SUPREME COURT OF QUEENSLAND

CITATION:	*R v BCT* [2016] QCA 180
PARTIES:	**R** **v** **BCT** (applicant)
FILE NO/S:	CA No 281 of 2015 DC No 2051 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – [2015] QDC 277
DELIVERED ON:	28 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	20 April 2016
JUDGES:	Margaret McMurdo P and Morrison JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – where the applicant pleaded guilty to the offence of cruelty to a child – where, at a contested sentence, the applicant admitted to knowing her partner was physically abusing the child but denied knowledge of his sexual abuse – where the child suffered substantial injuries and medical evidence established that the injuries would have been visible to the applicant prior to the child's admission to hospital – where the applicant contended the judge erred in concluding that knowledge of the injuries meant that the applicant knew of the sexual abuse – whether the sentencing discretion miscarried *Evidence Act* 1977 (Qld), s 132C *R v CBL; R v BCT* [2014] 2 Qd R 331, [2014] QCA 93, cited
COUNSEL:	S M Ryan QC for the applicant C N Marco for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The applicant pleaded guilty on 15 October 2015 to cruelty to a child on dates unknown between 31 July 2009 and 9 November 2009 by failing to remove her from access by CBL, the applicant's then partner, and by failing to provide her with adequate medical treatment. The child, who was two and three years old at the time of the offending, was the applicant's daughter. The Crown alleged at the time of the offence she knew her daughter was being physically and sexually abused by CBL. In her plea of guilty, she admitted to knowing that CBL was physically abusing the child but denied knowing of his sexual abuse. The prosecution rejected the contention that she did not know CBL was sexually abusing the child and the sentence proceeding was contested on this basis. The applicant gave evidence but the sentencing judge did not accept her account and sentenced her to four years imprisonment suspended forthwith with an operational period of four years. Pre-sentence custody of 522 days was deemed to be time already served under the sentence.

[2] The applicant has applied for leave to appeal against her sentence. She contended the sentencing discretion miscarried because the learned sentencing judge erred in her approach to the fact finding exercise, and in finding the applicant knew her daughter was being sexually abused.

Background

[3] On 8 March 2013 the applicant and CBL were each convicted after a trial in relation to these events of offences including multiple counts of rape, grievous bodily harm and torture. CBL was sentenced to an effective sentence of 16 years imprisonment and the applicant to an effective sentence of 10 years imprisonment. This Court dismissed CBL's appeal against conviction and application for leave to appeal against sentence but allowed the applicant's appeal against conviction and ordered a retrial: *R v CBL; R v BCT*.[1] The applicant's counsel on her re-trial made submissions to the Director of Public Prosecutions which ultimately resulted in the resolution of the matters by the applicant's plea of guilty to cruelty on 15 October 2015, with the other charges being discontinued.

The contested sentence hearing

[4] The contested sentence hearing proceeded over two days. The prosecution's position was that, based on the medical evidence, at the very least the applicant must have seen the extensive injuries to the complainant's genital and anal region, as well as the obvious injuries to her torso, head and face. She must have known, the prosecution contended, that CBL caused the complainant substantial injuries during at least one physical and one sexual assault. The prosecution submitted that she then failed to remove the child from CBL and protect her from further physical or sexual assault by failing to obtain medical treatment. Whilst accepting that she may not have been present at the time the sexual violence occurred and may not have known its full extent or nature, the prosecution argued that she must have known that the complainant suffered significant injuries to her genital area through a sexual assault, yet failed to get her treatment. The prosecution alleged the applicant was obstructive when she eventually took the complainant to hospital, lying to staff and investigators and inhibiting their ability to properly treat the child.

[5] The prosecution primarily relied on a schedule of facts;[2] a set of photographs of the child taken when she was under general anaesthetic on the day she went to hospital

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1 [2014] 2 Qd R 331.

