SUPREME COURT OF QUEENSLAND

CITATION:	*R v Waszkiewicz* [2012] QCA 22
PARTIES:	**R** **v** **WASZKIEWICZ, Marek Stanislaw** (applicant)
FILE NO/S:	CA No 301 of 2011 DC No 164 of 2011 DC No 356 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	24 February 2012
DELIVERED AT:	Brisbane
HEARING DATE:	9 February 2012
JUDGES:	Chief Justice, White JA, Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – SENTENCE MANIFESTLY EXCESSIVE – where applicant pleaded guilty to four counts of making child exploitation material, one count of possessing child exploitation material, and two counts of indecent treatment of a child under 16 – where applicant sentenced to two years imprisonment in respect of each of the counts of indecent treatment, with parole eligibility after ten months – where applicant contends that ten months was unlikely to be sufficient time to complete a sex offender treatment program – where applicant contends that the parole eligibility date was therefore illusory as parole was unlikely to be granted without completion of such a program – whether sentence ought to have been partially suspended on one offence with a long period of probation on another – whether the sentence was manifestly excessive in all the circumstances *Corrective Services Act* 2006 (Qld), s 180(2)(b) *Criminal Code* 1899 (Qld), s 210(1)(a), s 228B(1), s 228D *Penalties and Sentences Act* 1992 (Qld), s 13(1), s 160D

R v Cunningham [2008] QCA 289, discussed
R v Lloyd [2011] QCA 12, discussed
R v Widdon [1998] QCA 166, cited

COUNSEL: T A Ryan for the applicant
S P Vasta for the respondent

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

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of White JA. I agree that the application should be refused, for those reasons.

[2] **WHITE JA:** On 4 October 2011 the applicant pleaded guilty to four counts of making child exploitation material contrary to s 228B(1) of the *Criminal Code*, one count of possessing child exploitation material pursuant to s 228D of the *Criminal Code* and two counts of indecent treatment of a child under the age of 16 years pursuant to s 210(1)(a). He was discharged with respect to the remaining two counts on the indictment.

[3] Sentence was adjourned and on 29 October 2011, the day of the sentencing hearing, the applicant pleaded guilty to three summary charges relating to the possession of cannabis seeds, possession of a utensil for smoking a dangerous drug and the possession of restricted items, namely, three Chinese throwing stars.

[4] On 2 November 2011 the applicant was sentenced to 12 months imprisonment wholly suspended for an operational period of four years on counts 1 to 5 (making and possessing child exploitation material). With respect to counts 6 and 7 (indecent treatment) the applicant was sentenced to two years imprisonment on each count with a parole eligibility date of 2 March 2012. He was convicted and sentenced to imprisonment until the rising of the court in respect to the summary offences. Declarations of pre-sentence custody were made for the period 14 August 2010 to 2 September 2010 (20 days) when he was released on bail and 22 May 2011 to 2 November 2011 (165 days) after he was returned to custody, as time served under the sentences. All sentences were to be served concurrently. The effective parole recommendation was after serving 10 months of the two year sentences.

[5] The applicant does not complain about the sentences imposed for counts 1 to 5 nor the head sentence of two years for counts 6 and 7, but contends that because the parole release eligibility date was illusory the sentence imposed was manifestly excessive, making no allowance for the applicant's pleas of guilty as required by s 13(1) of the *Penalties and Sentences Act* 1992.

[6] The applicant was a mature man born in August 1969. He was aged 42 years at the time of sentence and between 38 and 41 during the offending which was charged as occurring between January 2008 and August 2010. The complainant was a boy aged between 11 and 13 when the offending occurred. The applicant suffers from a debilitating condition and is confined to a wheelchair.

[7] The applicant's only criminal history concerned his appearance on 12 April 2011 in the Townsville Magistrates Court when he was sentenced to six weeks imprisonment for three breaches of bail conditions which had been imposed when he was arrested and charged with these offences.

Circumstances of the offences

[8] The sentence hearing proceeded on a schedule of facts.[1] The applicant was a long time family friend who had had a short relationship with the complainant's mother some time in the past. The applicant rented a house and sublet rooms to adult boarders. The house was frequented by several teenage boys as an informal drop-in shelter. The complainant would visit the applicant and gain access to his upstairs bedroom through a laundry chute in the applicant's bedroom cupboard. He was able in that way to enter and leave the house without any of the other occupants seeing him.

[9] In 2009 the complainant boy's mother ceased communication with the applicant because she was upset at the amount of time he was spending with her son. In 2010 she forbade her son from seeing the applicant because the applicant was supplying him with cigarettes. Thereafter the boy spent nights away from his mother, telling her that he was at his friend's place but often he would spend the night with the applicant in his bed.

