SUPREME COURT OF QUEENSLAND

CITATION:	*R v Karlsson* [2015] QCA 158
PARTIES:	**R** **v** **KARLSSON, Mark Perti Juhani** (applicant)
FILE NO/S:	CA No 241 of 2014 DC No 430 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Unreported, 4 September 2014
DELIVERED ON:	Orders delivered ex tempore 15 May 2015 Reasons delivered 28 August 2015
DELIVERED AT:	Brisbane
HEARING DATE:	15 May 2015
JUDGES:	Carmody CJ and Morrison JA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 15 May 2015:** **1. Application for leave to appeal against sentence refused.** **2. Warrant of apprehension to be issued against the applicant.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE - GENERALLY – where the applicant was found guilty of one count of indecent dealing with a boy under the age of 12 years – where the offence occurred on a date unknown between 11 June 1983 and 13 June 1986 – where the applicant was found not guilty of a further count of indecent treatment of a boy under 12 years – where the applicant was sentenced to six months imprisonment, with the sentence of imprisonment suspended after two months for an operational period of 18 months – where the applicant was aged 30 to 33 at the time the offence occurred, and aged 61 at the time of sentence – where the applicant's partner was the complainant's uncle – where it was accepted that the offence was committed in an opportunistic way, whilst severely affected by alcohol, took place over a short space of time and occurred many years ago – where the sentencing judge also noted that the applicant had

no criminal convictions, and had otherwise led an exemplary life – where the sentencing judge accepted that general deterrence was not a significant consideration, but that there was a community expectation the sentence would reflect an appropriate level of denunciation – where the applicant filed an application for leave to appeal against the sentence – where the applicant had been released on bail pending the appeal – whether the sentencing judge erred by taking into account, or giving undue weight to a victim impact statement – whether the sentence imposed was manifestly excessive in all the circumstances – whether the sentencing judge erred by taking into account that there had been a plea of not guilty and a trial in circumstances where the applicant was acquitted of the more serious charge at the trial

Criminal Code (Qld), s 668D(1)(c), s 668E(3)
Penalties and Sentences Act 1992 (Qld), s 9(2)(b)(i)
Victims of Crime Assistance Act 2009 (Qld), s 15

AB v The Queen (1999) 198 CLR 111; [1999] HCA 46, considered
Barbaro v The Queen (2014) 253 CLR 58; [2014] HCA 2, considered
Director of Public Prosecutions v Terrick (2009) 24 VR 457; (2009) 197 A Crim R 474; [2009] VSCA 220, considered
House v The King (1936) 55 CLR 499; [1936] HCA 40, considered
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, considered
R v Latif; ex parte Commonwealth Director of Public Prosecutions [2012] QCA 278, cited
R v M; ex parte Attorney-General of Queensland [2000] 2 Qd R 543; [1999] QCA 442, cited
R v Wain [1998] QCA 267, cited
R v Wruck [2014] QCA 39, applied

COUNSEL: J Fenton for the applicant
M R Byrne QC for the respondent

SOLICITORS: Fisher Dore for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I have had the considerable advantage of reading the draft reasons prepared by Boddice J. Those reasons express my own considerations leading to my agreement on 15 May 2015 when the Court made its orders.

[2] Of importance to the outcome was a consideration of comparable decisions for a person in the position of the applicant, that is to say someone who has offended a long time ago but who otherwise is of good character and with no, or no relevant, criminal history. The decision in this Court in *R v Wruck*,[1] disposes of the applicant's argument that

[1] [2014] QCA 39, at 36-37.

a period of actual custody could not have been ordered by the learned sentencing judge. That is particularly so when, as here, the offence occurred in breach of a trust relationship between the offender and the complainant. Opportunistic though it may have been, and perhaps prompted by the level of intoxication that the applicant was under at the time, the offence was nonetheless one committed by an adult in his 30's on a young boy aged between nine and 11. The familial relationship in which the applicant stood in relation to the complainant was abused by what occurred.

[3] For these reasons, and those expressed by Boddice J, I agreed to the orders made on 15 May 2015.

[4] Since preparing these reasons I have had the opportunity to read those of Carmody J. Paragraphs [47] – [72] and [85] – [86] contain a discussion as to sentencing principles, the sentencing process, and aspects concerned with the High Court's decision in *House v The King*.[2] None of those matters were raised by, or with, the parties. For that reason this is not an appropriate occasion, in my view, to engage in such an analysis.

[5] **BODDICE J:** On 4 September 2014, a jury found the applicant guilty of one count of indecent dealing with a boy under the age of 12 years. The offence occurred on a date unknown between 11 June 1983 and 13 June 1986. The jury found the applicant not guilty of a further count of indecent treatment of a boy under 12 years. That offence was alleged to have been committed between 11 June 1979 and 13 June 1983.

[6] On 4 September 2014, the applicant was sentenced to six months imprisonment. It was ordered that sentence of imprisonment be suspended after two months for an operational period of 18 months.

[7] On 11 September 2014, the applicant filed an application for leave to appeal against that sentence. There were three grounds of appeal. First, the sentencing judge erred by taking into account, or giving undue weight to, a victim impact statement. Second, the sentence imposed was manifestly excessive in all the circumstances. Third, the sentencing judge erred by taking into account that there had been a plea of not guilty and a trial, in circumstances where the applicant was acquitted of the more serious charge at that trial.

[8] The application for leave to appeal was heard on 15 May 2015. At the conclusion of that hearing, the Court made orders refusing the application for leave to appeal against sentence, and that a warrant of apprehension issue.[3] The Court indicated reasons for dismissing the application would be given on a later date. These are my reasons for joining in those orders.

