SUPREME COURT OF QUEENSLAND

CITATION:	*R v HBL* [2014] QCA 270
PARTIES:	**R** **v** **HBL** (applicant)
FILE NO/S:	CA No 126 of 2014 DC No 91 of 2014 DC No 706 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	Orders delivered 30 September 2014 Reasons delivered 24 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	30 September 2014
JUDGES:	Fraser and Gotterson JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered 30 September 2014:** **1. Grant the application for leave to appeal against sentence.** **2. Allow the appeal.** **3. Vary the sentence imposed in the District Court by substituting for the sentence for Count 1 a term of imprisonment for 18 months.** **4. Fix the date on which the applicant is to be released on parole at 30 September 2014.** **5. Otherwise confirm the orders made in the District Court.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was the father to the three year old child – where the applicant and the child's mother were in a long-term, intermittent and turbulent relationship – where there was a Domestic Violence Order against the applicant – where the Federal Magistrates Court had ordered that the child live with the mother – where the applicant had limited contact with the child subject to written agreement between him and the mother – where the mother

would not agree – where the child was left at home with the mother's friend – where the applicant arrived unannounced at the house and took the child – where the friend noticed the child was gone and recognised the applicant's car speeding away – where the friend called "000" and the applicant's mother – where the applicant's mother said that the child was safe with the applicant – where the applicant informed police that he wanted to spend time with the child and would take him to a police station later – where three hours later the applicant called the police again and said that he would not be returning the child to his mother given her occupation as a prostitute – where the applicant later informed the police that he had taken the child over the border – where the applicant and the child were located in Lismore three days later – where the applicant was charged with abducting a child under 16 years and breaching a Domestic Violence Order – where the applicant pleaded guilty and was sentenced to four years' imprisonment with a fixed parole eligibility date at 23 May 2015 – whether the learned sentencing judge erred in accepting that this case fell into the "worst category of this type of offence" – whether the sentence was manifestly excessive

Criminal Code 1899 (Qld), s 363, s 363A

Barbaro v The Queen; Zirilli v The Queen (2014) 88 ALJR 372; [2014] HCA 2, cited
Hili v The Queen; Jones v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
R v Cogdale [2004] QCA 129, considered
R v Dixon [1999] QCA 251, considered
R v Hampson [2011] QCA 132, cited
R v Humphrys (unreported, CA No 172 of 1985), considered
R v Salmon; ex parte Attorney-General of Queensland [2002] QCA 262, considered
R v Weldon [1997] QCA 432, considered

COUNSEL: R A East for the applicant
J A Wooldridge for the respondent

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

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA.

[2] **GOTTERSON JA:** On 13 March 2014 at the District Court at Brisbane, the applicant, HBL, pleaded guilty to Count 1 on a two-count indictment which had been presented on 16 December 2013. The Crown elected not to proceed with the other count, Count 2. Count 1 alleged an offence against s 363A of the *Criminal Code* 1899 (Qld) ("the Code") in that on 15 May 2013, the applicant unlawfully took JHC, a child under 16 years of age, out of the custody and against the will, of FW, the person having the lawful charge of him. The applicant was thereupon convicted of the offence. His sentencing was adjourned.

[3] At the adjourned hearing on 23 May 2014, the applicant pleaded guilty to a summary offence which was dealt with by the District Court pursuant to s 651 of the Code. This offending was against s 177(2) of the *Domestic and Family Violence Protection Act* 2012 (Qld) in that on 15 May 2013, he contravened a domestic violence order that had been made against him. He was convicted of the summary offence.

[4] The applicant was sentenced to a term of four years' imprisonment on Count 1. A parole eligibility date of 23 May 2015 was fixed. A declaration was made that 105 days of pre-sentence custody be time served under the sentence. Thus, the sentence required the applicant to serve a total period of one year and 105 days prior to becoming eligible for parole. For the summary offence, a conviction was recorded but no further sanction was imposed.

[5] On 23 May 2014, the applicant filed an application for leave to appeal to this Court against his sentence. The sole ground of appeal was that the sentence on Count 1 was manifestly excessive. The application was heard on 30 September 2014. At the conclusion of the hearing, the court made orders granting leave to appeal, allowing the appeal, and varying the sentence on Count 1 by substituting a term of 18 months' imprisonment and fixing a parole release date at 30 September 2014. The court stated that reasons would be delivered later.

Circumstances of the offending

[6] The applicant had been in a long-term intermittent relationship with Ms FW since 2004. A child of the relationship, JHC, was born in 2009. He was three years old at the date of the offending.

