SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wruck* [2014] QCA 39
PARTIES:	**R** **v** **WRUCK, Paul Anthony** (applicant)
FILE NOS:	CA No 317 of 2013 DC No 1883 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	7 March 2014
DELIVERED AT:	Brisbane
HEARING DATE:	21 February 2014
JUDGES:	Holmes and Fraser JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave granted to appeal against sentence.** **2. Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant was convicted, on pleas of guilty, of two counts of indecent dealing – where the applicant was sentenced on each count to 18 months imprisonment, suspended after four months, with an operational period of 18 months – where the offences took place in 1982 and 1983 when the applicant was 25 years old – where the applicant was working as a teacher and a counsellor at the time of the offending – where the complainant was a 13 year old schoolboy who attended counselling with the applicant – whether the sentencing judge erred in sentencing on the premise that exceptional circumstances were a necessary condition for a non-custodial sentence to be imposed – whether a later practice to that effect should be taken to have retrospective application – whether the application for leave to appeal should be granted – whether the court's re-exercise of the sentencing discretion should lead to a different result – where the applicant had compelling mitigating factors in his favour – where the

offences involved a serious breach of trust and were not isolated incidents – where the offence had profound and continuing effects on the complainant – whether a sentence involving actual custody was warranted

Acts Interpretation Act 1954 (Qld), s 20C
Crimes (Sentencing Procedure) Act 1999 (NSW), s 19
Criminal Code 1899 (Qld), s 11(2), s 210
Penalties and Sentences Act 1992 (Qld), s 9(5)(b), s 180(1), s 180(2)
Sentencing Act 1991 (Vic), s 5(2)(b)

Green v The Queen (2006) 19 NTLR 1; (2006) 166 A Crim R 475; [2006] NTCCA 22, considered
R v AMP [2010] VSCA 48, considered
R v Bowen [2008] VSCA 33, considered
R v Davies, unreported, Court of Criminal Appeal, Qld, CA No 123 of 1987, 28 July 1987, considered
R v Goulding [1994] QCA 276, considered
R v H (1993) 66 A Crim R 505; [1993] QCA 240, considered
R v Harmer; ex parte Attorney General of Queensland unreported, Court of Criminal Appeal, Qld, CA No 203 of 1984, 11 October 1984, considered
R v Jackson; ex parte Attorney-General of Queensland [2001] QCA 445, considered
R v Kench (2005) 152 A Crim R 294; [2005] SASC 85, considered
R v Lipinski (1994) 75 A Crim R 54, considered
R v Meloury; ex parte Attorney General of Queensland unreported, Court of Criminal Appeal, Qld, CA No 247 of 1985, 6 November 1985, considered
R v MJR (2002) 54 NSWLR 368; 130 A Crim R 481; [2002] NSWCCA 129, considered
R v Pham [1996] QCA 3, distinguished
R v Pinder, ex parte Attorney-General of Queensland [1992] QCA 426, considered
R v Quick; ex parte Attorney-General (Qld) (2006) 166 A Crim R 588; [2006] QCA 477, considered
R v Solway; ex parte Attorney-General of Queensland [1995] QCA 374, considered
R v Warren; ex parte Attorney General [1979] Qd R 268, considered
Radenkovic v The Queen (1990) 170 CLR 623; [1990] HCA 54, considered
Stalio v The Queen (2012) 223 A Crim R 261 [2012] VSCA 120, considered

COUNSEL: B H Mumford for the applicant
B G Campbell for the respondent

SOLICITORS: Cranston McEachern for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** The applicant for leave to appeal against sentence was convicted, on pleas of guilty, of two counts of indecent dealing, and was sentenced on each count to 18 months imprisonment, suspended after four months, with an operational period of 18 months. He seeks leave to appeal against those sentences on two grounds, the first (added by leave at the hearing of the appeal) that the sentencing judge erred in assuming that exceptional circumstances must be demonstrated before a non-custodial sentence could be considered appropriate, and the second, that the sentences were manifestly excessive.