Background

[9] At the time the offence occurred, the applicant was aged 30 to 33 years, having been born on 23 March 1953. He was aged 61 at the time of sentence. The complainant was aged between nine and 11 years of age. The offence involved the applicant placing his hands down the complainant's pants and fondling his genitals in a masturbatory way.

[10] The offence occurred at premises in which the complainant was residing with his mother. The applicant's partner was the complainant's mother's brother. Both the applicant and his partner were heavily intoxicated on the night in question. The offence was committed opportunistically, and in a drunken state.

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2 (1936) 55 CLR 499.

3 The applicant had been released on bail pending the appeal.

Sentencing remarks

[11] The sentencing judge accepted the offence was committed in an opportunistic way, whilst the applicant was severely affected by alcohol, took place over a short space of time and occurred many years ago. The sentencing judge also noted the applicant had no criminal convictions, and had otherwise led an exemplary life. He had a good work history and had been in a long-term relationship.

[12] Whilst the sentencing judge accepted the long passage of time which had elapsed meant a sentence of general deterrence was not such a significant consideration, the judge stated there was a community expectation the sentence would reflect an appropriate level of denunciation for an offence involving the exploitation by an older man of a young and innocent child.

[13] The sentencing judge noted the offending had both an immediate, and a longer-term impact on the complainant. It had impacted on him personally and on his relationship with others. The sentencing judge observed that whilst the victim impact statement had to be read with a degree of caution, many of the matters referred to by the complainant were typical of the impact this level of offending had on young people.

[14] In determining what was the appropriate sentence, the sentencing judge recognised the relevance of the delay in the prosecution, the needs of the applicant's partner (who had undergone recent surgery) and the applicant's obvious remorse. However, the offence involved a breach of trust. After considering a number of comparable decisions, the sentencing judge found the nature of the offending required the applicant to serve a period in actual custody.

Submissions

[15] The applicant submitted the sentencing judge gave undue weight to the victim impact statement. When read in context, it was clear the complainant, when describing the impact of the indecent treatment upon him, was making specific reference to the alleged offence for which the applicant was found not guilty. That alleged offence was far more serious, involving an allegation of fellatio. The impact of the offence for which the applicant was convicted would have been far less, and would not have had the same long-term implications.

[16] The applicant further submitted the offence involved low level conduct committed many years before the applicant's conviction. A perusal of the relevant authorities in respect of offending many years prior to conviction supported a conclusion the importance of a period of actual custody was not open. Accordingly, the sentence imposed was manifestly excessive.

[17] The respondent submitted the sentencing judge correctly had regard to the victim impact statement. The sentencing judge was expressly cognisant of the need to disregard any reference to the count in respect of which the applicant had been found not guilty. Further, the sentencing judge expressly noted the victim impact statement should be read with caution. With those caveats, it was open to the sentencing judge to have regard to the general impact of sexual offending by a mature adult in a position of trust on a very young complainant.

[18] The respondent further submitted a consideration of the authorities supported the conclusion a sentence of actual custody was open. Sentences involving a period of actual imprisonment

fell within the sentencing discretion for offences involving the indecent treatment of minors by mature adults in a position of trust, even where there was a significant delay in the offender being prosecuted for that offence.

Discussion

Victim Impact Statement

[19] Whilst the victim impact statement referred to both counts, the trial judge accepted the statement as though the other count was never before the Court, and expressly read the statement with a degree of caution. There was no reason for the trial judge to have refused to consider that statement.

[20] The statement expressed complaints of nightmares, the need for counselling, difficulties with intimate relationships, and damage to the wider family relationship, as a consequence of the complainant having been indecently dealt with by the applicant, who had been associated with the complainant's extended family for some years. It is hardly surprising the complainant suffered as a consequence of the applicant's conduct which was the subject of a verdict of guilty. There is no basis to conclude the sentencing judge gave undue weight to the contents of the victim impact statement.

Actual custody

[21] Whilst the applicant had no prior criminal convictions, and his offending occurred three decades ago, the applicant was significantly older than the complainant at the time of the offence, and was in a position of trust having regard to the quasi-familial relationship. The offending, although opportunistic, involved actual touching and fondling of the complainant's genitalia inside his clothing. A sentence of imprisonment for six months, for a sexual offence against a minor involving a breach of trust, was well within the sentencing discretion.

[22] A consideration of the comparable decisions does not support a conclusion the applicant's offending did not allow for the imposition of a sentence of actual imprisonment. In *R v Wruck*[4] this Court dismissed an appeal against sentence in respect of an applicant who had been sentenced to 18 months imprisonment, suspended after four months, for an operational period of 18 months in respect of two counts of indecent dealing committed over 30 years earlier. That applicant was 25 years of age at the time of the offences and was employed as a teacher and a counsellor. The complainant was a 13 year old school boy who had attended upon the applicant for counselling. At issue on the appeal was 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 in such circumstances.

[23] In dismissing the appeal against sentence, Holmes JA (with whose reasons Fraser JA and Mullins J agreed) undertook an extensive analysis of past relevant comparable decisions. There was also an analysis of the potential retrospective effect of current sentencing practices in respect of dated offences. In rejecting the submission that the sentence imposed was manifestly excessive, her Honour observed:

> "[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

4 [2014] QCA 39.

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

[24] The decision of this Court in *Wruck* establishes that there is no principle that dated sexual offences in respect of offenders with an otherwise exemplary good character and no criminal history may not be required to serve an actual period of imprisonment.

[25] A requirement that the applicant serve a period of imprisonment for sexual offending in a quasi-familial relationship was well within the sentencing discretion of the sentencing judge. A suspension at the one-third mark, following a trial, was a just recognition for the fact the applicant had no prior criminal convictions, was otherwise of good character, and the offence involved an isolated incident in an otherwise blemish-free life.

