SUPREME COURT OF QUEENSLAND

CITATION:	*R v Vizzard* [2015] QCA 47
PARTIES:	**R** **v** **VIZZARD, Simon Blair** (applicant)
FILE NO/S:	CA No 176 of 2014 DC No 67 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	10 April 2015
DELIVERED AT:	Brisbane
HEARING DATE:	5 December 2014
JUDGES:	Margaret McMurdo P and Holmes JA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the application for leave to appeal against sentence and allow the appeal.** **2. Substitute sentences of four years each on the counts of permit sodomy and attempted sodomy (counts 5, 12 and 13) and sentences of three years on each other count.** **3. All periods of imprisonment to run concurrently from 4 February 2012.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count permit sodomy and two counts attempted sodomy and was sentenced to seven years imprisonment – where the applicant pleaded guilty to 11 counts of indecent treatment of a child and was sentenced to six years imprisonment – where the applicant pleaded guilty to seven counts of wilful exposure and was sentenced to three years of imprisonment – where the applicant pleaded guilty to four counts of procuring and was sentenced to three years imprisonment – where the sentences imposed were all concurrent – where the offending occurred between 1997 and 2001 – where the applicant fled the jurisdiction after being charged – where the applicant served eight years imprisonment in another jurisdiction before

extradition to Australia – where the applicant had been in custody since 6 November 2003 – where the applicant submitted the sentence imposed failed to take into consideration the totality principle – whether the sentence imposed was manifestly excessive

Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, cited
R v Auer; ex parte Attorney-General (Qld) [2011] QCA 222, cited
R v Ruhland [1999] QCA 430, cited
R v ZA; ex parte Attorney-General (Qld) [2009] QCA 249, cited

COUNSEL: J J Allen QC for the applicant
B J Power for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Dalton J's reasons for granting the application for leave to appeal against sentence and allowing the appeal. I agree with her Honour's proposed orders.

[2] **HOLMES JA:** I have had the advantage of reading the reasons for judgment of Dalton J, and agree with what her Honour has said and the orders she proposes. None of the offences to which the applicant pleaded guilty carried a maximum penalty greater than 14 years; indeed the sentences imposed on the attempted sodomy charges were the maximum which could be imposed (seven years imprisonment). Had the applicant served no other term of imprisonment, it might have been appropriate to impose sentences at that level to reflect the gravity of the offending as a whole. But effective sentences totalling slightly over 15 years imprisonment, with a minimum period in actual custody of 11 years and three months (allowing for the period between 13 December 2011 and 2 February 2012 when the applicant remained in jail in Mexico awaiting his extradition), were an excessive punishment for the criminality involved in both groups of offences. Of the decisions cited, *R v Ruhland*[1] in particular provides an indication of the proportions of the sentence which would appropriately have been imposed.

[3] I agree that there is nothing to be gained by altering the applicant's parole eligibility date, which has passed; but had that not been the case, I would have considered it appropriately set at the date of the sentence, the applicant by then having spent two and a half years in custody following the commencement of his early release on the Mexican sentence.

[4] **DALTON J:** This is an application for leave to appeal against 25 of 26 sentences[2] imposed in the District Court on the grounds that the sentences are manifestly excessive because they offend against the totality principle and have an effect which is crushing and disproportionate. My view is that the application and appeal ought to be allowed.

[5] The applicant pled guilty to 26 offences committed between 29 October 1997 and 16 March 2001. The offending was against three boys aged between 11 and 14.

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1 [1999] QCA 430.

2 No appeal is made against the 12 month sentence imposed on count 33 of the indictment.

The offending was serious; it involved oral sex, attempts at anal sex, having the boys perform sexual acts with each other and introducing the boys to sex toys and pornography. In relation to a charge of permit sodomy and two charges of attempted sodomy (counts 5, 12 and 13), the applicant was sentenced to seven years imprisonment. On 11 counts of indecent treatment of a child, the applicant was sentenced to six years imprisonment. On seven counts of wilful exposure the applicant was sentenced to three years imprisonment, and on four counts of procuring he was sentenced to three years. The sentences were all concurrent and parole eligibility was fixed at 4 February 2015.

[6] The offending is dated. Once charged, the applicant fled to Mexico. There he committed sexual offences against three young boys aged eight, 12 and 13. He was sentenced to 10 years imprisonment and served around eight before he was extradited to Australia to face the charges with which this Court is dealing. The applicant became eligible for release in Mexico on 13 December 2011 but remained in prison pending extradition and arrived in Australia in February 2012. Thus, at the time he was sentenced on 11 June 2014, he had been in custody continuously since arrest in Mexico on 6 November 2003.

