SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lynch* [2011] QCA 309
PARTIES:	**R** **v** **LYNCH, Alfred** (applicant)
FILE NO/S:	CA No 228 of 2011 DC No 531 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	4 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	1 November 2011
JUDGES:	Muir and Chesterman JJA and Margaret Wilson AJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted;** **2. Appeal against sentence allowed;** **3. Sentence varied by reducing the term of imprisonment from 15 months to nine months;** **4. Sentence varied by omitting the order fixing 25 November 2011 as the parole eligibility date;** **5. Declare that the 16 days spent in pre-sentence custody between 8 June 2010 and 23 June 2010 be taken to be time already served under the sentence;** **6. Order that the term of imprisonment is to be suspended after three months with an operational period of three years.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to indecent treatment of a child under 16 – where the applicant was sentenced to 15 months' imprisonment – where the parole eligibility date was fixed at 25 November 2011 – where the applicant seeks leave to appeal against sentence – whether the sentence imposed was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where counsel for the applicant submitted that the parole eligibility date was illusory as the applicant was required to complete a sexual offenders program which could not be completed before the parole eligibility date – whether in setting a parole eligibility date the sentencing judge denied the applicant procedural fairness

Penalties and Sentences Act 1992 (Qld), s 9, s 92

R v Denboon [1993] QCA 357, considered

COUNSEL: S A Lynch for the applicant
S P Vasta for the respondent

SOLICITORS: Walker Pender Group for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** I agree with the reasons of Margaret Wilson AJA and with the orders proposed by her.

[2] **CHESTERMAN JA:** I agree that the orders proposed by Margaret Wilson AJA should be made for the reasons given by her Honour.

[3] **MARGARET WILSON AJA**: On 16 March 2011 the applicant pleaded guilty to indecent treatment of a child under 16, and on 12 August 2011 he was sentenced to 15 months' imprisonment. Sixteen days' pre-sentence custody was declared time already served. His parole eligibility date was fixed at 25 November 2011.

[4] He seeks leave to appeal against the sentence on the grounds that it was manifestly excessive and that the sentencing judge erred in not affording him procedural fairness.

The facts

[5] The complainant was a girl aged 14 at the time the offence was committed. She lived in suburban Ipswich. One afternoon she wanted to catch a bus into Ipswich from her home. She missed the bus and was waiting at the bus stop when the applicant, who was then aged 48, pulled over in his red hatchback. He asked her if she wanted a lift into town. She declined, but he kept asking her. After a while she accepted his offer.

[6] In the car the applicant started talking about girls swimming on the Gold Coast and commenting on their bodies. He told her how pretty she was and how nice her body was. She asked him to take her to the train station, but he said no, that he would drop her off somewhere else. They turned into the Transit Centre car park, which was out in the open. As they stopped, the applicant reached over and grabbed her on the breast forcefully. She pushed him away, but he grabbed her shirt around the stomach area. She pushed him away again, but he grabbed her arm. She managed to pull away and get out of the car, although as she was getting out, the applicant pulled at her shorts. She memorised the number plate of the applicant's car and reported the incident to police.

Antecedents

[7] The applicant was aged 50 at sentence. He was a married man with five children aged from 22 to 10 years. He was a qualified metal machinist. He had served in the Air Force for 12 years, and since his discharge he had always been gainfully employed.

[8] He had no criminal history.

[9] At the time of the offending he was experiencing some sexual frustration in his marital relationship. That may have explained his conduct, but it was no excuse for it.

Remorse and co-operation

[10] The applicant showed remorse, and acknowledged that his behaviour had been totally unacceptable.

[11] There was a full hand-up committal, without any cross-examination. A timely plea was entered some five months before the sentence – thus saving the complainant the indignity of giving evidence and saving the criminal justice system the time and expense associated with a trial.

[12] The applicant pleaded not guilty to two other offences involving another complainant. He was found not guilty of one of these, and there was a directed verdict of not guilty of the other. Upon the conclusion of the proceedings relating to the second complainant, the applicant was re-arraigned in relation to the indecent treatment charge presently before this court. Again he pleaded guilty, and he was thereupon sentenced.

[13] He was publicly shamed in local newspaper articles. He had to sell his house to pay legal costs associated with the charges.

[14] When he was granted bail it was on condition that he not drive a motor vehicle. After a time that condition was varied: he was prohibited from driving unaccompanied. As a result, his wife had to drive him to and from work.

[15] He was a member of the Church of Jesus Christ of the Latter Day Saints. There was a prospect of the church offering him counselling, which he was willing to undertake. There was also a possibility he would be expelled from the church because of his offending.

