SUPREME COURT OF QUEENSLAND

CITATION:	*R v Thompson* [2019] QCA 245
PARTIES:	**R** **v** **THOMPSON, Dion John** (applicant)
FILE NO/S:	CA No 335 of 2018 DC No 183 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore – Date of Sentence: 9 November 2018 (Cash QC DCJ)
DELIVERED ON:	Date of Orders: 21 February 2019 Date of Publication of Reasons: 12 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	21 February 2019
JUDGES:	Fraser and Philippides and McMurdo JJA
ORDERS:	**Date of Orders: 21 February 2019** **1. Leave to appeal granted.** **2. Appeal allowed.** **3. Sentence imposed on 9 November 2018 is set aside.** **4. The applicant is sentenced to a period of imprisonment of 105 days.** **5. Declare that the 105 days between 9 November 2018 and today is time served under that sentence.** **6. The appellant be released under the supervision of an authorised Corrective Services Officer be a period of one year and that he must comply with the requirements set out in section 93(1) of the *Penalties and Sentences Act* 1992 (Qld) and report by 4.00 pm Monday, 25 February 2019 to an authorised Corrective Services Officer at Level 3, 27 Cornmeal Parade, Maroochydore, 4558.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant pleaded guilty to one count of grooming a child with intent to procure – where the applicant was sentenced to four months imprisonment with

two years' probation – where it was submitted that, in sentencing the applicant, the sentencing judge erred in finding that there were no "exceptional circumstances" in the case – where the primary judge only specifically addressed the factor of extra-curial punishment and certain aspects arising from a psychologist's report in finding that exceptional circumstances did not exist – where the primary judge did not articulate why exceptional circumstances did not exist in the wider circumstances – where the primary judge did not refer to the applicant's mental illness and other personal factors – whether the primary judge erred in finding that there were no exceptional circumstances

Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004 (Qld), s 5
Criminal Code (Qld), s 218B(1)(a)
Penalties and Sentences Act 1992 (Qld), s 9

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
R v BCX (2015) 255 A Crim R 456; [2015] QCA 188, considered
R v GAW [2015] QCA 166, considered
R v Schenk; Ex parte Attorney-General (Qld) [2016] QCA 131, considered
R v Tootell; Ex parte Attorney-General (Qld) [2012] QCA 273, considered

COUNSEL: J Crawford for the applicant
C M Cook for the respondent

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

[1] **FRASER JA:** I agree with the reasons for judgment of Philippides JA.

[2] **PHILIPPIDES JA:** On 7 September 2018, the applicant pleaded guilty to one count of grooming a child with intent to procure.[1] He was sentenced to four months imprisonment with two years' probation on 9 November 2018. The applicant appealed that sentence on the grounds that:

(a) the sentencing judge erred in finding that there were no exceptional circumstances in the case;

(b) the sentencing judge erred by failing to reflect the impact of the extra-curial punishment, adequately or at all, in the sentence; and

(c) the sentence was manifestly excessive in all the circumstances.

[3] Orders were made on the hearing of the application as follows:

"1. Leave to appeal granted.

2. Appeal allowed.

3. Sentence imposed on 9 November 2018 is set aside.

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1 *Criminal Code* (Qld), s 218B(1)(a).

4. The applicant is sentenced to a period of imprisonment of 105 days.

5. Declare that the 105 days between 9 November 2018 and today is time served under that sentence.

6. The appellant be released under the supervision of an authorised Corrective Services Officer be a period of one year and that he must comply with the requirements set out in section 93(1) of the *Penalties and Sentences Act* 1992 (Qld) and report by 4.00 pm Monday, 25 February 2019 to an authorised Corrective Services Officer at Level 3, 27 Cornmeal Parade, Maroochydore, 4558."

[4] What follows are my reasons for joining in the orders made.

Circumstances of the offending

[5] The sentence proceeded on the basis of an agreed statement of facts. The complainant was a 14 year old girl whose phone number the applicant came across through a friend. Over some weeks in June 2017, the applicant, who was then 45 years of age, wrote and sent sexually explicit text messages of an extremely crude nature to the complainant. On one occasion, the complainant advised the applicant that she was 14 years old, to which the applicant responded "bullshit", to which the complainant then replied "Haha I won't tell the cops … I'm not like that". The applicant continued messaging her, asking for pictures of her genitals and breasts and whether she "liked to fuck". She repeated that she was 14, something which the applicant treated with scepticism, asking for sexually explicit photos.

[6] When police attended the applicant's address in early July 2019, they found the messages on his phone. The applicant took part in a police interview and made admissions.

[7] An early plea was entered on the uncontested basis that the applicant did not believe that the complainant was in fact 14 years old, but accepted that he could not discharge the onus that he believed on reasonable grounds that the complainant was at least 16 years old.

The sentencing remarks

[8] Competing contentions were made at sentence as to whether there were exceptional circumstances present in this case, such as to prevent a period of time in actual custody being imposed under s 9(4) of the *Penalties and Sentences Act* 1992 (Qld) (the PSA).

