SUPREME COURT OF QUEENSLAND

CITATION:	*R v McArdle* [2004] QCA 7
PARTIES:	**R** **v** **McARDLE, Michael Joseph** (applicant)
FILE NO/S:	CA No 338 of 2003 DC No 1372 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	5 February 2004
DELIVERED AT:	Brisbane
HEARING DATE:	5 February 2004
JUDGES:	McMurdo P and McPherson JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where applicant convicted on guilty plea of 62 counts of indecent dealing and sentenced to six years imprisonment with recommendation for eligibility for post-prison community based release after two years – where offences committed by priest on children in parish – where three periods of offending spanning 22 years – where applicant had rehabilitated and confessed to offences – where applicant frail and elderly – where remorse shown – whether mitigating factors were adequately taken into account *R v C; ex parte A-G (Qld)* [2003] QCA 510, CA No 328 of 2003, 13 November 2003, considered *R v Wright* [1996] QCA 104, CA No 10 of 1996, 19 April 1996, considered
COUNSEL:	A Boe for the applicant S G Bain for the respondent

SOLICITORS: Boe Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: The applicant pleaded guilty on the 8th of October 2003 to 62 counts of indecent dealing. He was sentenced to an effective term of imprisonment of six years with a recommendation for eligibility for post-prison community based release after two years, a penalty imposed only on the most serious of the offences. He contends that the sentence was manifestly excessive.

Fifty-six counts concerned boys under 14 years and six counts of girls under 14 years. The offences involved 16 children. They occurred during three time periods and spanned 22 years. Counts 1 to 23 were committed between 1965 and 1967, counts 24 to 59 between 1972 and 1978 and counts 60 to 62 from 1985 to 1987.

The applicant was ordained as a Catholic priest in 1962 when he was 27 years old. He met the complainant children through the church's communities in the various provincial Queensland areas in which he ministered. He was aged between 29 and 51 over the offending period and was 68 years old at sentence. The offences were committed on 14 boys aged from 8 to 13 years and two girls aged from 10 to 13 years.

The conduct concerning the boys included kissing and fondling the boys genitals and pushing his own erect penis against the

boys' bodies and on one occasion he forced his tongue into a boy's mouth; placing the boys' hands on his penis; on some occasions masturbating the boys; on others having boys kiss his penis and masturbate him. Sometimes he performed oral sex on the boys and on one occasion made a boy perform oral sex upon him.

The offences concerning the girls were comparatively minor and were largely limited to kissing and fondling but nevertheless must have been distressing for the victims in the circumstances.

Some children complained to parents who in turn made complaints to authority figures within the church. This resulted in the applicant being removed from that particular provincial community. The police were not informed. The defence contends that had the applicant been confronted about his behaviour at an earlier time the extent of his offending may have been much less but this can in no way minimise the applicant's responsibility for his criminal conduct.

He has not offended for 17 years and, as his lawyer points out, but for his less serious offending against one female complainant he would not have offended for 25 years. The defence contends this demonstrates self rehabilitation.

The applicant resigned from active ministry in the church in 1988 and general facilities were withdrawn by the Bishop in

September 1999 prior to the applicant's resignation from the priesthood in October 2000.

The applicant contends that the sentence was manifestly excessive in that the learned primary Judge failed to give proper weight to the circumstances surrounding the offending conduct, the timely plea and cooperation with the administration of justice, the applicant's remorse, age, poor health, the delay in prosecution, the maximum penalty, the applicant's efforts at rehabilitation and the absence of any prospect of re-offending and relevant comparable cases.

The applicant particularly emphasises the submission that as the maximum penalty for the offences of indecent dealing was in these circumstances seven years imprisonment and the learned primary Judge correctly recognised that these offences were at the less serious end of the spectrum of such offending then the primary Judge erred in imposing a head sentence of six years' imprisonment so close to the statutory maximum, especially where a timely guilty plea had been entered at the committal proceedings which were by full hand-up statements without requirement the complainants to give evidence.

The submission, however, does not give proper weight to the large number of offences which the six year effective sentence plainly reflects; it was clearly imposed instead of a number of cumulative sentences.

