SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sybenga* [2004] QCA 391
PARTIES:	**R** **v** **SYBENGA, Daniel Philip** (applicant)
FILE NO/S:	CA No 234 of 2004 DC No 784 of 2004 DC No 786 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	19 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	19 October 2004
JUDGES:	de Jersey CJ, Davies JA and Chesterman 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 refused, subject to the recommendation that during his period of incarceration the applicant be given the benefit of Androcur therapy and psychotherapy and psychiatric and psychological counselling**
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 – SEXUAL OFFENCES – where the applicant pleaded guilty on two ex officio indictments to 16 counts of indecent dealing – whether the sentence imposed was manifestly excessive *R v Foy; Attorney-General (Qld)* [2001] QCA 209; CA No 21 of 2001, 31 May 2001, considered
COUNSEL:	K M McGinness for the applicant R G Martin for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant

Director of Public Prosecutions (Queensland) for the respondent

THE CHIEF JUSTICE: The applicant for leave to appeal against sentence, pleaded guilty on two ex officio indictments to 16 counts of indecently dealing with nine children under the age of 12 years, some of whom were as young as 2 or 3.

He committed the offences over the period January 2002 to August 2003. At the time, he was himself aged 19 years. He had no prior criminal convictions. He was sentenced to four years' imprisonment with post-prison community-based release recommended after the serving of 16 months. He was also subjected, under s 19 of the *Criminal Law Amendment Act* 1945 (Qld), to a 15 year reporting condition.

It was during the period of this offending, on 1st May 2003, that the Legislature increased the maximum penalty for indecently dealing with a child under 12 years of age from 14 years to 20 years' imprisonment. The learned Judge accepted Dr Fama's diagnosis that the applicant suffers a schizoid personality disorder and paedophilia although not amounting to mental illness. In these instances, the applicant, himself sexually immature, targeted young girls left alone by their parents at shopping centres.

He would travel to those shopping centres with members of his own family intending to carry out this activity. They, of course, I should make clear, were going to the shopping centres for legitimate purposes. The applicant later

explained to the police, following his apprehension, that his interest rested in sexual foreplay not sexual intercourse partly because of his concern about contracting sexually transmitted diseases.

He would seek out his victims in areas not subject to the view of security cameras. He selected girls no older than five years of age in order to minimise the risk of his being detected. His conduct involved putting his hand down their pants, kissing them, masturbating in front of them, having a child touch his penis and masturbate him, showing a child pornographic images then having the child lie on top of him while he seized her buttocks and so on.

The gravity of the offending escalated over time. He was detected in the course of committing one of the offences, confessed to it and then told the police of the other offences which would otherwise not have come to light. Unsurprisingly, the names of the victims for many of the offences were not known.

The applicant told the police that he was obsessed with sex. He realised the wrongfulness and unlawfulness of his conduct. The learned Judge described his offending as systematic, premeditated and predatory. The position put before the learned Judge was that the applicant, who is remorseful, was responding well to treatment he had voluntarily undertaken and that he had been fully cooperative with psychotherapy and his Androcur treatment. Androcur therapy is designed to inhibit

the sexual drive and, while he was subject to that treatment, his sexual drive had been reduced to virtually nil.

Another psychiatrist, Dr Wilkie, concluded that the applicant need not undertake any additional sexual offending program. The learned Judge made the observation that the continuing benefit of the Androcur therapy was of course conditional upon the applicant's continuing compliance and that paedophilia involves a high risk of re-offending.

Ms McGinness, who appeared before us for the applicant, referred to the applicant's supportive family. His mother is a general practitioner and has been involved in arranging his treatment. Unfortunately, as we have been informed, the Androcur therapy has not been continued during the period of his incarceration.

Counsel for the applicant submitted before us that the applicant should have been subjected to no more than a 12 month intensive correction order or 12 months' imprisonment coupled with three years' probation. She submitted that would have been appropriate in view of the applicant's youth, his lack of prior criminal conviction and his effective voluntary efforts at rehabilitation.

The case of *R v Foy; Attorney-General (Qld)* [2001] QCA 209 provides some guidance. The offending there was similar save that in the present case the complainants were generally much younger than in Foy. Foy was imprisoned following an

Attorney's appeal for four-and-a-half years with no recommendation in relation to post-prison community-based release. Points of difference are that Foy was an older man than the present applicant and, unlike the present applicant, Foy had a very serious relevant past criminal history.

It is significant, of course, that the four-and-a-half years' term was imposed upon Foy on an Attorney's appeal, the results of which are generally moderate responses within relevant ranges. As counsel for the present respondent, Mr Martin, has pointed out, this applicant was sentenced to the somewhat lesser term of four years coupled with the recommendation for post-prison community-based release after 16 months.

I do not consider that the contention has been sustained that the penalty imposed here was manifestly excessive. The protection of children and special and general deterrence are critically important goals of sentencing in these situations. For offending of this gravity with a number of complainants, nine, offending carried out in a systematic, premeditated and predatory way, actual incarceration for a not insubstantial period was amply warranted notwithstanding the circumstances of youth, absence of record, rehabilitation and cooperation which tend to favour the applicant.

His admission to his unfortunate condition and his willingness to undergo chemical treatment which, while persisting, was effective, should enhance his prospects of being released after the 16-month term which the learned Judge had in mind.

In view of his youth and lack of prior convictions and application to rehabilitation, his prospects of securing that release, which would be followed by supervision while on parole, should be reasonably good unless new circumstances intervene.

While taking the position now of endorsing, with respect, the recommendation of the learned sentencing Judge, I would, however, leave to the relevant Board the question of assessing eligibility for parole at that point. I would, however, add a recommendation that during the period of his incarceration the applicant be given the benefit of Androcur therapy and psychotherapy and psychiatric and psychological counselling. I think it is very important that the Androcur treatment be re-introduced, that it become an accepted facet of this young man's life so that the willingness to endure that treatment previously exhibited re-emerges and that its administration become an accepted long-term facet of this person's life which will continue indefinitely and thereby ensure the degree of control necessary for the protection of the community following his release from prison. Otherwise, I would refuse the application.

DAVIES JA: I agree.

CHESTERMAN J: I agree.

THE CHIEF JUSTICE: The application is refused subject to the introduction into the description of penalty of the additional recommendation I have indicated.