[7] The applicant was aged 26 to 30 at the time of the offending and 43 years at the time of sentence. The applicant had no previous convictions at the time of the 1997-2001 offending. Although he pled guilty in the District Court it could not be regarded as an early plea, firstly because of his flight to Mexico in breach of his bail conditions, and secondly because even once he returned to Australia a plea was not indicated initially in the District Court. A psychologist's report was tendered at the sentencing hearing. The psychologist assessed the applicant as at a high risk of re-offending due to poor self-awareness and poor self-regulation.

[8] The sentencing judge stated that she took into account the fact that the applicant had been in custody for a very long period of time as something which was "very relevant". The applicant submitted that the sentence actually imposed failed to reflect that totality consideration. It was accepted by the Crown that *Mill v The Queen*[3] required the sentencing judge to have regard to the effective sentence as if the defendant had committed all the offending in one jurisdiction and been sentenced at the one time. The sentence imposed in Mexico, together with the sentence imposed in the District Court, theoretically amounted to a head sentence of 17 years, although, in reality, because of early release at eight years in Mexico, the total of the two head sentences in practical terms was 15 years, with parole eligibility after 11 years.

[9] At the time of sentence in the District Court, the applicant had been in pre-sentence custody in Australia since 4 February 2012. That 858 days was declared as time already served under the sentences imposed. The parole eligibility date of 4 February 2015 was fixed to be three years from the time the applicant was returned to custody in Australia in February 2012.

[10] The applicant faces the hurdle that the sentences imposed by the District Court judge were in line with submissions made by his own counsel. There is no doubt that his fleeing while on bail was a very serious aggravating circumstance. It is also an aggravating feature that the Mexican offences were committed whilst on bail and after absconding. There is also no doubt that his conduct has caused great damage to his victims. The psychologist's report required the sentencing judge to consider

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3 (1988) 166 CLR 59, 66.

a heavy sentence which would provide adequate protection to the community. The applicant was not entitled to the normal credit for a plea.

[11] The applicant's counsel submitted on appeal that the most serious of the offences in the District Court ought to have attracted sentences of four years, thus yielding (in practical terms) a head sentence of 12 years. It was said that was more consistent with the sentences imposed in comparable matters, in particular with the authorities of *R v Ruhland;*[4] *R v ZA; ex parte A-G (Qld)*[5] and *R v Auer; ex parte A-G (Qld)*.[6]

[12] *R v Ruhland* involved eight counts of maintaining a sexual relationship with a boy under 16 years of age, three of those with the aggravating feature of anal carnal knowledge, and 98 separate offences committed over a period of five years, with 12 boy victims aged between 10 and 15 years. Ruhland had prior convictions for similar offences and he operated within a group of four men who preyed on the same children. This Court reduced a sentence of 17 years to one of 13-and-one-half years (de Jersey CJ dissenting). Ruhland was a mature man aged 53 at sentence. He pled guilty, thus saving time and expense and also saving the complainant boys from having to give evidence. There was evidence that the boys involved were vulnerable boys.

[13] The case of *R v ZA* involved a defendant convicted on his own plea of 34 sexual offences committed over a 15 month period against six boys. The most serious charge was a maintaining charge which carried a maximum penalty of life imprisonment, greater than the maximum penalty for any of the applicant's offending. *ZA* was 48 years old when sentenced and had two previous convictions for sexual offences against children. His victims were aged between 10 and 15 years. The offending was not dissimilar to the offending in this case. *ZA* was an Attorney's appeal. This Court held that the head sentence of nine-and-a-half years with four years and nine months to be served before eligibility for parole was manifestly inadequate. A sentence of 10 years was substituted on each of the maintaining offences and there was no recommendation for parole.

[14] *R v Auer* was also an Attorney's appeal. Auer pled guilty to 16 sexual offences committed over a four month period. One of those was a count of maintaining a sexual relationship with a child. There were also five counts of rape, five counts of indecent treatment of a child under 12 and in his care, and five separate counts of indecent treatment of a child under 12 years. There were six children involved. A sentence of seven years was imposed. The maximum penalties for both the maintaining and rape offences were life imprisonment. Auer was 31 years old at the time of the offending. He had a criminal history which this Court described as disturbing and which included sexual offending against children. He was entitled to the benefit of an early plea and co-operation, including the making of admissions. This Court re-sentenced by imposing a sentence of nine years on the maintaining count.

[15] I would grant the application and allow the appeal. I would substitute sentences of four years each on the counts of permit sodomy and attempted sodomy (counts 5, 12 and 13) and sentences of three years on each other count. All periods of imprisonment should run concurrently from 4 February 2012. I would not interfere with the parole eligibility date.

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4 [1999] QCA 430.
5 [2009] QCA 249.
6 [2011] QCA 222.