Additionally the applicant emphasises the offences were revealed by the applicant in a confession to a journalist when confronted with the allegations. The applicant told the journalist he did not report the offences because this was a matter for the complainants themselves, who may not wish to go through the pain of making a public complaint. He told the journalist there were between three and 10 victims and he painted them as willing protagonists, although he did accept that the offences were entirely his fault and said he in no way blamed the children for his commission of the offences.

As a result of publication of the article in The Courier-Mail in June 2002 and television exposure on a current affairs program a number of complaints were made to police and the applicant was then arrested and charged.

The particularly serious aspects of these offences are not only their large number, the large number of complainants and the lengthy period over which they were committed, but also that the applicant was in a position of trust and abused the authority of his position as priest in the church to overbear the children and to commit the offences. As has been pointed out in argument today, for example, he often blessed the children after committing these offences upon them.

A number of lengthy victim impact statements were tendered which graphically illustrated, often through poetry, the devastating impact of the actions of this paedophile priest on his child victims. The applicant often had a close friendship

with the parents of the victims and the abuse frequently occurred in the precincts of the church, a place where the children should have been protected, nurtured and safe.

Medical reports were tendered setting out the applicant's severe heart problems which required coronary artery bypass graft surgery on 25 August 2003. He also suffered an ulcer on the left leg which was slow to heal. A report of 6 October 2003 from cardiologist, Dr Roger Wilkinson, noted that the applicant was making an excellent recovery and had no residual symptoms. The wounds had healed nicely and he was back to reasonable fitness. He takes regular medication and will need regular assessment. In Dr Wilkinson's report of 8 October 2003 he noted that the applicant is very elderly, had undergone major surgery and would not stand up well, physically or emotionally, to prolonged incarceration and that he will continue to need ongoing care and attention in prison.

There was, however, no evidence before the sentencing Court to suggest that the applicant would not be able to have his medication in prison or that he could not be adequately cared for within the prison system.

Defence counsel tendered at sentence an affidavit from the applicant in which he referred to his hope that in speaking to the media his publicised acceptance of wrong doing would assist the healing process for the complainants. He emphasised that he had been shamed and vilified by his exposure and virtually became a prisoner in his own home,

which he had been afraid to leave. Completely unfairly, his family, especially his brother, was forced to share this vilification. He said he first suffered a heart attack in 1981 and a second heart attack in August 2003 which necessitated his more recent surgery. He said that on three occasions during his ministry with the church he was summonsed to meetings with the Bishop to discuss his offending and was candid in disclosing what he did. After the first two occasions he was moved to another provincial centre. After the third occasion in early 1990, having already ceased active ministry in the church, he attended counselling in New South Wales, which he found helpful in giving him insight into the effect of his conduct on the children. This encouraged him to refrain from any future contact with children. In the early 1990s he was approached by one complainant, openly discussed what had occurred and sought the complainant's forgiveness. Since he left the ministry in 1988 he said he has ceased all contact with children and has concentrated on personal devotion and prayer.

A number of references were tendered which supported the applicant's contention that he had removed himself from all contact with children so that he was unlikely to further re-offend.

References also attested to his otherwise good character. As the applicant's lawyer rightly contends, it is a significant factor that the maximum penalty for the more serious offences is seven years imprisonment. Had these offences been

committed in more recent times, the maximum penalty would have been as high as 20 years imprisonment.

There is no question that the lesser applicable maximum penalty must be reflected in the penalty imposed here. The comparable sentences relied on by the prosecution of *R v Benetto* CA number 367 of 1997, 2 December 1997, and *R v Lynas* [2001] QCA 377, CA No 117 of 2001, 10 September 2001 are of no real assistance, because the maximum penalty applicable in Benetto was 10 years imprisonment, and in Lynas, 14 years imprisonment.

Nor is the case relied on by the respondent of *R v Manns* CA No 155 of 1998, 15 July 1998 of much assistance: the facts are quite different and, unlike the early plea of guilty here and the considerable co-operation with the administration of justice given by this applicant, Manns was a late plea after the commencement of the trial and after the first victim had given evidence.

Of more comparability on the facts are the cases of *R v Wright* [1996] QCA 104, CA No 10 of 1996, and *R v C; ex parte A-G (Qld)* [2003] QCA 510; CA No 328 of 2003, 13 November 2003. Wright pleaded guilty to 17 counts of indecency with children, 13 involving girls under 12, four involving girls under 16, three counts of gross indecency with a boy under 16, and one count of indecent assault on a young aboriginal woman who was about 18 years old.

