SUPREME COURT OF QUEENSLAND

CITATION:	*R v KAL* [2013] QCA 317
PARTIES:	**R** **v** **KAL** (applicant)
FILE NO/S:	CA No 112 of 2013 DC No 21 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Childrens Court at Rockhampton
DELIVERED ON:	25 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	1 October 2013
JUDGES:	Margaret McMurdo P and Mullins and Henry JJ Joint reasons for judgment of Mullins and Henry JJ; separate reasons of Margaret McMurdo P dissenting
ORDER:	**The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to burglary and rape – where the applicant, as a 14 year old, raped the 16 year old male complainant in his home – where the applicant was on probation at the time of the offending and had a significant criminal history although had committed no prior sexual or serious violent offences – where the applicant was convicted and sentenced to detention for four years with an order that he be released after serving 70 per cent of the period of detention – where the applicant contends that his sentence was manifestly excessive; the sentencing judge gave insufficient weight to his plea of guilty, his youth and his shockingly dysfunctional background when considering whether there were special reasons under s 227 *Youth Justice Act* 1992 (Qld) for ordering his release earlier than after 70 per cent of his sentence – whether sentencing judge erred – whether sentence manifestly excessive

Youth Justice Act 1992 (Qld), s 3, s 227, Schedule 1

Bugmy v The Queen (2013) 87 ALJR 1022; [2013] HCA 37, discussed
Munda v Western Australia (2013) 87 ALJR 1035; [2013] HCA 38, cited
R v A; ex parte Attorney-General [2001] QCA 542, cited
R v DAU; ex parte Attorney-General [2009] QCA 244, cited
R v IC [2012] QCA 148, cited
R v JAJ [2003] QCA 554, cited
R v PZ; ex parte Attorney-General [2005] QCA 459, considered
R v S [2003] QCA 107, cited

COUNSEL: J R Hunter QC for the applicant (pro bono)
S J Farnden for the respondent

SOLICITORS: No appearance for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The applicant pleaded guilty on 6 December 2012 in the Childrens Court at Rockhampton to burglary and rape on 26 February 2012. He was an Aboriginal youth, aged 14 at the time of the offence and 15 at sentence. As a result of his age, he was sentenced under the *Youth Justice Act* 1992 (Qld) according to youth justice principles.[1] A presentence report was ordered and he was remanded in custody until 18 April 2013 when he was convicted and sentenced to detention for four years with an order that he be released after serving 70 per cent of that period of detention. He has applied for leave to appeal against sentence contending that it was manifestly excessive; a sentence of three and a half years imprisonment with an order for release after 50 per cent should be substituted. In his submissions, his counsel contended that the judge gave insufficient weight to his plea of guilty, his youth and shockingly dysfunctional background when considering whether there were special reasons under s 227 *Youth Justice Act* for ordering his release earlier than after 70 per cent of his sentence. The respondent contended the sentence, including the release order, was not manifestly excessive or affected by error.

The applicant's offending history

[2] Despite his youth, the applicant has a significant criminal history, all recorded in the Rockhampton Childrens Court. He was first sentenced in July 2011 for a miscellany of offences including burglaries and committing indictable offences, assaults occasioning bodily harm, wilful damage, entering premises and committing an indictable offence, stealing, failing to appear in accordance with bail undertakings, assault or obstructing a police officer and common assault. These offences occurred between February and July 2011. He was placed on youth probation for one year without convictions. The following month he was sentenced for offences committed three days after his previous court appearance: common assault, wilful damage and public nuisance. He was again placed on 12 months

[1] See *Youth Justice Act*, s 3 and Sch 1, Charter of Youth Justice Principles.

probation without conviction. He was next sentenced on 22 November 2011 for further assorted offences including wilful damage, unlawful use of a motor vehicle, stealing and attempted entering of premises with intent to commit indictable offences. These offences were committed in September and October 2011. He was placed on 100 hours community service without conviction. He was next sentenced on 17 April 2012, again without conviction, for offences of stealing, wilful damage and possessing dangerous drugs to four months detention with a declaration that 49 days presentence custody was time already served under the sentence. These offences occurred in February 2012 at about the time of the present offending. It follows that the present offence was committed whilst the applicant was on probation. In his favour, I note that he had committed no prior offences of a sexual kind or involving serious violence.

