# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v BCG* [2012] QCA 167 |
| PARTIES: | **R**<br>**v**<br>**BCG**<br>(appellant/applicant) |
| FILE NO/S: | CA No 338 of 2011<br>DC No 117 of 2011 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction & Sentence |
| ORIGINATING COURT: | District Court at Ipswich |
| DELIVERED ON: | 19 June 2012 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 12 June 2012 |
| JUDGES: | Chief Justice and Holmes and Muir JJA<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDER: | **1. The appeal against conviction be dismissed;**<br>**2. The application for leave to appeal against sentence be granted and the appeal allowed;**<br>**3. The sentences imposed in relation to counts one and two be set aside, and that in lieu thereof, the applicant be sentenced to two and a half years imprisonment on count one, and twelve months imprisonment on count two, the terms to be served concurrently.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where appellant convicted of count 1 (maintaining an unlawful relationship) and count 2 (exposing a child to an indecent film) but acquitted of counts 3 and 4 (exposing a child to an indecent film) and count 5 (indecent dealing), which were alleged to have occurred much later than counts 1 and 2 – where appellant admitted conduct the basis of count 2 but denied the conduct alleged in counts 3 and 4 – whether verdicts inconsistent – whether verdicts unsafe and unsatisfactory<br><br>CRIMINAL LAW – PROCEDURE – VERDICT – UNANIMOUS AND MAJORITY VERDICTS – where jury quickly returned verdicts on counts 2-5 but was split on count 1 – where jury indicated after six and a half hours |

deliberation that a unanimous verdict was unlikely but that a majority verdict was possible and the trial judge informed the jury as to the court's inability to accept a majority verdict until they had been deliberating for eight hours – where after deliberating for just over eight hours the jury returned a unanimous verdict convicting the appellant on count 1 – whether a jury member either compromised his or her verdict or was overborne

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to 3 and a half years imprisonment for count 1 and to 2 years imprisonment for count 2 – where no violence used, no touching underneath clothes, and where no penetration occurred – whether sentence manifestly excessive – where sentence for count 2 concurrent with larger sentence for count 1 – where sentence of 2 years for exposing a child to an indecent film considered excessive – whether sentence should be varied

*Ngati v R* (2008) 180 A Crim R 384 [2008] NSWCCA 3, cited
*R v CAQ* [1999] QCA 197, cited
*R v Gregory* [2011] QCA 86, considered
*R v K* (1997) 68 SASR 405; [1997] SASC 6654, cited
*R v Muto and Eastey* [1996] 1 VR 336 ;[1996] VicRp 21, cited
*R v Royal* [2010] QCA 129, followed
*R v VST* (2003) 6 VR 569; [2003] VSCA 35, cited
*R v WAA* [2008] QCA 87, cited

COUNSEL: D R Lynch for the appellant/applicant
B J Merrin for the respondent

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

**CHIEF JUSTICE:**

**Introduction**

[1] The appellant was convicted, on count one, of maintaining an unlawful sexual relationship with his daughter, who was then aged 11 years, over the period 1 September 2007 to 1 September 2008, and on count two, of exposing her to an indecent film. He committed those offences when living with his daughter and other children, and his then wife, at Bellbird Park. He was sentenced to three and a half years imprisonment on count one, and to a concurrent two year term on count two.

[2] The appellant was acquitted on three other counts, two of exposing his daughter to an indecent film, and one of unlawfully and indecently dealing with her, at times

when she was 13 years of age and when the appellant, having by then separated from his wife, lived at Westlake.

[3] The appellant pursues an appeal against his conviction on count one, on two grounds: first, that the conviction is unsafe and unsatisfactory; and second, that the Trial Judge "erred in asking the jury, prior to the expiry of the prescribed period, to reach a majority verdict and thereby induced the jury to deliver a compromised verdict upon count one".

[4] The appellant also seeks leave to appeal against the sentences imposed upon him.

**The basis of the respective charges and the jury's possible disposition of them**

*Count one: maintaining*

[5] The maintaining charge was based on the complainant's evidence that the appellant acted as follows: massaging her vagina area, on the outside of her clothing, with the his hands, as she played on a gaming console in his bedroom – over a period of weeks on an unknown number of occasions; over the same period, massaging her breasts once or twice; on two or three occasions, lifting her like an aeroplane and kissing her vaginal area outside her clothing; masturbating himself in bed as she was positioned in the bed next to him; and kissing her mouth as she lay in the bed between his wife and him.

