencing judge appropriately took into account the hardship the applicant would suffer if he was deported, the sentencing judge erred by failing to take into account that the rehabilitative component of the sentence would be frustrated if, as the applicant submitted was likely, the applicant would be held in immigration custody after the expiration of the four months imprisonment pending a decision by the Minister whether to revoke the mandatory cancellation of the applicant's visa and any review of such a decision. The respondent argued that, although the sentencing judge did not expressly mention the prospect of the applicant being held in continuing immigration detention after his release from custody under the sentence, it could be inferred from the applicant's submission upon that point and the sentencing judge's reference to *Norris* that it was taken into account. The respondent also argued that the "prison probation" order imposed by the sentencing judge was the sentence structure which would be least affected if the applicant were held in continuing immigration detention and that the two year period of probation was apt to achieve the sentencing judge's intended effect of reducing the applicant's risk of reoffending to low; there was no other sentence structure available under the legislation which could be adopted in the applicant's interests.

[54] The applicant's argument must be accepted. In written submissions which had been requested by the sentencing judge, the applicant submitted both that visa cancellation might be regarded as "an additional factor warranting exceptional treatment of this offender" and that it was "a factor which assists the court select between available sentencing options". More directly, in addition to making submissions about the prospect of deportation and the hardship involved in it, the applicant cited the relevant paragraphs in *Norris* and submitted that he faced "an uncertain period of immigration detention" which, it had been recognised, might interfere with his rehabilitation.[28] The sentencing judge cited *Norris* only for the proposition that a sentence cannot be fashioned to defeat or avoid the operation of the *Migration Act*. The sentencing judge appropriately took into account the possibility that the applicant would be deported and the resulting hardship, but the otherwise comprehensive sentencing remarks contain no reference to, or any consideration of, the applicant's submission that the anticipated immigration

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25 [2018] QCA 27 at [43], approving *R v Abdi* (2016) 263 A Crim R 38 at [48] – [49].

26 [2018] QCA 27 at [31], [34], citing *R v S* [2003] 1 Qd R 76 at [5] and *R v Mao; Ex parte Attorney-General (Qld)* [2006] QCA 99 at [18], [30].

27 [2018] QCA 27 at [46].

28 Outline of submissions for the applicant at the sentence hearing, paragraph (ix).

detention of uncertain duration might interfere with the applicant's rehabilitation. It is understandable how this one point might have been missed in this difficult sentence in which many issues were raised. It cannot be inferred that the sentencing judge took this relevant consideration into account despite not having adverted to it.

[55] The materiality of this consideration is emphasised by the sentencing judge's remarks that the intent of the sentence was that the applicant receive in-depth psychological and psychiatric treatment under the probation order such that, after the probation order was completed, the risk of reoffending would be reduced to a low risk. Because the sentencing judge did not take into account this material consideration, it is not appropriate to attempt to assess whether or to what degree that error influenced the sentence; the sentencing discretion having miscarried, it is necessary for the Court to exercise the sentencing discretion afresh.[29]

Resentencing

[56] The applicant relied upon these circumstances as amounting to exceptional circumstances warranting a sentence without actual custody: the applicant is a youthful first offender for whom rehabilitation is a relevant consideration; because his intellectual deficits reduced his ability to consider the consequences of his actions and to engage in moral reasoning to a level of similar aged peers, retribution, denunciation and general deterrence assume less prominence in the sentence;[30] the applicant was found to be remorseful and he made full admissions in circumstances where the complainant did not disclose the offending to police (which warranted mitigation of the penalty in accordance with *AB v The Queen*); he will be subject to immigration detention upon conclusion of the term of actual custody, thereby frustrating the rehabilitative purpose of the probation order; and the applicant was a "child" (as that term is, *now*, defined in the *Acts Interpretation Act* 1954 (Qld)) when he committed the offence and the Court should have regard to sentences that might have been imposed if he were sentenced as a child. The respondent did not submit that any of those circumstances are not relevant, but it is necessary also to bear in mind that the applicant's plea of guilty was not an early plea, he was not a "child" as that term was defined when he committed the offence, the maximum penalty for his offence is life imprisonment, and under s 9(4) of the *Penalties and Sentences Act* his sentence is not governed by the principle that a sentence of imprisonment should only be imposed as a last resort and it is necessary to impose an actual term of imprisonment unless there are exceptional circumstances.

[57] Taking into account all of the material considerations already mentioned, and despite the unusual combination of mitigating circumstances in this case, I would hold that the circumstances as a whole are not exceptional and it is appropriate that a conviction be recorded and the applicant serve a term of imprisonment in custody. That conclusion is particularly informed by these factors: the very young age and associated vulnerability of the complainant; the objectively predictable, significantly adverse effect of the offence upon the complainant; the seriousness of the offending conduct; that the offending conduct was not momentary; and the aggravating circumstance that this was a domestic violence offence. The mitigating factors (including that the applicant may be kept in immigration detention following the

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29 *Kentwell v The Queen* (2014) 252 CLR 601 at 617-618 [42] (French CJ, Hayne, Bell and Keane JJ).