The circumstances of the offence

[3] The facts of the present offence were frightening. The complainant, a 16 year old youth, had been introduced to the applicant by a mutual friend the Thursday before the offence. The complainant was home alone on Sunday, 26 February 2012 whilst his mother was working at the mines on a nine days on, five days off roster. This was the first time he was home alone for such an extended period. The applicant arrived at about 11.30 am and the complainant invited him in. They played Playstation games for about 10 or 15 minutes. When the complainant was sending a text message to his mother, the applicant snatched his phone and threw it, accusing him of calling the police. The complainant explained that he was not calling the police and politely asked him to leave. The applicant said: "No, I'm going to rape you."[2] He grabbed the complainant by the hair and dragged him to the couch, shouting: "Why are you pissing me off?"[3] He forced the complainant onto his back and punched him to the face, shouting, "I'm going to rape you, I'm going to rape you."[4] The complainant broke free and ran for the door but the applicant caught him and dragged him by the hair into the bathroom where the applicant grabbed a bottle of shampoo. He forced the complainant down the hallway into the main bedroom. He ripped the complainant's clothes off, put shampoo on his buttocks and inserted his penis into the complainant's anus. The complainant screamed as loud as he could. The applicant said: "Stop screaming, or I'll stab you."[5] The complainant continued to scream and struggled, eventually breaking free. He ran to the window but the applicant grabbed him by the hair and dragged him back down the hallway saying, "I'm going to stab you."[6] The applicant held the complainant in a head lock against the kitchen sink and pointed a knife at him.

[4] The terrified complainant broke away and ran naked out a side door. He tried to seek help from a next door neighbour but no-one was home. The applicant left on a bicycle. The complainant returned to his house, dressed and sought assistance from another neighbour. He was crying and shaken and told them he had been raped several times. They assisted him to call his mother, the police and the ambulance. He was examined by a forensic nurse at the Rockhampton Hospital who recorded that he had bruising on his face, head, ears and throat, and abrasions on his neck, legs and back. His anus was tender and bruised and had four 2 mm abrasions.

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2 T1-5.20.
3 T1-5.22.
4 T1-5.26.
5 T1-5.50.
6 T1-6.3.

[5] The complainant's victim impact statement recorded the expected traumatic effect of this offence on a young man. He was having helpful weekly counselling but he recognised he still had a long way to go to fully recover. Encouragingly, he stated that he knew he "will get there"[7] and courageously noted that these criminal actions would not defeat him as he was "stronger than that."[8] The complainant's mother in her victim impact statement explained she was a single parent as the complainant's father passed away some years ago. She had been earning nearly $1,000 a week at the mines, but had given up that employment and now was struggling financially. She wrongly felt guilty that she was absent when the offence occurred and naturally felt anger towards the applicant. Hearteningly, she reported they were gradually rebuilding their lives.

The presentence report

[6] The presentence report was based on personal and telephone interviews with the applicant and his mother; an attached psychological report dated 12 March 2013 from Griffith Youth Forensic Service (GYFS); and information from Child Safety Services, Child and Youth Mental Health Services (CYMHS), the Office of the Director of Public Prosecutions and Youth Justice Services' records and personnel.

[7] The applicant has spent 404 days in presentence custody which would be applied as time served under any ordered period of detention. He claimed not to remember the circumstances of the offence. He has three younger sisters. He has had limited contact with his father who has been in jail for most of the applicant's life. The applicant was taken into care in 2007 when he was about 10 years old because of substantiated risk of physical harm caused by sexual abuse by two older cousins who resided in the family home and due to emotional harm caused by neglect, primarily due to his mother's alcohol abuse.

