SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bunton* [2019] QCA 214
PARTIES:	**R** **v** **BUNTON, Vetea Joseph** (applicant)
FILE NO/S:	CA No 337 of 2018 DC No 40 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence 5 December 2018 (Devereaux SC DCJ)
DELIVERED ON:	Date of Orders: 2 September 2019 Date of Publication of Reasons: 15 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	2 September 2019
JUDGES:	Sofronoff P and Fraser and Morrison JJA
ORDERS:	**Date of Orders: 2 September 2019** **1. Leave to appeal is granted.** **2. Appeal allowed.** **3. Conviction recorded on 5 December 2018 is set aside.** **4. Save as afore said, the remaining orders made by Judge Devereaux are otherwise confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – RECORDING OF CONVICTION – where the applicant was found to be in possession of child exploitation material – where the applicant pleaded guilty to one charge of knowingly possessing child exploitation material – where the sentence imposed included the recording of the conviction – where the applicant challenges the sentence on the ground that the recording of the conviction is manifestly excessive – where it is contended that the child exploitation material was accessed when the applicant was under eighteen years of age – where it was submitted that the applicant fitted the typology of a "situational hands-off or no contact" offender, and a low danger of reoffending in a sexual way – where it was submitted that the applicant acquired the images out of curiosity and at a time when she was struggling with issues concerning her transgender identity and sexual identity – where it is contended that there was no evidence of entrenched paedophilic

tenancies – where the learned sentencing judge was of the opinion that the detrimental impacts on the applicant in having the conviction recorded did not overwhelm the serious nature of the offence – whether the recording of the conviction rendered the sentence manifestly excessive

R v Daw [2006] QCA 386, followed
R v Rogers (2013) 231 A Crim R 290; [2013] QCA 192, followed

COUNSEL: J Briggs for the applicant
D Balic for the respondent

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

[1] **SOFRONOFF P:** I agree with Morrison JA.

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

[3] **MORRISON JA:** When the applicant was just over 18 years old, police executed a search warrant at her house and discovered child exploitation material on her mobile phone. There was a total of 15 images depicting young boys between the age of five years and 16 years, posing naked, performing oral sex or engaging in anal intercourse either with other young people or adults.

[4] The search occurred on 19 January 2016. The applicant was interviewed that day and released on bail. On 5 December 2018 the applicant pleaded guilty to one charge of knowingly possessing child exploitation material. The sentence imposed required her[1] to perform two years' probation, with a specific requirement that she submit to medical, psychiatric or psychological treatment, as directed. In addition, and at the heart of the application to challenge the sentence, a conviction was recorded.

[5] The applicant's challenges the sentence on the basis that the recording of a conviction rendered it manifestly excessive. In turn, the basis upon which that ground was advanced is that the recording of the conviction had the automatic result that the applicant became a "reportable offender" within the meaning of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004 (Qld).[2]

[6] On the hearing of the application before this Court on 2 September 2019, orders were made granting leave to appeal, allowing the appeal and setting aside the order recording a conviction, but otherwise affirming the sentence. What follows are my reasons for having joined in that order.

Circumstances of the offending

[7] An agreed schedule of facts was tendered at the hearing. The applicant was born on 19 December 1997, and thus 18 years old at the time of the offending, and about 21 at the sentencing.

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1 As the applicant identifies as a transgender female I shall use the female pronouns in these reasons.
2 To which I shall refer as "the *ORA*".

[8] On 19 January 2016 police executed a search warrant at the applicant's house, and found child exploitation material on her mobile phone. She participated in a formal interview with police and made a number of admissions. These included:

(a) she had used an application called 'Kik' on her mobile phone to talk to people around the world, and they would send links to access child exploitation material through the cloud storage application 'Dropbox';

(b) she started using 'Kik' when she was 14, and had most recently used it to obtain child exploitation material in November 2015;

(c) the images and videos received were of boys, usually around her age (14 to 17 years old), having "normal sex"; and

(d) she was "curious" in wanting images and videos of "someone around [her] own age, not older".

[9] The mobile phone was analysed and a total of 15 images containing child exploitation material were identified. They depicted young boys between the age of five years and 16 years, posing naked, performing oral sex or engaging in anal intercourse either with other young people or adults. The images were categorised as follows:

(a) Category 1 (no sexual activity) – four images;

(b) Category 2 (child non-penetrate) – four images;

(c) Category 3 (adult non-penetrate) – three images; and

(d) Category 4 (child/adult penetrate) – four images.

