SUPREME COURT OF QUEENSLAND

CITATION:	*R v C* [2002] QCA 156
PARTIES:	**R** **v** **C** (applicant)
FILE NO/S:	CA No 25 of 2002 DC No 3022 of 2001 DC No 3023 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	10 May 2002
DELIVERED AT:	Brisbane
HEARING DATE:	12 March 2002
JUDGE:	McPherson and Williams JJA, Philippides J Separate reasons for judgment of each member of the Court; McPherson JA and Philippides J concurring as to the orders made, Williams JA dissenting in part.
ORDER:	**1. That the application to extend time be allowed;** **2. That the application for leave to appeal against sentence be dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – PARTICULAR MATTERS – OTHER INSTANCES OF INTERFERENCE – where no appeal against conviction filed – where refusal of application for stay of proceedings – where offences occurred between 1972 and 1976 – where complaints renewed in 2000 – whether lapse of time resulted in abuse of process – whether failure to grant stay resulted in injustice – where applicant convicted of other sexual offences in 1980 – whether applicant already punished for current offences – whether applicant deprived of defence of *autrefois convict* CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – MISCELLANEOUS MATTERS – QUEENSLAND – PROCEDURE – EXTENSION OF TIME,

NOTICE OF APPEAL AND ABANDONMENT – where applicant lodged out of time an application for leave to appeal against sentence – whether applicant has reasonable prospect of success in an appeal against sentence

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – where applicant pleaded guilty to four counts of indecent dealing, one of sodomy and one of rape – where applicant sentenced to five years imprisonment – whether failure to give effect to totality principle – where order pursuant to s 19(1) *Criminal Law Amendment Act* 1945 made – where provision was not in force at time of offence – whether order under s 19(1) constitutes punishment.

Acts Interpretation Act 1954 (Qld), 20C
Criminal Code (Qld), s 11(2), s 592A, s 592A(2)(a), s 592A(4), s 663B (repealed), s 668(1), s 668D(1)(c)
Criminal Law Amendment Act 1945 (Qld), s 19, s 19(1), s 19(2), s 19(9)
Penalties & Sentences Act 1992 (Qld), s 4, s 9(1)(c), s 9(1)(e), s 9(4)(b)

Birch v Allen (1942) 65 CLR 621, cited
Clunies-Ross v The Commonwealth (1984) 155 CLR 193, cited
Fenton v Thorley (1903) AC 443, cited
Fielding v Morley Corporation (1899) 1 Ch 1, cited
Jago v District Court of New South Wales (1989) 168 CLR 23, considered
Longman v The Queen (1989) 168 CLR 79, considered
Mill v R (1988) 166 CLR 59, considered
R v Cooksley [1982] Qd R 405, considered
R v C [1999] QCA 458; CA No 264 of 1999, 2 November 1999, considered
R v D [1996] 1 Qd R 363, considered
R v Muckan [1975] Qd R 393, considered
Vacher & Sons Ltd v London Society of Compositors [1913] AC 107, cited

COUNSEL: A Vasta QC for the applicant
P F Rutledge for the respondent

SOLICITORS: Beckett Lawyers for the applicant
Director of Public Prosecutions (Qld) for the respondent

[1] **McPHERSON JA**: I have read and agree with the reasons of Philippides J. In particular I agree that s 19(1) of the *Criminal Law Amendment Act* 1945, and of a reporting order made under it, are not intended to impose a form of "punishment" within the meaning of s 11(2) of the *Criminal Code*; and that that is so whether or not such an order is a form of "sentence" that may be subject of an appeal to this Court under s 668D(1)(c), read with the definition in s 668(1) of the Code.

[2] The orders should be as suggested by Philippides J.

[3] **WILLIAMS JA:** The convictions in question were recorded on 5 December 2001 and the sentences imposed on 12 December 2001. Partly due to the Christmas holiday period intervening an application for leave to appeal against sentence was not lodged in time. An application for extension of time in which to appeal against sentence and an application for leave to appeal against sentence were filed on 16 January 2002. The merits were fully argued and if merit was established the appropriate extension of time should be granted.

[4] No appeal against conviction (or application for extension of time with respect thereto) has been filed. In the course of argument senior counsel for the applicant contended there was an appeal against the refusal to grant a permanent stay on the application brought pursuant to s 592A of the Code. He referred to a document filed 5 March 2002, but that was strictly only an outline of argument. There was no application for an extension of time until 5 March to appeal against conviction. Section 592A(4) still requires a formal notice of appeal against conviction.