[26] For the above reasons, I agreed the application for leave to appeal against the sentence should be refused, and a warrant issue.

[27] Since preparing and circulating these reasons, I have been provided with a copy of the reasons for judgment of Justice Carmody. Those reasons contain a detailed discussion about sentencing principles and the nature of an appeal against sentence. As those matters were not the subject of submissions at the hearing of the appeal, I do not propose to address those matters. Any consideration of those matters should await an occasion when they have been the subject of detailed submissions by the parties to an appeal.

[28] **CARMODY J:** This is an application for leave to appeal against sentence under s 668D(1)(c) of the *Criminal Code* (Qld). The Queensland Court of Appeal unanimously decided to refuse leave to appeal on 15 May 2015, reserving reasons for a later date. This judgment states my reasons for refusing leave to appeal.

[29] The applicant was indicted on 26 March 2014 in the Brisbane District Court of two counts of indecent treatment of a child under 12 years.

[30] The first count averred that, on an unknown date between 11 June 1979 and 13 June 1983, the applicant performed fellatio on the complainant in a motel room on the Gold Coast (the ***"First Count"***).

[31] The second count averred that, on an unknown date between 11 June 1983 and 13 June 1986 at Norman Park, the applicant reached down the undergarments of the complainant and briefly masturbated him (the ***"Second Count"***).

[32] On 4 September 2014 the applicant was acquitted on the First Count, but convicted on the Second Count. The applicant was sentenced to six months imprisonment, partially suspended after two months with an operational period of eighteen months.

[33] The applicant filed an application for leave to appeal against sentence with the Supreme Court of Queensland on 11 September 2014. The applicant claimed that the primary judge erred by:

1. Receiving into evidence the victim impact statement produced by the complainant, or allocating excessive weight to the victim impact statement (the **"First Ground"**); and/or

2. Imposing a sentence which was manifestly excessive (the **"Second Ground"**).

[34] The respondent resists the First Ground of the appeal on the basis that: (a) although the victim impact statement contained references to the criminal conduct forming the foundation of the First Count on which the applicant was acquitted, the statement remained relevant because other information contained therein related to the Second Count on which the applicant was convicted; and (b) the learned primary judge gave appropriate weight to the victim impact statement in the sentencing assessment process.

[35] The respondent resists the Second Ground of the appeal on the basis that a custodial sentence was appropriate by reason of the applicant's "quasi-familial breach of trust" and significant lack of remorse.

[36] Prior to examining the substantive merit of the applicant's grounds of appeal, it is convenient to briefly summarise the factual matrix relating to the Second Count, the sentencing remarks of the learned primary judge, and general principles governing appeals against sentence.

The Context

[37] The circumstances relating to the criminal behaviour forming the foundation of the Second Count are comparatively uncontentious. On an unknown date between 11 June 1983 and 13 June 1986 a social function was held at the complainant's residence in Norman Park. The applicant and his partner, the complainant's uncle, Mr LM, attended the event.

[38] Sometime in the evening the applicant and Mr LM were together in the kitchen of the premises. They were both intoxicated. The applicant opportunistically inserted his hands into the complainant's undergarments to fondle his genitalia in a manner consistent with masturbation.

[39] The complainant was aged between eight and eleven at the time of the sexual interference. The respondent, in contrast, was between thirty and thirty-three years. Although ostensibly brief, the abusive act had a profound adverse impact on the psychological development and stability of the complainant.

Sentencing Remarks

[40] The learned primary judge delivered detailed and nuanced sentencing remarks. The applicant was sentenced on the basis of the maximum penalty of seven years for indecent dealing which prevailed at the time of the offending. The judge properly acknowledged that the conduct of the applicant, in failing to acknowledge responsibility for, or the

gravity of, the offending behaviour demonstrated a significant lack of remorse. Despite this, the learned primary judge properly recognised that it is the fundamental right of the accused within the adversarial system of justice to require the Crown to establish, beyond reasonable doubt, the culpability of the accused for the offence.

[41] Appropriate weight was given to the opportunistic nature of the criminal behaviour, and the fact that it was partly induced by the consumption of intoxicating substances. Further, the sentencing judge rightly identified that the level and gravity of offending was on the lower end of the scale for the offence concerned.

[42] The sentencing judge also appropriately considered the substantial delay – approximately thirty years – between the commission of the relevant offence and the sentencing of the applicant. His Honour quite correctly observed that throughout the duration of this period, the offender possessed a good work history. The applicant was well-educated, maintained a long-term relationship with Mr LM and had no prior criminal history. With the exception of the relevant criminal conduct, the applicant had excellent antecedents. These features of the case indicated that the applicant was not an appropriate vehicle for general or specific deterrence, and that community protection was not a necessary consideration.

[43] Despite this, the offending involved an older man exploiting the vulnerability of a very young child. This entailed an egregious violation of community values and norms. Condign denunciation was called for.

[44] The judge referred to the adverse health conditions of Mr LM, and that the applicant's assistance would support his ongoing recovery. However, the applicant's assistance was not essential to Mr LMco's recovery, and support may be obtained from alternative social welfare agencies.

[45] His Honour acknowledged that the offending had an immediate and long-term negative impact on the complainant. The sentencing judge also recognised the importance of reading the victim impact statement with appropriate caution, but nonetheless observed that many of the consequences of referred to by the complainant were typical of victims of child sex offences. The primary judge reflected on the feelings of anxiety and self-disgust experienced by the complainant, and the significant impact it has on his relationships. His Honour further emphasised the breach of the trust reposed in the applicant by the complainant, his family and the community.

