SUPREME COURT OF QUEENSLAND

CITATION:	*R v SCI; Ex parte Attorney-General (Qld)* [2015] QCA 39
PARTIES:	**R** **v** **SCI** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 270 of 2014 DC No 1283 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	24 March 2015
DELIVERED AT:	Brisbane
HEARING DATE:	3 March 2015
JUDGES:	Holmes and Gotterson and Philippides JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal against sentence on count 2 is allowed to the extent of substituting an operational period of five years for the existing operational period of three years.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the respondent pleaded guilty to one count of making child exploitation material and one count of distributing child exploitation material – where the respondent was sentenced to two years probation on count 1 and two years imprisonment wholly suspended for an operational period of three years on count 2 – where the respondent committed the offences whilst on bail for a charge of fraud, and partly within the period of a good behaviour bond for a conviction of unlawfully obtaining a financial advantage – where the respondent was the mother of the complainant and the offending involved a serious breach of trust – where the respondent's offending occurred during a period of emotional and psychological turmoil – where there was a delay of over two years between the complaint

being made to police and the respondent being charged, during which the respondent had served a term of imprisonment for fraud – where the respondent had taken significant rehabilitative steps which would be jeopardised by a return to incarceration – whether the respondent should have been required to serve time in actual custody – whether the sentence was manifestly inadequate

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the respondent pleaded guilty to one count of making child exploitation material and one count of distributing child exploitation material – where the respondent was sentenced to two years probation on count 1 and two years imprisonment wholly suspended for an operational period of three years on count 2 – where the respondent had served 12 months of a three and a half year custodial sentence, suspended for an operational period of five years for a conviction of fraud – where this operational period ran concurrently with that for the sentence on count 2 – where the appellant argued that the totality principle did not warrant a reduction in sentence, or in the alternative, that the sentencing judge had misapplied the totality principle by imposing a sentence which did not properly reflect the overall criminality of the offending conduct – whether the totality principle was misapplied

Penalties and Sentences Act 1992 (Qld), s 143

CMB v Attorney General for New South Wales [2015] HCA 9, applied
R v Beattie; Ex parte Attorney-General (Qld) [2014] QCA 206, cited
R v L; ex parte Attorney-General (Qld) [1996] 2 Qd R 63; [1995] QCA 444, cited
R v MAK (2006) 167 A Crim R 159; [2006] NSWCCA 381, cited
R v MBM (2011) 210 A Crim R 317; [2011] QCA 100, distinguished
R v Rogers [2009] QCA 10, distinguished

COUNSEL: A W Moynihan QC for the appellant
J J Allen QC, with C M Giarola, for the respondent

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

[1] **HOLMES JA:** The respondent, having pleaded guilty, was placed on a two year probation order in respect of one count of making child exploitation material and was sentenced to two years imprisonment, suspended in its entirety for a period of three years, on a second count of distributing child exploitation material. Three days spent in pre-sentence custody were declared. The verdict and judgment record

shows that convictions were recorded on both counts.[1] The appellant appeals the sentences as manifestly inadequate and as involving error by the sentencing judge in applying the totality principle.

The factual background

[2] A schedule of facts was tendered by agreement. The respondent, who at the relevant times was 37 or 38 years old, was the mother of a 12 year old girl. On five different occasions, she took a series of photographs of the girl. In three of them, the child was wearing underwear; in six, she was naked in the shower; while another six or eight (the schedule gives a range) showed her vaginal area, one with the child holding her labia open. (The schedule of facts also refers to two photographs of the child in her bikini, taken from the front, but it is difficult to see why they should be regarded as indecent images.) The respondent told her daughter that the photographs of her vaginal area were needed to show a doctor. Others, she said, would be used in a photograph album she was making for the girl. Occasionally, she tried to entice her to co-operate by promising money or books.

[3] The respondent, although living with her husband and two children (the daughter of whom the photographs were taken and a son some six years younger), was having a sexual affair with a man to whom I shall refer as Mr B. Of the photographs, one of the child wearing only underpants, taken from behind, one of her in the shower and three photographs of her vaginal area, including the one with her labia held open, were sent to Mr B over three occasions in December 2010 and January 2011. According to the schedule of facts, Mr B maintained that he was shocked by the photographs sent to him and deleted them, but the respondent informed a psychiatrist, Dr Beech, whom she attended for the purposes of a report for sentence, that she had taken and sent the photographs at his instigation. The prosecutor at sentence conceded that some of the respondent's text messages concerning the photographs appeared to be responding to others, but that was a matter of speculation; the messages Mr B sent had been deleted. Counsel could make the concession, however, that "we may never get to the bottom of what all [sic] started this".