[10] The offences the subject of counts 1 to 4 (making child exploitation material) involved the applicant giving the complainant money or gifts in return for the boy either taking photographs of his own penis and providing those photographs to the applicant or allowing the applicant to take a photograph of the boy naked. The four counts are based on the images found on the applicant's mobile phone on 12 August 2010. Three of the four images were photos of the complainant's penis. The fourth showed the complainant lying naked on the applicant's bed with a semi-erect penis.

[11] Count 5 is constituted by the possession of those images.

[12] Count 6 concerned an act in which the applicant put the complainant's penis into his mouth and took a photograph of the act.

[13] Count 7 concerned the applicant performing oral sex on the complainant until the complainant ejaculated. The applicant swallowed the ejaculate. On that occasion the applicant had supplied alcohol to the boy who, at the time of the offence, was drunk.

[14] All seven counts are thus closely connected.

[15] On 6 August 2010 the complainant ran away from home after telling his mother that he was going on a weekend camping trip with his friend's family. A social worker located him at the applicant's house three days later and returned him to his mother. The boy ran away again almost immediately and his mother reported him missing to police on 10 August 2010. On 12 August 2010 police attended at the applicant's house seeking the boy. The applicant told them he had not seen the boy for three days. However, after leaving the house police received information that the complainant was actually at the house but had jumped the back fence and hidden. They re-entered the house and located the boy hiding in the applicant's bedroom wardrobe. He told police that the applicant had told him to jump the fence and hide and had whistled when the coast was clear. It was on that occasion that police seized the applicant's mobile phone and found the images the subject of counts 1 to

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1 AR 46-50.

5. Police also located a list of instructions and markings on a road map for the boy to follow to escape the house and travel to a safe house to avoid detection by his parents or the police.

[16] Police also located two bongs, some cannabis seeds and a set of three Chinese throwing stars, which resulted in the three summary charges.

[17] The applicant was arrested on 14 August 2010 after the boy was interviewed. He told police that he had been staying at the applicant's house almost every weekend, during which time he was supplied with alcohol by the applicant which made him drunk. He told police that the applicant gave him money, cigarettes, clothing, PlayStation consoles and games as well as mobile phone credit. He was bribed in that way to get the photographs. He said the applicant would always want to touch and kiss him so the boy started getting his own friends to visit. The applicant persuaded him to drop his girlfriend because it was "cheating" on the applicant. The complainant described the specific acts the subject of charges and explained that he had given the applicant a "celebration" card because the applicant had threatened to kill himself.

[18] The applicant's mobile phone contained hundreds of text messages to and from the complainant of express declarations of sexual love for the complainant.

[19] Two of the adult boarders told police that the applicant had asked them to lie to police if they were questioned about whether the boy had visited or stayed at the house.

[20] The applicant had paid for, and acted as guardian, so the boy could get his tongue pierced. He was overheard telling the boy that because he had just been pierced it would be a few days before he could perform oral sex.

Conduct post-arrest

[21] Of significance is the applicant's post-arrest conduct. In April 2011 police were investigating another matter in Cairns. As part of that investigation they spoke to an adult couple in Townsville who had rented a room to the complainant. They told police that the applicant had rented the room for the boy, paid the rent and spent most days at the house with him. Eventually they asked the applicant not to spend so much time there. Police went to the applicant's house. The complainant had been present but the applicant told him to leave quickly when he noticed the police. The boy left the house and hid in the backyard. He had stayed the previous night with the applicant. When police located and re-interviewed him he told them that he was still in regular contact with the applicant, receiving gifts and money. He said they would meet at night and when he had asked the applicant for money the applicant had said that he could withdraw his statement to keep the applicant from going to prison for a lengthy period. It seems that the complainant did attend at a police station without adult supervision to do so but police did not act on his request.

Submissions on sentence

[22] The sentencing judge was told that three witnesses were cross-examined at the committal on 15 February 2011 - two former housemates of the applicant and the complainant child's mother. Her cross-examination was to the effect that the complainant was lying. There had been two listings for the pre-recorded evidence

of the complainant. On the first occasion he had attended at the DPP's office, watched the three video tapes of his police interviews and on the morning of the anticipated hearing the applicant's legal representatives withdrew. On the second occasion on 4 October the applicant pleaded guilty to counts 1 to 7 and was discharged on counts 8 and 9. The pleas could not, thus, be described as early or timely.

