SUPREME COURT OF QUEENSLAND

CITATION:	*R v MCA* [2014] QCA 47
PARTIES:	**R** **v** **MCA** (applicant)
FILE NO/S:	CA No 261 of 2013 DC No 71 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Bundaberg
DELIVERED ON:	21 March 2014
DELIVERED AT:	Brisbane
HEARING DATE:	7 March 2014
JUDGES:	Holmes and Fraser JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – PARTICULAR CASES – where the applicant committed two offences of indecent treatment of a child under 16, each with the aggravating circumstance that the child was under 12 – where the primary judge did not impose actual custody but recorded a conviction – whether the primary judge erred in recording a conviction – relevance of the reporting obligations and restrictions under the *Child Protection (Offender Reporting) Act* 2004 and their effect on the applicant's social wellbeing – relevance of the applicant's future levels of risk of re-offending *Penalties and Sentences Act* 1992 (Qld) s 12(1), s 12(2), s 13 *Fleming v The Queen* (1998) 197 CLR 250; [1998] HCA 68, distinguished *R v Rogers* [2013] QCA 192, considered
COUNSEL:	D Shepherd for the applicant P J McCarthy for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and the order he proposes.

[2] **FRASER JA:** The applicant pleaded guilty to two offences of indecent treatment of a child under 16 years of age with the circumstance of aggravation that the child was under 12 years of age. In relation to each count the applicant was sentenced to 18 months probation upon conditions including that he undergo such medical, psychological, psychiatric and other examination, treatment, counselling and advice as may reasonably be required by an authorised Corrective Services Officer to assist him to overcome any disposition and/or predilection for committing sexual offences against children to the extent that it results in anti-social behaviour and conduct. Convictions were recorded for both offences. The applicant has applied for leave to appeal against sentence on the ground that the sentencing judge erred in exercising his discretion to record convictions, rendering the sentence manifestly excessive in all the circumstances.

[3] At the hearing of the application the respondent applied for an adjournment in order to adduce evidence in relation to the applicant's performance under the terms of the probation orders. The respondent acknowledged that the foreshadowed evidence would become relevant only if the Court granted the application for leave to appeal, allowed the appeal, and re-sentenced the applicant afresh. The Court then proceeded to hear submissions limited to the question whether the application for leave to appeal against sentence should be granted, on the footing that, if the application were granted, the question whether the foreshadowed evidence should be admitted would be considered in a subsequent hearing of the appeal. Neither party opposed that course.

Circumstances of the offences and the applicant's personal circumstances

[4] The circumstances of the offences were set out in a schedule of admitted facts. The seventeen year old applicant, a school student, lived next door to the complainants, a five year old girl and her three year old brother. Whilst the applicant was at the complainants' house he went with both complainants into the girl's bedroom. The applicant took a toy stethoscope out of the girl's toy doctor's kit, he lifted up her shirt, he placed the stethoscope on her chest, he moved it onto her stomach, he placed it on the outside of her nappy, and he then placed it on the inside of the nappy and touched her vagina with it. The applicant then said to the boy that it was his turn and put the stethoscope under his pyjama pants and touched it on the boy's penis.

[5] The complainants' mother, who was present in the house, complained to the police on the same day. The applicant wrote a letter to the police in which he claimed that he had "played doctor" with the girl, that she had lifted up her shirt, and that he had said "no". The applicant acknowledged that he knew that what was alleged against him was "rude" and "wrong" and that if he did it he would go to jail. A week after the offences the applicant went to the police station and told police that the denials in his letter were wrong. He admitted that he had committed both offences. He told police that he knew it was "sexual harassment" and that he could go to jail over it. His family and a counsellor had told him that it was wrong. There was a full hand up committal and the applicant entered early pleas of guilty.