[6] Other allegations were that the appellant asked the complainant whether he could watch her masturbating herself, and said that she could watch him masturbating; and that he would facilitate her watching his wife and him while they had sexual intercourse, by leaving a window curtain open and the bedroom light on.

[7] The complainant told her mother about the kissing and rubbing of the vagina later in the morning on which the kissing occurred. The complainant was upset, and her disclosure might have been considered as spontaneous and proximate in time to the alleged offending. By contrast, the complainant's subsequent disclosure in relation to later alleged offending, in 2010, followed her discomfort about restrictions the appellant placed upon her use of Facebook etc, and as will emerge, that may have contributed to the jury's determination to acquit on counts three to five, whereas the jury may have gained comfort from the spontaneity and temporal proximity of her complaint in relation to the matters involved in counts one and two.

*Count two: exposing to indecent film*

[8] This count was based on the complainant's evidence that the appellant showed her a pornographic movie, while at the same time providing her with a vibrator and instruction as to its use: the appellant then informed his wife that he had done so.

[9] The appellant acknowledged that he had shown the complainant this movie. It is obvious that the jury could readily have excluded his explanation – instructing the complainant about sexual matters – as not amounting to a "legitimate reason" for what he did.

*Counts three and four*

[10] The jury reached verdicts on counts two to five within approximately one hour of retiring on the third day of the trial. Counts three and four concern the appellant's having allegedly exhibited pornographic movies via his computer. The appellant denied that he had done so, whereas he agreed that he had shown the movie involved in count two. In addition to that point of distinction, there is the circumstance that notwithstanding the police seized the appellant's computer, which

was examined, there was no evidence of the results of that examination. In his summing up, the Judge observed that "obviously they didn't help the prosecution or that evidence would have been put before you". That provides a logical explanation for the jury's acquitting on counts three and four without their having generally rejected the credibility of the complainant.

*Count five*

[11] The complainant gave evidence in brief terms that in the week prior to her providing the s 93A statement, the appellant pinched her breasts while tickling her. This allegedly occurred about 15 months after the time span involved in the maintaining count. The appellant denied the allegation, as he did the allegations involved in counts three and four. Having determined to acquit on counts three and four, the jury may well have been impelled to acquit on count five, which fell within the same time period, where the evidence was scant, and where by contrast with count two, the appellant denied the matter alleged against him.

**Whether verdict on count one is unsafe and unsatisfactory**

[12] The appellant points first to the jury's quick rejection of the prosecution case on counts three, four and five, and contends that leaves the conviction on count one without rational explanation. I have above explained why the jury could rationally acquit on those counts without generally rejecting the complainant's credibility.

[13] The appellant then contends that the conviction on count two, which we were informed Counsel for the appellant at the trial invited, lacks significance when one turns to assessing the case on count one. But the jury were entitled to draw, from the circumstances of count two, an inference that the appellant harboured a sexual interest in the complainant, explaining why he may have been tempted to engage in the misconduct involved in count one.

[14] Counsel for the appellant relied on the complainant's inability to detail particular occasions on which the touching involved in count one occurred. That is not an unusual feature where offending has been regular and repetitive. Importantly, the jury were told of the need to accept the evidence of the complainant beyond reasonable doubt; the jury was given a Markuleski style direction (*R v Markuleski* (2001) 52 NSWLR 82); the jury were directed to take into account any reasonable doubt in relation to one offence in assessing the complainant's credibility on others; and during further directions, the Judge instructed the jury to take account of their plain doubt about counts three to five, when assessing the complainant's evidence on count one.

[15] Counsel relied on additional matters: the complainant's possible motive to have implicated her father falsely in counts three to five (the restriction on Facebook etc); some inconsistencies in time periods for the touching alleged in count one; and lateness of the allegations in relation to the appellant masturbating in bed. The jury was properly instructed about those matters.

[16] I have reviewed the whole of the evidence. It was open to a jury, acting reasonably, to have been satisfied beyond reasonable doubt that the appellant was guilty on count one, notwithstanding the particular matters ventilated before this court (*MFA v The Queen* (2002) 213 CLR 606, 614-615).