[7] The relationship was, at times, a troubled one. The domestic violence order the subject of the summary offence, was made on the request of Ms FW on 11 July 2011 at the Beenleigh Magistrates Court. On 27 June 2012 the Federal Magistrates Court ordered that the child live with her. Limited contact with the applicant was allowed by the order subject to written agreement between him and the mother. The applicant had been attempting to arrange contact since June 2012 but Ms FW would not agree to it.

[8] On 15 May 2013, the mother went to the Sunshine Coast. She left the child with a female friend with whom she and the child were living at Salisbury. At about noon that day, the applicant arrived at the house unannounced. He entered it, located the child who was upstairs watching television, and took him from the house to his car. The friend heard a door slam and the child call out "Mummy". She noticed that the child was gone and looked outside. She recognised the applicant's car as it sped off. She contacted "000" and next the applicant's mother who told her that the child was safe with the applicant.

[9] The police left a voice message on the applicant's phone. Some hours later, at about 5 pm, he called them. He alleged that Ms FW was a prostitute (an allegation which was not challenged on sentence). He told police that he wanted to spend time with his son and would take the child to the police station later.

[10] Three hours later he phoned the police again. This time he told them that under no circumstances would he be returning his son if the child was to be handed back to the mother or her friend. He said that unless there was an alternative to that, he would not be returning the child. He repeated the allegation concerning the mother's occupation and said that what he was doing was for the good of his son.

[11] Fifteen minutes later, the applicant phoned the friend; however, the police, who were present, took the call. He told them that he had taken the child over the border and that they should tell the mother that she would not be seeing him again. The applicant then hung up.

[12] Three days later, on 18 May 2013, the police obtained intelligence that the applicant was in Lismore. He and the child were located there the following morning and the applicant was then arrested.

[13] In attending at the house at Salisbury, the applicant breached the domestic violence order which was still current. It banned him from going to that residence.

Applicant's personal circumstances and history of offending

[14] The applicant was born on 2 March 1981. He was 32 years old at the date of the offending and 33 years old at the date of sentence. At the time of sentence he was living with his mother at Kingaroy.

[15] The applicant's criminal history began when he was 18 years old. He had been convicted of a variety of offences over fourteen court appearances. In 2005, he was ordered to serve a three month suspended sentence for a traffic offence. Otherwise he was usually fined. He was given the benefit of probation on one occasion and wholly suspended sentences on two other occasions.

[16] Relevantly, he had been convicted on 29 June 2011 of an offence of not complying with a child protection order granted on 2 December 2010 which prevented him from having any contact with the child other than under the supervision of a child safety officer. Five days after the order was granted, he breached it by, in the words of the prosecutor, "effectively taking the child". The applicant's then counsel stated that the offending occurred when the applicant and the mother met at a shopping centre and socialised for a period of time. The apparent inconsistency between the two accounts was never resolved in those proceedings. It would seem, however, that the sentencing magistrate regarded the offending as at or towards the lower end of seriousness. Despite the recording of a conviction, no further punishment was ordered on that occasion.

The sentencing remarks

[17] In the course of his sentencing remarks, the learned sentencing judge referred to the circumstances and history which I have set out. He also referred to the following additional matters:

(i) the seriousness of non-compliance with the Federal Magistrates Court order in the context of previous non-compliance with court orders regulating contact with his child;
(ii) the young age of the child;
(iii) that whilst the applicant's frustration at not being able to secure contact with his son was understandable, the actions he took to achieve contact could not be condoned;
(iv) that general deterrence was a significant feature of a case of this kind;
(v) the maximum penalty for the Count 1 offence of seven years' imprisonment;

(vi) that there had been a full hand-up committal hearing; the applicant had indicated his intention to plead guilty at an early stage; and there was no factual contest on sentence requiring witnesses to testify;
(vii) the applicant's cooperation with police;
(viii) the applicant's remorse;
(ix) that the applicant had been struggling emotionally for a number of years and was continuing to do so; and
(x) that the applicant had been a "worker" but had suffered a significant workplace injury.