2 Exhibit 2.

(8 November 2009),[3] a set of photographs taken later (12 November 2009);[4] an extract from the transcript of evidence from paediatrician, Dr Deanna True, given at the 2013 trial;[5] an extract from the transcript of evidence from Professor Roy Kimble, the Director of Burns and Trauma, Mater Children's Hospital given at the 2013 trial;[6] and the transcript of the evidence of Professor Johan Du Flou, a forensic pathologist, called by CBL in the 2013 trial.[7] The prosecutor also tendered transcripts of interviews between the applicant and police officers on 8 November 2009;[8] 9 November 2009;[9] 12 April 2010;[10] 24 May 2010[11] and a statement taken from the applicant by police 25 May 2010.[12] The prosecutor contended those interviews gave untruthful versions of events and contained many inconsistencies so that the judge would not accept her as a witness of credit.[13]

[6] The applicant gave evidence and was cross-examined. She said that the first time she saw an injury to the complainant's vagina was on the evening before the child was taken to hospital.[14] CBL told her that, after the child wet the bed, he showered her and she slipped and hit her head.[15] She saw that the child's vagina was swollen but did not know why. She did not learn of the injuries to the child's anus until later when the applicant was at a women's refuge. The nurses at the hospital told her about the tear from the child's vagina to her anus. The surgeon at the hospital told her that the child had "scarring inside" but she did not know what this meant or what caused it.[16] The doctor did not tell her that the child had been sexually abused. Although she was aware that CBL was physically violent to the child, she had no idea that he had sexually abused her.[17] She accepted CBL's account of how the child came to be innocently injured. In the two weeks prior to the child being hospitalised, the applicant noticed that she was not talking much;[18] she thought the child had been traumatised by CBL's yelling. She asked the child what was wrong, but she did not complain or say anything. She did not tell the applicant that CBL was hurting her.[19] During the week prior to the child's admission to hospital, CBL took over the child's showering. The applicant allowed him to do this because otherwise there would be "another explosion."[20] She insisted she did not know he was sexually abusing the child. She said she had examined the child on the Friday before her admission to hospital, after CBL said she had fallen off her bike. She saw a little cut above the split of the complainant's vagina which she did not think was significant. It was really small, just below her undie line. She also saw a scratch on the complainant's bottom.[21]

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3 Exhibit 11.
4 Exhibit 12.
5 Exhibit 13.
6 Exhibit 14.
7 Exhibit 17.
8 Exhibit 18 and 19.
9 Exhibit 20.
10 Exhibit 21.
11 Exhibit 22.
12 Exhibit 23.
13 The prosecution also tendered the transcripts of evidence of Dr Mark Phillips, a specialist paediatric radiologist, and Dr Christopher Posselt, visiting Medical Officer at the Mater Hospital, but this material is not directly relevant to this application.
14 T1-34, AB 40.
15 T1-35, AB 41.
16 T1-37, AB 43.
17 T1-40, AB 46.
18 T1-46, AB 52.
19 T1-47, AB 53.
20 T1-48, AB 54.
21 T1-72, AB 78.

[7] Defence counsel submitted that the applicant had lived with CBL for only two months. He was dominant, threatening, demanding, belittling and violent. The applicant was unsophisticated and isolated from family and friends. The external signs of abuse on the child did not appear until shortly before she was taken to hospital.[22] The applicant and CBL maintained a sexual relationship and she had no reason to consider he had a sexual interest in her two or three year old daughter; this was unthinkable. Counsel emphasised that the question was not whether the applicant had seen the child's anal and genital injuries but whether she knew those injuries were signs of sexual abuse.[23]

The primary judge's reasons

[8] The primary judge stated that she had considered all the evidence placed before her carefully and concluded that she did not accept the applicant's denials of any knowledge of the sexual abuse of her daughter by CBL. Her Honour accepted defence counsel's submissions that the applicant was unsophisticated and conditioned to do what she was told in her relationship with CBL who was very much the controlling partner. He was physically larger, considerably older and she deferred to him.[24] As a result of their relationship, she became isolated from family and friends. The applicant's focus was clearly on pleasing CBL to the detriment of her own child. The judge noted that the applicant witnessed several incidents of physical abuse and was satisfied she was aware of the sexual abuse.[25] The applicant's conduct in the sentencing proceeding, her Honour concluded, showed a continuing refusal to accept full responsibility for the sexual assault inflicted upon her daughter. The applicant was a very vulnerable person and in that respect remained at risk of re-offending. The judge was satisfied that the applicant was aware of the sexual assaults and, having that knowledge, failed to take any action to remove her daughter from further harm and/or to obtain medical treatment for her.[26]