The offences

[2] The offences took place in 1982 and 1983 when the applicant was 25 years old. At the age of 15, he had entered a training college with the intention of becoming a Christian Brother, and at 20 had moved to a seminary to train for the priesthood. In 1982, he had recently left the seminary without taking orders, and was working as a teacher, while also working in a voluntary capacity as a counsellor with a Catholic agency. The complainant was a 13 year old schoolboy. His parents were separated, and his mother, concerned that the boy needed a male figure in his life, had taken him to the applicant for counselling. Thereafter the two had regular contact, often going on camping and fishing trips together.

[3] The first of the two offences charged occurred when the applicant took the complainant on an overnight trip to the Gold Coast. He entered the boy's bedroom at night, removed his pants and performed fellatio on him to the point where the child ejaculated. On the occasion of the second offence, the applicant had taken the complainant to an athletics carnival and then returned with him to the applicant's suburban home. He took the boy to his bedroom and said that he would teach him how to masturbate. After himself masturbating, he asked the boy to put his hand on his, the applicant's, penis. Placing his own hand over the complainant's, he masturbated himself to ejaculation. The applicant told the complainant not to tell his mother what had occurred. Other similar incidents not the subject of charges were said to have occurred on camping trips in New South Wales; the point of their being raised was to show that the two offences before the court were not isolated incidents.

[4] The complainant, now middle-aged, made a victim impact statement to the sentencing judge, in which he described the profound effects of the sexual abuse on his life and on his ability to have successful relationships. He was estranged from both his parents; he found it difficult not to blame them in part for what had occurred. He had suffered confusion about his sexuality, embarrassment, guilt and an irrational fear of abusing his own children.

The bringing of the matter before the court

[5] The complainant first approached police about the matter in December 2012. He made a pretext call in mid-2013 to the applicant, raising two incidents of sexual activity between them. The applicant acknowledged them; he said that he was ashamed of his behaviour and was sorry for it. He explained that at the time of his offending he was immature; that his own sexual development had been retarded by years spent in a cloistered all-male environment; and that he had, in an entirely inappropriate way, been seeking intimacy. After indicating an awareness that the conversation was being recorded, he said that he would co-operate and assist the

appellant in any way he could. The applicant did subsequently co-operate with authorities: the charges proceeded by way of committal without cross-examination, with indications at that point that there would be a guilty plea. That plea was in fact entered, and the sentencing took place on the day the indictment was presented.

Submissions on sentence

[6] The sentencing judge was informed that the applicant had taught in secondary schools for some 35 years and resigned from his final employment as a deputy principal when he was arrested for the offences in 2013. He had no criminal history. He had married not long after the commission of the offences and had two children, now in their twenties. An impressive array of references was tendered on his behalf from personal and professional acquaintances of long standing.

[7] Counsel for the applicant at sentence tendered a psychologist's report, which spoke of the offending behaviour as that of "an immature, emotionally repressed and interpersonally naive young man, whose psychosexual development had been arrested in his mid-teens"; the last was a reference to the fact that the applicant had spent his late adolescence and early twenties in all-male religious organisations, had received no sex education and had no opportunity to express his sexuality. The psychologist noted that the applicant had lived his adult life as a married man in a monogamous relationship and had never been the subject of any complaint. He showed no sign of any paraphilia, or, more particularly, of paedophilia.

[8] The maximum penalty for the offence of indecent dealing at the time the offences were committed was seven years imprisonment. The Crown relied at first instance on two cases from the 1990's, also referred to here: *R v Pinder, ex parte Attorney-General of Queensland*[1] and *R v Goulding.*[2] In *Pinder,* the respondent, who had pleaded guilty to 14 counts of indecently dealing with a 13 year old boy over a six month period, including mutual acts of fellatio, was placed on probation for three years with a condition that he perform 200 hours of community service. The boy was a scout, the respondent a scout leader. The prosecution acknowledged that the boy did not appear to have suffered any long term psychological harm. The respondent had no criminal history.