[18] His Honour also referred to the one sentencing decision which had been cited to him, the decision of this Court in *R v Weldon*.[1] At the time, it was the only sentencing decision of this Court involving an offence against s 363A. A maximum penalty of two years' imprisonment prevailed for the offending in *Weldon*. With respect to that decision, the learned sentencing judge observed:

> " … There, of course, the maximum penalty was two years imprisonment. The maximum penalty for the offence you have committed is seven years imprisonment. Obviously the legislature took the suggestion of the Chief Justice de Jersey that there was a need to increase the penalty for this type of offence. Weldon, though, is a different case in that the offender was a friend of a young man who had formed a relationship with the complainant's sister. The child in that case was 14 years of age and the offender was a person with a criminal history that was the type that would not make any parent feel comfortable. He had been convicted of two counts of committing an act of indecency with a child under 16 and two counts of homosexual intercourse. It was inferred in that case that he had an unnatural passion for the complainant. The parents were obviously affected by what had happened with the child being taken. There was a search, obviously, throughout Queensland and New South Wales to try and find the child on that occasion and the Court noted the immense anguish the parents would've felt."[2]

[19] In *Weldon*, the offender was sentenced to the maximum of two years' imprisonment. He was in his late twenties. The offending occurred over about 10 months. On appeal, the sentence was held not to be manifestly excessive.

[20] Towards the end of his sentencing remarks, his Honour stated:

> "General deterrence is a significant factor in a case of this kind. I bear in mind your being in pre-sentence custody for 105 days. I treat that as being a period of about four months imprisonment. I cannot agree that a 12 month head sentence would be appropriate in this case nor that the three and a half months you have already been in custody is sufficient time. Considering the maximum penalty and the concern that there be a general deterrent in any sentence that is imposed and bearing in mind the serious aspects of your offending, including the breaching of previous orders, and the young age of this child, despite the other factors, including your frustration, I sentence you on the indictment to four years imprisonment."[3]

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1 [1997] QCA 432.
2 AB31 LL5-18.
3 *Ibid* at LL29-37.

Applicant's submissions

[21] The applicant submitted that the sentence imposed here was one that was appropriate for a category of offending distinctly more serious than that of the applicant's. The learned sentencing judge implicitly accepted the prosecutor's submission that this case fell into the "worst category of this type of offence". The exercise of the sentencing discretion was thereby led astray, it was submitted, and, as a consequence, a manifestly excessive sentence was imposed for Count 1.

[22] Counsel for the applicant developed the submission by reference to three cases involving the cognate offence of child stealing under s 363 of the Code, in which a child of whom the offender was not a biological parent, was taken with an underlying sexual purpose in mind. The cases are *R v Humphrys*,[4] *R v Cogdale*[5] and *R v Dixon*.[6] Two of them, *Cogdale* and *Dixon* were also referred to by the respondent in written submissions on the application.

[23] In *Humphrys*, the offender secretly persuaded a 12 year old boy to leave his family. He took him from Townsville to various parts of Australia over a 19 month period during which sexual activity between the two of them took place. The offender was a 33 year old male and had a criminal history which included offences of a sexual nature. He was convicted on a plea of guilty of child stealing. He was sentenced to four years' imprisonment with hard labour. On appeal, the sentence was described as one that could not "in any way be regarded as manifestly excessive".

[24] The offender in *Cogdale* was sentenced to five years' imprisonment. He had pleaded guilty to one count of burglary, one count of taking a child for immoral purposes and one count of exposing a child under the age of 16 to an indecent act. The maximum penalty for the child stealing offence was 14 years' imprisonment. The offender, a 36 year old male, removed a fly screen from the window of the complainant's bedroom. She was an eight year old girl. She had gone to bed while her parents were watching television. The offender carried her away to his car and drove to an isolated spot. She began to cry. He told her that if she was quiet, he would take her home. He then got into the back seat with the girl and masturbated himself to ejaculation. Afterwards, he dropped the complainant off outside her house. He was remorseful for what he had done. His application for leave to appeal against sentence on the ground that it was manifestly excessive was refused.

[25] In *Dixon*, the 27 year old offender drove up to where a seven year old girl was playing on a footpath. He moved quickly, grabbed her, put his hand over her mouth and told her to shut up. She screamed and struggled. Her father, who was nearby, heard her screams. The offender had wrested the girl into his car. The father ran to the car and punched the offender. The girl escaped. The offender evaded immediate interception by persuading the father that he in fact had rescued the girl from an attacker. It was clear that there was some sexual motivation behind the taking of the child. The offender pleaded guilty to the offence of child stealing. At the time the maximum penalty for the offence was seven years' imprisonment. He was sentenced to five years' imprisonment. He was refused leave to appeal against the sentence on the ground that it was manifestly excessive.

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4 CA No 172 of 1985.
5 [2004] QCA 129.
6 [1999] QCA 251.