[46] The primary judge was referred to appropriate comparative cases, including *R v Wruck*,[5] *R v M; ex parte Attorney-General*[6] and *R v Wain*.[7] As observed by his Honour, although each contained similar elements, none were directly comparable, and they involved more serious levels of offending.[8]

Nature of the Sentencing Process

[47] "Sentencing", in the context of the Queensland criminal justice system, may be described as the process by which a tribunal with judicial power imposes a penalty on a person convicted of proscribed criminal behaviour. Within a sophisticated system of government

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5 *R v Wruck* [2014] QCA 39.

6 *R v M; ex parte Attorney-General* [1999] QCA 442.

7 *R v Wain* [1998] QCA 267.

8 For example, *R v Wruck* [2014] QCA 39 involved a teacher convicted of two counts of indecent dealing ingratiating his way into the family life of a male student to facilitate sexual molestation. The first count involved the teacher fellating the student to ejaculation. The second count entailed the teacher using the complainant's hand to masturbate himself to ejaculation.

exhibiting an effective separation of powers, the power to impose criminal sanctions is vested exclusively within the judiciary. The judiciary, possessing a monopoly over the dispensation of criminal justice, retains this power in the form of a public trust to be exercised in accordance with law and prevailing community values.

[48] Notwithstanding the overwhelming public interest in the efficient and effective administration of the criminal justice system and the importance of incorporating community values in the imposition of criminal sanctions, the sentencing process remains one of the most elusive and esoteric aspects of the judicial function. Through the decisions of *Markarian v The Queen*[9] and *Barbaro v The Queen*,[10] the High Court of Australia has resolutely exorcised the spectre of the "two-stage" approach, and expurgated the heresy of "penalty ranges" and judicial arithmetic, from the judicial lexicon through the "instinctive synthesis" method of sentencing.

[49] The "instinctive synthesis" approach to sentencing, without further description, is apt to conjure images of an "arcane process into the mysteries of which only judges can be initiated". Although the "instinctive synthesis" approach has not yet been comprehensively defined, and it is doubtful whether its proponents would accept any reductionist account, it may broadly be described as the intuitive balancing of multiple complex and competing qualitative features of the offending conduct to ascertain the appropriate penalty. This definition, however, lacks any meaningful *discrimen* from the two-stage approach, as both involve balancing features of the offending through intuition.

[50] The crucial *genus differentia* between the two-stage and intuitive synthesis approach appears to be two negative attributes: (a) the "intuitive synthesis" approach does not involve illusory "judicial arithmetic" nor maligned "penalty ranges"; and (b) the "intuitive synthesis" approach does not utilise a well-defined cognisable structure. As described by McHugh J in *Markarian v The Queen*:

> "Analysing the process involved in two-tier sentencing reveals that its appearance of objectivity and unfolding reason is illusory. Whether the starting point is a sentence derived from the objective circumstances or a sentence proportionate to the offence, the correctness of the sentence always depends on the correctness of the value judgment involved in assessing the first-tier sentence. But even if the judge can correctly assess the first-tier sentence, the judge must still correctly assess the quantum of the increment or decrement for each factor in the process. With great respect to those who think the contrary, it would require a judge to have the statistical genius and mental agility of a Carl Friedrich Gauss to arrive at the correct sentence using these methods. As Gaudron, Gummow and Hayne JJ pointed out in *Wong v The Queen*, mathematical increments and decrements to some pre-determined notional sentence are "apt to give rise to error"."[11]

[51] Although I would join McHugh J in his criticisms of the illusory nature of the two-tier sentencing approach, one might question whether its outcome would substantially deviate from the instinctive synthesis approach in most cases.

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9 *Markarian v The Queen* (2005) 228 CLR 357.
10 *Barbaro v The Queen* (2014) 253 CLR 58.
11 *Markarian v The Queen* (2005) 228 CLR 357, [56].

[52] The partly intuitive nature of the sentencing process is signalled by the absence of any direct and articulable correlation between the qualitative incriminating or mitigating features of a particular case and its reflection in the nature or quantum of the sentence (aside from requiring "condign punishment" or a more "weighty penalty").[12] Ordinarily, the sentencing judge, at least partly, engages in a process of *ex post facto* rationalisation; the sentencing judge believes, based on their knowledge, experience, training and values, that the appropriate sentence is within a reasonable range, and supports that decision through the articulation reasons. Put another way, the judge commonly intuits the conclusion (or part thereof), and fortifies that conclusion through the reasoning process. It is unrealistic and intellectually dishonest to maintain that judges embark blindly upon their sentencing remarks with no destination in mind.

[53] Acknowledging the centrality of intuition within the sentencing process does not require the conclusion that sentencing is an irrational or arbitrary exercise. Indeed, intuitions may be reasonable and well-supported, or they may be unreasonable and arbitrary. Equally, rational cognitive processes unquestionably discharge a significant, perhaps even dominant, role in the sentencing process.[13] However, recognising the essentially intuitive nature of sentencing, or certain components of sentencing, underscores the importance of judicial officers exercising special caution in ensuring that any biases or prejudices – possessed by all natural persons – are properly accounted for in one's decisional processes.[14] It also sheds valuable light on the conceptual dichotomy between error of principle and manifest error articulated in *House v The King*, which forms the foundation of this appeal.

Appeals against Sentence: *House v The King*

[54] The *Criminal Code* (Qld) provides that a convicted person may appeal with leave of the Court against the sentence passed on their conviction.[15] On an appeal against sentence, the Court shall quash the sentence and pass another sentence in substitution if they would pass some other sentence, whether more or less severe, and in any other case dismiss the appeal.[16] Aside from these broad statements, the *Criminal Code* provides little guidance on the circumstances within which an appeal against sentence may be successful.