[9] This Court set aside the sentence imposed on Pinder at first instance and substituted one of two years imprisonment, with a recommendation for consideration for parole after six months. In doing so it took into account: the corruption of the complainant boy; the disparity of age between him and the respondent; the respondent's position of trust and authority and his persistence in the offending over time; the fact the two offences were committed in the boy's home; and the offering of inducements to the boy to comply. The parole recommendation was made having regard to the fact that the applicant had completed part of the community service which was a condition of his probation.

[10] In *Goulding,* the applicant was convicted after a trial of one count of indecently dealing with a boy of about 12 and was sentenced to two years imprisonment with a recommendation for parole eligibility after six months. The applicant, who was about 37 years old, was a family friend of the complainant. He had touched the boy on the groin, kissed his inner thighs, sucked his penis and rubbed his own penis

---

1 [1992] QCA 426.
2 [1994] QCA 276.

against the boy's. At the end of the incident, which was said to be an isolated one, he gave the boy $10 and said "that ought to keep you quiet". That applicant had no previous convictions and he was not convicted until some 12 years after the offence. Given the nature and circumstances of the offence, the court concluded that the sentence, while "by no means light" was not manifestly excessive, and refused the application.

The sentencing judge's reasoning

[11] Both counsel proceeded before the sentencing judge on the basis that it was necessary he be satisfied of exceptional circumstances before considering a non-custodial sentence, a premise which his Honour adopted:

> "[It] is accepted that in such matters as this, without an extraordinary circumstance, the sentence should include a period of actual custody".

His Honour noted that there were exceptional features to the case: the very early plea, the applicant's co-operation, his early expression of remorse, the fact that he had no other criminal history and his general good conduct subsequently. But the breach of trust involved and the seriousness of the offences required, in his Honour's view, actual incarceration.

Issues on appeal

[12] Counsel had initially approached the appeal as involving consideration of whether his Honour should have regarded the exceptional circumstances of the case as warranting a non-custodial sentence. However, the court having questioned whether the premise that exceptional circumstances were a necessary condition for a non-custodial order applied at all in the present case, the notice of appeal was amended and arguments were directed to whether the sentencing judge had erred in proceeding on that basis. There were two issues in that regard: whether the approach of requiring that exceptional circumstances be identified for a non-custodial sentence existed at the time of the offences; and, if not, whether a later practice to that effect should be taken to have retrospective application.

The development of the 'exceptional circumstances' approach

[13] *Pinder*, the earlier of the decisions which the Crown put before the sentencing judge, was decided in 1992. This court concluded that the non-custodial sentence imposed at first instance could not be supported purely because of the seriousness of the offending; there was no suggestion of any need to consider whether the mitigating circumstances were of some particular potence. The first reference to the significance of special or exceptional circumstances that I have been able to identify comes in 1993, by way of observation in *R v H*.[3]

[14] The court in *R v H* reviewed a number of cases between 1984 and 1993 which it described as involving

> "interference with young girls by parents or persons in the position of parents … [mostly involving] very intimate sexual conduct short of penetration and … an absence of physical injury".[4]

Its review of cases indicated, the court said, that

---

3 (1993) 66 A Crim R 505.

4 At pp 508-509.

> "whilst it is not impossible for a non-custodial sentence to be imposed, very special circumstances will be needed before such a result may occur".[5]

That observation was repeated the following year in *R v Lipinski*:[6]

> "Undoubtedly, in most cases where adults indecently deal with immature children in ways similar to the ways in which the applicant dealt with the children in this case, a custodial sentence will be imposed. Very special circumstances however may justify a non-custodial penalty or a suspended sentence."[7]

[15] The approach was reiterated in *R v Pham*[8] and *R v Quick; ex parte Attorney-General (Qld)*[9]; the reference in those cases was to "exceptional" rather than "very special" circumstances. It ultimately attained legislative effect when s 9(5)(b) of the *Penalties and Sentences Act* 1992 was inserted in 2010, requiring a term of actual imprisonment for offences of a sexual nature against a child in the absence of exceptional circumstances. The question is, however, whether any similar precept existed at the time of the offending in this case.