**Whether verdict on count one was "compromised"**

[17] This ground arises in the context of s 59A of the *Jury Act* 1995. The terms of that section are as follows:

"**59A Verdict in criminal cases for other offences**

(1) This section applies to a criminal trial on indictment other than the following trials—

(a) a trial for an offence mentioned in section 59(1)(a); or

(b) a trial before a jury as mentioned in section 59(1)(b).

(2) If, after the prescribed period, the judge is satisfied that the jury is unlikely to reach a unanimous verdict after further deliberation, the judge may ask the jury to reach a majority verdict.

(3) If the jury can reach a majority verdict, the verdict of the jury is the majority verdict.

(4) For the definition in subsection (6), *prescribed period*, paragraph (a), the periods mentioned in subparagraphs (i), (ii) and (iii) are the periods reasonably calculated by the judge.

(5) A decision of the judge under subsection (4) is not subject to appeal.

(6) In this section—

***majority verdict*** means—

(a) if the jury consists of 12 jurors—a verdict on which at least 11 jurors agree; or

(b) if the jury consists of 11 jurors—a verdict on which at least 10 jurors agree.

***prescribed period*** means—

(a) a period of at least 8 hours after the jury retires to consider its verdict, not including any of the following periods—

(i) a period allowed for meals or refreshments;

(ii) a period during which the judge allows the jury to separate, or an individual juror to separate from the jury;

(iii) a period provided for the purpose of the jury being accommodated overnight; or

(b) the further period the judge considers reasonable having regard to the complexity of the trial."

[18] The relevant events were these, conveniently taken from the outline of Counsel for the appellant (deleting footnotes).

"14. The jury retired to consider their verdicts on 30 November 2011 (day 3 of the trial) at 4.12 pm. At 5.15 pm the court received a note from the jury (Exhibit H) advising that they had reached verdicts upon 4 of the counts but wanted to return the next day to consider the other count. The jury then delivered verdicts upon counts 2, 3, 4 and 5. The jury found the appellant guilty of count 2 and not guilty of counts 3, 4 and 5. The jury were then permitted to separate

overnight in order to resume deliberating upon count 1 from 10.00 am the next day.

15. On 1 December 2011 (day 4 of the trial), the jury were returned into court at 1.24 pm, having sent a note which said 'Have not reached a verdict at this time' (Exhibit I). The jury speaker then asked a number of questions which the learned trial Judge answered. His Honour then asked whether the jury would like more time, the spokesperson said yes and the jury again retired at 1.32 pm. Before the jury retired, His Honour made reference to the length of time they had been deliberating and the possibility they may not reach a verdict at all. His Honour said:

> 'In due course you will reach a verdict or you won't. If you don't, you will still have done your duty. From time to time it is not possible for 12 out of 12 people to reach the same view. On occasions, the Court has power to take a majority verdict; that hasn't arisen yet; so there are options that are available.'

16. At 3.10 pm, the court received another note from the jury which read 'No amount of discussion will change the decision. Hung jury.' (Exhibit J). The learned trial judge then attempted to calculate the total length of time the jury had been deliberating up to that point. His Honour concluded it was 'About five and a half hours.' Counsel for the appellant then submitted that the jury not be discharged without having received a full '*Black*' direction and indicated he had no objection to the jury being told that the court had power to take a majority verdict of 11/1 after the permitted period and said 'Well I'd be asking that we at least give it a try.'

17. The jury were returned into court at 3.17 pm at which time His Honour gave a '*Black*' direction largely consistent with the model direction in the Bench Book. The following exchange then occurred:

JUDGE: Now, I have the power to take a majority verdict of 11 one, but that power will not arise until after you've been deliberating for a further two and a half hours. I'm just letting you know.

Now, I don't know and I don't want to know the voting figures. I don't know how deadlocked you are. And if there is any prospect of reaching a verdict, then I would encourage you to further continue or continue your deliberations further.

Now, can I address the – your speaker. Madam, are you the speaker? You are, sir?

JUROR [indistinct]

JUDGE: No need to stand. Is it realistic to think that, given more time, you might reach a verdict that's unanimous?

JUROR: No, your Honour. And the reason for that is we're – we've reach the stage where we're – we're more concerned about the quantity of evidence that we're asked to maintain a guilty or not guilty verdict and we haven't got the – the clarity of evidence, if you like, more of the – as solid evidence in the [indistinct]. It's not solid enough for us to make a – this type of decision.