[55] The sentencing process involves an intuitive synthesis of the relevant incriminating and mitigating factors of the relevant case to determine an appropriate penalty proportionate to the gravity of the offending which is designed to achieve statutorily prescribed sentencing objectives. However, as held in *Barbaro*, there is no one "correct sentence", nor is there a rigid penalty range demarcating the upper and lower limits of an appropriate sentence. Rather, sentencing involves judicial discretion, and different judges may legitimately impose divergent types and degrees of punishment for the same offence.

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12 Although some authors have been known to object to the attribution of "significant weight" to a particular feature of the offending conduct by reason of the fact that no numerical account may be connected with that factor, this misinterprets the meaning of the concept of "weight" in the context of sentencing. "Weight" does not require or imply the existence of a numerical attribution; it may merely describe the relative *qualitative* significance of a particular aspect of the criminal behaviour.

13 I do not express a concluded view on the relevant extent to which rational and intuitive cognitive processes are engaged in sentencing criminal offenders. It is sufficient to note that any response to such a question must be verified by empirical study, as opposed to philosophical or legal argument.

14 Personal biases and prejudices are constrained through precedent, comparative decisions, appellate review, and the requirement to deliver reasons.

15 *Criminal Code* (Qld), s 668D(1)(c).

16 *Criminal Code* (Qld), s 668E(3).

[56] In *House v The King* the High Court established a dichotomy distinguishing between "errors of principle" and "manifest error". The majority of the Court described an "error of principle" in the following manner:

> "If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."[17]

[57] Although the concept of "manifest error" is contemporarily referred to as "manifestly excessive" or "manifestly inadequate", the majority of the Court in *House v The King* described it in the following manner:

> "It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts, it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."[18]

[58] The dichotomy articulated within *House v The King* derives from fundamental principles governing appellate review of the exercise of judicial discretion by inferior courts. Discretionary decisions do not admit of a singular uniquely correct decision. Rather, discretionary decisions – especially those which are inherently intuitive – often involve complex and conflicting value judgments and subjective determinations. Accordingly, different judges exercising judicial discretion may arrive at divergent conclusions – each equally reasonable – depending on their personal values and beliefs.

[59] Having regard to the intrinsic scope for reasonable variation within discretionary judgments, it would be inappropriate and unprincipled to permit appellate intervention merely because an appellate court would prefer an alternative outcome to that propounded by an inferior court. Such interventions cultivate an extraordinary form of appellate tyranny which undermine public confidence in the administration of justice and improperly misappropriate public time and resources.

[60] Appellate courts must also recognise that courts at first instance are often better positioned to determine the appropriate exercise of discretion, especially in sentencing appeals. In criminal proceedings, the sentencing judge is often the trial judge who benefitted from hearing the evidence adduced by the defence and the prosecution and observing the conduct and demeanour of the offender, victim and witnesses. As a significant portion of interpersonal communication is non-verbal and may not be properly recorded in the transcript, the appellate judge is necessarily disadvantaged in reviewing documentary records of the original proceedings. Accordingly, the sentencing judge is advantageously positioned to accurately assess the individual offender's susceptibility to rehabilitation, responsiveness to personal deterrence, and need for incapacitation. Considering the advantages of the sentencing judge in exercising his or her judicial discretion, allowing appellate interference on marginal grounds is liable to produce suboptimal outcomes.

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17 *House v The King* (1936) 55 CLR 499, 505.

18 Ibid.

Problematic Nature of "Error of Principle" or "Specific Error":

[61] Notwithstanding the simplicity of the dichotomy drawn in *House v The King*, the legal framework remains conceptually problematic. The source of the difficulty is that the collection of forms of error nominated within the first category of *House v The King* appears to lack a clear unifying theme or organising principle.

[62] Guidance on a potentially organising principle is gleaned from *AB v The Queen*, where Hayne J held that:

> "The difference between cases of specific error and manifest excess is not merely a matter of convenient classification. It reflects a fundamental difference in what the appellate court does. In the former case, once an appellate court identifies an error, the sentence imposed below must be set aside and the appellate court is then required to exercise the sentencing discretion afresh. The offender must be re-sentenced unless, of course, in the separate and independent exercise of *its* discretion the appellate court concludes that no different sentence should be passed. By contrast, in the case of manifest excess, the error in reasoning of the sentencing judge is not discernible; all that can be seen is that the sentence imposed is too heavy and thus lies outside the permissible range of dispositions. Only then may the appellate court intervene and, in the exercise of its discretion, consider what sentence is to be imposed."[19]

[63] Justice Hayne is correct to observe that an "error of principle" leads to an automatic quashing of the original sentence and re-sentencing of the offender, even where the sentence which would be imposed by the appellate court is only marginally different to that of the primary judge. This is distinguishable from "manifest error", which will only be sustained where it can be shown the sentence is manifestly excessive or inadequate. However, the *consequences* emanating from the classification[20] cannot be utilised as its *justification*; there must be something in the nature of the different instantiations of the forms of error which justifies both the categorical framework and its implications.[21]

[64] In *AB*, Hayne J also posits an alternative organising principle, namely that forms of errors of principle are *identifiable* or *specific*, whereas forms of manifest error are *not specific*. This proposition is developed by Gleeson CJ, Gummow, Hayne and Callinan JJ in *Markarian*, where the plurality distinguished between "specific error" and "non-specific error":

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19 *AB v The Queen* (1999) 198 CLR 111, [130].