[26] To further develop the submission, the applicant cited the decision in *R v Salmon; ex parte Attorney-General*,[7] to which the respondent also referred. That was not a case of child stealing or abduction although retrieval of a child was an objective of the offending. There, the child concerned was two and a half years old. She was the foster child of the offender's aunt. The 24 year old offender and the child's natural mother were participants in a home invasion. They invaded the foster parents' home unit armed with pieces of wood. Both foster parents were hit and injured. The child was traumatised. Apparently the overall purpose of the home invasion was to recover the child. The offender pleaded guilty to an offence of burglary with violence. The sentence imposed was a 12 months' intensive correction order. An Attorney-General's appeal succeeded and a sentence of 18 months' imprisonment to be suspended after six months, was imposed.

[27] Drawing on these decisions, counsel for the applicant proposed that a sentence of four to five years' imprisonment is commonly imposed for offending against s 363 (*Humphrys*, *Cogdale* and *Dixon*) or s 363A (*Weldon*) where the child is unrelated to the offender and the taking is motivated by a sexual interest. *Salmon* suggests that where those features are absent, the offending is apt to be regarded as less serious and a lesser sentence is imposed.

Respondent's submissions

[28] In written submissions, the respondent conceded that the submission at sentence that the subject offending fell into the worst category was one that could not be maintained to resist the application.[8] That concession was appropriately made. The respondent also accepted that the decisions to which reference was made by both it and the applicant demonstrated that "a lesser sentence could have been imposed". However, that, of itself, it was submitted, did not bespeak any legal error in the sentence.[9]

[29] It was further submitted that the sentencing exercise was a difficult one here, with no clear guidance from any genuinely comparable decision. The Court was reminded of the following observation of Muir JA in *R v Hampson*:[10]

> "It would tend to follow that the absence of guidance from comparable sentences as to an appropriate sentence in a particular case would make it more difficult for an appellate court to conclude that the sentence imposed fell outside the range of an exercise of a proper sentencing discretion."

Discussion

[30] In this case, two highly significant factors which have marked other sentences involving the taking of a child were not present. Here, the child was not one who was unrelated or unknown to the applicant-offender. Nor was there any motivation by a sexual interest. In addition, the taking was non-violent. Allowing for these differences, it is beyond question that the offending here was not within the worst category of offending.

[31] In my view, there is a discernible error in the sentencing in this case. It arises from an apparent categorisation of it with others where much more serious factors were

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7 [2002] QCA 262.

8 Outline of Submissions para 9.4.

9 *Ibid* para 9.10.

10 [2011] QCA 132 at [33], White JA agreeing.

present. They elevated the level of criminality involved. On account of those factors, those cases might fairly be regarded as in or towards the worst category of offending. In the result, the offending here and its attendant criminality was miscategorised. What followed from that was a sentence that was manifestly excessive.

[32] The above observation in *Hampson* is one that may need to be reconsidered particularly in light of the decisions of the High Court in *Hili v The Queen; Jones v The Queen*[11] and *Barbaro v The Queen; Zirilli v The Queen*.[12] I would add that even it be correct in principle, I do not regard that observation as placing a constraint or limitation upon this Court in an instance where the sentence under consideration is one that has been imposed after a clear miscategorisation of the seriousness of the criminality of the offending involved.

Disposition

[33] For these reasons, it is appropriate that leave be granted to appeal against sentence and the appeal be allowed by setting aside both the term of imprisonment and the parole eligibility date.

[34] In deciding upon a substitute sentence, it is important to bear in mind that despite having been motivated by a frustration to be with his own son, the applicant's conduct in taking the law into his own hands and breaching court orders, cannot be condoned. Though no one was hurt, deterrence is highly significant here. A custodial sentence is called for. In my view, the appropriate sentence is 18 months' imprisonment on Count 1. By the date of the hearing of the appeal, the applicant had served about seven and a half months of actual custody allowing for the declared time. He need not serve any more time before becoming eligible for parole.

Orders

[35] For these reasons, I consider that it was appropriate that the following orders were made on 30 September 2014:

1. Grant the application for leave to appeal against sentence.
2. Allow the appeal.
3. Vary the sentence imposed in the District Court by substituting for the sentence for Count 1 a term of imprisonment for 18 months.
4. Fix the date on which the applicant is to be released on parole at 30 September 2014.
5. Otherwise confirm the orders made in the District Court.

[36] **MULLINS J:** I agree with Gotterson JA.

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11 (2010) 242 CLR 520; [2010] HCA 45.

12 (2014) 88 ALJR 372; [2014] HCA 2.