18. His Honour then heard further submissions in the absence of the jury before giving further directions to the jury concerning the elements of the offence of maintaining and the factual allegations upon which that charge was based. The jury again retired to deliberate further at 3.50 pm.

19. At 4.28 pm the court received a further note from the jury (Exhibit K) requesting that they be permitted to view the police interview with the complainant (Exhibit A). The jury returned to court at 4.32 pm and after viewing a portion of that recording the jury again retired at 5.09 pm.

20. At 6.01 pm the court received a further note from the jury which read 'Still no decision and will not be able to reach one'. (Exhibit L). At this time His Honour asked the Bailiff if she had calculated how long the jury had been deliberating and the Bailiff replied 'We have your Honour, myself and the two barristers, and we calculate roughly six to six and a half hours'. His Honour then discussed with counsel the options available including that he could tell the jury that he could take a majority verdict in another hour and a half. The jury were returned to court at 6.05 pm when the following exchange occurred:

JUDGE: Welcome back, ladies and gentlemen. Madame Bailiff has given me your note where you said, 'Still no decision, and we'll not be able to reach one.' You've currently, it is thought, been deliberating, excluding breaks and so on and so forth, for six and a-half hours. That means – I should tell you – under our law I can't – a Judge can't take a majority (sic) from a jury until the jury has been deliberating for eight hours, excluding various breaks. That won't happen for another hour and a-half.

Now I don't say that to terrorise you – just to let you know what the law is. Is there any

purpose in asking you to deliberate for another hour and a-half, that is in the sense that is there any possibility that there could be an 11 one decision after another hour and a-half of consideration?

JUROR: I think that would be the case, your Honour.

JUDGE: You do.

JUROR: Yes, I do.

21. The jury then retired briefly while His Honour again discussed with counsel what should happen. The following exchange took place:

JUDGE: I'm not one to criticise the law.

DEFENCE: No.

JUDGE: The law is the law. But in a situation like this – this is something that Judge McGill raised recently too, with the Judges, when it's clear as a bell that there will be an eleven one in these circumstances, the law requires us to wait another hour and-a-half.

DEFENCE: Yes, it's ridiculous but we can't do anything about it.

JUDGE: And that's the law.

DEFENCE: Yes.

JUDGE: So, we have a choice now.

DEFENCE: Yes.

JUDGE: Do I discharge the jury now, or do I effectively force them to sit around in the jury room for another hour and-a-half.

DEFENCE: As unpalatable as it sounds, I'd ask for the decision.

PROS: I would too, your Honour, given that the jury has gone through four days of the trial, it would be unfair to the accused to take it out from him at this late stage----

JUDGE: I think that's right.

PROS: ---- and to have to sit it all again.

JUDGE: Okay. We can have the jury back please, Madam Bailiff. That's what I'll say.

22. The jury then returned and the following occurred.

JUDGE: Thank you. Welcome back again, ladies and gentlemen. You have been deliberating a long

time in this trial, you have mulled it over, you heard all the evidence, you've heard some of it again, I think it would be fair in all the circumstances if you were to deliberate for another hour and-a-half. We've come this far, you know the issues, you know the evidence intimately. Now, that would take us through to up to 7.40 pm. What can we do about food? I ask that rhetorically, but with a hope that someone will respond.

BAILIFF: Well, there's the International Hotel, or I would say, pizza. I'll have to check with the Registry to see what they could do.

DEFENCE: And I suppose – here's a question. I don't know, if they go to the International Hotel, whether that's going to be counted as a time.

JUDGE: No, it won't be counted. Something has got to be brought in I think.

…

JUDGE: All right. Well, the Registrar will liaise with Madam Bailiff and yourselves about that. So, those pizzas will be ordered as soon as they can be ordered, and delivered to the jury room, and you will – I don't mean to sound like I'm giving you orders, but I'd like you to deliberate – continue to deliberate while you're eating the pizzas please.

So, that means that we can take a majority verdict at – 7.40 would be safe, wouldn't it?

DEFENCE: Yes, I think so.

23. The jury then again retired to deliberate at 6.12 pm. The court then adjourned and the learned trial Judge indicated his intention to resume at 7.40 pm to take a majority verdict.

23. At 7.53 pm the court reconvened having received a further note from the jury which read 'We have reached a verdict.' (Exhibit M). The jury then were returned into court and the following transpired:

BAILIFF: The jury all present and correct, your Honour.

