SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lister* [2009] QCA 368
PARTIES:	**R** **v** **LISTER, Susan Beryl** (applicant)
FILE NO/S:	CA No 233 of 2009 DC No 2118 of 2009 DC No 3091 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	3 December 2009
DELIVERED AT:	Brisbane
HEARING DATE:	3 December 2009
JUDGES:	Holmes and Fraser JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to amend grounds of appeal granted.** **2. Application for leave to appeal against sentence dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant convicted of one count of unlawful deprivation of personal liberty and two counts of common assault – where applicant was a carer in a care facility and complainants were children with disabilities – where applicant sentenced to 150 hours community service and convictions were recorded – where applicant argued that the recording of convictions rendered the sentence manifestly excessive – where applicant argued that the recording of convictions would prevent her from obtaining a travel visa or 'blue card' in the future – whether sentencing judge gave adequate consideration to the matters in s 12 *Penalties and Sentences Act* 1992 (Qld) – whether sentencing judge erred in failing to exercise the discretion not to record convictions – whether sentence manifestly excessive

	Commission for Children and Young People and Child Guardian Act 2000 (Qld)
	Penalties and Sentences Act 1992 (Qld), s 12
COUNSEL:	B W Farr SC for the applicant M B Lehane for the respondent
SOLICITORS:	Ryan & Bosscher for the applicant Director of Public Prosecutions (Queensland) for the respondent

HOLMES JA: I'll ask Justice Fraser to give the first reasons.

FRASER JA: On 4 September 2009, the applicant was found guilty by a jury after a five day trial in the District Court and convicted of one offence of unlawful deprivation of personal liberty and two offences of common assault.

The trial Judge ordered that convictions were recorded and that the applicant perform unpaid community services for 150 hours.

The applicant has applied for leave to appeal on the ground that the judge erred in exercising his discretion to record convictions.

At the hearing of the application, the applicant sought leave to add another ground that in recording the convictions, the judge erred by failing to give any, or any adequate attention to the provisions of s 12 of the *Penalties and Sentences Act* 1992 (Qld). I would allow that amendment, which was not opposed by the respondent.

The applicant committed the offences in the course of her employment as a carer at a care facility on Bribie Island. The complainant in counts 1 and 2 was a young boy aged between about six and nine years at the time, who suffered severe autism and was susceptible to tantrums which had the potential to escalate to violence.

The complainant in the other count of which the applicant was convicted, count 5, suffered from a similar condition and was aged between about nine to 15 years at the time of the offence.

In relation to count 1, between April 2000 and July 2003, the applicant tied the young boy's arms and legs to the railings on the side of a toilet and left him restrained on the toilet seat. She went to the kitchen in the care facility to get a camera and asked a co-employee to "come and have a look at this."

The co-employee did so, and saw that the complainant was trying unsuccessfully to free himself. He looked really distressed and was squealing, which was how he attempted to communicate. The applicant told her co-employee that the child would not be allowed off the toilet until he had defecated. She took a photograph of him restrained on the toilet.

In relation to count 2, during 2000, the applicant struck the same young boy on his arms, his back, and the back of his head with a plastic fly swatter a number of times. The applicant hit him because he was not eating his dinner, but would do so when hit enough times with the fly swatter. He was upset and crying. He put his arms up to try to push the applicant away.

In relation to count 5, between the end of February and the beginning of August 2000, the applicant held the complainant down whilst another carer rubbed chilli on to his mouth.

The sentencing judge accepted that the applicant's job of caring for people with severe disabilities would not be an easy task and might at times be frustrating. The two complainants behaved in a way which was unacceptable if judged against the standards of behaviour in the community, and the applicant's offending behaviour was done as a way of attempting to modify the complainant's behaviour.

Her conduct was supported, or perhaps even demanded by those managing the care facility. Some employees disagreed with such conduct and attempted to protest, but the applicant "fell into line with what management was suggesting was appropriate."

The applicant also had the benefit of references from people who spoke highly of her in a service context, including from a manager of a facility which employed the applicant after her employment at the Bribie Island facility had ceased.