[10] Even though the images had been obtained at a previous time, and the applicant had used the application 'Kik' for some years, the only charge brought was that of possession on the day of the search.

Antecedents and the psychological report

[11] The applicant was examined by Dr Palk, a consultant and forensic psychologist, who produced a report tendered at the sentencing hearing.[3] The report noted that the applicant was born a male but identified as a transgender female. She was yet to undergo gender reassignment.

[12] The applicant told Dr Palk that by the time she was 14 years she became interested in transgender issues and attracted to the same sex. She had always been interested in feminine things and female attire, and by the time she was 16 she regarded herself as a transgender female. She expressed a desire to commence hormone treatment and eventually have an operation for gender reassignment.[4]

[13] The applicant migrated to Australia when she was about 12 or 13, her parents having separated when she was about seven. She described her childhood as unhappy, and said her father did not approve of her identification as transgender, or her feminine interests as she aged. However, she had not experienced any abuse. She had a normal education to year 12, but since leaving school had experienced relatively little employment. She commenced seriously living as a transgender

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3 Appeal Book (**AB**) 35.

4 Report paragraph 6.1, AB 37.

female from the age of about 16 years. She had only one relationship with another male of similar age, but had never lived with another person in a relationship.

[14] She had a history of suicidal ideation and depression related to family issues, but denied any current suicidal ideation.[5] Her professed desire was to do a course in beauty therapy and work in that industry.

[15] As to the offences, the applicant told Dr Palk that she attributed her involvement with child exploitation material as being due to curiosity, but "she no longer views child pornography and ceased this activity when she was aged 17 years".[6]

[16] Various psychological tests were conducted which showed that she was of average intelligence and normal fortitude. Whilst she identified as a transgender female, she experienced some adjustment difficulties relating to sexual issues during her teenage years. There was no evidence of aggressive, violent or generally antisocial tendency, nor of major mental health concerns or personality disorders. She was generally a reserved and introverted person.

[17] The applicant denied any sexual attraction to children and told Dr Palk that her viewing of child pornography ceased when she was aged 17 years.[7] Dr Palk's view was that the viewing of child pornography seemed to be "more related to curiosity and adolescent experimentation and an attempt to discover her own sexual interests".[8]

[18] Dr Palk's opinion was that the applicant fitted the typology of "a situational 'hands off' or 'no contact' offender".[9] In Dr Palk's view she did not present as a person who was a risk to children.[10] His opinion was:[11]

> "… [the applicant] impresses as fitting the typology of a situational 'hands off' or 'no contact' offender. Her behaviour was curious and recreational and had the potential to lead to becoming impulsive. She does not present as a person who is a risk to children. Her sexual offences appear situational and in the context of low self esteem and lack of confidence due to teenage sexual adjustment issues."

[19] Dr Palk's assessment was that the applicant was a low risk of reoffending, and would benefit from treatment. There was no evidence of entrenched paedophilic tenancies.[12]

[20] The applicant had no relevant criminal history.

Approach of the sentencing judge

[21] The learned sentencing judge reviewed the nature of the offending, and some features of the psychological report. As to that his Honour noted that the key

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5 Report paragraph 6.7, AB 38.
6 Report paragraph 7.1, AB 38.
7 Report paragraph 11.8, AB 47.
8 Report paragraph 11.9, AB 47.
9 Report paragraphs 11.11 and 13.3, AB 47, 52.
10 Report paragraphs 11.11 and 13.4, AB 47, 53.
11 Report paragraph 12.13, AB 50.
12 Report paragraph 13.4, AB 53.

feature or concentration of the report was on the gender identity issue.[13] His Honour noted that the applicant was 18 years old, and without criminal convictions of any relevance. Further, that it was "a low number of images, although there is nothing particular (sic) low about the classifications of the images".[14] His Honour also noted the conclusion that the applicant fitted the typology of a "situational hands-off or no contact" offender, and a low danger of reoffending in a sexual way.[15]

[22] Whilst his Honour considered those things relevant, he also said that "none of them really excuses obtaining child exploitation material with children as young as five years".[16]

[23] His Honour referred to paragraph 13.4 of the psychologist's report and the first two sentences: "the use of child pornography occurred during her sexual adjustment difficulties during teenage years. Her preference at that time was to view child pornography of similar aged boys". His Honour then observed: " … And I know from the details, that that is not entirely true".[17]