[5] Nevertheless both counsel made submissions with respect to the stay issue and if there was merit in the applicant's contention undoubtedly the procedural problems could be overcome.

[6] The essential background facts relevant to the determination of the issues raised are set out in the reasons for judgment of Philippides J and I will not repeat them unnecessarily.

[7] The first matter to be considered is whether or not Healy DCJ erred in refusing to grant a stay of the indictment on an application pursuant to s 592A of the *Criminal Code* on the ground that its presentation amounted to an abuse of process. An objective bystander would have some difficulty in comprehending the argument given that ultimately the applicant pleaded guilty to the charges contained in the indictment. Because the submission can be dealt with shortly on the merits I would leave open the question whether such an issue can properly be raised after a plea of guilty.

[8] The argument for the applicant in favour of a stay is based primarily on delay and the reasoning of the High Court in *Jago v District Court of New South Wales* (1989) 168 CLR 23.

[9] Argument on the s 592A application was based on evidence given at the committal proceedings with respect to the charges in question and court records relating to the sentences imposed on the applicant in 1980-1. A summary of the position of the complainants with respect to the making of the complaints is set out in the reasons for judgment of Philippides J. That to my mind establishes a valid, reasonable

explanation for the delay from the commission of the offences (between 1972 and 1976) to the making of the relevant complaints in November 2000.

[10] The fact that in October 1980 the applicant pleaded guilty to a large number of sexual offences involving a number of other children for which he was sentenced after an appeal to the Court of Criminal Appeal in 1981 to an effective period of 15 years imprisonment has no direct bearing on the question whether the presentation of the indictment in question constituted an abuse of process. That earlier sentence may have some relevance when determining the proper sentence to be imposed on the applicant for the offences charged on the indictment in question, but it can have no direct relevance to the propriety of proceeding with respect to those charges.

[11] Cases such as *Longman v The Queen* (1989) 168 CLR 79 illustrate the problems associated with the prosecution of a sexual offence many years after it allegedly occurred. But as *Longman* itself demonstrates the ultimate question will be whether or not the accused had or can have a fair trial. Here the applicant has not identified anything other than mere delay as providing an obstacle to a fair trial such as would warrant the court staying the proceeding as an abuse of process. The applicant has not established that a fair trial could not be had, nor that the administration of justice would be brought into disrepute by presenting the indictment.

[12] It was submitted that in the circumstances the applicant was deprived of an opportunity to raise the defence of *autrefois convict*. The argument is in my view misconceived. The sentencing judge in 1980 and the Court of Criminal Appeal in 1981 made oblique references to offences having been committed by the applicant against his daughters; those remarks were apparently based on a statement contained in a psychiatric report tendered on sentence. There was clearly no admission by the applicant in the 1980-1 proceedings that he had committed offences against his daughters, the present complainants. It is clear that the courts then did not take into account the present offences in determining the appropriate sentence. Therefore it cannot be said that he has been deprived of the opportunity of raising a plea of *autrefois convict* or that there has been a breach of s 16 of the Code.

[13] I am not persuaded that Healy DCJ erred in refusing to grant a stay, and I can see no merit in any of the arguments raised against the conviction recorded following the pleas of guilty. Given there is no formal appeal against conviction no order need be made with respect thereto.

[14] With regard to the sentence imposed by O'Brien DCJ, the applicant contends that, as he served a term of imprisonment of 15 years consequent upon the convictions in 1980, he was being doubly punished by the imposition of a period of imprisonment for these offences which in fact were committed prior to 1980. I am prepared to accept that the fact that the applicant had served 15 years imprisonment in the circumstances outlined was a relevant factor calling for some degree of moderation in determining the appropriate sentence here; that is merely an extension of the totality principle to meet the circumstances of this case. But it seems clear that the courts in 1980-1 would have imposed a sentence greater than 15 years imprisonment if they had then been dealing, not only with the offences on the then indictment, but with offences including rape and sodomy of his two daughters who were under 14 years of age at the material time.

[15] When everything is taken into account the sentence imposed of 5 years imprisonment suspended after 12 months with an operational period of 5 years for the offences in question is so low that it can only be justified against the background that the applicant had served 15 years in prison for sexual offences between the date on which the relevant offences occurred and the date of sentence with respect to them.