[4] A victim impact statement from the respondent's (now estranged) husband said that he and his two children had undergone psychological counselling. His daughter remained withdrawn and became emotional if the subject of her mother were broached.

The respondent's antecedents

[5] The respondent was born in New Zealand, where she was educated to Grade 10 level, and as a teenager moved to Australia to live with an aunt. She married her husband at the age of 21; the marriage was said to have become unhappy and to have involved some violence. The respondent obtained an advanced diploma in child care and became director of a child care centre. In April 2009, she was dealt with in the Magistrates Courts for an offence under the *Crimes Act* 1914 (Cth), of obtaining financial advantage (in relation to family tax benefit) over a period of

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[1] In fact, the sentencing judge's remarks do not indicate the recording of a conviction on either count, although a conviction would have been necessary to the sentence of suspended imprisonment: *Penalties and Sentences Act* 1992 s 143. Both parties to the appeal agreed that convictions would properly have been recorded on both counts and the verdict and judgment record showing that they were should not be disturbed.

eight months ending in June 2008, and was released on a two year good behaviour bond with an order that she make reparation of some $4,000. In some financial difficulties, she subsequently commenced to steal from the child care centre. She was ultimately charged with a fraud committed between 30 September 2009 and 12 June 2010, for which she was sentenced in April 2013 to three and a half years imprisonment suspended after 12 months with an operational period of five years.

[6] According to the submissions of the prosecutor on sentence, the respondent's daughter had made a complaint "a couple of weeks or months" after the last incident in 2011, but police had taken some time to conduct the investigation, with the result that the respondent was not charged until late 2013, when she was in custody on the fraud charge. Her counsel informed the court that since her release from custody she had formed a new relationship, and, since she had no prospect of working again in child care, was training to become a florist. She no longer had any direct contact with her children.

[7] Dr Beech, who provided the psychiatric report relied on by the respondent, recorded as part of her history that she had been sexually abused by her brother when she was between the ages of eight and 10 years. From 2010, the respondent informed him, she had been using tranquillisers heavily and was unhappy and lonely in her marriage. She had taken the photographs of her daughter in a bid to maintain her relationship with Mr B. She had subsequently separated from her husband and formed a relationship with another man, which endured through her incarceration and was still in place at the time of sentence. Dr Beech noted that the respondent described significant remorse and guilt about what she had done. While in custody, she had ceased using tranquillisers and had received anti-depressant medication. On her release she undertook counselling from Drug Arm.

[8] Dr Beech said that the respondent appeared aware of the wrongness of her behaviour and had some insight into the circumstances giving rise to her offences. The offending had occurred during a period of emotional and psychological turmoil in which the respondent was involved in an unhappy marriage and was experiencing loneliness and depression, probably related to her family background of childhood sexual abuse and development of psychological symptoms after her daughter's birth. There were added stresses of her financial difficulties and a falling out with her mother. It was likely she had provided Mr B with the indecent images in an endeavour to retain her relationship with him; she described problems with self-esteem which were made worse by her husband's criticism and alleviated by the relationship with Mr B. Dr Beech's opinion was that her risk of re-offending was low.

[9] In addition to the psychiatric report, the respondent's counsel tendered an appointment schedule showing that she had attended fortnightly appointments with a psychologist over the two months leading up to the sentence; reports from Drug Arm indicating that the respondent had attended 11 of 12 sessions in a treatment and intervention program targeted at drug misuse; the results of drug screening over some months, showing nothing untoward; a list of medications (including an antidepressant) prescribed by the respondent's general practitioner; and a letter from a program worker with Sisters Inside who had visited the respondent in custody on a fortnightly basis and said that she continued to meet her weekly to support and assist her.

The sentencing remarks

[10] The sentencing judge described the respondent's behaviour, accurately, as a gross betrayal of her daughter, which had clearly had a significant impact on the girl. At the time the offences were committed, the respondent was on the good behaviour bond imposed in April 2009. Her Honour accepted that the offences for which she was sentencing the respondent had occurred in a period of emotional and psychological turmoil, during which she had also committed the fraud. It could be said in her favour that the photographs were relatively passive; there was no use of any device on the child, or hint of penetration; the distribution was to one person only; and there was no suggestion of any financial profit. There had been a delay in charging the respondent, who had entered a timely plea of guilty. Her Honour accepted that the respondent was remorseful. She had taken steps towards rehabilitation, having undergone counselling and drug and alcohol rehabilitation, and had continuing support both from her current partner and the Sisters Inside organisation. She had lost contact with her children as a result of the offending and would no longer be able to work in child care.