20 Although it results in complex locution, this proposition should be qualified as follows: the *consequences* of a *classification* (as opposed to the subject), or the *decided* consequences of a subject (as opposed to the *natural* consequences of the subject), cannot justify the classification without producing an artificial and arbitrary taxonomy. In sentencing, the consequences emanating from a particular error are *determined by the Court*, they do not derive from the *intrinsic nature of the error*. Therefore, there must be some property of the relevant *error* that justifies: (a) its categorisation as an "error of principle" (or "specific error"); and (b) the peculiar consequences of that particular error. In other disciplines, a taxonomy may be justified by the consequences of the subject where the consequences flow from the subject without external intervention.

21 The consequences of a classification cannot justify the classification itself because they: (a) induce circuitous reasoning; and (b) fail to disclose the rationale for categorisation. To illustrate: a mistake of law is an error of principle because it authorises the Court to set aside the decision of the sentencing judge without proof that the sentence was manifestly excessive, and the decision of the sentencing judge is set aside because the sentencing judge committed an error of principle. This attempt at justifying the categorisation of a mistake of law as an error of principle by reference to its consequences is fundamentally circuitous and fails to identify any intrinsic characteristic of a mistake of law which justifies its categorisation as an error of principle *or* the immediate intervention of the Court.

> "As with other discretionary judgments, the inquiry on an appeal against sentence is identified in the well-known passage in the joint reasons of Dixon, Evatt and McTiernan JJ in *House v The King*, itself an appeal against sentence. Thus is specific error shown? (Has there been some error of principle? Has the sentencer allowed extraneous or irrelevant matters to guide or affect the decision? Have the facts been mistaken? Has the sentencer not taken some material consideration into account?) Or if specific error is not shown, is the result embodied in the order unreasonable or plainly unjust? It is this last kind of error that is usually described, in an offender's appeal, as "manifest excess", or in a prosecution appeal, as "manifest inadequacy"."[22]

[65] The attributive adjective "specific" is defined by the Oxford English Dictionary as "having a special determining quality". "Specific error", in the sense applied by the High Court of Australia in *Markarian* and *AB*, has at least two plausible meanings: (a) an error which is merely identifiable and articulable; or (b) an error of a particular kind enumerated in the first category of *House v The King*.

[66] The first category of meaning, although deceptively elegant, appears unsustainable. Certain categories of error, such as the failure to give adequate weight to a relevant factor, or the attribution of excessive weight to an irrelevant factor, are clearly identifiable and articulable, but nevertheless not classified as a "specific error". The existence of identifiable and articulable errors which are not deemed "specific errors" would appear to be fatal to this construction of the categorical framework.

[67] A response to this objection to the first category of meaning might involve the claim that the assignment of excessive or inadequate weight to a relevant factor is not an "error". Intermediate appellate courts frequently describe the argument that the sentencing court assigned excessive or inadequate weight to a relevant factor as a "reason" supporting the asserted finding that the sentencing judge committed "manifest error".[23] This argument, however, presumes *a priori* that the assignment of excessive or inadequate weight is not an "error" but a "reason", but provides no justification for the removal of this type of flaw from the relevant class of "errors". Stated in its abstract form, to say that giving excessive or inadequate weight to a relevant factor is not a "specific error" appears to unduly circumscribe the natural and ordinary scope of the phrase, and is inconsistent with its common usage. Indeed, it is tantamount to proposing a redefinition of the concept of "error", which is arbitrary in the absence of a cogent reason for not describing such a fault as an "error".

[68] An alternative response is that the assignment of excessive or inadequate weight to a relevant factor may be an "error", but it is ordinarily unverifiable, and for that reason should be excluded from the category of "specific error". For example, in *Director of Public Prosecutions v Terrick*,[24] the Victorian Court of Appeal held that the proposition that too much, or too little, weight was given to a particular factor is "almost always untestable" because "quantitative significance is not to be assigned to individual considerations". This explanation preserves the unifying theme of specificity through deploying a limited, but pragmatic, exception.

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22 *Markarian v The Queen* (2005) 228 CLR 357, [25]. This rationale for the distinction appears to have been endorsed by Kirby J, in dissent in *Markarian*, who cites the passage of Hayne J in *AB* extracted above at [87]. Justice Kirby, however, prefers to describe the *House v The King* categories as "specific error" and "imputed error".

23 *R v Major; ex parte Attorney-General (Qld)* [2012] 1 Qd R 465; [2011] QCA 210, [88]-[91]; *R v Latif; ex parte Commonwealth Director of Public Prosecutions* [2012] QCA 278, [17].

24 [2009] VSCA 220, [4]-[5].

[69] This response, however, raises further conceptual and empirical difficulties. Firstly, it assumes that the empirical claim that the argument is "almost always untestable" is correct. Secondly, although it is true that quantitative significance is not assigned to individual considerations, *qualitative* significance *is* attributed to individual considerations, which form inputs in the global determination of the sentence. Therefore, identifying that a sentencing judge has assigned excessive or inadequate qualitative significance to a relevant consideration may – not unreasonably – justify a finding that the particular consideration disproportionately affected the global sentence. Thirdly, the reasons of a sentencing judge can be demonstrative of the attribution of excessive or inadequate qualitative significance to a relevant consideration.

[70] The mere fact that a finding that the sentencing judge attributed excessive or inadequate weight to a relevant consideration might be uncommon or exceptional should not operate preclude an appropriate remedy. Therefore, there should be a *principled*, rather than merely *pragmatic*, basis for the exclusion of this ground from "specific error" to prevent legal irregularity or arbitrariness.