[16] I am not persuaded that the sentence imposed was excessive.

[17] That leaves for consideration the order made pursuant to s 19(1) of the *Criminal Law Amendment Act* 1945 ("the Act"). That section, the terms of which are set out in the reasons of Philippides J, was inserted into the 1945 Act by amending legislation in 1989. As the provision only came into force after the offences with which the court is now concerned were committed, an order under that section could only be made against the applicant if it did not constitute "punishment" of the applicant. That follows from s 11(2) of the Code and s 20C of the *Acts Interpretation Act* 1954, the terms of which are set out in the reasons of Philippides J.

[18] Statute law, primarily the *Criminal Code*, provides the penalty which may be imposed by a court consequent upon conviction for an offence. The order of the criminal court imposing the penalty, its judgment, is generally referred to as the sentence of the court. The term "sentence" is given a wide meaning by s 668(1) of the Code. The definition of "sentence" in s 4 of the *Penalties & Sentences Act* 1992 confirms that the court may impose a sentence even though a conviction is not formally recorded. Parliament also has provided from time to time (for example, s 663B of the Code, now repealed, relating to an order for payment of compensation) that an order made at the time of sentence shall not be taken to be part of the sentence, that is part of the punishment imposed by the court (*R v Muckan* [1975] Qd R 393).

[19] *Prima facie*, therefore, in the absence of a specific statutory provision each order making up the sentence after conviction is by way of punishment. It was necessary to insert s 19(9) to meet the situation where the order was made under s 19(1)(b). As the Act specifically provides that an order of the type in question can be made subsequently to the substantive sentence, the making of such an order in those circumstances would not amount to the offender being twice punished for the same offence (s 16 of the Code).

[20] In my view it is of critical importance to note that the long title of the *Criminal Law Amendment Act* 1945 is: "An Act to make further provision for, the treatment and punishment of offenders convicted of sexual offences, and for other purposes". That long title was not amended in 1989 when s 19 was inserted. It is clear that the long title is part of a statute and resort may be had to it when construing the statute and determining the scope of its operation. (*Fenton v Thorley* (1903) AC 443 at 447, *Fielding v Morley Corporation* (1899) 1 Ch 1 at 3, *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 128, *Birch v Allen* (1942) 65 CLR 621 at 625-6, and *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 199).

[21] Section 19 can have no relationship to the treatment of convicted sexual offenders; when the statute is considered as a whole s 19 was clearly intended by the

legislature to be associated with or part of the punishment of convicted sexual offenders.

[22] It may well be correct to say that a purpose of a legislative provision such as s 19 is to protect vulnerable young people who are at risk from sexual predators. But I do not consider that to be an indication that an order made thereunder is not punishment. It has long been recognised that one of the purposes of punishment imposed by the criminal law is to protect the community at large, or a specific vulnerable section thereof, from the type of crime in question. Indeed such considerations are now enshrined in s 9(1)(c) and (e) and s 9(4)(b) of the *Penalties & Sentences Act*.

[23] In the light of those considerations I have come to the conclusion that an order pursuant to s 19 of the Act constitutes part of the punishment imposed on a sexual offender by the sentence of the court which follows upon conviction for such an offence. It follows that, because s 19 had not been enacted when these offences were committed, the sentencing judge had no power to make such an order.

[24] I would therefore order as follows:

1. Extend the time, and grant leave to appeal against sentence;
2. Allow the appeal against sentence to the extent of deleting from the sentence the order pursuant to s 19 of the *Criminal Law Amendment Act* 1945;
3. Otherwise the sentence imposed should stand.

[25] **PHILIPPIDES J:** On 8 November 2001, an indictment was presented against the applicant in respect of a number of sexual offences alleged to have been committed by him on his two daughters between 1972 and 31 December 1976, being four counts of indecent dealing, one of sodomy and one of rape. On 14 November 2001, an application was brought on behalf of the applicant pursuant to s 592A(2)(a) of the *Criminal Code* seeking that the indictment be permanently stayed, which resulted in a ruling dismissing the application for a stay. On 5 December 2001, the applicant was convicted on his own plea and on 12 December 2001 he was sentenced to 5 years imprisonment. In addition, an order was made pursuant to s 19(1) of the *Criminal Law Amendment Act* 1945 ("the Act").