[6] The children's mother provided a victim impact statement. The sentencing judge accepted that the children's mother's distress was genuine. The sentencing judge

referred to changes in the children's behaviour observed by their mother, was not persuaded that all of those changes were attributable solely to the offences in circumstances in which some of the observed behaviours were experienced by children who did not have the distress of indecent treatment, but accepted that the affect upon the children was real and distressing.

[7] A psychiatrist's report referred to the applicant's documented history of Attention Deficit Hyperactivity Disorder and Asperger's Disorder. The psychiatrist considered it likely that the former disorder was significantly controlled by medication and he did not elicit enough symptoms to confirm the diagnosis of Asperger's Syndrome or an Autistic Spectrum Disorder. The psychiatrist considered that the applicant had behavioural difficulties and some social difficulties. The applicant was likely to have a low average intelligence with perhaps specific learning disorders, or his intellect might be on the Borderline Intellectual Functioning range, but the psychiatrist did not believe that the applicant had a natural mental infirmity. It was possible that the offending occurred because of the applicant's social immaturity, his identification with children of a younger age, and vulnerability exasperated by depression and stressors he was experiencing at the time. The applicant required ongoing counselling and support with particular emphasis on appropriate sexual behaviours and boundaries, social skills, and appropriate adult relationships. The psychiatrist considered that there was a high likelihood that the applicant would respond to appropriate counselling but would need follow up, and that with appropriate interventions and supervision the risk of further offending would be reduced to "low". The psychiatrist also observed that the applicant would be very vulnerable in prison and prison would not provide him with the required level of personal counselling.

Sentencing remarks

[8] The sentencing judge referred to the circumstances of the offences and the applicant's personal circumstances and accepted that the applicant was remorseful. The sentencing judge also accepted the psychiatrist's opinions, further information that the applicant had attended counselling on a weekly and sometimes fortnightly basis both before and after the offences, that the offending was momentary, and that the applicant had not engaged in that offending with a view to more serious sexual activity. The sentencing judge also observed that it was important to consider the impacts of the applicant's offending on the children. After expressing the conclusion that the circumstances were exceptional and justified the imposition of a sentence which did not involve actual custody, the sentencing judge sought submissions specifically about the question whether a conviction should be recorded.

Submissions at sentence about recording or not recording convictions

[9] The prosecutor submitted that convictions should be recorded because of the nature of the offence and the seriousness of the offending upon such young children. Defence counsel referred to s 12 of the *Penalties and Sentences Act* 1992 (Qld) and the difficulties under which the applicant already laboured in obtaining employment. He submitted that it was important for the applicant to have at least some prospect of obtaining employment in the future and that convictions should not be recorded. The prosecutor replied that it was relevant to consider community protection in relation to the applicant working with young children.

The sentencing judge's reasons for recording convictions

[10] The sentencing judge held that whilst it was relevant that recording convictions could affect the applicant's employment that was not a sufficient basis for not recording convictions; at least until the applicant had satisfactorily completed his counselling sessions, the applicant was a possible danger in a community and it was appropriate that convictions be recorded for such offences.

Consideration

[11] Section 12(1) of the *Penalties and Sentences Act* 1992 (Qld) confers upon sentencing courts a discretion to record or not record a conviction. Section 12(2) requires a sentencing court which is considering whether or not to record a conviction to "have regard to all circumstances of the case" including the nature of the offence, the offender's character and age, and "the impact that recording a conviction will have on the offender's … economic or social wellbeing … or … chances of finding employment."

[12] The applicant argued that the discretion to record or not record a conviction under s 12 of the *Penalties and Sentences Act* 1992 (Qld) miscarried because the sentencing judge did not take into account the existence of the obligations and restrictions in the *Child Protection (Offender Reporting) Act* 2004 (Qld). As support for that argument the applicant referred to *R v Rogers* [2013] QCA 192, in which the Court took into account the impact of the onerous reporting obligations under that Act upon that offender's social wellbeing in deciding to not record convictions.