[24] His Honour identified cooperation with the police and the plea of guilty, which indicated an acceptance of responsibility and an understanding of the seriousness of the offence. His Honour then identified the factors he was required to focus on, as being: (i) the nature of the images; (ii) the need to deter similar behaviour by other offenders; (iii) protection of children; (iv) the applicant's prospects of rehabilitation, including any report received; (v) the applicant's antecedents and remorse or lack of remorse; and (vi) the safety of children under 16 to the extent that his Honour considered it necessary or relevant.[18]

[25] His Honour then imposed the probation order, taking into account the matters referred to above. In addition his Honour noted several particular factors: (i) the level of seriousness of the offence itself, including relatively few images; (ii) her age at the time (18); (iii) her age at the time of the accessing when she was actually a child; (iv) the degree of cooperation; and (v) the position she found herself in.[19]

[26] The learned sentencing judge then turned to the issue of whether a conviction should be recorded:[20]

> "It has been submitted that I should not record a conviction, but I do record a conviction. Despite your youth, despite that it is your first offence, and even taking into account that there might be an impact on your economic or social well-being or chances of finding employment, I think those things are not impossible. But in any case, I think there is not sufficient prospect of those detriments to overwhelm the serious nature of the offence which I think is the primary reason, or the primary factor, I should look at ..."

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13 AB 28 line 30.
14 AB 28 line 34.
15 AB 28 line 43.
16 AB 29 line 1.
17 AB 29 line 21.
18 AB 29 lines 41 – 46.
19 AB 30 lines 4 – 8.
20 AB 30 lines 41 – 47.

Discussion

[27] As counsel for the applicant points out, nowhere in the oral argument, outlines or in the sentencing remarks was the question of the impact of the *ORA* referred to. As will appear, the impact of that Act upon the applicant is such that it likely would have received a reference in the sentencing remarks had it been addressed or had it been considered by the sentencing judge. Those matters lead to the inference, which I draw, that it was not adverted to, either by Counsel or by the learned sentencing judge. The impact of that Act is a relevant consideration on the sentencing for an offence of this kind.[21] There has therefore been a demonstrated error in the exercise of the sentencing discretion.

[28] The purposes of the *ORA*, as they appear in s 3, are as follows:

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

[29] The Act impacts upon the relevant offender in a variety of ways. They include:

(a) upon being sentenced for a "reportable offence",[22] the offender becomes a "reportable offender" unless a conviction is not recorded: s 5(1) and (2)(a);

(b) reportable offenders must be registered on a child protection register: s 68;

(c) the *ORA* imposes reporting obligations including an initial report of the offender's personal details, and monthly periodic reports to the police commissioner, until the reporting period ends: s 14, s 18(1) and s 19; the initial report has to be in person, and subsequent periodic reports in such ways as the Police Commissioner directs: s 26;

(d) the reporting obligations commence upon being sentenced, and continue for five years: s 35(1)(b) and s 36(1)(a);

(e) absent the finding of guilt or the conviction being quashed or set aside, a person stops a being reportable offender at the end of all reporting periods to which they are subject: s 8(b);

(f) a reportable contact with a child means having physical contact with a child, or oral or written communications with a child: s 9A(1);

(g) it is an offence to fail to comply with the reporting obligations: s 50; and there is no time limit set for prosecutions for such an offence: s 52;

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21 *R v Rogers* [2013] QCA 192 at [41].

22 Which this offence is: Schedule 1, item 4 of the *ORA*.

(h) personal details which have to be reported include: the offender's name, date and place of birth, tattoos or distinguishing marks (whether existing or since removed), and details of where the offender generally resides; changes in residence; details of any child with whom the offender has a reportable contact; the nature of employment including the name of the employer and the place of employment; details of any club or organisation of which the offender is a member if there child members or child related activities; the make, model and colour of any vehicle owned or driven within a one year period; details of any telephone or internet services used; details of any social networking; details of any email addresses and internet usernames; passport details; and if travel is intended, the reasons for travel: schedule 2;

(i) any change in personal details must be reported, some within 24 hours: s 19A;

(j) any intention to leave Queensland for 48 or more consecutive hours must be reported, even if travel is only elsewhere in Australia: s 20;

(k) any change in travel plans must be reported if the offender is outside of Queensland while travelling, and the return to Queensland must be reported within 48 hours: s 21 and s 22;

(l) reports have to be made at a local police station where the offender is currently residing, or as directed: s 25;

(m) on the initial report, police have the power to take fingerprints: s 30;

(n) police have the power to compel photographs to be taken, and to retain documents, fingerprints and photographs indefinitely: s 32: s 31 and s 32; and reportable offenders can be given a notice to provide DNA to the police: s 40A; and

(o) a reportable offender must obtain the Police Commissioner's written permission before changing, or applying to change, that offender's name under the *Births, Deaths and Marriages Registration Act* 2003 (Qld): s 74A.