[8] Between 2007 and 2009 he had a variety of foster and kinship carers and many placement breakdowns. He displayed problematic behaviours including aggression and violence towards carers, other children and students, objects and teachers. He maintained sporadic contact with his mother and sisters. He later "self-placed"[9] with his mother and subsequently remained in her care. She successfully attended alcohol and drug sessions and parenting courses.

[9] He first came to the attention of CYMHS in 2005 when he was seven with suicidal ideation and hallucinations. He was diagnosed with Attention Deficit Hyperactivity Disorder and placed on medication. His behavioural issues and suicidal ideations increased through 2007 and 2008. He was also diagnosed with Reactive Attachment Disorder of Early Childhood and placed on medication. His engagement with CYMHS significantly increased in 2011 when he was admitted on a number of occasions to the emergency department of the Rockhampton Hospital, having attempted suicide and with suicidal ideations. He was again prescribed medication but was non-compliant and CYMHS closed his case in late 2011. At the time of his present offending, he was not receiving any direct psychotherapy or counselling to address his mental health concerns as he refused to engage with CYMHS.

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7 Ex 4 (RB 88).

8 Above.

9 Ex 2 (RB 43).

[10] The author considered that the applicant's:

> "exposure to adverse developmental experiences throughout his childhood, which included being a victim of emotional harm, neglect and sexual abuse and experiencing family dysfunction and poor attachment, have negatively impacted on his psychological, sexual and behavioural functioning and development. As such, it is assessed that these predisposing developmental factors may have contributed to the commission of the current offence."[10]

[11] The applicant reported that he was under the influence of a concoction of drugs and had no recollection of attending the complainant's residence on the day of the offence. The unreliable information from the applicant made it impossible to assess whether substance misuse was a contributing factor. His concern was primarily for himself rather than others, including the complainant, although he demonstrated limited empathic concern for him. He understood that his detention in custody was a direct consequence of his offending and had found it difficult to be separated from his family.

[12] Whilst in custody, he has engaged in skills based and educational programs. He has expressed a willingness to engage in therapeutic intervention and support. The report set out the various sentencing options under the *Youth Justice Act*. If a detention order were imposed, he could participate in activities designed to address his offending behaviour. He could undertake education and training programs; offence specific counselling; and participate in interventions to address personal and emotional issues, impulse control, victim empathy and life skills development. He could also participate in a treatment program with GYFS. On his release under a supervised release order, support and assistance would be provided to reintegrate him into the community and avoid re-offending. A condition of release would be participation in specialist sex offender treatment.

[13] The GYFS psychological report noted that the applicant was an Aboriginal adolescent of average build who identified as Aboriginal Australian and had connections with his Aboriginal culture through family networks, although not broader community networks. The author used recognised psychometric tools to assess the applicant, although acknowledged that they have not been routinely administered to Indigenous youth and there may be cultural variance in mental health symptoms reported by Indigenous youth. The report recorded further details of the applicant's subjection as a child to sexual and physical abuse and neglect, exposure to domestic violence and coercive parenting practices, parental criminality, parental substance abuse and periods of out of home placements. His mother reported that he was first sexually molested when only three or four years old by an older male cousin. His father was presently serving a jail term for raping a woman and had a previous conviction for a like offence. The applicant, when seven years old, was again sexually abused by the same cousin on three separate occasions. On one occasion he was sodomised, on another he was tied up and all involved force and threats to kill. As a result, he experienced nightmares and dissociative symptoms, including voices telling him to kill himself and his abuser. These symptoms were consistent with Post-Traumatic Stress Disorder (PTSD). He had attempted to hang himself on several occasions and had lost multiple family

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10 Above.

members to both suicide and natural causes. He completed year 7 but had not attended high school and began to abuse substances and engage in anti-social behaviour. He smoked cannabis, sniffed glue and abused inhalants. He used methamphetamine intravenously for six months when he was 13 years old. He regularly abused alcohol, heroin and prescription pills. He stole and lied to his mother to pay for drugs. He appeared to be a high risk of developing a substance use disorder.