Principles

[16] The maximum penalty which might have been imposed was 14 years' imprisonment.[1]

[17] By s 9(2)(a) of the *Penalties and Sentences Act* 1992, in sentencing an offender a court must have regard to the principles that a sentence of imprisonment should only be imposed as a last resort and that a sentence which allows a prisoner to remain in the community is preferable. However, subsections (5), (5A) and (6) provide –

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1 *Criminal Code* s 210(1)(a) and (2).

"(5) Also, in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years—

(a) the principles mentioned in subsection (2)(a) do not apply; and

(b) the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.

(5A) For subsection (5)(b), in deciding whether there are exceptional circumstances, a court may have regard to the closeness in age between the offender and the child.

(6) In sentencing an offender to whom subsection (5) applies, the court must have regard primarily to—

(a) the effect of the offence on the child; and

(b) the age of the child; and

(c) the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another; and

(d) the need to protect the child, or other children, from the risk of the offender reoffending; and

(e) the need to deter similar behaviour by other offenders to protect children; and

(f) the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community; and

(g) the offender's antecedents, age and character; and

(h) any remorse or lack of remorse of the offender; and

(i) any medical, psychiatric, prison or other relevant report relating to the offender; and

(j) anything else about the safety of children under 16 the sentencing court considers relevant."

Need for actual imprisonment

[18] Before the sentencing judge the prosecutor submitted that a sentence of 12 to 18 months' imprisonment would be appropriate. She submitted that, taking the plea into account, the applicant should be required to serve four to six months' actual imprisonment. She submitted that the applicant was in need of supervision because he had shown sexual interest in a child, and that accordingly he should be given a parole eligibility date rather than a partial suspension of his sentence. In the alternative, she submitted that he might be ordered to serve four to six months actual custody and then be released on probation for up to three years.[2]

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2 *Penalties and Sentences Act* 1992 (Qld) s 92.

[19] Counsel who then appeared for the applicant submitted that no actual imprisonment was called for. Alternatively, he submitted, any term of imprisonment should be "very minimal" – about three months, followed by a very lengthy period of probation to ensure he received supervision in the community.

[20] The sentencing judge said –

> "For you to not be sent to gaol today would require me to find in this case that there are exceptional, that is unusual, or extraordinary circumstances.
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> ...
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> I have considered all of the factors in this case, all of the submissions made, your plea of guilty and the other matters to which reference was made by Mr Seaholme as well as by Ms Logan [the prosecutor]. But I am unable to see or to accept, and am not satisfied that, there are any exceptional features or circumstances in this case as would justify me in not imposing a period of actual imprisonment."

[21] Before this court, counsel for the applicant properly conceded that there were no exceptional circumstances such as to warrant no actual term of imprisonment under s 9(5).

Was there a denial of procedural fairness?

[22] The applicant's complaint is, in effect, that the parole eligibility date fixed by the sentencing judge is illusory. His counsel submitted that he will be required to complete a sex offenders program before being released on parole and that this cannot not be done by his parole eligibility date.

[23] The applicant's counsel sought to ventilate this issue before the sentencing judge, but he did not adduce any relevant evidence. He submitted –

> "Part of the problem with your Honour placing him in prison with an eligibility for release, albeit after four months or so, would be that he would not get parole. He would have to undergo the Sexual Offenders Treatment Program. That program can incur a waiting list of up to nine months to get onto the program and that program can in fact take some six months to complete.
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> That is a program that is available within the community, a program available through Corrective Services under the auspices of a supervised order."

[24] The sentencing judge refused to take this into account on the strength of assertions from the bar table. His Honour said –

> "That is a submission that I've heard on a number of occasions in Court over the years. But have to say, with all respect, that it is a submission that as far as I'm aware is not supported by factual evidence. It may be that offenders in relation to sexual matters who are given a parole-eligibility date do not receive parole. I don't know. Comments are made that the sexual offenders' treatment programme, which is available for offenders in custody, has a lengthy waiting list. This again is a submission that I have heard

> over a long period in Court, but as far as I'm aware, I've not seen any evidence which supports that. If it is the case that offenders who are sentenced for sexual offences ordinarily do not receive parole at their parole-eligibility date, given that they otherwise behave themselves in prison, one would think that that would be the subject of an evidence-based submission rather than a submission from the Bar table."

[25] On the hearing of this application the applicant sought leave to read an affidavit by the Acting Manager of Offender Development at the Wolston Correctional Centre. Counsel for the respondent did not oppose leave being granted, although he submitted that the affidavit did not take the matter further than it was before the sentencing judge. Leave was granted.

[26] The effect of the further evidence is as follows –

(a) The applicant commenced the Preparatory Program for Sexual Offending on 17 October 2011. He has done three of the 12 sessions in that program, and is expected to complete the program in four to four and a half weeks' time.

(b) Upon completion of the Preparatory Program, he "will be required" to undertake the Moderate Intensity Intervention Program. But the deponent also said that he "has been recommended" to complete this program.