Wright was sentenced on the basis that the maximum penalty for the offences of indecency was five years imprisonment. He was sentenced to three years imprisonment and applied for leave to appeal against sentence principally on the failure of the sentencing Judge to recommend early parole. Wright was an assistant parish priest, and later a full-time chaplain in an aboriginal community. The offences occurred in assorted places, including within the precincts of the church. Generally speaking, the seriousness of his actions was comparable to that of this applicant, although there are here far more counts and victims, and the offences occurred over a much longer period. As here, Wright used the authority of his position to accomplish his purpose with the young complainants, and his conduct had a lasting impact on them. Wright was 58 at sentence and was understandably suffering from feelings of guilt and personal failure, and was not considered likely to re-offend as he was no longer employed as a parish priest. He too had undergone counselling and made efforts at rehabilitation. Accepting that the maximum penalty was only five years, this Court determined that the sentence of three years imprisonment was within range, although the Court observed that a longer term of imprisonment could have been imposed by making cumulative sentences and adding a recommendation for parole to produce the same effective result.

C is a more recent matter. In that case, the Attorney-General appealed against sentences of three and a half years imprisonment, suspended after 14 months for an operational

period of four years, for 34 counts of indecent dealing to which *C* pleaded guilty. The offences occurred between January 1973 and December 1981 in a country town where C was a parish priest, associated with the school attached to his church. One victim was aged between four and six, and another between six and seven, whilst the remainder were between eight and 12. Twenty children were involved, and the offending occurred, as here, within the precincts of the church. C fondled his victims on the breast and buttocks areas, sometimes under the underpants. The most invasive conduct was on two occasions when he digitally penetrated a girl's vagina. The Court noted the gross betrayal of trust and the effect on the victims. C was remorseful, but initially denied sexual impropriety when the offences came to light in 2000, 20 years after their commission. C had rehabilitated himself by the time of sentence and had left the church and was in a stable adult relationship. A psychiatrist described his behaviour as far removed from predatory paedophilic behaviour, but rather a result of retarded sexual development, making it unlikely he would re-offend in future. He was publicly humiliated by his arrest and conviction. The Attorney-General did not assert that the sentence of three and a half years imprisonment, but contended that its early suspension after 14 months made it manifestly inadequate. The maximum penalty for the most serious offences committed by C was seven years. The Court in *C* considered that the offences in *Wright* were more serious and that the mitigating factors including the period since last offending, his efforts at rehabilitation, and his other good community work supported the sentence imposed.

It is important to remember that *C* was an Attorney's appeal, and this Court will only interfere with a sentence on an Attorney's appeal in the clearest of cases. *C* is therefore of limited use in determining whether the applicant's sentence here is manifestly excessive.

The applicant's offending was more serious than in either *Wright* or *C* because of the large number of offences involved, and on any view, required a heavier effective penalty. The sentence imposed is not simply one of six years, but it is six years with a recommendation for eligibility for parole after serving two years, so that the applicant will be eligible for release just six months later than Wright was able to be released. The applicant committed a larger number of offences than Wright, and that must be reflected in his sentence. While it is true that no individual offence was at the more serious end of the spectrum for offences of this kind, the large number of offences has the result that the six year head sentence imposed here was not manifestly excessive. Cumulative lesser sentences could easily have been imposed on each of the three discreet series of offending. It should also be remembered that Wright was sentenced on the basis that the maximum period of imprisonment on any one count was five years, whereas here that period is seven years imprisonment.

After balancing the very serious aspects of the applicant's lengthy and multiple offending with the numerous mitigating features, I am satisfied that the sentence imposed here, which

I emphasise includes the early recommendation for parole after two years, adequately reflects the mitigating circumstances, and is within the proper range. I would refuse the application for leave to appeal against sentence.

McPHERSON JA: I agree. I would add, only by way of emphasis, that some of the complainants were altar boys and the applicant used the opportunities presented by the performance of their functions to commit a number of these offences. The order should be as the President has stated it.

MACKENZIE J: I agree with the reasons of the President.

THE PRESIDENT: The order is the application for leave to appeal against sentence is refused.