[26] A ruling made pursuant to s 592A(2)(a) of the *Criminal Code* is not subject to interlocutory appeal, but may be raised as a ground of appeal against conviction.[1] Accordingly, counsel for the applicant seeks to appeal the conviction pursuant to s 529A, on the basis that the learned trial judge erred in law in making the ruling on 14 November 2001 dismissing the application for stay of the indictment. In fact, no appeal against conviction has been filed. In oral submissions, counsel for the applicant referred to a document filed on 5 March 2002, but this was merely an outline of argument. Despite this procedural defect, both parties proceeded as though an appeal had been brought pursuant to s 592A, and there is nothing which prevents the Court from considering this issue.

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[1] See s 592A(4) of the *Criminal Code*.

[27] In addition, the applicant seeks leave to appeal against the sentence imposed on 12 December 2001 and brings an application for an extension of time within which to do so.

Appeal against Conviction

[28] On behalf of the applicant two grounds were put forward, based on the decision in *Jago v District Court of New South Wales,*[2] as to why the learned trial judge erred in failing to grant a stay of the indictment. Firstly, it was contended that the circumstances in which the complaint was brought amounted to an abuse of process. Secondly, it was said that the failure to order a stay has led to the applicant suffering injustice, because the matters the subject of the indictment were taken into account in respect of a sentence imposed on the applicant in 1980 and because the applicant was deprived of the opportunity of a defence of *autrefois convict.*

[29] On behalf of the respondent it was submitted that there is no merit in the appeal against the refusal to stay the indictment, having regard particularly to the fact that after the indictment was presented, the applicant pleaded to the offences. It was also submitted that the present offences were not considered in respect of the sentence imposed on the applicant in 1980.

[30] No authority was cited as to whether s 592A(4) of the *Criminal Code* is unavailable where the conviction follows a plea and no such submission was made by the respondent. In the present case, that issue is not critical as, in my opinion, no ground for appeal against conviction on the basis of the ruling has been made out for the reasons that follow.

(a) Abuse of Process

[31] In October 1980, the applicant was convicted on his own plea of 10 sexual offences committed in 1978 and 1979, consisting of two counts of attempted carnal knowledge of a girl under the age of 10, two counts of sodomy committed on the same girl, three counts of unlawful and indecent dealing with the same girl, two counts of sodomy committed on her brother and one count of unlawfully and indecently dealing with a boy. It appears that these children were not the children of the applicant. The applicant was sentenced to nine years imprisonment in respect of six of the counts and three years for the remaining four counts. On appeal, the Court of Criminal Appeal increased the nine-year sentence to one of 12 years imprisonment, cumulative on the sentence of three years, making an effective period of 15 years imprisonment, which the applicant served in full.

[32] It appears that in 1975, one of the daughters, who was then aged nine, made a complaint to her mother. The applicant was then undergoing psychiatric treatment. The family doctor had made inquiries of the mother about the applicant's sexual interference with the daughters. It appears that the other daughter then also revealed that she too had been sexually interfered with.

[33] It also appears that in 1980 the police were informed that the applicant's two daughters had been interfered with by the applicant. However, this seems to have been in the absence of any complaint by the mother or the daughters. At the

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2 (1989) 168 CLR 23 at 25.

committal hearing in respect of the present indictment, the mother gave evidence that, after consulting the daughters, who were then aged 12 and 14 years, it was decided not to make a complaint. The complainants do not recall this conversation, but conceded that it may have occurred.

[34] The two complainants first made a complaint in respect of the matters the subject of the indictment in April 1997. Approximately two months later, the complaint was withdrawn, apparently because of the ill health of the complainants' mother and their desire not to place their family through the stress of a trial. However, the complaints were renewed in November 2000, with the applicant being charged on 9 January 2001.

[35] It appears that both complainants believed that the applicant had been imprisoned in 1980 for offences committed by the applicant against them. It seems that sometime in 1995 one of the complainants formed the impression that the applicant wished to have contact and as a result the complainants obtained transcripts of the 1980 court proceedings against the applicant. It was said that the complainants then realised that the applicant had not been dealt with in relation to any charges concerning them in 1980. Thus, when the complainants made their original complaint to the police in 1997, they appear to have been prompted to do so as a result of the applicant trying to make contact with them.