[16] *R v Warren; ex parte Attorney General*,[10] decided in 1979, provides some illumination as to how matters stood then. There, an Attorney-General's appeal against a probation order made on an indecent dealing charge was dismissed, in that case by a majority. Of particular note is this statement by Hoare J, with whom Lucas J agreed:

> "So far as concerns the type of offence with which we are now concerned, the circumstances surrounding these offences as well as the circumstances relating to the offender are so varied that it could not be said that a gaol sentence should necessarily be regarded as the norm. For some offences it is often appropriate that there be what is sometimes described as a "tariff" sentence … However the circumstances surrounding the offence of the kind which we are now considering are so varied as well as the circumstances of the individual that any suggestion of a "tariff" for offences of this nature is inappropriate."[11]

It may be seen that the Court did not consider any singular approach warranted, much less what for convenience I shall refer to as the "*Pham* approach", of requiring the establishment of exceptional circumstances as a pre-condition to a non-custodial sentence.

[17] The earliest of the cases reviewed in *R v H* were also Attorney-General's appeals on the ground of manifest inadequacy of non-custodial sentences: *R v Harmer; ex parte Attorney General of Queensland*[12] and *R v Meloury; ex parte Attorney General of Queensland*,[13] decided respectively in 1984 and 1985. In *Harmer*, the respondent

---

5 At p 510.
6 (1994) 75 A Crim R 54.
7 At p 57.
8 [1996] QCA 3 at p 3.
9 (2006) 166 A Crim R 588.
10 [1979] Qd R 268.
11 At p 276.
12 CA No. 203 of 1984.
13 CA No. 247 of 1985.

had been convicted of six counts of indecent dealing with his 12 year old daughter; the offences consisted of handling her genitals and, on two occasions, placing his erect penis in the vicinity of her vulva. He was fined and placed on a good behaviour bond, the sentencing judge considering that the respondent was unlikely to re-offend and observing that it would not assist the child to have her father imprisoned. The court said that it was not in substantial disagreement with the sentence, previous decisions revealing a range of sentencing for that type of offence. The judgment contains no suggestion that sentencing for indecent dealing offences was to be approached in any way differently from sentencing for any other offence.

[18] Similarly in *Meloury*, no such suggestion was made, the court observing that each case must depend on its own facts and that it was:

> "a matter of balancing up the competing considerations of what might be called the objective nature of the offence which can properly be regarded in the ordinary course of calling for some custodial sentence, and the rehabilitative aspects which would point to a non-custodial sentence...".[14]

The respondent in that case had pleaded guilty to two counts of indecent dealing, which involved touching the genitals of his de facto wife's daughters, aged 11 and six. They were not isolated incidents and occurred over a significant period of time. He had no previous convictions. A psychiatrist had reported that therapeutic treatment he was receiving would be interrupted to disastrous effect by a custodial sentence, which would also have adverse consequences for his de facto wife and children. He was admitted to probation for three years with conditions for psychiatric treatment. The court dismissed the appeal, its members saying that they were not in substantial disagreement with the sentencing judge's order.

[19] The court in *R v H* noted particularly that the cases before 1989, some of which indicated lighter penalties, were based upon sections of the *Criminal Code* providing for lower maximum penalties. Interestingly, that statement, while broadly correct and certainly accurate insofar as offences against young children (such as those under consideration in *R v H*) were concerned, did not in fact hold true of the offences charged against the present applicant. The offence under s 210 of indecent dealing with a boy under the age of 14 years carried, at the time he committed it, a penalty of imprisonment with hard labour for seven years. In 1989, the provision was repealed and a new s 210 substituted, under which the maximum penalty for the offence, simpliciter, of indecent dealing with a child above the age of 12 years was actually reduced to five years imprisonment. The fact that the legislature saw fit to do so makes it even less likely that the *Pham* approach had any currency in the 1980's, particularly so far as offending against adolescents was concerned.

