SUPREME COURT OF QUEENSLAND

CITATION:	*R v O'Shea* [2011] QCA 18
PARTIES:	**R** **v** **O'SHEA, Paul Gerard** (applicant)
FILE NO/S:	CA No 227 of 2010 DC No 799 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED EX TEMPORE ON:	16 February 2011
DELIVERED AT:	Brisbane
HEARING DATE:	16 February 2011
JUDGES:	Margaret McMurdo P and Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring to the orders made
ORDERS:	**1. The application to adduce further evidence is granted.** **2. The application for leave to appeal against sentence is granted.** **3. The appeal is allowed to the limited extent of setting aside the parole eligibility date and instead ordering that the sentence be suspended from 16 February 2011, with an operational period of six months.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – ADMISSION OF FRESH EVIDENCE – IN GENERAL – where the applicant sought to adduce evidence that he is unable to obtain parole because he does not have an address in Queensland – where some of the evidence was not available at sentence – whether the admission of the evidence would cause the court to form the opinion that some other sentence should have been passed – whether it is in the interests of justice to admit the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS OF INTERFERENCE – FRESH EVIDENCE AND EVENTS OCCURRING AFTER SENTENCE – where the applicant was convicted of indecent dealing with a child with a circumstance of aggravation – where the applicant was

	sentenced to six months imprisonment with an order that he be eligible for parole at the halfway point – where fresh evidence was adduced relating to the applicant's inability to obtain parole – whether it was in the interests of justice to re-sentence the applicant on the basis of the new evidence
	Criminal Code 1899 (Qld), s 668E(3)
	R v Maniadis [1997] 1 Qd R 593; [1996] QCA 242, followed *Ratten v The Queen* (1974) 131 CLR 510; [1974] HCA 35, followed
COUNSEL:	S T Courtney for the applicant M J Copley SC for the respondent
SOLICITORS:	Justin Crosby Solicitors for the applicant Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: The applicant was convicted after a jury trial of indecent dealing with a 12 year old friend of his daughter in May 2007 with a circumstance of aggravation that at the time she was in his care. He was sentenced to six months imprisonment with an order that he be eligible for parole on 7 December 2010. He has abandoned his appeal against conviction but has applied for leave to appeal against his sentence. He also seeks to adduce further evidence in this application.

The applicant was 40 at the time of the offence and 43 at sentence. He had no prior convictions.

The facts of his offending were as follows. In May 2007 the applicant was separated from his wife. She was attending a function in Brisbane and asked him to care overnight at her home for their children and the complainant child. When the applicant heard that his wife was attending the function with her new partner, he drank heavily and became intoxicated and behaved badly.

On three occasions during the evening he entered the bedroom his daughter and the complainant were sharing. He tried to engage them in conversation but they asked him to leave. On the last occasion, he sat on the complainant's bed, moved his hand under the

covers and touched her in the area of the groin on the outside of her clothes. She sat up "really fast" so that the touching was momentary. He did not attempt to repeat his shabby conduct.

A victim impact statement tendered at sentence suggested that the offending has had a detrimental effect on the young complainant at a critical time in her personal, emotional and sexual development.

The prosecutor at sentence emphasised the youth of the victim and the applicant's abuse of trust. The applicant desisted only when the complainant resisted. He had not shown remorse. The complainant was cross-examined extensively in her pre-recorded evidence at trial. A sentence of about six months imprisonment was appropriate.

Defence counsel emphasised that the applicant had no criminal convictions. He worked in a gold and copper mine in Indonesia training Indonesian miners. Whilst a head sentence of between four to six months was appropriate, the judge should completely suspend it or suspend it after a brief period to enable the applicant to continue his work in Indonesia.

The Judge made the following comments in his sentencing remarks. The applicant's conduct warranted a sentence of imprisonment. His conduct had a reasonably profound impact upon the victim. This was understandable because the applicant was a trusted adult who had behaved badly. The case was not a serious example of the offence. The applicant desisted when it became clear that the complainant understood what he was doing. He was intoxicated and emotional but that did not excuse his behaviour towards a child in his care. This was not within the category of exceptional cases where a period of actual imprisonment was not required. The judge imposed a six month term of imprisonment setting the parole eligibility date on 7 December 2010, that is, at the halfway point, noting that it was a matter for the parole authorities whether it was acted upon.

The further evidence upon which the applicant seeks to rely is to the following effect. The judge's parole eligibility date has not been acted on. The applicant has been unable to obtain parole because he does not have an address in Queensland. His full time employment is in Indonesia. His ability to obtain accommodation in Queensland has become more difficult following the accommodation crisis resulting from the recent floods. He has been told by an officer in the Sentencing Management area of Corrective Services that his full time sentence will now expire prior to any fresh parole application being considered. If he is able to retain his employment in Indonesia he may be able to continue to meet his significant financial obligations, presently in arrears. These include financing a mortgage on an investment unit in Victoria, a personal loan and bank card and credit card debts.

This Court has a discretion to receive evidence of this kind. In *R v Maniadis* [1997] 1 Qd R 593; [1996] QCA 242, Davies JA and Helman J, with Fitzgerald P agreeing, noted that there was power to admit evidence in an appeal against sentence where this was in the interests of justice. The power was at least as wide as when admitting evidence in an appeal against conviction. The discretion will not be commonly exercised, but an appeal court may admit new evidence even where it is not fresh in the sense discussed in *Ratten v The Queen* (1974) 131 CLR 510 if the admission of the evidence causes the court to form the "opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed": see s 668E(3) *Criminal Code* 1899 (Qld). I consider that the evidence now sought to be adduced by the applicant, some of which was not available at sentence, is helpful to this Court in determining whether the sentence imposed at first instance should have been passed. Mr M J Copley for the respondent has in his usual and even-handed way conceded that in the unique circumstances pertaining here it is appropriate to grant the application to adduce further evidence. I would therefore grant that application.

The sentence imposed was certainly not manifestly excessive. Had the applicant been released on parole at about the time he became eligible, this application would not have been brought. The short sentence imposed means that any period of parole would have had limited benefit in terms of supervising and reforming the applicant. The amount his sentence would now be shortened is only a matter of weeks. Had the primary judge been aware of the information now before this Court, that the applicant was ineligible for parole because he did not have a Queensland address, there seems no particular reason why the Judge would not have suspended the sentence at the halfway point. In the unusual circumstances pertaining in this case, I consider it is in the interests of justice to receive the further evidence which was not before the primary judge and to now re-sentence the applicant on the basis of it. As I have stated, the respondent does not oppose that course.

I would grant the application to adduce further evidence. I would also grant the application for leave to appeal against sentence and allow the appeal to the limited extent of setting aside the parole eligibility date and instead I would order that the sentence be suspended from today, 16 February 2011, with an operational period of six months.

FRASER JA: I agree.

CHESTERMAN JA: Yes, I agree. What makes the case special is that the applicant could never become eligible for parole so the order made by the judge could never take effect. I agree with the President's reasons and the orders she proposes.

THE PRESIDENT: The orders are as I've proposed.