[36] Counsel for the applicant submitted that the complainants and their mother were presented with an opportunity to make a formal complaint at the time the applicant was being proceeded against in 1980, but failed to do so. It was submitted that that fact combined with the circumstances in which the complaint was renewed, some three years after first being made and as a result of the applicant having sought to have contact with the complainants, amounted to an abuse of process.

[37] The learned trial judge, in determining whether to exercise his discretion given the delay involved, referred to matters mentioned in *Jago,* that is, whether there was a fundamental defect going to the root of the trial "of such a nature that nothing that a trial judge [could] do in the conduct of the trial [could] relieve against its unfair consequences"[3] and whether the applicant had shown that "the lapse of time [was] such that any trial [was] necessarily unfair so that any conviction would bring the administration of justice into disrepute".[4]

[38] His Honour held, having regard to the history of the matter and the fact that, after serving the 15 year sentence, the applicant was convicted on 24 May 2001 on his own plea of two further counts of unlawfully and indecently dealing with a girl under the age of 16, he should not exercise his discretion to stay the indictment.

[39] Counsel for the applicant was, not surprisingly, unable to refer to any authority to support the view that the mere passing up of an earlier opportunity to proceed with a complaint is a basis for staying a proceeding. Furthermore, in this case there was an explanation as to the earlier failure to proceed, which pointed to there being a misunderstanding as to the charges the subject of the 1980 proceedings.

[40] In the circumstances, I do not consider that it has been shown that his Honour, in considering the history of the matter and other issues, proceeded on an erroneous

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3 See *Jago* at 34

4 See *Jago* at 34.

basis in rejecting the submission that the bringing of the indictment constituted an abuse of process.

(b) Injustice

[41] Counsel for the applicant also submitted that the failure to order a stay resulted in injustice to the applicant, because the matters the subject of the present indictment were taken into account by the learned sentencing judge and the Court of Criminal Appeal in the sentencing of the applicant in 1980, and because the applicant was deprived of an opportunity to rely on the defence of *autrefois convict*.

[42] It is well established that a sentencing judge may not properly take into account, for the purpose of punishing the accused, other offences whether similar or not, in respect of which the accused has not been convicted, unless the accused explicitly admits the offences in question.[5]

[43] In support of the submission that the matters the subject of the present indictment were taken into account in the sentence imposed in 1980, counsel for the applicant referred to a comment made by the sentencing judge in his sentencing remarks, that the applicant had "committed incest with both of his daughters". However, it was conceded by counsel for the applicant that the recitation of the facts relied upon by the Crown in the 1980 proceedings made no reference to the matters the subject of this indictment. It appears that the matter of the applicant's sexual dealings with his daughters came before the court in 1980 only because they were mentioned in a psychiatric report tendered at sentencing.

[44] In my opinion, it appears that the remarks of the sentencing judge were directed to the purpose of referring to the applicant's personal antecedents and character. As was said in *Cooksley,*[6] only a fine line may exist between ascertaining the character of an accused from the surrounding circumstances (which may themselves involve criminal conduct) and punishing the accused for offences revealed by those circumstances. However, in my opinion, there is nothing to indicate that, in sentencing the applicant in 1980, the sentencing judge proceeded in a manner contrary to the principles outlined in *Cooksley*. His Honour did no more than have regard to the psychiatric report for the purpose of considering the applicant's character and personal circumstances. It is clear that the reference to the applicant's acts of incest was not made for the additional purpose of imposing a heavier punishment.

[45] Counsel also referred to a statement in the judgment of the Court of Criminal Appeal, where it was said that it was "apparent that the charges brought were only a sample of the many dealings by the [applicant] with these children", as indicating that the current charges were considered by that Court in increasing the sentence on appeal. However, in my view, it is apparent from that Court's judgment, and indeed, as I have already mentioned, from the recitation of facts, that none of the applicant's children were the subject of the counts in the 1980 proceedings and the reference to "these children" is clearly a reference to the children, the subject of the 1980 indictment, that is, children other than the applicant's children.

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5 See *R v Cooksley* [1982] Qd R 405 at 417, *R v D* [1996] 1 Qd R 363 at 403.

6 *Cooksley* at 419.

[46] Further, the statement of the Court of Criminal Appeal referred to above does not support any proposition that the current offences were put before the Court in 1980 as "sample offences" capable of being considered for sentencing purposes in the manner outlined in *Cooksley*, given that there is no evidence that the applicant admitted the offences the subject of the current indictment in 1980.