[9] The sentencing judge was referred by the prosecution to *R v Schenk; Ex parte Attorney-General*[2] in contending that no exceptional circumstances existed. The prosecution put forward a head sentence in the range of 12 to 18 months imprisonment, with four to six months of actual custody followed by probation to assist with rehabilitation, as within the sentencing range.

[10] The sentencing judge observed that the offence was one of some seriousness, involving continued contact with a young girl through messages that were explicit

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2 [2016] QCA 131.

and demeaning not only in the context of "a young girl, but which would be considered explicit and demeaning and, indeed, misogynist in the case of any female". His Honour noted the basis on which the plea, which was considered to be an early one, was entered; that the applicant did not actually believe that the complainant was under 16.

[11] The sentencing judge noted that, while the applicant, who was 46 at sentence, had prior convictions, they largely concerned drug offences, the applicant having abused drugs for a significant part of his adult life. Further, in July 2017, although soon after the commission of the present offence, he committed some drug offences for which he was placed on probation. He had satisfactorily completed that probation.

[12] The sentencing judge made reference to the applicant seeing a psychologist, Ms Bardsley, whose report spoke favourably of steps taken toward rehabilitation, including undergoing some 10 sessions which included cognitive behaviour therapy to assist with drug abuse. The sentencing judge regarded that as a significant factor in the applicant's favour because the applicant's poor judgment in contacting the complainant and committing the offence was influenced by drug use. Accordingly, steps taken to address that drug use were relevant in that the applicant was less likely to reoffend.

[13] The sentencing judge noted the submissions made on behalf of the applicant which focused on whether or not exceptional circumstances were present such that it would be open to the Court to impose a sentence that did not involve actual imprisonment. His Honour listed the factors which it was submitted combined to represent exceptional circumstances as:

- the actual rehabilitation attempted as demonstrated in the applicant's satisfactory compliance with the previous probation order and the report of Ms Bardsley;
- that the applicant did not have a history of relevant convictions, including offending against children;
- Ms Bardsley's assessment that the applicant represented a low to moderate risk of reoffending;
- the fact that the plea revealed a lower level of culpability than might otherwise be the case because it occurred against the background of the applicant's belief that the complainant was not in fact 14 years old, albeit that the applicant could not discharge the onus that the belief was based on reasonable grounds; and
- that some months after the offence, in December 2017, the applicant was the subject of an assault motivated in part, but not solely, because of the offending (the applicant was attacked and suffered injury to his cheekbone and eye socket requiring surgery and implantation of titanium plates).

[14] The sentencing judge expressed a concern in relation to the report and the applicant's prospective rehabilitation that, while the applicant had substantially addressed his opioid dependency, the same could not be said in relation to amphetamine dependency, which was of particular concern given that the offending was committed against the background of disinhibition after consuming methylamphetamine. The sentencing judge stated he was particularly influenced by that factor in concluding that exceptional circumstances were not demonstrated that

would permit the imposition of a sentence that did not involve a period of actual custody.

Consideration

Impact of the extra-curial punishment

[15] In relation to the ground alleging failure to reflect the impact of the extra-curial punishment in the sentence imposed, the applicant contended that the sentencing judge did not appear to have taken into account the significant extra-curial punishment in any tangible way in the sentence imposed. It is to be noted that it was not disputed that there were other motivations for the attack upon the applicant in December 2017, but his Honour did identify the fact of the injuries sustained by the applicant as going to whether the combination of circumstances demonstrated that exceptional circumstances existed.

[16] That raises the ground going to whether if it was open to his Honour to find that there were not exceptional circumstances, such that the imposition of a period of actual custody was not required to be imposed.

Exceptional circumstances

[17] The meaning of the words "exceptional circumstances" now found in s 9(4)(b) of the PSA were considered in *R v Tootell; Ex parte Attorney-General (Qld)*,[3] *R v GAW*[4] and *R v BCX*[5] from which the following principles emerge:

1. The PSA does not define what amounts to "exceptional circumstances" but the expression is to be read in its statutory context and mindfully of the intent of s 9 of the PSA to make it the usual case that those who commit sexual offences against children will serve actual imprisonment.[6]

2. There is no one clear prescription of what circumstances are capable of being regarded as exceptional; consideration is to be given not only to the unusualness of the individual factors but to their weight and those factors, which taken alone may not be out of the ordinary, may in combination constitute an exceptional case.[7]

3. A single episode of low level offending may, in the circumstances of a particular case, where, for example, it is combined with the absence of prior or subsequent sexual offending, lead to a finding of exceptional circumstances.[8]

4. Sentencing under s 9(4) of the PSA requires an integrated approach which takes into account all the circumstances of the case, having regard to the other provisions of s 9 of the PSA. It is not a stepped process.[9]

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3 [2012] QCA 273.
4 [2015] QCA 166.
5 [2015] QCA 188.
6 *R v Tootell; Ex parte Attorney-General (Qld)* [2012] QCA 273 at [19]; *R v GAW* [2015] QCA 166 at [54].
7 *R v Tootell; Ex parte Attorney-General (Qld)* [2012] QCA 273 at [18] and [24]; *R v GAW* [2015] QCA 166 at [54].
8 *R v GAW* [2015] QCA 166 at [3] and [66]; *R v BCX* [2015] QCA 188 at [29], [1] and [2].
9 *R v BCX* [2015] QCA 188 at [29], [1] and [2]; *R v Schenk; Ex parte Attorney-General (Qld)* [2016] QCA 131 at [34].