[23] The prosecutor tendered a victim impact statement from the complainant who explained that he had come under the influence of the applicant who had plied him with cigarettes and alcohol before evincing a sexual interest in him. The complainant kept returning "despite the fact that [he] was scared"[2] because of the inducements and because he was allowed to do whatever he pleased. At the time of sentence he had been restored to his family and was endeavouring to abide boundaries and rules. The prosecutor noted the period of over two years with escalation at the end during which the offending conduct occurred; the breach of trust of a family friend; aggravating features included the escape plan for the complainant; the attempt to have people living with him to lie to the police; plans for the complainant to evade not only police but also his parents; the attempt to have the complainant withdraw his complaint; and the manipulative behaviour surrounding the charges. He noted that the applicant had engaged in grooming behaviour and took advantage and exploited a troubled youth in a vulnerable state between the ages of 11 and 13.

[24] The prosecutor noted the difficulty in finding comparable sentences but submitted that anything less than two years imprisonment would be inappropriate. She referred to *R v Cunningham*[3] and *R v Widdon*.[4] She identified, correctly, that the central issue for determination was whether, to reflect the mitigating features, there should be a parole eligibility date or whether the sentence should be suspended. Involved in that submission was the timeframe in which the applicant could participate in a sex offender's treatment program. The prosecutor's submission was that it would be highly desirable for the applicant to undertake such a course and, unless there was evidence of rehabilitation, he should not be released into the community untreated.

[25] Defence counsel conceded that the offending involved the corruption of a vulnerable teenager and that the applicant would be placed on a child offender reporting registry for at least 10 years. However, counsel emphasised that the applicant not be sentenced for what were, essentially, background facts not the subject of charges, and particularly that he had not been charged with maintaining a sexual relationship with a child. Counsel also referred to *R v Lloyd*[5] on the issue of the availability of sex offender treatment programs when a short sentence has been imposed. That case was relied on by Mr Ryan, for the applicant, on this hearing. Counsel contended for a two year head sentence to be suspended after one-third because of the risk the applicant would serve the entirety of his sentence before release and thus would not be given credit for his pleas of guilty.

Approach of the sentencing judge

[26] His Honour reserved his decision for several days until 2 November 2011. He commented, perhaps unfortunately, that had a charge of maintaining a sexual

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2 AR 51.
3 [2008] QCA 289.
4 [1998] QCA 166.
5 [2011] QCA 12.

relationship with a child under the age of 16 been preferred, a more serious penalty would have been imposed. I suggest "unfortunately" because it may have given rise to a perception that his Honour sentenced more severely as a consequence. His Honour, however, said he was sentencing strictly on the basis of the charges, accepting the range contended for by the prosecutor and agreed to by defence counsel. His Honour described the applicant's conduct as "disgraceful" and the applicant as "a manipulative sexual predator".[6] His Honour concluded that the important considerations were general and personal deterrence; community denunciation of the applicant's behaviour and community protection. His Honour did not overlook the applicant's serious illness and that he was confined to a wheelchair. No submission was made that these disabilities would cause particular difficulties or suffering for the applicant if incarcerated. His Honour correctly characterised the pleas of guilty as "not early" noting that the complainant had the ordeal of preparing for a pre-recorded hearing on two occasions. His Honour described counts 6 and 7 as serious examples of indecent treatment of a child warranting condign sentences.

[27] Having made the relevant declarations his Honour said that to give a discount for the pleas of guilty the applicant should be eligible for parole after serving 10 months imprisonment making his parole eligibility date 2 March 2012. His Honour imposed an operational period of four years on the suspended sentences imposed for counts 1-5 as a protection for the community.

Applicant's contention

[28] Mr Ryan submitted that, as a matter of practicality, the applicant has no prospect of being released to parole on 2 March 2012 or even shortly thereafter and the sentencing judge ought to have recognised this by making some different order. As a consequence, recognition of the pleas of guilty by an early parole release eligibility date was illusory.

[29] Mr Bradley Heilbronn, a solicitor with Legal Aid Queensland, deposed that on 12 January and 2 February he spoke to the sentence management co-ordinator at the correctional centre where the applicant is accommodated. He was advised that:

- a prisoner cannot apply for parole whilst an appeal is pending;[7]
- a prisoner cannot apply to undertake a sex offender treatment program whilst an appeal is pending;
- the applicant would not be able to undertake such a program in Townsville but would need to be transferred to the Wolston Correctional Centre;
- assessments for participation in such a program are conducted centrally in Brisbane;
- the applicant cannot be considered for a place in a course while an appeal is pending;
- an offender is not required to complete a sex offender treatment program in order to be granted parole but the Parole Board may make a recommendation that a program be completed first.