The sentencing judge also observed, however, that the applicant's conduct went beyond what could be regarded as reasonable in a civilised society and inflicted unjustifiable suffering on unfortunate and very vulnerable children.

The applicant had not expressed remorse for the offences, nor had she cooperated in the administration of justice in a way which could have been taken into account had she pleaded guilty to the offences.

The sentencing judge imposed a community service order after the applicant indicated that she was prepared to comply with the terms of that order. Such an order had been sought by the prosecutor and accepted by defence counsel as being appropriate.

The sentencing judge did not accept defence counsel's submission that convictions should not be recorded. Defence counsel had submitted that the applicant had an opportunity to travel to the United States as part of her role with a service club and that the recording of a conviction was a factor which would be taken into account in the decision whether the applicant would be granted a visa to travel to the United States.

In ordering that convictions be recorded, the judge observed that there was no reason why that should not occur.

In this Court, the applicant's counsel submitted that in recording convictions, the sentencing judge failed to take relevant considerations into account, with the result that the sentence was manifestly excessive.

I do not accept this submission. The sentencing judge's explanation for not recording a conviction followed very shortly after defence counsel's brief submissions.

The judge's remarks in that context conveyed that he was satisfied that convictions should be recorded, despite the matters raised in defence counsel's submissions. Nor is there any basis for thinking that his Honour, who was the trial judge, did not take into account the other matters relied upon by the applicant in this Court, namely that the applicant's offending behaviour was not of the most serious category; it was consistent with the

conduct which her employers required of carers at the facility; other carers behaved in a similar way; the applicant's conduct did not cause permanent injury; with the exception of these offences, the applicant's character as attested to in favourable references, was exemplary and featured longstanding and recognised service to the community and her family; she had reached a mature aged without criminal conviction and these circumstances might suggest that the applicant's conduct was out of character and thus unlikely to be repeated.

The applicant's counsel argued that the judge failed to take into account that there had been no further complaint whilst the applicant continued to work in the same industry in the lengthy period since she committed the offences, which suggested that the applicant may have rehabilitated herself.

But the sentencing judge referred in terms to the very favourable reference given about the applicant by the manager of a facility which employed the applicant after she had ceased employment at the Bribie Island facility.

It was also submitted for the applicant that recording a conviction potentially had an adverse effect upon any future application the applicant might make for a positive notice under the *Commission for Children and Young People and Child Guardian Act* 2000 (Qld).

That submission was based upon a question in a form used for the purpose of assessing whether such notice should be issued, which enquired whether a conviction was recorded. No such submission was made on behalf of the applicant at the sentence hearing.

It was a relevant feature of these offences for the purpose of considering whether or not to exercise the discretion not to record a conviction under s 12 of the *Penalties and Sentences Act* 1992 (Qld), that the applicant's offences involved a serious breach of trust by her in her treatment of vulnerable members of the community who were under her care.

The absence of evidence of remorse also works against the submission made for the applicant in this Court, that the offences were out of character. That the applicant committed her offences in an environment where other employees apparently acquiesced in management's wishes to engage in similar appalling conduct, perhaps provides a partial explanation of the applicant's departure from the standards of conduct to be expected of one in her position, but it does not excuse it. It also revealed a concerning failure to exhibit that strength of character which her demanding occupation required.

The sentencing judge's omission to refer in express terms to the relevant provisions of s 12 of the *Penalties and Sentences Act* 1992 (Qld), with which his Honour was no doubt very familiar, does not support the proposition for the applicant that his Honour failed to give adequate attention to those provisions.

The applicant has failed to demonstrate that the sentencing judge erred in the exercise of the broad discretion under that section.

I would refuse the application for leave to appeal against sentence.

HOLMES JA: I agree that the amendment to the application for leave to appeal should be allowed, and for the reasons Justice Fraser has given, that the application for leave to appeal against sentence should be dismissed.

DAUBNEY J: I also agree that the amendment should be allowed and, for the reasons given by Justice Fraser, would also order dismissal.

HOLMES JA: The application for leave to appeal against sentence is dismissed.