5. A finding that exceptional circumstances exist is one made in the exercise of a discretion and one where reasonable minds may differ.[10]

[18] While not referred to the decisions mentioned above, the sentencing judge was referred to *Schenk* in relation to the expression "exceptional circumstances". The focus of that case was on the failure of the sentencing judge to have regard to the provisions of s 9(4) of the PSA.

[19] Although his Honour recited the circumstances which were put forward as establishing exceptional circumstances, his Honour only specifically addressed the factor of extra-curial punishment and a particular concern arising from the psychologist's report and prospective rehabilitation as informing his finding that exceptional circumstances were not established. The particular concern that arose from the psychologist's report was related to the applicant's prospective rehabilitation resulting from not having addressed amphetamine dependency given its connection to the offending through disinhibition. His Honour indicated that he was intending to fashion a sentence that would facilitate rehabilitation through the imposition of a period of probation but did not articulate how, in the circumstances of this case, that particular aspect of the case precluded the finding that exceptional circumstances were demonstrated. His Honour's stated concern was that, in the circumstances of the case where there was one count only, he could not both impose a suspended sentence and a period of probation.

[20] In my view, it is apparent that the exercise of the sentencing judge's discretion as to whether exceptional circumstances existed miscarried in the application of principle. His Honour failed to have regard to the principles enunciated in *Tootell*, *GAW* and *BCX* as to whether the combination of circumstances established exceptional circumstances. In particular, his Honour did not articulate why, notwithstanding that the offending was serious, the low level of the offending was such that, when combined with other circumstances present, including the absence of prior or subsequent offending, exceptional circumstances did not exist so that the usual imposition of a period of actual custody was required. In that regard, his Honour also failed to refer to the applicant's mental illness as set out in the psychologist's report and other personal factors which I will refer to below. In sentencing submissions, the sentencing judge had inquired into whether the prior probation order had been complied with as a matter going to exceptional circumstances, but made no comment as to its relevance in his sentencing remarks.

[21] Given the error in the approach to relevant principles which resulted in an error of the kind identified in *House v The King*,[11] it fell to this Court to re-exercise the sentencing discretion and proceed to make its own assessment as to whether exceptional circumstances were demonstrated.

[22] The combination of circumstances present in this case were such as to establish exceptional circumstances such that a custodial sentence was not militated. The offending, while serious, was of a low level involving text messaging where there was no prior relationship between the applicant and the complainant, nor any physical contact or attempt to initiate such contact. The applicant cooperated with authorities and was genuinely remorseful, which was reflected by an early plea of

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10 *R v BCX* [2015] QCA 188 at [32], [33], [1] and [2].

11 (1936) 55 CLR 499 at 504-505.

guilty that was entered on an unusual basis, in that it was not disputed that he did not actually believe the complainant was under 16. The offending was out of character, in that the applicant had no prior or subsequent criminal history involving offending of a sexual nature. His previous community orders were completed without contravention, including the recent probation sentence.

[23] The tendered report revealed that in the period between the offending and his sentence of almost 17 months, the applicant had, of his own volition, engaged in rehabilitation with his treating psychologist which was ongoing. He was treated for opioid addiction through the Sunshine Coast AOD Service and received prescribed daily methadone which had assisted him to overcome heroin and morphine. The report indicated that the applicant suffered from mental health issues, including severe anxiety disorder and obsessive compulsive disorder. He also suffered from severe depression following the death of his brother in 2012 and his mother in 2017 and from suicidality. There was no evidence of psychopathy or paedophilic interests and no evidence of anti-social personality disorder and the uncontested evidence of the psychologist who conducted various assessments was that the recidivism risk was low to moderate.

[24] The death of the applicant's elderly mother in December 2017 had been a particular stressor, with the retaliatory attack on him occurring not long after. The applicant had been close to his mother, living with his mother in housing commission accommodation since 2006 when he became her carer due to her mental health issues (bipolar), alcoholism and osteoporosis. In 2008, when her condition deteriorated, he undertook her fulltime care. In 2015, when he could no longer meet her needs, she moved into institutional care. A custodial sentence carried the potential loss of the housing commission accommodation.

[25] It was also pertinent to bear in mind that consequent on his plea, the applicant became a reportable offender under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004 (Qld) which imposed significant obligations for a period of five years.

[26] In the circumstances of this case, it would have been open to impose an appropriately lengthy period of probation with no custodial sentence as an adequately denunciatory deterrent sentence that addressed the nature of the offending, but also the exceptional circumstances of the case including matters of mitigation and rehabilitation.

[27] At the date of the hearing of the application, the applicant had served 105 days in custody and it was appropriate not to require any further period of imprisonment to be served. It was also appropriate that considerations of rehabilitation be facilitated by ordering that the applicant be released under the supervision of an authorised Corrective Services Officer for a period of one year.

[28] **McMURDO JA:** I agree with Philippides JA.