SUPREME COURT OF QUEENSLAND

CITATION:	*R v S* [2001] QCA 531
PARTIES:	**R** **v** **S** (applicant)
FILE NO/S:	CA No 209 of 2001 DC No 719 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	30 November 2001
DELIVERED AT:	Brisbane
HEARING DATE:	26 November 2001
JUDGES:	McPherson and Thomas JJA, 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 against sentence and the appeal against the refusal to re-open it dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – where after sentence the applicant was made aware that he may be deported as a result of the length of his sentence – whether the learned sentencing Judge should have re-opened the applicant's sentence – whether the sentence imposed was manifestly excessive *Migration Act* 1958 (Cth), s 501 *Criminal Code* (Qld) s 210, s 229B *Penalties and Sentences Act* 1992 (Qld), s 188 *R v Booth* [2001] 1 Qd R 393, considered *R v Chi Sun Tsui* (1985) 1 NSWLR 308, applied *R v P* [2001] QCA 130, CA No 4 of 2001, 5 April 2001, considered *R v Shrestha* (1991) 173 CLR 48, applied
COUNSEL:	K E Tronc for the appellant S G Bain for the respondent

SOLICITORS: Neumann & Turnour for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA**: This is an appeal, or it may be an application for leave to appeal or to extend the time for doing so, against a decision of Brabazon DCJ refusing an application under s 188 of the *Penalties and Sentences Act 1992* to re-open a sentence his Honour had imposed on the appellant on 9 April 2001. On that date the appellant had pleaded guilty to two counts. The first was an offence of maintaining, contrary to s 229B of the Criminal Code, a sexual relationship with S a child under 16 years of age, accompanied by the circumstances of aggravation that the child was in fact under 12 years and that he was in the care of the appellant. The second was an offence under s 210 of the Code of having indecently dealt with a child under 12, with the aggravating circumstance that he too was under the care of the appellant. The appellant was sentenced to imprisonment for three years on count 1 and to six months on count 2 to be served concurrently, but the term of three years was ordered to be suspended after 12 months for an operative period of five years.

[2] On 19 July 2001 the appellant came back before Brabazon DCJ with the application under s 188 to re-open that sentence. The basis of the application was that he had now received from the Department of Immigration a notice of intention to consider cancelling the visa that he held, which was his authority to enter or remain in Australia. Section 501(2) of the *Migration Act 1958* (Cth) provides that the Minister may cancel a visa granted to a person if:

> "(b) the person does not satisfy the Minister that the person passes the character test."

By s 501(4), that power may only be exercised by the Minister personally, and by sub-s (5) the rules of natural justice do not apply to the decision. The "character test" referred to in s 501(2) is explained or expanded in s 501(6) of the Act in terms of which the following are relevant:

> "(6) For the purposes of this section, a person does not pass the 'character test' if
>
> (a) the person has a substantial criminal record (as defined by subsection (7)".

Subsection (7) provides that for the purposes of the character test, a person has a "substantial criminal record" if:

> "(c) the person has been sentenced to a term of imprisonment of 12 months or more".

[3] The appellant is a citizen of the United States of America who has, under the authority of a visa, resided in Australia for the past 35 years. The sentence imposed on him on 9 April 2001 was one of imprisonment for three years. It is true that that term was ordered to be suspended after the appellant had served 12 months of it, but it remained, within s 501(7), "a sentence of imprisonment for 12 months or more", and it continues to do so even if regard is had only to the prospective term of actual detention or imprisonment that is contemplated by the suspension order. It is clear, therefore, that the power or discretion of the Minister under s 501(2) to cancel the appellant's visa was activated by the sentence imposed on 9 April 2001.