JUDGE: Thank you. Thank you, Madam Bailiff, and welcome back, ladies and gentlemen. Can I ask your speaker whether you are still deadlocked?

JUROR: No, we're not, your Honour.

JUDGE: Thank you. I will ask my Associate to take the verdict.

ASSOC: Speaker, have the members of the jury reached a verdict on which all 12 are agreed?

JUROR: Yes, we have.

ASSOC: So says your speaker, so say you all?

JURORS: Yes.

ASSOC: Members of the jury, do you find the accused, BCG, guilty or not guilty of count 1, maintaining a sexual relationship with the child?

JUROR: Guilty.

ASSOC: Guilty, your Honour. So says the speaker, so say you all?

JURORS: Yes."

[19] Counsel for the appellant contends that before the prescribed eight hour period had elapsed, the Judge requested the jury to return a majority verdict, which would have been unlawful. He also submitted that the announced unanimity, when the verdict was delivered, reflected the "inevitability" that "having been told that a majority verdict of 11/1 would be taken at 7.40 pm, the jurors then in the minority simply accepted the inevitable and voted with the majority". The overall submission was that "the unanimous verdict upon count one was induced by the "unlawful" request that the jury reach a majority verdict on that count".

[20] It was not inappropriate for the Trial Judge to inform the jury about the possibility of lawfully returning a majority verdict, and the circumstances in which that might occur. See *R v Muto and Eastey* [1996] 1 VR 336, 339; *R v VST* (2003) 6 VR 569, 575; *Ngati v R* (2008) 180 A Crim R 384, 392; and *R v K* (1997) 68 SASR 405. It is worth repeating the commonsensical observations of Doyle CJ in the last mentioned case (pp413-4):

> "…in my opinion it is impractical to conceal from the jury knowledge of what the law provides in this respect. It is quite likely that the jury in a given case will include people who have been called for jury service on a previous occasion, or who will know from other sources that the law provides for a majority verdict. As the month for which a jury is called for service wears on, it becomes increasingly likely that the jury will include a juror who has served on a jury which has already returned a majority verdict. Failure to say anything about the power to return a majority verdict in the course of a summing-up may lead to confusion in the jury room, as a result of jurors aware of the power raising the matter in the course of the jury deliberations.
>
> Of course, I accept what the High Court said in *Cheatley v The Queen* (1993) 177 CLR 541 at 552-553 about the significant difference between a deliberative process in which a verdict can be returned only if agreement is reached by all jurors, and a process in which a majority verdict can be returned. But in this State, Parliament has given the jury the power to return a majority verdict

> after they have been deliberating for at least four hours, and in my opinion knowledge of that power cannot conveniently and should not be withheld from them.
>
> On the other hand, I agree wholeheartedly with the thrust of what was said by the Court of Appeal of Victoria in *R v Muto* [1996] 1 VR 336. There, the effect of what the court said was that in the context of explaining the unanimous verdict that is required, the trial judge should refer to the power to return a majority verdict, but that the emphasis in the summing-up at the outset should be on the returning of a unanimous verdict. There are various ways in which this can be done. It is a matter of ensuring that the jury's attention is focused upon the delivery of a unanimous verdict, while at the same time informing them that a power to return a majority verdict does arise once they have deliberated for at least four hours."

[21] On a proper reading of the Judge's observations to the jury, the Judge did not – as the appellant contends – request the jury to deliver a majority verdict. His Honour did no more than advise the jury as to the time when a verdict might be delivered on that basis.

[22] As it turned out, the verdict in fact delivered was delivered on the basis that it was unanimous. No juror dissented from the delivery of the verdict on that basis. There is no basis therefore from which this court should reject the asserted unanimity (*R v Royal* [2010] QCA 129, para 62). That embraces this court's rejection of the contention that a previously alone dissenting juror changed his or her mind simply to ensure unanimity. Other matters apart, one would wonder why, contrary to that juror's oath or affirmation, he or she would have taken that course where the Judge had made plain that he would accept a majority 11/1 verdict anyway. Earlier, the jury was told a juror in a minority should not "vote with the others…(to) get out of here".

[23] The appeal against conviction in relation to count one should therefore be dismissed.

