SUPREME COURT OF QUEENSLAND

CITATION:	*R v MCG* [2015] QCA 184
PARTIES:	**R** **v** **MCG** (applicant)
FILE NO/S:	CA No 152 of 2014 DC No 173 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport – Unreported, 16 May 2015
DELIVERED ON:	6 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	5 February 2015, 30 September 2015
JUDGES:	Fraser and Gotterson JJA and Jackson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The order of the Court is that:** **1. The conviction is set aside and in lieu thereof it is ordered that no conviction be recorded.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – PROOF AND EVIDENCE – OTHER MATTERS – where the applicant was convicted of an offence of bestiality – where the trial judge made a finding that the applicant was a risk of being influenced to do things she might not have done otherwise – where the trial judge recorded a conviction – whether the trial judge erred in his finding that the applicant was a relevant risk *Penalties and Sentences Act* 1992 (Qld), s 9, s 13A *Working with Children (Risk Management and Screening) Act* 2000 (Qld), s 226 *House v The King* (1936) 55 CLR 499; [1936] HCA 40, followed *R v Briese; ex parte Attorney-General* [1998] 1 Qd R 487; [1997] QCA 10, cited *R v Brown; Ex parte Attorney-General* [1994] 2 Qd R 182; [1993] QCA 271, cited *R v Cay, Gersch & Schell; Ex parte Attorney-General* (2005) 158 A Crim R 488; [2005] QCA 467, cited *R v Mirza; Ex parte Attorney-General (Qld)* [2008] QCA 23, referred to

COUNSEL:	P Wilson for the applicant (pro bono) D C Boyle for the respondent
SOLICITORS:	Brooke Winter & Associates for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Jackson J and the order proposed by his Honour.

[2] **GOTTERSON JA:** I agree with the order proposed by Jackson J and the reasons given by his Honour.

[3] **JACKSON J:** The applicant applies for leave to appeal against sentence under s 668E(3) of the *Criminal Code*. On 16 May 2014, she pleaded guilty to and was convicted of the offence of bestiality. It was ordered that she be released on probation for a period of two years. The only questions that would be raised on appeal are whether the sentencing judge erred in exercising his discretion to record a conviction and, if he did, whether no conviction should be recorded in lieu of the order made. The circumstances of the offence are not complex. The applicant was 21 at the time. She had a casual sexual encounter with a man whom she had previously conversed over the internet about sexual matters. In those internet conversations, the man had expressed a desire to see the applicant perform a sex act with a dog.

[4] On the night of the offence, the applicant and the man engaged in consensual sex. The man then brought a dog into the room and persuaded the applicant to allow the dog to lick her vagina. He then rubbed the dog's penis to make it erect and placed it into the applicant's vagina for a short period – said to be about 10 seconds. He recorded the events on the applicant's mobile phone. The applicant told him to stop and the episode ceased.

[5] After the episode, the applicant emailed the video file to the man.

[6] Apart from the circumstances of the offence itself, every other factor points in the applicant's favour. She was psychologically assessed for the purposes of sentence. She does not have a sexual preference for bestiality. Other than the circumstances of the offence, there is no indication that she suffers from any form of sexual deviancy. She is unlikely to re-offend. She has no other criminal history and is otherwise of good character. She was studying at university at the time of the offence. As a result of the prosecution and its consequences she ceased her enrolment. She continued employment in the hospitality industry.

[7] As to the circumstances of the offence itself, it does not appear whether the applicant was aware that the conduct was unlawful. The offence was instigated by the man who sought sexual gratification from it. It does not appear that the applicant sought the same gratification; rather, she was prepared to accommodate the man's wishes for a short time.

[8] In the face of detection of the offence and police action, the applicant has cooperated with police and with the process in this court in all respects, including providing a statement and undertaking under s 13A of the *Penalties and Sentences Act* 1992 (Qld) in respect of prosecution of the man.

[9] The learned primary judge did not overlook any of these factors. He seriously considered the question whether a conviction should or should not be recorded. His Honour was minded to the conclusion that it should be recorded because the community's right to know of it outweighs applicant's personal interests and the interests of her rehabilitation. He concluded that "because [of] what I see as a significant risk to others, if a conviction was not recorded, I determine in this case … to record a conviction."

[10] The risk to which his Honour referred was identified earlier in the transcript of the hearing as "the risk that members of the community might be exposed to if she was in a position of significant trust at a time when she's not fully rehabilitated if, indeed, that can occur". His Honour went on to describe "…a difficulty associated with being influenced, potentially, by others to do things that she might not otherwise have done on her own, and, particularly in the sort of industry that she was hoping to go into, it is important that she not be like that."