[4] The assumption implicit in the application made on 19 July 2001 to re-open the sentence is that that particular consequence of Federal law can, or could be, avoided by re-visiting the sentence of imprisonment imposed on 9 Aril 2001 and reducing it to a term of less than 12 months. I am far from persuaded that this is so. Section 501(10) of the *Migration Act* provides that, for the purposes of the character test, a sentence imposed on a person is to be disregarded if: (a) the conviction "has been quashed or otherwise nullified", or (b) the person has been pardoned in relation to the conviction concerned. The fact that s 501(10) says nothing about reduction of a sentence on appeal, or on re-opening a sentence under a provision like s 188 of the *Penalties and Sentences Act*, may mean that those possibilities were overlooked in the drafting of s 501; but it is at least as likely that it was the result of a deliberate decision to exclude them from the ambit of the exception in s 501(10). Once a sentence of the relevant duration has been imposed, the Minister's discretion under s 502(2) of the *Migration Act* becomes exercisable, and there is nothing that the law of Queensland can do to contradict that state of affairs without raising the spectre of s 109 of the Constitution. As it is, the provisions of s 188, and in particular of s 188(4)(a), for re-opening a sentence seem clearly enough to treat the procedure as resulting, if it succeeds, in a re-sentencing of the offender. It does not operate as if the sentence had never previously been imposed at all.

[5] To the extent, therefore, that the application to re-open made on 19 July 2001 was based on the ground that, in imposing sentence on 9 April 2001, the learned judge had wrongly failed or refused to take into account the impact that that sentence would, if unaltered, have on the appellant's prospects of retaining his visa, it was in my opinion misconceived. Re-opening and reducing the sentence imposed on 9 April 2001 would not have detracted from the Minister's power to exercise his discretion under s 501(2) of the *Migration Act*. But, in any event, I consider that the process of sentencing should not seek to anticipate the action that some other authority or tribunal, lawfully acting within the limits of a proper discretion, may take in future, by so adjusting the sentence as to defeat, avoid or circumvent that result. See, although in a different sentencing context, *R v Booth* [2001] 1 Qd R 393, 400, where it was said to be wrong to attempt to circumvent a specific legislative direction by deliberately imposing a lesser sentence in order to avert it. More specifically, in *R v Chi Sun Tsui* (1985) 1 NSWLR 308, 311, Street CJ said that "the prospect of deportation is not a relevant matter for consideration by a sentencing judge in that it is the product of an entirely separate legislative policy area of the regulation of society". Those remarks of the learned Chief Justice were cited without apparent disapproval in *R v Shrestha* (1991) 173 CLR 48, 58.

[6] Having referred to that decision, Brabazon DCJ concluded that it would not be right to consider adjusting a sentence because of the possible impact of what his Honour called "the Commonwealth considerations". In this, his Honour was in my opinion plainly correct, especially when, as he observed, it was not at all clear what attitude the immigration authorities would take toward the appellant. It would in my opinion be quite wrong for the sentencing judge to deliberately impose a lesser sentence in order to avoid the possibility of deportation, only to find that the Minister in fact later exercised his discretion to allow the offender to remain in Australia. That would have the consequence of imposing a sentence that was less severe than that visited upon an Australian citizen who was at no risk of deportation. It would produce a regime under which visitors or non-permanent residents were sentenced more leniently than Australians who had committed the same kind of offence. That cannot be a proper result in the administration of justice.

[7] In my opinion, therefore, his Honour was correct in refusing to re-open the sentencing proceedings on the ground advanced by the appellant. He was, however, also referred to the decision of this Court in *R v P* [2001] QCA 130, which had been decided only a day or two before the original sentence hearing in the present case. His Honour was disposed to think that that decision did, to use his words, "signal a somewhat different view being taken of what might be called the usual case of indecent dealing", and that the appropriate sentence for such an offence might be somewhat less than in the past. I respectfully differ from his Honour's impression of that decision, in which an application for leave to appeal against a sentence of imprisonment for two years for indecent dealing was in fact dismissed. That, it may be noticed, was a case in which the judge who imposed the sentence in question specifically recorded that he was giving effect to various mitigating factors operating in favour of the offender by reducing the head sentence rather than by making an early recommendation for parole or, as happened in this instance, suspending the sentence after one third of the head sentence had been served.