[9] At the conclusion of her Honour's sentencing remarks her Honour published her reasons for finding that the applicant had knowledge of the sexual, as well as physical, abuse of the complainant: *R v BCT*.[27] Her Honour noted that at the time of the offending the child was either three years old or almost three years old[28] and she was in the applicant's care. On the evening of Saturday, 7 November 2009 she was taken unconscious from the applicant's home to the Mater Children's Hospital. She had significant injuries including: multiple bruises, abrasions and lacerations on her head and face; vertical tears on her upper and lower lips; large ulcers inside her mouth; hair loss with scabs on the scalp; bruising and swelling to her chest, abdomen, legs and arms, with the bruising to the abdomen being described as massive; and bruising and lacerations with severe swelling to her genital and anal areas. She also had internal injuries: subdural bleeding around the brain; bleeding behind the eyes; extensive bleeding within the muscular layer of the abdomen; tears in her buttocks muscle and the internal wall of the anus; an enlarged bladder and kidney; and damage to her liver and pancreas. She was severely anaemic.[29] The applicant denied knowledge of the injuries resulting from the sexual assaults as she did not know that CBL was sexually abusing the

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22 T2-14, AB 108.
23 T2-17, AB 111.
24 Sentence (10 November 2015) T2, AB 123.
25 Above, T3, AB 124.
26 Above, T4, AB 125.
27 [2015] QDC 277.
28 Above, [1].
29 Above, [3].

child.[30] The judge considered she could not have regard to the injuries occasioned by the sexual assaults unless satisfied that the applicant knew of the sexual abuse.[31]

[10] Given s 132C *Evidence Act* 1977 (Qld) and the seriousness of the offences, the degree to which the court must be satisfied of the contested fact is, her Honour concluded, approaching that of beyond reasonable doubt.[32]

[11] The extent of the applicant's injuries meant that the medical team examined the child under anaesthetic in an operating theatre. Her genital area was grossly swollen; there was a large laceration from the anus to the vagina which looked as though it had occurred in the last 24 to 48 hours. She had ulcerated lacerations on the inside of her anus which were several days, possibly weeks, old; ulcerations take time to develop. The injuries appeared to be of different ages suggesting at least two episodes of assault on her genital area including forceful penetration of the vulva. Her bladder and kidneys were enlarged because the passing of urine would have been intensely painful, resulting in less frequent urination. Her injuries would have caused extreme pain during bowel motions and when moving around, walking and going to the toilet.[33]

[12] Her Honour referred to the evidence of Professor Kimble. When asked whether it was possible that a carer could not see the deep chronic ulcer in the anal area, he responded that "there was a lot of chronic swelling around it and it would have been quite obvious to anyone who was caring for a girl of this age." These lesions were large and swollen, not subtle and, he considered, should have been picked up.[34] He described her as a very sick little girl.

[13] The judge considered that the evidence of Professor Du Flou did not contradict the evidence of Dr True or Professor Kimble in any significant respect.[35]

[14] Her Honour stated that CBL told Dr True in the applicant's presence that the child had fallen in the bathroom that night (7 November) and there were no genital or anal injuries. CBL then said that the child "toilets herself, so they don't usually look in that area" and eventually accused the doctors of causing the injuries. The judge observed that the applicant did not contradict CBL's clearly false statements.[36]

[15] The applicant gave four interviews to police as well as a field interview at the hospital on 8 November 2009 and a formal written statement on 25 May 2010. Her third and fourth police interviews were given after she had ended her relationship with CBL. The judge observed that she gave different answers in these different interviews.[37] She said that she had always trusted CBL and accepted what he told her. Her Honour noted that CBL was some 10 years older, dominant and controlling.[38] Given the nature of their relationship, her Honour considered she should not place much reliance on the first two interviews which occurred during their relationship. By the time of the third and fourth interviews the applicant was in a women's refuge, although she said she