[11] The industry the applicant was hoping to go into is to work with disadvantaged children. Her degree course at university was adapted to that aim. Before the offence was detected, she held a "blue card" under the *Working with Children (Risk Management and Screening) Act* 2000 (Qld) ("the Act"). The blue card was cancelled before the hearing before his Honour.

[12] His Honour returned to the subject saying: "Now, I think that it is important, therefore, that members of the community – dealing with her in the future, for example, in respect of a blue card should know of this conviction."

[13] In order to obtain employment in her preferred industry, the applicant would require a blue card. Because bestiality is contained within Sch 2 to the Act it is a "serious offence". Under s 226(2)(a)(ii) of the Act, the Chief Executive must have regard to a conviction of an offence and whether that offence is a serious offence. Schedule 7 defines "conviction" to include the acceptance of a plea of guilty by a court, whether or not a conviction is recorded.

[14] In other words, whether or not a conviction is recorded does not, per se, advantage the applicant in obtaining a blue card under the legislation.

[15] In *R v Mirza; Ex parte Attorney-General (Qld)*[1] this Court recognised that a conviction for attempted indecent treatment of a child under 12 years does not automatically cancel a blue card. The decision maker is entitled to take the offence into account and whether or not the sentencing court had recorded a conviction.

[16] His Honour's concern for the protection of the community (including its children) is more than understandable – it is an express purpose for which a sentence may be imposed.[2] He concluded in his sentencing remarks that a conviction should be recorded "because what I see as a significant risk to others, if a conviction is not recorded." However, in my view, it is necessary to unpack the logical factual steps between the conviction of the applicant and the relevant risk.

[17] The risk is not that the applicant might act in a predatory way towards children. There is no suggestion in any evidence that she is in anyway disposed to do that. The risk is also not that the applicant is a person who has a personality disposed towards deviant sex which might affect her dealings with children. A report of Ms Suzanne Briggs, clinical psychologist, was received into evidence. Her opinion was that the applicant "certainly does not need treatment for bestiality as it is not a sexual preference she

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1 [2008] QCA 23.

2 *Penalties and Sentences Act* 1992 (Qld), s 9(1)(e).

has". The relevant risk as identified by his Honour, appears to be that the applicant might be persuaded by another person to behave inappropriately or assist that person to behave inappropriately towards or around children.

[18] As his Honour said: "The psychological condition and your emotional capacity to withstand pressure which resulted in your participating in this offence, relatively readily, caused me concern about what might happen in the future if such a conviction is not recorded."

[19] In my view, the circumstances of the offence, as disclosed by the evidence and the submissions before his Honour, did not justify the factual conclusion as to the existence of the relevant risk. In the unusual circumstances of this case, in my view, there needed to be some evidentiary link between the applicant's offence and the relevant risk before it was appropriate to make a finding, on the balance of probabilities, as to the existence of that risk. The prosecution adduced no such evidence.

[20] In my view, his Honour made a mistake as to the existence of the relevant risk, on the evidence.

[21] In the unusual circumstances of this offence, in my view, his Honour's error in finding the relevant risk in the absence of evidence supporting that conclusion warrants the interference by this court with the discretionary decision of a sentencing judge whether or not to record a conviction. If a sentencing Judge "mistakes the facts … 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."[3]

[22] In exercising the discretion whether or not to order that a conviction be recorded under s 12(1) of the *Penalties and Sentences Act* 1992 (Qld) afresh, once the risk identified by his Honour is put to one side, the other factors on balance favour the conclusion that no conviction should be recorded.[4] The applicant is a young woman who made a very poor choice which she plainly regrets. Before this offence, she was at university pursuing a career path which, conviction or no conviction, may well now be out of her reach. Her record and character otherwise appear to have been unblemished up to this time. There is reason to think that a recorded conviction will have negative impacts upon her economic and social wellbeing and chances of finding employment.

[23] The offence has had significant financial and other impacts upon her already. The learned sentencing judge said that "in some ways this is a victimless crime". In my view, Ms Rigg's psychological report shows that the applicant has suffered significant damage, although it is of her own making. Her ill-conceived and tawdry sexual adventure has resulted in some public embarrassment and other consequences associated with being prosecuted for an indictable offence. It is not surprising that she has already suffered psychological consequences described as an extremely severe level of anxiety, moderate level of stress and a severe level of depression exhibiting some of the symptoms of a post traumatic stress disorder.

[24] In my view, the orders should be that the conviction is set aside and in lieu thereof it is ordered that no conviction be recorded.

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

4 *R v Brown; Ex Parte Attorney-General* [1994] 2 Qd R 182, 185; *R v Briese; ex parte Attorney-General* [1998] 1 Qd R 487, 491; *R v Cay, Gersch & Schell; Ex Parte Attorney-General* (2005) 158 A Crim R 488, [40], [45], [70] and [74].