[8] In the present case, the victims of the offences to which the appellant pleaded guilty were two boys of about 8 or 9 and 6 or 7 years of age, who were brothers. As to the complainant P, who was the younger of the two, the appellant and he were together in the disabled persons' facilities at a cinema, when the appellant asked him if he wished to touch the appellant's penis, to which P answered "No" (count 2). It was accepted for sentencing purposes that his penis was not erect at the time or visible by him at the time, and the learned judge regarded the incident as a very minor offence of indecent dealing.

[9] It was the appellant's conduct with the other boy S that attracted the effective sentence imposed on 9 April 2001. The offence in this instance (count 1) of maintaining a sexual relationship covered some 11 or 12 incidents occurring between 31 December 1999 and October 2000. A number of them took place at a cinema to which the appellant often used to take S to see films, and consisted of placing S's hand on the appellant's erect penis. One or more of such incidents occurred in the car travelling to the cinema, or while watching television at the appellant's home, and some involved active masturbation of the appellant. On one occasion at the appellant's house, he rubbed cream or soap on S's penis. On another or other occasions, he persuaded S to remove his pants, placed him on a toilet, and put his penis between S's legs.

[10] The appellant and his wife were next door neighbours of S's family and he had made a special friend of S. It was when S's parents noticed that he was no longer willing to visit the appellant or to go out with him that they began to investigate and found out from S what had been happening. It is to the credit of the appellant that, when confronted by S's father, he admitted what he had been doing, apologised and was remorseful, and later voluntarily disclosed four further offences in the course of the police interview. The parents were, however, naturally very upset and angry at the betrayal of their trust of a man whom they had known and with whom they had been friendly for some 10 years. S now displays anger toward the appellant and both of the boys are receiving counselling. Family stresses developed and the parents felt it necessary at some expense to sell their house and move away from the appellant. Each member of the family has inevitably been affected in a different degree by the experience.

[11] The appellant is a 74 year old man. He was examined by a leading psychiatrist, who recorded in his report that the appellant was born and grew up in New Hampshire in a large family that was very poor. He had a hard childhood. His father was an alcoholic, and the appellant was sexually abused by other members of his family, including his grandmother, and also he claims by a nun at his school. He served as a marine engineer in the US Navy during three wars and was highly commended. At the age of 25 he met an Australian woman in the United States to whom he has now been married for 49 years. He and she have recently become members of a Pentecostal church from which he and they have derived much comfort and support. He has been giving voluntarily of his time to help at the Mater Hospital. He pleaded guilty at the first opportunity, spared the complainants a trial, and is very remorseful for what he has done. There is little or no prospect of his re-offending and he has no prior criminal record.

[12] In sentencing, his Honour took account of all of these matters. The prosecutor contended for a head sentence of 3 to 4 years with a recommendation for parole after 12 or 18 months. His Honour thought it inevitable, which indeed it was, that the appellant would go to prison, but he gave recognition to the various mitigating factors by ordering suspension of the sentence after 12 months. The offence, which under s 229B carries a maximum of life imprisonment, is plainly a serious offence. The present case is very far from being the worst example of its kind; but there was a degree of persistence in the appellant's behaviour, and the extent of his breach of the parents' and the boys' trust is perhaps the most exacerbating feature of his conduct. The sentence imposed on 9 April 2001 was well within the appropriate sentencing range and there is no reason for disturbing it. The application for leave to appeal against it and the appeal, if any, against the refusal to re-open it should be dismissed.

[13] **THOMAS JA:** I agree with the reasons of McPherson JA which I have had the advantage of reading. My only qualification is that I would reserve to another day the questions that are discussed in para 4 which need not be resolved for present purposes, and as to which we did not have the benefit of legal argument.

[14] I also agree with the order proposed by McPherson JA.

[15] **MULLINS J:** For the reasons given by McPherson JA, I agree that the sentence imposed on the applicant on 9 April 2001 was within the appropriate sentencing range and that the applications should be dismissed.