[20] Counsel for the respondent, however, pointed to some later decisions of this court as indicating either a view that the *Pham* approach did exist in the early 1980's; or, at any rate, that it was regarded as retrospectively applicable to sentencing for offences committed then. In *Lipinski*, already mentioned, the court made its reference to special circumstances as justifying a non-custodial penalty in the context of an application for leave to appeal against sentences imposed for offences occurring between 1968 and 1971. That applicant had been sentenced to three years imprisonment, with eligibility for parole after three months, for indecent dealing with two girls and a boy. He had himself brought the conduct to light by informing police of it and co-

---

[14] At p 4.

operated by pleading guilty on an ex-officio indictment. Having regard to those "unusual and exceptional" circumstances, the court considered that a suspended sentence ought be substituted for the sentence of three years actual imprisonment.

[21] There is no suggestion, however, that the court in *Lipinski* gave any consideration to whether that approach had any application at the time of the offending. Nor was it really necessary to do so, when the existence of such circumstances was being treated as a positive factor pointing to the allowance of the appeal. It is noteworthy that in setting aside the sentence, the court observed that counsel had not been able to refer the court to any range of sentences imposed for similar offences at the time of the offending, but that the three-year term of imprisonment must have been at the upper end of the sentencing range appropriate at that time. That observation suggests a view that information as to sentencing practices at the time of the offences, if available, would have been relevant.

[22] The next of the cases relied on was *R v Solway; ex parte Attorney-General of Queensland*.[15] The offences there had taken place over a period ranging from 1986 to 1989. Fitzgerald P expressed the view that:

> "[unless] a case for special consideration is established, child molesters should, in my opinion, be sent to jail."[16]

His Honour did not indicate that this was other than a contemporary opinion, as opposed to articulating the approach taken in the 1980's; and neither of the other judges in that case (Pincus JA and Demack J) referred to or adopted any such view.

[23] Finally, in another Attorney-General's appeal, *R v Jackson; ex parte Attorney-General of Queensland*,[17] the court again was considering a non-custodial sentence imposed for indecent treatment offences, in this case committed between 1979 and 1987. The appeal was dismissed. Davies JA, delivering the leading judgment, noted various unusual mitigating features, particularly the respondent's rehabilitation over the intervening years, in considering whether the suspension of the four year sentence of imprisonment imposed made it manifestly inadequate; but did not express their existence as a necessary pre-condition to a non-custodial sentence. McMurdo P agreed with him; Ambrose J, also agreeing, described those features as "exceptional circumstances which in the present case justified the fully suspended sentence". As in *Lipinski*, the exceptional circumstances were a reason for deciding in the offender's favour; it was not a case of their absence operating as a bar to a non-custodial result.

[24] None of the three cases relied on – *Lipinski*, *Solway* and *Jackson* - can be taken as any pronouncement on what sentencing practices were in earlier decades. In contrast, *Warren*, *Harmer* and *Meloury* illustrate clearly, in my view, that there was, at the time of the applicant's offences (1982-1983), no practice according with the *Pham* approach. Nor do the cases cited by the respondent suggest any consideration of or resolution of the question of whether that approach should be given retrospective effect. Indeed, and somewhat surprisingly, I have been unable to uncover any instance in which this court has considered whether current sentencing practices should be given retrospective effect.

---

15 [1995] QCA 374.

16 At p 4.

17 [2001] QCA 445.

Retrospective effect of current sentencing practice?