[14] He was heterosexual and had engaged in consensual heterosexual sex with same aged females. Same sex rape offences are not always sexually motivated. They may be a violent expression of power and domination over other males. His offending may have been him paralleling his own victimisation after recalling past instances of abuse against him due to increased association with the perpetrator in November 2011. He had limited empathic concern about the impact of his offending on the complainant. He had since expressed some shame and embarrassment and recognised the need for offence specific therapy to assist in reducing his future risk of both sexual and non-sexual offending.

[15] Since his detention in February 2012, he had continued to display aggression with 47 reported behavioural incidents with other young people. His aggressive behaviour was consistent with Conduct Disorder, child onset type.

[16] He was presently at a high level of risk of probable recidivism as a sexual offender at the time of the report. Factors increasing his risk included low levels of community support; continued association with anti-social peers; substance abuse; poor carer monitoring and supervision; and the opportunity for contact with the vulnerable. Factors decreasing the risk included developing a Relapse Prevention Plan; increasing skills to manage his emotional and behavioural regulation; interventions to attend to his Conduct Disorder; and victimisation counselling. He would require supervision, support persons and therapeutic alliances with care providers. Reducing his intake of alcohol and drugs, separation from anti-social peers and engagement in structured activities such as education, training and employment may also reduce the risk.

[17] If sentenced to detention, the applicant's supervised release order should consider strict conditions to manage the risk of recidivism. Accommodation options should afford a high level of supervision and monitoring. He should be engaged in highly structured activities, for example, education or training. He should receive victimisation counselling to address his own traumatic sexual abuse experiences. He should engage in drug and alcohol counselling and services. He should be engaged in pro-social activities such as sporting clubs and youth groups and should avoid contact with anti-social peers.

The contentions at sentence

[18] The prosecutor submitted that a sentence of between four and five years detention was appropriate and that there were no special circumstances warranting release any earlier than the normal 70 per cent. A conviction should be recorded because of the serious nature of the offending and the lack of mitigating features. The present offence involved a high degree of violence which only ceased when the complainant escaped. She emphasised the applicant's high risk of violent and sexual reoffending. There was, however, a very early plea of guilty on the day the indictment was presented and there was no cross-examination at committal.

[19] Defence counsel accepted that this was a serious and violent example of the offence of burglary and rape. The offence, however, appeared to be opportunistic rather than premeditated. He submitted that the cases demonstrated a sentencing range of between three and five years detention but the mitigating features placed this case in the three to four year range. Because of his youth, he should be released on supervision earlier than the usual 70 per cent. He emphasised that the applicant had pleaded guilty at a very early stage and that his mother was supportive and in court.

[20] The applicant's mother briefly addressed the judge, expressing sympathy to the complainant's family. She wanted the applicant to return home and she would do all she could to keep him out of trouble.

[21] The applicant wrote a note to the judge apologising for committing "a pretty bad crime"[11] and asking the judge for forgiveness. He stated that he did not remember anything about the offence and that, although that did not excuse him, he remained sorry. In the past he had not "stayed with"[12] his probation and drugs got hold of him. He expressed a willingness to stay out of trouble in the future if given the opportunity.

[22] An officer from Youth Justice addressed the court, emphasising that in his 10 years experience he had not before seen an offence involving such a level of aggression and physical violence. The applicant's GYFS high risk assessment was also unusual.

The judge's sentencing remarks

[23] The judge noted the applicant's early plea of guilty, age and criminal history. The present offending occurred whilst he was on probation. After setting out the circumstances of the offending, his Honour noted that it was a very serious offence involving a significant level of violence. His Honour took into account the victim impact statements. The judge did not consider the applicant to be remorseful in light of his claimed absence of recollection.