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6 AR 39.

7 *Corrective Services Act* 2006, s 180(2)(b).

Mr Heilbronn also deposed that:

- the applicant had applied for parole and the documentation been returned to him (appeal pending);

- at a meeting held with sentence management on 5 January 2012 the applicant was recommended courses – Specialised Assessment for Sexual Offending Program, Getting Started, and Transitional Support Service, none of which he had been able to access (appeal pending).

[30] Mr Ryan contended that it may be inferred that the sentencing judge thought the protection of the community did not require a sex offender treatment program be undertaken prior to release because only four months remained for release on parole when sentenced. His Honour must have considered that the lengthy operational period was a sufficient deterrent.

[31] Mr Ryan submitted that the appropriate order would be to structure a sentence with a probation order for three years on count 5 (possessing child exploitation material) with a condition that the applicant undertake a sex offender treatment program in the community. The sentences for counts 6 and 7 (indecent dealing) should be varied by suspending the two year terms of imprisonment on 2 March 2012 with operational periods of four years. The sentences on counts 1 to 4 would remain as pronounced.

Discussion

[32] As noted in *Cunningham*[8], amendments to the *Penalties and Sentences Act* 1992 in 2006 subjected sex offenders to a different early release regime from other prisoners serving terms of imprisonment of not more than three years. Section 160D of the *Penalties and Sentences Act* requires a parole eligibility date to be ordered, not a fixed parole release date. The evident intent is that each offender would be considered individually with respect to suitability for early release into the community.

[33] There may be individual sex offenders where either the sentencing court or the Parole Board can be confident that the offender's rehabilitation can be undertaken satisfactorily in the community by participating in personal or group therapy to address the offending behaviour and its causes. The offender in *Lloyd*[9] had pleaded guilty on *ex officio* indictment to 11 counts of possessing child exploitation material contrary to s 228D of the *Criminal Code*. He was sentenced to three years imprisonment on 18 May 2010 with a parole eligibility date of 16 July 2010 taking into account some 301 days served in pre-sentence custody. By the time the application for leave to appeal was heard he had spent about six months in prison beyond his parole eligibility date. That offender had a bad prior criminal history for offending against young children but the current offending all related to internet obtained material. No remorse was evident and he was said to possess paedophiliac tendencies. There had been no prospect of his participation in a suitable sex offender's course in prison when sentenced. Chesterman JA said it would be unjust that credit would not be given to his pleas of guilty. His Honour, with whom the Chief Justice and I agreed, proposed, as submitted here by Mr Ryan, that the

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8 [2008] QCA 289 at [2] and [19].

9 [2011] QCA 12.

sentence of imprisonment on one of the counts be set aside and instead the applicant be ordered to undergo a period of probation during which he should participate in a suitable course.[10]

[34] There are two concerns with respect to this applicant. He has not identified any suitable health practitioner or group therapy in Townsville where he could undertake rehabilitation treatment, assuming that he would be willing to undergo such treatment as he has not instructed to that effect. The second concern is the applicant's blatant disregard of his bail conditions in continuing his association with the complainant clandestinely after he had been charged with these offences. The course that the applicant took in resisting any acknowledgement of guilt until the morning of the trial, as well as that latter conduct, do not make him an obvious candidate for release prior to undertaking some treatment to address his offending conduct.

[35] Parliament has legislated that neither remand prisoners nor offenders seeking leave to appeal their sentences may receive relevant rehabilitation treatment in prison. The applicant might have been able to persuade the Parole Board to release him to undertake an identified course of treatment in the community had he not come within s 180(2)(b) of the *Corrective Services Act*. He is, of course, entitled to exercise his right to seek leave to appeal but having chosen to do so, with the consequences mentioned, this court ought not to accede to the application merely because of those consequences unless there is good reason for doing so. What has happened is as a result of the legislative scheme and choices made by the applicant. It has not led to an unjust result. In my view there was no error in the sentencing judge recognising that it was for the Parole Board to assess the applicant's suitability for release. The protection of the community remains a significant factor here.

[36] I would refuse the application for leave to appeal.

[37] **ATKINSON J:** I agree with White JA that the application for leave to appeal the sentence should be refused for the reasons given. I only wish to add that it appears counterproductive that the beneficial rehabilitation effect of treatment programmes in prison are denied to prisoners who do not seek to deny their guilt but do seek to exercise their right to seek leave to appeal against sentence. Rehabilitation of such prisoners undoubtedly benefits the offender but more importantly it protects the community by reducing the risk of reoffending, perhaps the most fundamental justification for incarceration.

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10 At [23].