[25] The question has, however, been considered in other States. In *R v MJR*,[18] the New South Wales Court of Criminal Appeal sat as a five member bench to consider the question and, by majority, decided in the negative; or to put it in the converse, decided that a court ought to take into account sentencing practices as at the date of the commission of the offence. That conclusion was reached largely because of the existence of an earlier authority for the latter proposition. Spigelman CJ was also influenced by the remarks of Mason CJ and McHugh J in *Radenkovic v The Queen*,[19] which concerned a change in sentencing legislation and its effect where a sentence imposed before its commencement was quashed and the appellate court was required to re-sentence after its commencement:

> "In the context of an appeal against sentence, when a court of criminal appeal is called upon to re-sentence because it has quashed the sentence initially imposed, considerations of justice and equity ordinarily require that the convicted person be re-sentenced according to the law as it stood at the time when he was initially sentenced, particularly when that law was more favourable to him than the law as it existed at the hearing of the appeal."[20]

[26] Spigelman CJ noted also that sentencing legislation in New South Wales[21] provided, in effect, that an offender was to have the benefit of any reduction in penalty post-dating his offence, but was not to be subject to any increase in penalty.[22] A similar principle of fairness should be adopted in the common law context, so that the court should not refuse to have regard to sentencing practice as at the date of the offence "when sentencing practice ha[d] moved adversely to an offender".[23]

[27] The sole dissenting judge in *MJR*, Mason P, emphasised the fact that the issue arose in circumstances where the statutory maximum penalty for the relevant offence had not altered. In those circumstances, he said, current practices, which were likely to reflect a greater understanding about the long-term effects of child sexual abuse and judicial response to changing community attitudes, should prevail. The earlier case relied on was not a strong precedent and there were obvious difficulties in ascertaining past sentencing patterns.

[28] In *R v Kench*,[24] the South Australian Court of Criminal Appeal had to consider whether a higher level of sentencing for sexual offences against children set in a 1997 decision ought to apply where the relevant offences were committed before 1997. The court decided in the negative, Doyle CJ observing:

> "To apply the standard of sentencing foreshadowed in [the 1997 case], to offences that occurred before that decision, amounts to a retrospective change in the approach to sentencing. It also produces the result that an offender sentenced today for offences committed before 1997 is treated more harshly than an offender whose like offences were committed before 1997, but who was

---

18 (2002) 54 NSWLR 368.
19 (1990) 170 CLR 623.
20 (2002) 54 NSWLR 368 at 373.
21 *Crimes (Sentencing Procedure) Act* 1999 (NSW) s 19.
22 Cf s 11(2) of the *Criminal Code* 1899, s 20C of the *Acts Interpretation Act* 1954 and s 180(1) of the *Penalties and Sentences Act* 1992.
23 At p 374.
24 (2005) 152 A Crim R 294.

> sentenced before [the 1997 decision]. It is open to the court to apply a newly formulated sentencing standard to offences committed before the change occurs, but there should be good grounds to ignore the considerations just referred to by me, before one does so."[25]

[29] In *Green v The Queen*,[26] a majority in the Northern Territory Court of Criminal Appeal accepted

> "the general principle that a sentencing court should apply, as far as is reasonably practicable, the sentencing standards applicable at the time of the commission of the offence".[27]

In that case, however, a legislative scheme for the imposition of an indefinite sentence which could be replaced by a determinate sentence on review, possibly years into the future, was held to have qualified that principle.

[30] In Victoria, the situation is somewhat different because s 5(2)(b) of the *Sentencing Act* 1991 (Vic) requires the sentencing judge to have regard to "current sentencing practice"; an expression which the Victorian Court of Appeal has held in *Stalio v The Queen*[28] to mean practices at the time of sentence. Nonetheless, the court in that case observed that sentencing practices at the date of the offence remained relevant; the principle of equal justice required that an offender not receive a substantially higher sentence than another who committed similar offences at or about the same time, simply because of the lapse of time.[29]

[31] Given that weight of authority, this court should, in my view, regard the *Pham* approach as having no application in the applicant's case. The sentencing judge, having proceeded on the basis that it did, fell into error. The application for leave to appeal should be granted on that basis.