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30 Above, [4].
31 Above, [5].
32 Above, [6].
33 Above, [7].
34 Above, [8].
35 Above, [10].
36 Above, [11].
37 Above, [12].
38 Above, [13].

was still scared of CBL and aware of the extent of his contacts.[39] She then told police of some of the physical abuse which she had seen CBL inflict on her daughter. In the third interview, the judge apprehended that the applicant accepted that the paediatrician did not cause the rip from the child's vagina to her anus, although she denied any knowledge of that injury until informed of it at hospital.[40] In the third interview she originally said that CBL's attitude towards the child changed in the last two days before her hospitalisation. Later in the interview she said there were other incidents between CBL and the child a few weeks beforehand. The judge noted that the applicant told police that CBL had hit her but never her daughter, contradicting her earlier statement in that interview that CBL had only become physically violent towards her after the child was taken away.[41]

[16] The applicant, in her evidence in the sentencing proceeding, the judge noted, changed the roles CBL and she played in the complainant's toileting and showering in the two weeks prior to the child's hospitalisation. The applicant's account, her Honour considered, was clearly directed to limiting her opportunities to have seen her daughter's injuries. In this third interview she said that CBL was mainly toileting her but later in the same interview she said she toileted her two or three times over the weekend but saw no swelling. She also admitted to having seen the child asleep on the toilet on the Friday night. The applicant's long-winded explanations in relation to that incident and in denying that the child ever spoke of a "stingy pee" were, the judge found, contrived and unbelievable.[42]

[17] Her Honour observed that in the third and fourth interviews the applicant admitted to showering her daughter after an alleged motor bike accident on the Friday morning (6 November). All she claimed to have noticed was a little cut above her daughter's groin and a little scratch on her bottom; there was no swelling on her vagina when she looked at it. In her police statement she also said she examined the child at this time. The medical evidence, her Honour found, showed that those statements were patently false.[43] In the third and fourth interviews the applicant said that, after showering the complainant that morning, CBL cared for the child for the rest of that day and the next.[44] In her evidence in the sentencing proceeding, the judge observed that the complainant denied showering the complainant on Friday. In cross-examination she said she had tried to pull the child's clothes up and get her undressed and into the shower but CBL said he would do it. It was at that time she saw the scratch above the child's vagina but CBL intervened.[45] When it was put to her in cross-examination that she had not said that before, she said she had forgotten to mention it because she was still trying to process and make sense of everything and could not always remember specifics.[46] She claimed she wanted to take the child to the doctor although she had no opportunity to fully examine her.[47]

[18] When cross-examined about the week prior to the child's hospitalisation, particularly the Monday, she again said she had attempted to remove the child's clothes but CBL

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39 Above, [14].
40 Above, [15].
41 Above, [16].
42 Above, [17].
43 Above, [18].
44 Above, [19].
45 Above, [20].
46 Above, [21].
47 Above, [22].

stopped her and said he would do it. She claimed that she could definitely recall that she did not shower the child that night. But, the judge observed, in her interview on 9 November she gave a long convoluted story about the child slipping in the shower that night. When cross-examined, she was unable to explain this inconsistency. During her interviews and in her police statement, a clear focal point was the household routine in relation to toileting and showering the child.[48]

[19] By contrast, the applicant's evidence in the sentencing proceeding, the judge noted, was quite different and a clear attempt to distance herself from having had any opportunity to obtain knowledge as to her daughter's condition. Medical evidence established that the injuries to the child's genital and anal areas would have been very obvious by the Friday morning and even before then.[49]

[20] The judge referred to the applicant's evidence that her daughter was still eating on the Friday and denied that she saw any injuries to her mouth; she was not in any obvious pain and did not have any problems walking; she was fine. That evidence too, was completely at odds with the medical evidence,[50] her Honour found.