[47] Accordingly, I do not consider that any error was demonstrated to have been made by the learned sentencing judge in rejecting the submission that the applicant had already been sentenced in respect of the current offences. For the same reasons, I do not consider that any error has been demonstrated by his Honour in rejecting the submission that the stay should have been granted because the applicant had already been punished for the current offences and was thus deprived of the defence of *autrefois convict*. In the circumstances, I do not consider that the trial judge erred either in law or in the exercise of his discretion in dismissing the application for a stay.

Appeal against Sentence

[48] The applicant seeks leave to appeal against the sentence imposed on 12 December 2001 and seeks an application for an extension of time within which to appeal against sentence, the application for leave to appeal against sentence being filed one day out of time.

[49] There are two grounds relied upon in the application for leave to appeal against sentence.

[50] Firstly, counsel for the applicant submitted the learned sentencing judge erred in imposing the sentence of five years imprisonment in that he failed to give effect to the totality principle.[7] It was submitted that having regard to the total criminality of the applicant, the appropriate sentence, upon the applicant being convicted, was not to otherwise punish him. It was therefore said that the learned sentencing judge's discretion miscarried because, having regard to the totality principle, it could not be contended that, had the current charges been specifically charged in the 1980 indictment, the Court of Criminal Appeal would have required the applicant to serve any more than the 15 years in fact served by him.

[51] It is clear that the 1980 offences were of a very serious nature. The Court of Criminal Appeal in the course of its judgment stated that it was "hard to imagine a worse case of the matters charged than this one demonstrates". The offences the subject of the present indictment represented a grave abuse of the trust reposed in the applicant by the complainants. In my opinion, it has not been shown that had those offences been considered at the time the 1980 sentence was imposed, that they would not have attracted an additional sentence of the range imposed by the learned sentencing judge. Accordingly, I do not consider that any error has been demonstrated in this regard.

[52] Secondly, it was submitted that the learned sentencing judge erred in law in making an order pursuant to s 19(1) of the Act. Alternatively, it was submitted that no such order should have been made, because the learned sentencing judge failed to refer to evidence showing that he was satisfied of the matters in s 19(2) of the Act.

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7 See *Mill v R* (1988) 166 CLR 59.

[53] Section 19 of the Act relevantly provides:

> "(1) Where a person has been convicted on indictment of an offence of a sexual nature committed in relation to a child under the age of sixteen years, then, whether or not a direction has been made in respect of that person pursuant to section 18(1) –
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> (a) the court of trial; or
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> (b) any other court of like jurisdiction upon application made by a person authorized in that behalf by a Crown law officer,
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> may order that the offender –
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> (c) report the offender's current name and address to the officer in charge of Police at any place specified in the order within 48 hours after being released from custody; and
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> (d) thereafter, for such period as is specified in the order, report any change of name or address, within 48 hours of the change taking place, to the officer in charge of Police at that place or at another place approved by the commissioner of the police service.
>
> (2) An order shall not be made under subsection (1) unless the court is satisfied a substantial risk exists that the offender will thereafter commit any further offence of a sexual nature upon or in relation to a child under the age of sixteen years.
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> …
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> (6) A report referred to in subsection (1)(c) shall be made by the offender personally.
>
> (7) A report referred to in of subsection (1)(d) shall be made by the offender personally or by letter signed by the offender and sent by registered post addressed to the officer in charge of police at the appropriate place.
>
> (8) A person who fails to comply with an order made under subsection (1) commits an offence, and is liable upon summary conviction to a fine of twenty penalty units or to 6 months imprisonment.
>
> (9) Where a court –
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> (a) has made an order under subsection (1) in respect of a person, the person may appeal against the making of the order pursuant to the *Criminal Code*, chapter 67 as if the order were a sentence pronounced upon the conviction of the person for an indictable offence;
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> (b) … "

[54] Counsel for the applicant submitted that the learned sentencing judge erred in law in making an order under s 19(1) of the Act, because s 19 was not a provision in force at the time the offences, the subject of the indictment, were committed. The offences were said to have been committed during the period between 1972 and 1976. Section 19 came into force in 1989.[8]

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[8] See Act 17 of 1989 s 70; amended Act 87 of 1999 s 4.

[55] In support of his submission, counsel for the applicant referred to s 11(2) of the *Criminal Code*, which provides:

> "If the law in force when the act or omission occurred differs from that in force at the time of the conviction, the offender cannot be punished to any greater extent than was authorised by the former law, or to any greater extent than is authorised by the latter law."