[13] In *R v Rogers*, the Court set aside a sentence imposed at first instance and re-sentenced afresh. The applicant in that case submitted that the Court should order that convictions not be recorded because, on the recording of a conviction, he would become a "reportable offender" under that Act and subject to the Act's onerous reporting obligations, and for that reason his social wellbeing would be affected adversely. No similar submission was made to the sentencing judge in this matter and there was nothing in the material before the sentencing judge to support such a finding. Indeed, in the context of defence counsel's express reference to s 12 of the *Penalties and Sentences Act* 1992 (Qld), his reliance only upon the effect of recording a conviction upon the applicant's chances of finding employment implied that recording a conviction would not materially impact upon the applicant's social wellbeing. In any event, in the absence of a submission or any material to support it, the sentencing judge can hardly be criticised for failing to find and take into account that the recording of a conviction would have an adverse effect upon the applicant's social wellbeing.

[14] The applicant also argued that the sentencing judge's failure to advert to this issue was itself an error. *Fleming v The Queen* (1998) 197 CLR 250 was cited for the propositions that the sentencing remarks should have shown, expressly or by necessary implication, that the sentencing judge took into account the impact that recording a conviction would have on the applicant's social wellbeing, and that it was no answer to this requirement that the sentencing judge was an experienced judge who must have been well aware of the requirement and must have taken into account. *Fleming* turned upon provisions of the *Criminal Procedure Act* 1986 (NSW) applicable in trials by judge alone which required the judge to take into

account any warning to be given to a jury under any Act or law and to include in the judgment all principles of law applied by the judge. The latter requirement has no analogue in s 12 of the *Penalties and Sentences Act* 1992 (Qld). The absence of any such requirement may be contrasted with the provisions in s 13 of the *Penalties and Sentences Act* 1992 (Qld) that "the court must state in open court that it took account of the guilty plea in determining the sentence imposed" and that a court that does not reduce the sentence imposed on an offender who pleaded guilty "must state in open court…that fact, and…its reasons for not reducing the sentence". In circumstances in which there was no submission or other basis for the sentencing judge to find that recording the convictions would impact materially upon the applicant's social wellbeing, the sentencing judge's obligation under the general law to give reasons did not extend to an obligation to refer expressly to this aspect of s 12.

[15] The applicant argued that the sentencing judge was wrong to take into account the contingency of the possible unsatisfactory outcome of counselling sessions in circumstances in which the psychiatrist had indicated that the level of risk of re-offending would be reduced to low by treatment and supervision and there was a high likelihood that the applicant would respond to counselling. Upon the evidence the applicant remained at risk of re-offending "at least until he has satisfactorily completed his counselling sessions", to use the sentencing judge's expression. The evidence suggested that for the period up until the satisfactory completion of the counselling sessions, the risk could not properly be described as being a low level or risk. The sentencing judge was entitled to take that into account. The sentencing judge was also entitled to take into account the risk after satisfactory completion of the counselling sessions, notwithstanding that the psychiatrist assessed the risk in that period as being at a low level. The latter period was likely to be far longer than the former period, but that circumstance bears upon the weight, rather than the relevance, of this factor.

[16] The applicant also argued that the sentencing judge did not take into account the circumstances that the offending was momentary, that it involved the use of a toy stethoscope rather than a hand or fingers, and that it was not part of a lead up to more serious offending. However, the sentencing judge expressly took those matters into account in deciding that this was an exceptional case in which a non-custodial sentence should be imposed. I am unable to accept that when the sentencing judge immediately afterwards embarked upon the exercise of the discretion whether or not to record convictions his Honour neglected to take the same matters into account.

[17] The discretion did not miscarry in any of the ways for which the applicant contended. The applicant did not develop in oral argument a proposition that the sentence as a whole, including the recording of convictions, was manifestly excessive. It is therefore sufficient in that respect to record my conclusion that any such proposition should not be accepted.

Proposed order

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

[19] **DAUBNEY J:** I also agree with Fraser JA.