[30] That review of the obligations demonstrates why this Court has described them as "onerous".[23] The onerous nature is demonstrated as well by the fact that any breach of the obligations renders the applicant potentially liable to five years' imprisonment: s 36(1)(a) and s 50.

[31] For present purposes, one of the most significant aspects about the effect of the *ORA* is that it changes the legal status of the offender. Here that change in legal status will endure three years beyond the end of the period of probation. Any breach of the reporting obligations exposes the applicant to prosecution, and a prospect of imprisonment well beyond the current sentence.

[32] The potential exposure of the applicant to prosecution, and the arbitrary nature of that risk given the psychologist's report which formed the basis of the sentencing, is demonstrated by what has occurred since the sentence was imposed. In July 2019

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[23] *R v SBP* [2009] QCA 408 at [20], *R v Rogers* [2013] QCA 192 at [40]; see also *R v LAL* [2018] QCA 179 at [104].

police attended the applicant's address for a compliance check and found that the applicant's cousin had been living at that address for at least six weeks, with her four children, aged between three and 12. According to police, the applicant made full admissions and was cooperative. Action on the breach had been deferred until this application has been determined. One infers that if the conviction remained the applicant would be charged with a reporting offence.

[33] Given that the sentence was imposed upon the factual basis in the psychologist's report, which was that the applicant fitted the typology of a situational 'hands off' or 'no contact' offender, did not present as a risk to children and there was no evidence of entrenched paedophilic tendencies, there was no demonstrable risk to the cousin's children, yet the reporting obligations meant that the applicant faced prosecution and imprisonment.

Re-sentencing

[34] Demonstrated error having been shown in the sentencing process, it is the obligation of this Court to re-sentence. For that purpose, in considering whether or not to record a conviction, the Court must have regard to all the circumstances of the case including the nature of the offence, the offender's character and age, the impact that recording a conviction will have on the offender's economic or social wellbeing, and the impact it will have on the changes of finding employment: s 12(2) of the *Penalties and Sentences Act* 1992 (Qld).

[35] Factors which are relevant include the following:

(a) the applicant is now aged about 22 years old;

(b) she was 18 at the time of offending, and under 18 when the images were obtained;

(c) in the period since 19 January 2016 (now three years and eight months, all of which has been spent on bail or under a probation order) there has been no re-offending of any relevant kind by the applicant;

(d) the applicant had no relevant criminal history;

(e) the applicant acquired the images, according to the psychologist report, out of curiosity and at a time when she was struggling with issues concerning her transgender identity and sexual identity;

(f) there were only 15 images, 11 of which did not fall into category 4, the category applicable to images where sexual intercourse or oral penetration was depicted;[24]

(g) even though the description in the agreed facts was that the images depicted young boys between the age of five years and 16 years, it is not possible to tell which category the images of younger boys fell into; category 1 is for images of no sexual activity (e.g. nudity and posing), category 2 is for non-penetrative sexual activity between children or solo masturbation, category 3 for non-penetrative sexual activity between children and adults (e.g. mutual masturbation), and category 4

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[24] The established categories were developed from *R v Oliver* [2003] 1 Cr App R 28; see *R v Hickey* [2011] QCA 385 at [5], *R v Edwards* [2019] QCA 15 at [19].

images which involve images of sexual intercourse (e.g. anal penetration or fellatio);

(h) in *R v Daw*[25] this Court dealt with an offender who had 58 pornographic images depicting young female children in various poses naked and semi-naked, and performing oral sex; whilst noting the serious concerns about the exploitation of children and the fact that the offender's actions contributed to feeding that market, this Court expressed a view that the offence was "at a very low level";[26] notwithstanding the nature of the offending no conviction was recorded against that offender;

(i) given that there are only 15 images in this case, the offending has to be seen at a very low level in the scale of such offending, notwithstanding the serious nature of such images and the fact that possession of child exploitation material is not a victimless crime;

(j) the change in legal status of the applicant has serious and ongoing impacts upon her, including her exposure to prosecution in situations where there is no risk to children[27] and at a more base level concerning any change of name once the applicant undergoes transgender treatment;

(k) there is no suggestion that the applicant is sexually attracted to children, has ever experienced a sexual encounter with a child, or is a risk to children; and

(l) the Crown does not challenge the identification of the application as a situational hands-off or no-contact offender, without entrenched paedophilic tenancies, and a low risk of reoffending.