[71] The second category of meaning of "specific error", namely that the error is not of a kind enumerated in *House v The King*, is similarly unsustainable. The failure to define any material property of the relevant instantiations of error which cogently delineates between the array of identifiable errors described as "specific errors" and other types of identifiable errors which are "manifest errors" creates an ostensibly arbitrary classification of grounds of appeal against sentence.[25]

[72] Perhaps more fundamentally, the current conceptual structure fails to explain why certain types of identifiable error (such as failing to consider a relevant factor) should entitle a successful appellant to have their sentence set aside and be resentenced, whereas other forms of identifiable error (such as failing to give adequate weight to a relevant factor) require proof that the relevant sentence was manifestly excessive or inadequate before the sentence is set aside and the appellant is resentenced.[26] Having regard to the significance of the conceptual dichotomy in determining the outcome of an appeal, there is a public interest in ensuring that the categorical *discrimen* is adequately articulated.[27]

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[25] Relevantly, the concept of imputed error displays similar theoretical difficulties. Imputation is the process of assigning a value to a subject on the basis of inferred qualities. If "imputed error" means that the appellate court *infers* an error (of any kind) from the fact that the sentence is manifestly excessive or inadequate, the conceptual structure remains problematic insofar as certain forms of identifiable error may nevertheless fall within the catch-all rubric of "imputed error" if they are not subsumed within the category of "specific error". If imputed error means that the appellate court *infers* an error of a specific kind (that is, an error which is ordinarily described as "specific error") from the fact that the sentence is manifestly excessive or inadequate, then the conceptual structure is equally problematic insofar as there appears to be no logical grounds for the inference, as certain categories of identifiable non-specific error may lead to imputed error. In any event, the concept of "imputed error" seems to overlook the fact that a sentence being manifestly excessive or inadequate *itself* should be sufficient to constitute an appellable error *per se*, as opposed to merely a fact from which an appellable error might be inductively inferred.

[26] It is unlikely that the categorisation can be explained merely by reference to the *gravity* of the relevant error. It is readily conceivable that the attribution of excessive or inadequate weight to a relevant factor may more greatly influence the outcome of the sentencing process than the failure to consider a material factor or the consideration of an immaterial factor.

[27] Perhaps the answer to this question is that the question *itself* is insoluble, insofar as it presumes the existence of a unifying theme or criterion. If this were the case, then each individual ground articulated under the rubric of "specific error" must possess a separate reason justifying its consequences and distinguishing the grounds from those grounds of identifiable error not subsumed within the aforesaid category. If such an account could be provided, then the dichotomous structure propounded in *House v The King* and later decisions distinguishing between specific and non-specific error is apt to mislead, insofar as it appears to presuppose a unifying theme or organising principle.

[73] Despite these conceptual difficulties, the Queensland Court of Appeal is bound by precedent to the existing conceptual structure of sentencing appeals. Therefore, unless the applicant can establish one of the grounds enumerated in the first category of *House v The King*, the applicant must demonstrate that the sentence is manifestly excessive before the decision of the sentencing judge will be set aside.

First Ground of Appeal: Consideration of the Victim Impact Statement

[74] The First Ground of appeal possesses two limbs:

1. the sentencing judge erred by considering the victim impact statement (**"Limb One"**); or

2. the sentencing judge attributed excessive weight to the victim impact statement (**"Limb Two"**).

[75] To establish Limb One, the applicant must show that the sentencing judge should not have considered the victim impact statement, issued under s 15 of the *Victims of Crime Assistance Act* 2009 (Qld). This can be demonstrated by establishing that the victim impact statement was an irrelevant or immaterial consideration.

[76] Section 9(2)(b)(i) of the *Penalties and Sentences Act* 1992 (Qld) prescribes that, in sentencing an offender, a court must have regard to the nature of the offence and how serious the offence was, including any physical, mental or emotional harm done to a victim, including harm mentioned in information relating to the victim given to the court under s 15 of the *Victims of Crime Assistance Act* 2009 (Qld).

[77] Therefore, provided that the victim impact statement related to the offence for which applicant was convicted, the sentencing judge was ostensibly required by s 9(2)(b)(i) of the *Penalties and Sentences Act* 1992 (Qld) to give consideration to the statement. This does not preclude, however, a sentencing judge from treating such a statement with appropriate caution where sections of the statement relate to alleged offences in respect of which the applicant was acquitted.

[78] The victim impact statement, despite containing material which related to a count for which the applicant was acquitted, contained material relevant to the nature and degree of suffering the complainant experienced as a result of the applicant's offending behaviour. Accordingly, it remains a relevant and material consideration, and Limb One of the First Ground of appeal is not established.

[79] Limb Two, insofar as it amounts to an assertion that excessive weight was attributed to a relevant consideration, does not constitute a "specific error" within the first category of *House v The King*. Therefore, despite being identified and articulated by the respondent, it merely constitutes an *explanation* or *reason* underpinning the submission that the sentence was manifestly excessive. Accordingly, it is more appropriately dealt with below in considering the Second Ground of appeal.

Second Ground of Appeal: Manifest Error

[80] The applicant asserts that the sentencing judge erred by imposing a sentence which was manifestly excessive having regard to the circumstances of the offending behaviour. The applicant was sentenced to six months imprisonment, suspended after two months with an operational period of eighteen months. The applicant submits that a reason for the imposition of a manifestly excessive sentence was that the sentencing judge attributed excessive weight to the victim impact statement of the claimant adduced to the Court.

[81] The profound psychological and emotional consequences of the offending behaviour particularised by the complainant in the victim impact statement are typical of the long-term suffering which is caused to young or adolescent victims of sexual abuse. Although the complainant has attributed particular significance to the offending conduct which formed the foundation of the count on which the applicant was acquitted, a fair reading of the victim impact statement could not justify the conclusion that the criminal behaviour for which the applicant was convicted did not materially contribute to, or could not have independently caused, the described psychological or emotional harm.