[56] Counsel also referred to s 20C of the *Acts Interpretation Act* 1954, which provides:

> "(1) In this section-
> "Act" includes a provision of an Act.
> (2) …
> (3) If an Act increases the maximum or minimum penalty, or the penalty, for an offence, the increase applies only to an offence committed after the Act commences."

[57] It was submitted that, since an order under s 19(1) of the Act may only be made if there is a conviction, and having regard to s 19(9) of the Act, such an order should be viewed as part of the sentencing process. In this respect counsel referred to s 668 of the *Criminal Code* which provides that "sentence" includes:

> "any order made by the court of trial on conviction of a person with reference to the person's person or property whether or not the person is adversely affected thereby and whether or not the order is made instead of passing sentence."

[58] In my opinion, the relevant consideration for the purposes of s 11(2) of the *Criminal Code* is not whether an order made under s 19(1) of the Act is part of the sentence imposed on an offender, but whether it is a "punishment". Likewise, the question for the purposes of s 20C of the *Acts Interpretation Act* is whether the order can be said to be a "penalty".

[59] I do not consider that the purpose of s 19 of the Act is to punish or penalise an offender. Rather, the purpose of the provision is protective. That is, its purpose is to protect a vulnerable part of the community, being children under 16 years of age, from circumstances where they are at risk of being the subject of sexual offences. So much is made clear by s 19(2) of the Act, which specifies the only circumstances in which an order may be made, as being where a court is satisfied that a substantial risk exists that the offender in question will commit a further sexual offence on a child under the age of 16.[9] This view of s 19 of the Act is supported by the fact that, pursuant to s 19(2) of the Act, an order may be made under s 19(1) of the Act, not only when sentence is imposed by the trial judge upon conviction, but also at some other time after conviction, by an authorised person.

[60] The protective purpose of s 19 of the Act is also highlighted by the carefully circumscribed conditions surrounding the release of any information that a person is subject to an order made under s 19, the details of any sexual offence of which such person has been convicted and, indeed, any other relevant information about that

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[9] See also s 19A of the Act which outlines similar considerations as to the circumstances where an order may be revoked.

person.[10] Nor can the effect of s 19 of the Act be said to be punitive in the sense that it imposes any restriction on the offender's movements or personal liberty.

[61] Furthermore, if an order under s 19 of the Act were to be viewed as punishment, an order made other than by the court of trial upon an application pursuant to s 19(1)(b) of the Act would offend s 16 of the *Criminal Code,* which provides that a person cannot be punished twice for the same act or omission. It follows that such an order would be irreconcilable with 16 of the Code, unless that provision of the Code is considerably modified by s 19 of the Act. In *R v Muckan*[11] it was held that an order for compensation under the now repealed s 663B of the Code, although forming part of a sentence for the purposes of s 668 of the Code, nevertheless did not constitute a punishment. In so finding, the court was influenced by a consideration of s 16 of the Code, as well as a consideration of the purpose of s663B of the Code. Section 663B of the Code was subsequently amended by s 663B (1C) of the Code to provide that an order for compensation was not to be taken to be part of a sentence, thereby clarifying the position with respect to compensation orders. In my opinion, that amendment does not affect the relevance to the present case of the dicta of the court in *R v Muckan* concerning the characterisation of an order for compensation as punishment.

[62] In the circumstances, I do not consider that the learned sentencing judge was precluded, as a matter of law, from making an order under s 19 of the Act in this case by the fact that offences were committed before s 19 of the Act commenced.

[63] As to the exercise of the discretion to make an order under s 19(1) of the Act, this is not a case, such as *R v C*,[12] where it can be said that, on the evidence before the learned sentencing judge, he could not have been satisfied of the matters specified in s 19(2) of the Act. In my opinion, there was ample evidence before his Honour permitting him to exercise his discretion as he did.

[64] Since there are no merits in the appeal against conviction, no order is required to be made extending time in which to appeal. I would allow the application for an extension of time within which to appeal against sentence, but would dismiss the application for leave to appeal against sentence.

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10 See s 20 of the Act.

11 [1975] Qd R 393. See also *R v Gangemi* [1971] QWN 19

12 [1999] QCA 458, CA No 264 of 1999, 2 November 1999.