The applicable maximum penalty

[32] Counsel were invited to make submissions as to the effect, if any, of the already-mentioned amendment of the *Criminal Code* in 1989, substituting a new s 210 under which the maximum penalty for indecent treatment of a child 12 years or over was five years imprisonment, Those submissions were sought in light of s 180(2) of the *Penalties and Sentences Act*, which provides:

> "**180 Effect of alterations in sentences**
>
> ...
>
> (2) If a provision of this or another Act reduces the sentence, or the maximum or minimum sentence, for an offence, the reduction—
>
> (a) extends to offences committed before the commencement of the provision; but
>
> (b) does not affect any sentence imposed before the commencement."

[33] Both counsel took the position that s 180(2) had no application. They agreed that a new offence was created when s 210 was repealed and replaced in 1989, particularly

---

25 At p 298.
26 [2006] NTCCA 22.
27 At [62], [98].
28 [2012] VSCA 120.
29 At [54].

given that the substituted provision now dealt with indecent treatment of both boys and girls and provided for aggravating circumstances. That entails a narrow construction of the word "offence" in s 180(2), but it is consistent with dicta of the Victorian Court of Appeal in *R v Bowen*[30] as to a provision similar to s 180(2); and the result, of regarding the section as inapplicable, conforms with the conclusion reached, for different reasons, by the same court in *R v AMP*.[31] Given the applicant's concession that the maximum penalty was correctly regarded by the sentencing judge as seven years, it is unnecessary now to embark on further consideration of the issue.

The sentence which should now be imposed

[34] There remains the question of how this court should now exercise the sentencing discretion. I can commence by saying that, in my view, the sentence of 18 months imprisonment imposed by the sentencing judge was entirely appropriate, against a maximum penalty of seven years. The question of real difficulty is whether a sentence requiring actual custody should be imposed. *Harmer* and *Meloury* are examples of cases where indecent dealing, apparently of less serious proportions, did not result in incarceration.

[35] On the other hand, *R v Davies*,[32] which involved offences committed in 1986, indicates that that actual imprisonment might well have been imposed on this applicant had he been sentenced at that time. The offending there, although somewhat worse, involved, like the present case, a serious breach of trust. It consisted of four offences of indecent dealing (part of a larger pattern of abuse) with a 10 year old girl. The applicant, who was supposed to be teaching the child arithmetic, used some sort of relaxation technique to induce drowsiness in order to commit sexual acts on her. On one occasion, he licked her genitals; on two others, rubbed her genitals with Vaseline; and on a fourth, put his penis into her mouth, invited her to suck it and ejaculated in her mouth. That applicant was 51 years old with a wife and four children, had no previous convictions and a good work history and had pleaded guilty. He unsuccessfully appealed against concurrent sentences of three years imprisonment.

[36] There is no doubt that there are compelling mitigating circumstances in the applicant's favour: his relative youth and sexual immaturity at the time of the offending, his blameless life thereafter over a period of decades, his evident remorse and co-operation in the prosecution. Against that is the egregious breach of trust entailed in the offending: called on in a counselling role to provide the complainant with the male guidance he lacked because of his father's departure, the applicant abused his position utterly, in what were not isolated incidents. The other striking feature of the case, one which would not have been evident had the applicant been dealt with at the time of the offending, is the serious and lasting harm done to the complainant who, in middle age, remained deeply affected by what had occurred.

[37] The case is not one in which personal deterrence has any part to play. The role of general deterrence is very limited because the offending happened so long ago, in a different statutory context, with a much lower maximum penalty applicable. There is no issue of community protection. But the seriousness of the offences

---

30 [2008] VSCA 33. See also *R v Ronen* (2006) 161 A Crim R 300.

31 [2010] VSCA 48.

32 [1987] CA No. 123.

does, I have concluded, call for denunciation and real punishment in the form of actual imprisonment, albeit for a short period.

Conclusion

[38] The sentence imposed by the learned sentencing judge was not manifestly excessive; rather it achieved the necessary balance between the factors to which I have referred. Since I would not reach any different conclusion as to sentence, I would grant leave to appeal on the basis of the sentencing judge's error in approach, but dismiss the appeal.

[39] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with those reasons and with the orders proposed by her Honour.

[40] **MULLINS J:** I agree with Holmes JA.