[36] In relation to the relevance of the reporting obligations under the *ORA*, and their nature, reference can be made to what was said in *R v Rogers*.[28] The offences there were two counts of using electronic communication within intent to expose indecent matter to a child. The sentence was three years' probation with convictions recorded. Errors were demonstrated and therefore this Court had to re-sentence. On the issue of whether to record a conviction, regard was had to the reporting obligations that would follow under the *ORA*. Having reviewed the general nature of the reporting obligations, Henry J said:[29]

> "[40] Those reporting obligations are onerous and it may reasonably be inferred that compliance with them would adversely impact the applicant's social wellbeing.
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> [41] The respondent submitted that because such obligations would arise by operation of statute their impact is an irrelevant consideration in the context of deciding whether a conviction should be recorded. However the terms of s 12 of the *Penalties and Sentences Act* 1992 (Qld) are clear. The court

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25 [2006] QCA 386.

26 *R v Daw* at page 4.

27 As in the case of her cousin coming to stay at the same house, where there is no suggestion of risk but the prospect of prosecution materialised.

28 [2013] QCA 192, per Henry J, with whom Holmes JA (as she then was) and Fraser JA concurred.

29 *R v Rogers* at [40]-[42].

> must have regard to the impact that recording a conviction will have on the offender's social wellbeing. Section 12's terms do not discern between impacts caused by operation of statute and impacts caused otherwise. The impact of the abovementioned obligations caused by the recording of a conviction is a relevant consideration under s 12.
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> [42] The better point is the bare fact the applicant would become a reportable offender and thus suffer adverse impact upon his social wellbeing is not a determinative consideration. Under s 12, "the court must have regard to all circumstances of the case". Those circumstances include the nature of the offence and the community interest in taking reasonable precautions for the welfare of children who may come into contact with persons who have in the past committed sexual offences in relation to children. As McPherson JA observed in *R v Gallagher*, *ex parte Attorney-General*, refraining from the recording of a conviction tends to deprive those who may have care of such children from finding out about the past offending of such persons. On the other hand the circumstances of the present offending did not bespeak a significant future risk of paedophilic conduct. The offences arose in a situation specific way in the context of a relationship between an immature 20 year old male and his 14 and a half year old girlfriend. Moreover he will not escape supervision in the community. A period of three years probation coupled with the applicant having been on bail for about two years and nine months would give rise to a total period of supervision of him in one form or another by the criminal justice system of about five years and nine months."

[37] Those comments are apt in this case. The offending here does not bespeak a significant future risk of paedophilic conduct, and the offences were situational and not in the context of any relationship. Moreover, the applicant will not escape supervision in the community in the same way in that the offenders in *Rogers* did not. The applicant was admitted to bail on 19 January 2016 and remained on bail until the sentencing hearing on 5 December 2018, a period of about two years and 10 months. When one adds the two year probation period, that means the applicant will have been under the supervision of the criminal justice system for four years and 10 months in total. In addition, the probation order has conditions attached requiring the applicant to submit to medical, psychiatric or psychological treatment as directed.

[38] In my respectful view, the applicant's circumstances are unusual. Whilst the possession of such images is a very serious matter, not only by their nature but also because they perpetuate a market in which real children are actually exploited, the very small number of images held by this applicant, the fact that she obtained them when a child, the long period where there has been no re-offending, the applicant's psychological profile and the absence of risk to children, all indicate that this case is an inappropriate one in which to record a conviction, even for the purposes of general deterrence, given that it necessarily follows that the applicant's legal status

is changed by *ORA* and she becomes subject to a reporting regime and risk of prosecution disproportionate to the real risk she presents by her offending.

[39] For these reasons I joined in the orders of the Court, setting aside that part of the sentence which imposed a conviction.