[11] The sentencing judge expressed the view that had the respondent been sentenced in April 2013 for the current offending as well as the fraud, she was likely to have been sentenced to a longer period in actual custody. However, given the steps taken towards rehabilitation and the fact that the respondent had served 12 months of the fraud sentence, her Honour considered it appropriate to impose a sentence allowing her to stay in the community under supervision. Accordingly, she imposed the probation order and the suspended sentence of imprisonment which are the subject of this appeal.

The submissions on this appeal

[12] The appellant relied on two cases described as yardsticks against which the sentence could be measured: *R v MBM*,[2] and *R v Rogers*.[3] In *MBM*, the applicant was sentenced to two years imprisonment suspended after eight months with an operational period of two and a half years on charges of knowingly possessing child exploitation material and making child exploitation material. He was successful in appealing that sentence on the former count, but not on the latter. He was a 37 year old man with no previous convictions who had pleaded guilty to making five separate movies of his niece showering, including depictions of her fondling her breasts and touching her vagina. She was 14 years old and appeared unaware that she was being filmed. In his favour, the court said, were his previously unblemished history, his excellent work history, family support, his good prospects of rehabilitation and his early pleas of guilty. In recognition of those factors, the sentence on the possession charge was reduced to one of 12 months suspended after three months. However, observing that the applicant was a mature man who had engaged in the conduct involved on five occasions, and although not in a position of trust, had betrayed the protection to be expected by his niece in the home of her extended family, the Court concluded that the sentence imposed on the count of making child exploitation material was not manifestly excessive.

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2 [2011] QCA 100.
3 [2009] QCA 10.

[13] In *R v Rogers*, the applicant's web camera, which was movement activated, filmed his 15 year old stepdaughter dressing and undressing. It was accepted at sentence that the filming was inadvertent, but the applicant proceeded to create still images from the footage. That conduct led to a charge of making child exploitation material to which the applicant pleaded guilty, being sentenced to 12 months imprisonment. On a further count of possession of child exploitation material in a very great quantity (48,000 images), some of which involved torture and bestiality, he was sentenced to three years imprisonment suspended after 10 months. He was also sentenced to 12 months imprisonment on a remaining count of possession of child exploitation material (which was committed on bail). All terms were concurrent. His argument on his application for leave to appeal against sentence was that because by the sentence date he had already served seven and a half months under conditions of some difficulty, because of a physical disability, he should not have been required to serve the further two and a half months before his sentence was suspended. He was not successful.

[14] The appellant argued that the offending in the present case was worse than that in *MBM* and *Rogers*, because the children in those cases were oblivious to the conduct, and in neither case was the offender charged with distributing the images recorded. The respondent had been responsible for a significant breach of trust in the mother-daughter relationship, one of particular vulnerability; her offending was a course of conduct, not an isolated incident; and she was not an immature first offender. She had a history of anti-social and dishonest behaviour, and for part of the period during which she committed the offences, was in breach of both the two year good behaviour bond imposed on the Commonwealth offence and the conditions of her bail granted on the fraud offence. The head sentence of two years on the charge of distribution of material was appropriate; what rendered the sentence inadequate was the failure to require any part of the sentence to be served in custody.

[15] The second limb of the appellant's argument was that while the totality principle was relevant, because the respondent was still serving the fraud sentence at the time she came to be sentenced on the present offences, the sentencing judge had failed to apply it properly. Her Honour had allowed the mitigating factors – remorse, rehabilitation, the delay in charging, the effect on the respondent's contact with her family, her supportive relationship and her low risk of reoffending – to overwhelm the exercise of the sentencing discretion. The totality principle had not warranted any reduction in sentence; alternatively, the sentencing judge had misapplied the principle so as to impose a sentence which did not properly reflect the overall criminality of the conduct.

[16] The offending in question significantly increased the criminality for which the respondent was to be sentenced, which warranted either consecutive terms of imprisonment or alternatively an increase in the actual period to be served. To ensure public confidence in the administration of justice it was necessary that the Court avoid any suggestion of "a discount for multiple offending".[4] There was no real additional punishment here, other than the two years probation, because the operational period for the fraud sentence and the sentence for distribution of the photographs ran concurrently, the first expiring on 20 April 2018 and the second on 30 September 2017. Any subsequent offence would breach both sentences, so it

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4 *R v MAK* (2006) 167 A Crim R 159 (a decision of the New South Wales Court of Criminal Appeal).

could be expected that, if activated, they would run concurrently, with the balance of the fraud sentence extending beyond the distributing sentence.