(c) The Moderate Intensity Intervention Program would take three to five months to complete, depending on a specialised needs assessment. It could be completed in prison or in the community, and there have been instances of prisoners being granted parole on condition that they complete it in the community.

(d) There is a rolling list of persons for whom the Moderate Intensity Intervention Program has been recommended, and acceptance into it depends on availability at the time the Preparatory Program is completed.

[27] Whether parole is granted to a prisoner who is eligible for it is a matter for the Parole Board to determine, and it is not for a court to predict how the board will exercise its discretion.

[28] I do not accept that there was any denial of procedural fairness by the sentencing judge. It was open to the applicant's counsel to adduce evidence before his Honour, but he did not do so. It is no answer that this court has on occasion recognized some of the factors sought to be relied on without evidence having been called. The circumstances of each case must be considered, in particular whether there was any dispute about the factors taken into account.

[29] Moreover, there is still no evidence before the court that the board routinely, or even often, requires the completion of these courses before granting parole to a prisoner such as the applicant.

Was the sentence manifestly excessive?

[30] The sentencing judge said –

> "Your behaviour, I accept, was predatory. It may have been momentary or fleeting, but it was predatory. She was 14 and you were 48 at the time."

[31] That was a fair description of the behaviour. It was opportunistic conduct at the low end of the range of this type of offending. There was a persistence in the conduct, but no suggestion of touching inside the girl's clothing.

[32] The complainant was no doubt distressed by what occurred, and understandably so. But there was no evidence of any substantial physical or psychological harm having a long term effect on her. A victim impact statement was not tendered before the sentencing judge.

[33] No truly comparable case was cited.

[34] Counsel for the respondent referred to *R v Denboon*,[3] which was a more serious case. There the offender pleaded guilty to three offences, all committed on the same day and in the course of a single continuing episode – indecent treatment of a girl under 16, wilfully exposing the same girl to indecent acts, and wilfully exposing her to an indecent videotape. The same circumstance of aggravation was charged with respect to each offence – namely, that the girl was under his care. The complainant was aged 14 at the time and the offender was 46. She was a close friend of a girl in the offender's household, which led to her being in his care on the day in question. The offender had recently moved his household from Brisbane, which was where the complainant lived, to Stanthorpe. With the consent of the complainant's parents, arrangements were made for him to drive her to Stanthorpe for a weekend visit. He picked her up and drove her back to his Brisbane house. When they arrived, he suggested having a bath together. She was hesitant. She entered the bathroom alone and got into the bath after removing some clothes, but keeping her T-shirt on. The offender walked in wearing only his underpants. He tried to pull her shirt up, but she continued to try to hold it down. As she got out of the bath, she saw that the offender had no clothes on and his penis was presented to her in full view. After making suggestive comments to her, he said he wanted to show her something, and went and got a video which he proceeded to play on a nearby television set. She took a quick look at it, saw enough to persuade her that it was an indecent video, and quickly went out of the front door. The maximum penalty which might have been imposed was 10 years' imprisonment.[4] The offender was sentenced to 18 months' imprisonment with a recommendation that he be considered eligible for parole after six months. In his reasons for refusing the offender's application for leave to appeal against sentence, Macrossan CJ referred to the applicant's persistence, that he breached of the complainant's trust and took advantage of his dominant situation in her mind, and that he subjected her to an episode which continued long enough to cause her extreme upset.

[35] In my view the head sentence of 15 months' imprisonment in the present case was manifestly excessive in all the circumstances. I would substitute a sentence of nine months' imprisonment with a declaration that the 16 days' pre-sentence custody be deemed time already served under the sentence.

[36] The timely plea of guilty had to be taken into account. This is often done by fixing parole eligibility or partially suspending the term after one-third of it has been served. I see no reason not to follow that course in the present case.

[37] Given the applicant's age, that the offending was quite out of character, and his expressed willingness to undertake counselling, I think the risk of re-offending can

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3 [1993] QCA 357.

4 The date of the offending is not apparent from the reasons for judgment. However, counsel for the respondent informed the Court that this was the maximum penalty applicable at the time.

be adequately catered for by a suspension of the sentence after three months, with an operational period of three years.

Conclusion

[38] I would make the following orders:

1. Application for leave to appeal against sentence granted.

2. Appeal against sentence allowed.

3. Sentence varied by reducing the term of imprisonment from 15 months to nine months.

4. Sentence varied by omitting the order fixing 25 November 2011 as the parole eligibility date.

5. Declare that the 16 days spent in pre-sentence custody between 8 June 2010 and 23 June 2010 be taken to be time already served under the sentence.

6. Order that the term of imprisonment is to be suspended after three months with an operational period of three years.