[24] The judge had regard to the presentence report and the CYFS report and adverted to the Charter of Youth Justice Principles, one of which was that the community should be protected from offenders. This was significant given the applicant's risk of reoffending. His Honour also adverted to the principle that a sentence of detention should be of last resort and for the shortest appropriate duration. Cases referred to by counsel showed the range for an offence of this significance was between three and five years detention. The appropriate sentence here was four years. *Youth Justice Act* s 227 required the applicant to ordinarily serve 70 per cent of the period of detention, although the court could order release at an earlier time where there were special reasons. His Honour was unconvinced there were special circumstances warranting early release. Having regard to the applicant's past history and the seriousness of this offence, a conviction should be recorded.

The applicant's contentions

[25] The applicant contended that the sentence failed to properly reflect his plea of guilty, his youth and shockingly dysfunctional background. The applicant's counsel

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11 Ex 6 (RB 91).

12 Above.

at sentence failed to emphasise as special reasons under s 227 anything other than the applicant's youth. There were special reasons for fixing a release period earlier than 70 per cent. The high risk of recidivism did not merit the imposition of a sentence at the top of the appropriate range. The applicant had no significant criminal history for like offences. In any case, the community would be best protected by an extended period of supervision in the community. The comparable cases of *R v A; ex parte Attorney-General*,[13] *R v PZ; ex parte Attorney-General*;[14] *R v DAU; ex parte Attorney-General*;[15] *R v S*;[16] *R v IC*;[17] and *R v JAJ*[18] demonstrated that a sentence in the range of three to four years imprisonment with release after 50 per cent was appropriate.

Conclusion

[26] It is imperative for judges sentencing young people under the *Youth Justice Act* to adhere to the principle that detention must be imposed only as a last resort and for the shortest possible period. That said, sentencing is a discretionary exercise and sentences can be lawfully imposed within a range or band, even when determining whether a particular term of detention is for the shortest possible period. It is a rare case where the exercise of the sentencing discretion allows for only one possible sentencing order.

[27] This was a serious example of the serious offence of burglary and rape. The then 14 year old applicant used a high degree of physical violence against the 16 year old complainant, including threatening him with a knife. Although the applicant did not have a history of sexual or serious violent offending, he had committed many criminal offences and was on youth probation at the time. It is concerning that he continued to perpetrate violence on other young people after his detention. He had only limited empathy for the complainant and minimal insight into the seriousness of his offending. The psychological report stated that his probability of re-offending by committing sexual and violent offences was high. The sentencing judge was right to consider that protection of the community was a relevant sentencing factor.

[28] Unsurprisingly, none of the cases relied upon by the parties is closely comparable. Perhaps the closest is *PZ* where this Court allowed the Attorney-General's appeal and increased the sentence to three years detention with release after serving 50 per cent. PZ was 15 years old when he committed two counts of rape and other related offences upon a 16 year old female complainant. They were consensually kissing at a party but when she refused his request for oral sex, he pushed her head against a wall and later held a large knife to her throat. He prevented her leaving, twice slapped her and pushed her to the floor. He hit her in the head with a weights dumbbell and forced her into a bedroom where he told her she would have to give a number of males oral sex if she did not smoke cannabis. She complied. Whilst she was heavily under the influence of the cannabis, PZ sat on her and twice digitally penetrated her vagina before inserting a beer bottle. When she finally managed to leave, he pursued her and pushed her to the ground. The presentence

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13 [2001] QCA 542.
14 [2005] QCA 459.
15 [2009] QCA 244.
16 [2003] QCA 107.
17 [2012] QCA 148.
18 [2003] QCA 554.

report described a lack of remorse and empathy and stated that he posed a risk to the community. His drug addicted mother had neglected him as a child. He had no prior convictions, was in a relationship, had fathered a child whom he was supporting and was employed. This Court considered that the least period of detention appropriate in the circumstances was one of three years detention and recognised the special circumstances of the case by releasing him after serving 50 per cent of that term.