[17] The respondent's counsel tendered affidavits from the respondent and a Legal Aid lawyer. The respondent's affidavit expresses her (predictable) concern at the prospect of returning to jail, but more importantly details her continuing involvement with Sisters Inside and her treatment by a psychologist, as recommended by her Corrective Services case manager. The Legal Aid officer's affidavit annexes the case manager's report, which is favourable, in relation to the respondent's performance of her probation order and confirms the recommendation for the psychologist's treatment. A letter from the same Sisters Inside program worker who reported at sentence confirms her continuing role in meeting the respondent on a weekly basis to support and counsel her. The third document annexed to the affidavit is the report of Mr Jones, the psychologist, who had seen the respondent on two occasions prior to giving it and had been given access to information from Queensland Corrective Services. He describes the respondent as "forthcoming and transparent" and observes that she is

> "at a critical point in her recovery from substance abuse, long term abusive relationships since childhood, establishing her relationship with her current partner, general and substance rehabilitation and training for an occupation".

Mr Jones makes the unsurprising point that a return to custody would put her progress in jeopardy.

[18] Counsel for the respondent pointed out that both aspects of the mitigating effect of delay identified in *R v L; ex parte Attorney General*[5] were present in this case. The respondent had been left in a state of uncertainty over the period between her daughter's complaint to police in August 2011 and her being charged in December 2013. The delay had also been sufficient for her to demonstrate considerable progress in her rehabilitation, which continued to the present. It was an extremely significant factor in sentencing that the respondent had been released from custody back into the community and taken steps to rehabilitate. It was plain that a further custodial term would not have contributed to the respondent's rehabilitation or served any aim of personal deterrence. Those were reasons which had persuaded this court in *R v Beattie; Ex parte Attorney General (Qld)*[6], on re-sentencing, against returning an offender to custody who had served a relatively recent term of imprisonment. If the Court were to conclude that the sentence was manifestly inadequate, it should exercise its residual discretion to decline to intervene.

Conclusions

[19] To succeed on this appeal the appellant must identify error in the sentencing judge's exercise of discretion and, if successful in doing so, negate any reason for the exercise of the residual discretion.[7]

[20] I have not found either of the decisions to which the respondent referred, *MBM* and *Rogers*, particularly useful. The sheer volume and the grossness of the child

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5 [1996] 2 Qd R 63.

6 [2014] QCA 206.

7 *CMB v Attorney General for New South Wales* [2015] HCA 9 at [34–36]; [56–66].

exploitation material involved in *Rogers* makes it of dubious assistance. On the other hand, the abuse of the mother-daughter relationship in this case is considerably more abhorrent than the circumstances in *MBM*. (The want of comparable sentences involving child exploitation material in the mother-daughter context is something for which to be grateful.) However, neither *MBM* nor *Rogers* involves the significant feature, plainly a powerful consideration for the sentencing judge, of the respondent's relatively recent imprisonment and rehabilitation.

[21] The appellant's submission that application of the totality principle could not of itself have warranted an approach which required the respondent to serve no further period in actual custody is obviously correct. It is clear that had she been sentenced for all counts at once she was likely to have received a longer term of actual incarceration. But the sentencing judge acknowledged as much. What warranted her approach was the respondent's release from custody and rehabilitative steps, which were likely to be defeated by further incarceration, together with the unlikelihood of the respondent's reoffending in a similar way. I do not consider that the sentence was manifestly inadequate by reason of the respondent's not having been required to serve any further time in actual custody. While in the ordinary course, an offence involving such a serious breach of trust would attract a custodial term, it was open to the sentencing judge in the exercise of the sentencing discretion in these particular circumstances to tailor a sentence which kept the respondent in the community while ensuring supervision of her and facilitating her continuing treatment.

[22] But, in my view, the appellant's submissions are correct to this extent: the sentence was manifestly inadequate in that it imposed a sentence in respect of the distributing charge which added nothing to the existing three and a half year sentence for fraud. That was because, as the appellant's counsel identified, if there were to be a breach of the former, it would be inconsequential in light of the shorter operational period attached to it; that did involve something of the "discount for multiple offending" effect. If the sentences were to run concurrently, in order to give the sentence on the distributing charge any additional effect, it was necessary at least that the operational period extend beyond the existing one for the fraud sentence. (Counsel for the respondent disavowed any reliance on the residual discretion so far as the prospect of an increase in the operational period was concerned.)

Order

[23] For that reason, I would allow the appeal against sentence on count 2 only to the extent of substituting an operational period of five years for the existing operational period of three years.

[24] **GOTTERSON JA:** I agree with the order proposed by Holmes JA and with the reasons given by her Honour.

[25] **PHILIPPIDES JA:** I agree with the reasons of Holmes JA and with the order proposed.