**Application for leave to appeal against sentence**

[24] As has been noted, in respect of the maintaining count, the applicant was sentenced to three and a half years imprisonment, and in respect of count two, exposing the child to the pornographic movie, he was sentenced to a concurrent term of two years imprisonment.

[25] At the time when he committed the offences, the applicant was 30 years of age, and had reached 34 years by the time he was sentenced. At the time of the commission of the offences, the complainant was 11 years of age or thereabouts.

[26] The applicant's prior criminal history was immaterial to the sentencing for these offences.

[27] In his sentencing remarks, the learned Judge summarized the conduct involved in count one as follows:

> "With respect to count 1, the maintaining of the unlawful relationship of a sexual nature: Over a period of about three months, between April and June 2008 when you were about 30 and your

> daughter was about 11, you rubbed her legs up to her vaginal area and then rubbed her vaginal area over her clothing whilst she was lying or sitting, playing an Xbox game. That occurred almost every night during that period.
>
> On one occasion you rubbed her vaginal area over her clothing until she reached orgasm. The girl was 11; she was your daughter; she was in the family home in her parent's bedroom---a place where she should reasonably felt completely safe."

[28] In addition, the jury should be taken to have accepted the complainant's evidence that the applicant massaged her breasts once or twice, kissed her in the vaginal area outside her clothing two or three times, and kissed her on the mouth while in bed. In addition there was the discussion about masturbation and watching the applicant and his wife have sexual intercourse, and the applicant masturbating in bed.

[29] The Judge rightly referred to the applicant's betrayal of the complainant's trust, the impact of the offending on the complainant and her mother, and the applicant's lack of remorse. The prosecutor contended for a range, applicable to count one, of three to four years imprisonment. Defence Counsel contended for a substantially lesser term.

[30] His Honour was referred to cases including *R v WAA* [2008] QCA 87 which was potentially especially helpful because the prisoner in that case was convicted at trial. The offending in that case was rather more serious than in the present. It is summarized as follows in the reasons for judgment of Muir JA:

> "[6] In her first record of interview, the complainant stated that the appellant had touched her inside her clothes, on her breasts and vagina for 'about…an hour or something'. That was alleged to be at Mt Garnet (count 2). The next occasion on which she said such touching occurred was when the complainant, the appellant and various other family members were camping at Tinaroo. On this occasion, when the other persons in the tent were asleep, the appellant 'kind of played around with' the complainant's vagina (count 3).
>
> [7] She said that when her Nan was away from home, the appellant would enter her room late at night and touch her vagina. Sometimes this occurred in her sister's room as well. It happened 'a lot of times'. The appellant 'always puts…the oil on his hand or on his finger…and…he just rubs my vagina and all that.' She said that he had put his finger inside her vagina 'lots of times' and that it made her 'feel sick in the belly'. She said that it happened on the Sunday prior to her giving her evidence on 11 September 2003."

[31] It is relevant to note that the present applicant's offending did not include the application of any force, or touching under the clothing, or any penetration of the complainant.

[32] The sentence for maintaining in *WAA* was reduced on appeal from five years imprisonment to three years imprisonment. A comparison of the present case and *WAA* persuades me that the sentence of three and a half years imposed here was

manifestly excessive and should be replaced by a sentence of two and a half years imprisonment.

[33] Notwithstanding the approach taken in *R v Gregory* [2011] QCA 86, this court should in my view reduce the sentence of two years imprisonment imposed in relation to count two if that sentence is considered manifestly excessive. Allowing a manifestly excessive concurrent term to stand undisturbed may possibly have some ramification in the consideration of parole for example. I do consider the two year term imposed in relation to count two to have been manifestly excessive. I would substitute twelve months imprisonment, noting that in *R v CAQ* [1999] QCA 197, where the prisoner had pleaded guilty, the term imposed for similar offending was 12 months imprisonment.

**Orders**

[34] I would make the following orders:

1. that the appeal against conviction be dismissed;

2. that the application for leave to appeal against sentence be granted and the appeal allowed;

3. that the sentences imposed in relation to counts one and two be set aside, and that in lieu thereof, the applicant be sentenced to two and a half years imprisonment on count one, and twelve months imprisonment on count two, the terms to be served concurrently.

[35] **HOLMES JA:** I agree with the reasons of the Chief Justice and the orders he proposes.

[36] **MUIR JA:** I agree with the reasons of the Chief Justice and with the orders he proposes.