[29] It does not seem that PZ came from an Aboriginal background or that his social disadvantage was as extreme as that of the present applicant. Although the facts and circumstances in *Bugmy v The Queen*[19] were very different to those in this case, it provides strong authority for the principle that Aboriginal social disadvantage is a factor to which a sentencing court must give weight. The penalty imposed on the offender, however, must not be disproportionate to the gravity of the offending. It must give due recognition to the victim of grave violent offending: see *Munda v Western Australia*.[20] PZ does not seem to have had the mental health problems of this applicant who had a long history with CYMHS concerning suicidal ideations and hallucinations and probably suffered from PTSD following his repeated sexual abuse by an older male cousin. There was a real possibility that he paralleled his victimisation when committing this offence after having had more recent contact with this older cousin. These factors were also relevant to the exercise of the sentencing discretion: see *Bugmy*.[21] That said, this offence was more serious than PZ's in that the applicant had a lengthy criminal history and was on probation at the time. That factor, however, may well be related to his grossly dysfunctional background which compromised his capacity to mature and learn from experience: see *Bugmy*.[22] Unlike PZ, who at sentence had commenced his rehabilitation, was supporting a child and had employment, the applicant had continued to display aggression to young inmates whilst in detention and was assessed at being at a high risk of probably committing further sexual and violent offences. Community protection was therefore a pertinent sentencing consideration. The shortest possible period of detention was more than the three years imposed in *PZ*.

[30] *PZ* and the other cases relied upon by the applicant suggest that his four year head sentence was towards the top of the appropriate sentencing range. Certainly, a sentence of three and a half years detention was open. But the cases to which this Court has been referred do not demonstrate error on the part of the sentencing judge in concluding that a head sentence of four years detention was the shortest period of detention appropriate in the circumstances.

[31] The applicant's principal contention is that the judge should have found special circumstances warranting the exercise of the discretion under s 227(2) *Youth Justice Act* to release the applicant from detention after serving 50 per cent or some other period less than 70 per cent of the four year term of detention.

[32] At sentence, the applicant's counsel referred only to his client's youth as constituting special circumstances under s 227(2). The applicant's present counsel also emphasised the applicant's very early plea of guilty, the lack of prior convictions for

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19 [2013] HCA 37, [37]-[43], especially [42]-[43].
20 [2013] HCA 38.
21 [2013] HCA 37, [47].
22 Above, [43].

like offences, the sad details of his seriously dysfunctional upbringing, particularly the physical and sexual abuse he was subjected to as a child, and that the community would be best protected by a longer rather than a shorter period of community supervision. These circumstances have in the past been held to be special circumstances warranting an earlier than usual release on supervision under s 227(2). See, for example, *R v IC;*[23] *R v A; ex parte A-G*[24] and *R v PZ; ex parte A-G.*[25] The discretion given to sentencing judges under s 227(2) is wide. The fact that one judge in one case finds a circumstance or combination of circumstances to amount to special circumstances under s 227(2) does not necessarily bind another judge in another case. The judicial exercise of the s 227(2) discretion according to law will inevitably turn on the unique combination of circumstances pertaining in each individual case: see *R v S.*[26] This is consistent with the need for individualised justice discussed by the High Court in *Bugmy*,[27] which requires sentencing courts to give full weight to the experience of Aboriginal offenders growing up in an environment surrounded by alcohol abuse and violence. Although the applicant's rehabilitation prospects were not promising, it was at least encouraging that he wrote to the judge asking forgiveness and that his mother attended court and made clear that he will have her love and support in his rehabilitation. It is commendable that she has apparently taken steps to address her own life difficulties. In addition, he pleaded guilty at a very early stage. Against the remarkable combination of mitigating circumstances present here must be weighed the fact that the judge was rightly concerned with the protection of the community, especially in light of the psychological report concerning future risk and the applicant's violence towards others whilst in detention. These factors, however, are almost certainly related to his dysfunctional upbringing and to his interconnected mental health issues.

[33] After weighing the competing considerations, I consider it was not within a sound exercise of discretion to conclude that the exceptional factors relied on by the applicant did not in combination amount to special circumstances under s 227(2) warranting his release after serving 50 per cent of his period of detention. This was especially so as the four year period of detention was towards the higher end of the appropriate range. By structuring a sentence with a period of detention towards the higher end of the appropriate range but moderating it for this exceptional combination of circumstances so that the applicant is released on supervision after serving 50 per cent, the competing youth justice principles of community protection and detaining offenders for the shortest possible period are both met. The community is protected by the lengthy period during which the applicant will be closely supervised within the community, and the period of actual detention imposed is for the shortest possible period.