30 *Muldrock v The Queen* (2011) 244 CLR 120 at 139-140 [54] and [58].

date of his release under the sentence) justify the imposition of a custodial term that is shorter than it otherwise would be.

[58] The sentencing judge referred to *R v SBR*[31] (in which a 13-15 year old offender was sentenced to four months detention and 12 months probation for a rape, involving digital penetration of the vagina of his 7-10 year old sister, with two years probation for three counts of indecent treatment) and *R v IC*[32] (in which a 14 year old offender was resentenced on appeal (when he was 16) to 16 months detention with release after serving fifty per cent for an offence of rape in which the offender grabbed and carried the complainant into bushes and forcibly digitally raped her four or five times). Bearing in mind that those offenders were children and much younger than the applicant, those sentences support the order I propose.

[59] The sentencing judge also referred to comparable sentencing decisions upon which the prosecutor relied: *AAD*,[33] *BBE*,[34] and *SAH*.[35] In *SAH*, a 19 year old offender was resentenced on appeal to three years imprisonment, suspended after 12 months with an operational period of three years, for the rape of a three year old boy in his care, involving digital penetration of the child's anus. That offender had a not insignificant prior criminal history but without any sexual offending, he had been sexually abused as a child, and entered an early plea of guilty. In *BBE*, the 22 year old offender was resentenced on appeal to three years imprisonment, suspended after six months with an operational period of five years, for two counts of rape involving digital penetration, one count of rape involving tongue penetration, and one count of indecent dealing, with his five year old niece. The offending came to light when the applicant confessed to his sister after he had ceased offending. He suffered from intellectual impairment and cooperated fully with the authorities. Both sentences are consistent with the order I propose. The respondent also referred to another case in which an adult offender was sentenced to three years imprisonment, *R v MBF*.[36] It too is not inconsistent with a short period of imprisonment being imposed in the present case. The sentence of four years imprisonment imposed on appeal in *AAD* for more serious offending against a six year old girl by an offender with a criminal history which included previous convictions for indecent assault and rape is of no real assistance in this case.

[60] The applicant relied upon two decisions in which non-custodial sentences were imposed. In *R v BCO*[37] the Court allowed an appeal against a sentence of two years probation with a conviction recorded and varied the sentence by setting aside the order recording a conviction and substituting an order that no conviction was recorded on that count. The case is distinguishable on the grounds that the offender was sentenced as a child (he was only 15 years and 11 months old when he offended), and the only issue in the appeal was whether or not, having regard to ss 183 and 184

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31 [2010] QCA 94. The appeal against the recording of the conviction was allowed. There was no appeal against the sentence otherwise, but Muir JA observed that it was difficult to reconcile with the provisions in s 150(2)(e) of the *Juvenile Justice Act* 1992 (Qld), which provided a "special consideration" that "a detention order should be imposed only as a last resort", with the other "special considerations" in s 150(2) of that Act, and with statements of principle in authorities concerning the sentencing of youthful offenders.

32 [2012] QCA 148.

33 [2008] QCA 4.

34 [2006] QCA 532.

35 [2004] QCA 329.

36 [2008] QCA 61.

37 [2013] QCA 328.

of the *Youth Justice Act* 1992, it was appropriate to record a conviction. In *LAL*,[38] the Court set aside wholly suspended sentences of imprisonment of four months for one offence of indecent treatment of a child under 12 and nine months for a second such offence, with convictions recorded, and instead ordered release upon recognisance with no convictions recorded. That offender committed the offences as a child but he was not convicted and sentenced until about 17 years later, when he was 32. The less serious character of the offences committed by that offender together with the finding to the effect that in the long period between the offending and sentence the offender had become a law abiding and productive member of the community, render *LAL* of no real assistance as a comparable sentencing decision in this case.

[61] The applicant also referred the Court to the short summary of a number of sentencing decisions in an annexure to the reasons of Ryan J in *R v LAL*.[39] The only one of those decisions which involved an offence of rape was *R v BDA*,[40] in which a 15 year old offender was sentenced to three years probation for two counts, one of which was rape, and 12 months detention with three months conditional release for another count of rape, with no convictions recorded. Overall, the offending was markedly more serious than in the present case, but that offender was a child, he had himself been a victim of sexual offending by a predatory older male, and there was not the aggravating circumstance of the offence being a domestic violence offence.

[62] In my view the appropriate sentence is that which was imposed by the sentencing judge, save that the period of actual imprisonment should be three months rather than four months.

Proposed Order

[63] I would grant the application for leave to appeal, allow the appeal, and vary the sentence imposed in the District Court by substituting a period of three months for the period of four months imposed in the District Court as the period for which the applicant is to be imprisoned, and in all other respects I would confirm the sentence and orders imposed in the District Court.

[64] **MULLINS J:** I agree with Fraser JA.

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38 [2018] QCA 179.
39 [2018] QCA 179, at pages 25 – 27 (attachment A).
40 Dearden DCJ, 25 September 2009.