[21] The judge gave no credence to the applicant's evidence in the sentencing proceeding. It was inconsistent with the medical evidence and internally inconsistent. Her Honour did not accept that the applicant did not know of the injuries to the child's genital and anal areas or that her daughter was being sexually abused by CBL.[51] Accordingly her Honour was satisfied beyond reasonable doubt that the applicant had knowledge of the sexual, as well as the physical, abuse to her daughter when she failed to remove her from access to CBL.[52]

The applicant's contentions

[22] The applicant's counsel referred this Court to passages of the applicant's evidence which supported her position that she did not see any anal and genital injuries until just before the child was admitted to hospital. Counsel conceded, however, that she has a difficult task in persuading this Court to set aside the primary judge's findings that she did not accept the applicant's evidence she had no knowledge of the injuries to her daughter's genital and anal areas.

[23] But, counsel contended, this finding was not determinative of the contested finding of fact and the judge erred in treating it as determinative. The judge erred in automatically stepping from the finding that the applicant had knowledge of the injuries inflicted to her daughter's genital and anal areas to concluding that therefore she knew her daughter was being sexually abused. The judge should have considered the applicant's submissions which challenged that conclusion. Her Honour made no finding as to when the applicant knew her daughter had been sexually abused or the period of time over which the applicant knowingly exposed her to the risk of sexual assault. These matters were relevant to the applicant's culpability. As a result, counsel contended, the sentencing discretion miscarried.

[24] Even if the applicant saw her daughter's anal and genital injuries before the Saturday night when the complainant was hospitalised, in light of the applicant's unsophisticated

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48 Above, [23].
49 Above, [24].
50 Above, [25].
51 Above, [26].
52 Above, [27].

nature and her subservient relationship to CBL at that time, counsel contended that the judge could not have found, to the relevant standard, that the applicant knew her daughter was being sexually abused by CBL. This finding, counsel submitted, was not reasonably open on the evidence.

Conclusion

[25] As counsel for the applicant sensibly conceded, there was ample evidence to support the judge's finding that the applicant did have knowledge of the injuries to her daughter's genital and anal areas, even before the Friday morning. This conclusion was consistent with photos of the complainant tendered at sentence, even taking into account that they were taken on 8 and 12 November. There was every reason for the primary judge not to accept the complainant's evidence at sentence. The many inconsistencies between her many accounts demonstrated that she was, at best, self-serving and completely unreliable. The judge's conclusion that she must have known of the injuries, at least by the Friday morning was also consistent with the expert evidence from Dr True and Dr Kimble, none of which was relevantly disputed by Dr Du Flou.

[26] The applicant contends, however, that the primary judge erred in concluding that knowledge of the injuries inflicted to her daughter's genital and anal areas meant that she also knew her daughter was being sexually abused. The applicant's contention that the judge should have determined when and over what period the applicant knew her daughter was being sexually abused is unrealistic in circumstances where the judge was not asked to make those specific findings. But in any case, it may be inferred from the judge's reasons and the modest sentence imposed for such concerning offending, that the judge accepted the prosecution's contentions that the applicant may not have been present when the sexual violence occurred or known its full extent or nature but that she found out about it at some point before the complainant was taken to hospital; the applicant was then both aware of the injuries to the complainant's ano-genital area and that CBL had caused them by sexually abusing her. The judge's leniency in sentencing the applicant indicates that her Honour accepted that CBL was the principal and the perpetrator of the heinous assaults on the vulnerable child and gave full weight to the applicant's subservient relationship to him and his dominance over her. The applicant's modest sentence reflected that her failure to provide her own daughter with adequate medical treatment and care, knowing that CBL was both physically and sexually abusing her, occurred over a relatively short time, and when CBL was probably also physically and mentally abusing the applicant.

[27] The applicant has failed to demonstrate any error on the part of the primary judge in fact finding at sentence. The application for leave to appeal should be refused.

[28] **MORRISON JA:** I have read the reasons of Margaret McMurdo P and agree with those reasons and the order her Honour proposes.

[29] **MULLINS J:** I agree with the President.