[34] For these reasons, I would grant the application for leave to appeal against sentence and allow the appeal to the extent of deleting the order that, pursuant to s 227(1) *Youth Justice Act*, the applicant be released after serving 70 per cent of the period of detention. Instead, I would order that, under s 227(2) *Youth Justice Act*, as there were special circumstances, the applicant is to be released from custody after serving 50 per cent of the detention order. I would otherwise confirm the sentence imposed below.

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23 [2012] QCA 148, [30].
24 [2001] QCA 542, 5 and 7-8.
25 [2005] QCA 459, [35].
26 [2003] QCA 107, 11.
27 [2013] HCA 37, [37]-[43], especially [42]-[43].

[35] **MULLINS & HENRY JJ:** We agree with the President that the sentence of four years' detention for the applicant's offending does not reveal error on the part of the sentencing judge or a miscarriage of the sentencing discretion in applying the sentencing principles under the *Youth Justice Act* 1992 (the Act), including the imposition of the shortest period of detention appropriate in the circumstances.

[36] Under s 227 of the Act, a child sentenced to serve a period of detention must be released from detention after serving 70 per cent of the period of detention, unless the court makes an order under s 227(2) of the Act. It is an exercise of the court's discretion as to whether such an order is made and the test incorporated in s 227(2) is if the court considers there are "special circumstances". We rely on the authorities referred to by the President in paragraph [32] of her reasons as to the types of matters that can constitute special circumstances, justifying the exercise of the discretion in favour of a reduction of the period of detention before release from 70 per cent of the detention period to 50 per cent or more of the detention period.

[37] These factors, however, are considered in the context of all the circumstances applying in the particular case. A single factor such as a plea of guilty reflecting genuine remorse or the youth of the offender may be sufficient to constitute special circumstances for the exercise of the discretion in favour of the offender under s 227(2) of the Act in one case, but not in another. The same observation applies when considering whether a combination of factors constitutes special circumstances.

[38] The sentencing judge was not convinced in the circumstances of this particular case there were special circumstances that warranted the applicant being released any earlier than after 70 per cent of the period of detention provided for in s 227(1) of the Act.

[39] The factors identified by the President at paragraph [32] of her reasons as relevant to the issue of whether the period of detention before the applicant is released under a supervised release order should be reduced from 70 per cent of the period of detention were canvassed during the sentencing hearing in this matter.

[40] The sentence proceeded on the basis of the extreme dysfunction and abuse in the applicant's upbringing that had manifested itself in the applicant's polysubstance abuse, mental health problems, behavioural issues and criminal offending, culminating in the serious offences for which he was being sentenced. It is a tragic outcome for the applicant that his dysfunctional childhood experiences and consequential behaviours have resulted in the report of the Griffith Youth Forensic Service assessing him as a probable risk of sexual and/or violent reoffending with a recommendation accordingly for appropriate treatment.

[41] Although the applicant's counsel at the sentencing hearing based his submission in respect of the issue under s 227(2) of the Act on the applicant's youth, other matters were specifically referred to in that context throughout the submissions, including the applicant's early plea of guilty, the fact that the applicant seemed "to be quite a high risk of reoffending" and the importance of community protection.

[42] The sentencing remarks show that the sentencing judge did not confine his consideration of this issue to the applicant's youth. There were competing factors to be weighed by the sentencing judge on whether there were the special

circumstances that are required before a favourable exercise of discretion under s 227(2) of the Act. We are unpersuaded that the sentencing judge's conclusion that there were not special circumstances to enliven the exercise of the power under s 227(2) of the Act was not open in all the circumstances applying to the applicant.

[43] The application for leave to appeal against the sentence should be refused.