[82] The Court is not required to determine whether the sentencing judge assigned excessive weight to the victim impact statement. Rather, the Court is only required to determine whether the sentence imposed is manifestly excessive. However, if it were necessary to express an opinion on the weight assigned by the sentencing judge to the victim impact statement, I would note that the sentencing judge expressly observed the importance of treating the victim impact statement with caution, as it partly related to the count on which the applicant was acquitted. Therefore, I would be unable to find any specific or non-specific error in the decision of the sentencing judge by relying on the statement.

[83] Considering the suitability of the sentence more broadly, the offence was opportunistic and ostensibly induced by intoxication. There has been significant delay between the commission of the offence and sentencing, within which the applicant appears to have been substantially rehabilitated. Although the duration of molestation as comparatively short, the offence involved the fondling of the complainant's genitalia in a manner consistent with masturbation. The applicant also possesses no relevant criminal history, and has lived an otherwise blameless life.

[84] Despite these significant mitigating factors, the offence involved a gross breach of trust reposed in the applicant, who appears to have been temporarily entrusted with partial responsibility for caring for the complainant. The complainant, by reason of his youth at the time of the offence, was in a position of extreme vulnerability relative to the more physically, psychologically and emotionally mature applicant. The applicant possessed a quasi-familial relationship with the complainant, who suffered profound and enduring psychological and emotional trauma due to the molestation.

[85] Then sentencing process, although directed towards the particular offending conduct of the applicant and constrained by the principle of proportionality, remains a mechanism for the vindication of broader social values. Therefore, the Courts, as the sole repository of judicial power, possess a responsibility to ensure that the punishment of offenders is aligned with legitimate community standards and expectations.[28] If such standards and values were not reflected by the criminal justice system or considered in judicial decision-making, public confidence in the administration of justice would deteriorate, destabilising the practical source of judicial legitimacy.

[86] Manifestly excessive or inadequate means that the sentence is so "unreasonable" or "plainly unjust" that it may be inferred "that in some way there has been a failure to properly exercise the discretion the law reposes in the court of first instance".[29] This conception appears to suggest that the fact that the sentence is "manifestly excessive" gives rise to the inference that there "must have been a misapplication of principle even

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[28] The annexation of the adjective "legitimate" is intended to refer to the durable and broad-based social values, as opposed to transient and uninformed public opinion and attitudes.

[29] *House v The King* (1936) 55 CLR 488, 505.

though that is not apparent from the sentencing remarks".[30] With respect, the requirement of an "inferred error" appears artificial, unnecessary and tautological; the fact that a sentence is "manifestly excessive" or "plainly unjust" should *itself* be sufficient to establish a ground of appeal.[31] If plain injustice alone is not an "error", which would be an extraordinary conclusion for any Court to draw, the fact that the sentence is "manifestly excessive" would *necessarily* appear to offend the principle of parity, constituting an error of law justifying appellate intervention.

[87] Nevertheless, even if I am wrong in proposing that a manifestly excessive or inadequate sentence is inherently erroneous without the need to infer any secondary error in the sentencing judge's reasoning process, the test would be identical: is the sentence imposed by the sentencing judge plainly unjust or unreasonable in comparison with the gravity of the offending behaviour and prior analogous judicial decisions?

[88] The answer to this question, in the context of the present case, must be in the negative. The reprehensible conduct of the applicant, involving a gross breach of trust irreversibly injuring the psychosocial and formative development of the complainant, is repugnant to community values and deserving of condign punishment. The sentencing objectives of denunciation, just deserts and general deterrence were fundamental to forming an appropriate penalty for the applicant. In light of the circumstances relating to the offending behaviour, there is no merit in the proposition that a sentence of six months imprisonment, suspended after two months with an operational period of eighteen months, is unreasonable or plainly unjust. Therefore, the application for leave to appeal against sentence should be refused.

Order

[89] As the applicant has failed to establish any form of specific or non-specific error, the application for leave to appeal against sentence was refused. A warrant was issued against the applicant.

Postscript

[90] Following the circulation of my draft reasons, I have read the amended reasons of Morrison JA and Boddice J. I respectfully note their Honours' position that this was not an appropriate occasion to engage in the above analysis of *House v The King*.

[91] The first ground of appeal particularised by the applicant submitted that the primary judge improperly gave consideration to the victim impact statement of the complainant, or attributed excessive weight to the victim impact statement. Limb One of this ground of appeal falls within the category of "specific error" recognised in *House v The King*. However, Limb Two articulates an identified error which is not subsumed within the

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30 *R v Latif; ex parte Commonwealth Director of Public Prosecutions* [2012] QCA 278, [17].

31 The motivation underpinning the search for a specific or inferred error appears to reside in the artificial conception of sentencing as a purely rational process. The mental or cognitive processes involved in ascertaining the nature or quantum of sentencing, however, are at least partly *intuitive*, in the sense of not deriving from an explicit or articulable reasoning process. This is admitted by the description of the sentencing process as "instinctive synthesis", and reflected in the absence of any direct quantitative correlation between the qualitative attributes of offending behaviour and the quantitative sentence imposed. Once it is conceded that the ascertainment of the nature and quantum of sentence is partly intuitive, one can freely admit that a manifestly excessive or inadequate sentence is (or, at least, can conceivably be) an error of *intuition*. This is consistent with the difficulty in explicating clear criteria for manifest excess and inadequacy, except for the determinative criterion of "plainly unjust", which is often a *felt* or *intuited* experience.

category of specific error. The composite form of this ground of appeal, simultaneously alleging specific error and identifiable non-specific error, adequately disclosed the potentially problematic nature of the existing conceptual dichotomy.

[92] For this reason, and with respect to those who have or feel the need to express a different view, I am of the opinion that the discussion of specific and non-specific error in this instance remains relevant and appropriate. It may even be beneficial to some.