SUPREME COURT OF QUEENSLAND

CITATION:	*R v OQ* [2011] QCA 348
PARTIES:	**R** **v** **OQ** (applicant)
FILE NO/S:	CA No 224 of 2011 DC No 239 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	6 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	28 October 2011
JUDGES:	Muir and Chesterman JJA and Margaret Wilson AJA 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.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was the older brother of the complainant – where the offences were committed when the applicant was 14 to 16 years old and the complainant was four to seven years old – where the applicant stood to be sentenced as an adult – where the applicant was charged with 14 counts of indecent treatment of a child under 16, with the circumstance of aggravation that the child was under 12, and one count of rape – where the applicant pleaded guilty to 11 of the indecent treatment charges, and went to trial on the rape charge and three of the indecent treatment charges – where the applicant was found guilty of the rape and one of the indecent treatment charges – where the applicant was sentenced to two and a half years' imprisonment for the rape and 18 months' imprisonment for each of the indecent treatment offences, to be served concurrently – where the parole eligibility date was fixed after about six months' imprisonment – where the applicant contends that the sentence was manifestly excessive – where the sentencing judge had a discretion pursuant to s 160D of the *Penalties and Sentences Act* 1992 (Qld) to fix a parole eligibility date – where the applicant contends that the

sentencing judge erred in failing to consider whether the sentences should be suspended – where the applicant could not be ordered to serve a term of imprisonment longer than the period of detention that could have been imposed if he had been sentenced as a child pursuant to s 144 of the *Youth Justice Act* 1992 (Qld) – where counsel for the applicant submitted that the parole eligibility date was illusory because the applicant was unlikely to be released on parole at or near the parole eligibility date – where counsel for the applicant contended that the applicant would have to complete a sex offender's treatment program before having any prospect of obtaining parole – whether the sentence imposed was manifestly excessive

Acts Interpretation Act 1954 (Qld), s 20C
Corrective Services Act 2006 (Qld), Part 5, s 184
Criminal Code 1899 (Qld), s 11, s 210, s 348
Criminal Law Amendment Act 1997 (Qld), s 23
Juvenile Justice Act 1992 (Qld), s 8, s 120, s 121
Juvenile Justice Legislation Amendment Act 1996 (Qld)
Penalties and Sentences Act 1992 (Qld), s 180, Part 9 Division 3
Youth Justice Act 1992 (Qld), s 140, s 144, s 227

Lacey v Attorney-General of Queensland (2011) 275 ALR 646; [2011] HCA 10, cited
R v Ianculescu [2000] 2 Qd R 521; [1999] QCA 439, cited
R v J; ex parte A-G (Qld) [2001] QCA 216, considered
R v JJ; R v JJ; ex parte A-G [2005] QCA 153, considered
R v M [1999] QCA 118, cited
R v PGW (2003) 134 A Crim R 593; [2002] QCA 462, considered
R v SBR [2010] QCA 94, considered
R v Watkins (2001) 120 A Crim R 565; [2001] QCA 250, considered
Siganto v The Queen (1998) 194 CLR 656; [1998] HCA 74, cited

COUNSEL: J J Allen for the appellant
S P Vasta for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA**: I agree that the application for leave to appeal against sentence should be refused for the reasons given by Margaret Wilson AJA.

[2] **CHESTERMAN JA**: I agree that the application for leave to appeal against sentence should be refused for the reasons given by Margaret Wilson AJA.

[3] **MARGARET WILSON AJA**: The applicant seeks leave to appeal against sentences imposed for sexual offences committed against his younger sister.

[4] He was charged with 14 counts of indecent treatment of a child under 16, with the circumstance of aggravation that the child was under 12, and one count of rape. He pleaded guilty to 11 of the indecent treatment charges, and went to trial on the rape charge and three of the indecent treatment charges. He was found guilty of the rape and one of the indecent treatment charges.

The sentences

[5] On 29 July 2011 the applicant was sentenced to two and a half years' imprisonment for the rape and 18 months' imprisonment for each of the indecent treatment offences. All of the sentences were concurrent. The sentencing judge fixed the parole eligibility date as 29 January 2012 (that is, after about six months' imprisonment).

Grounds of appeal

[6] The applicant wishes to appeal against the sentences on two grounds –

(a) that they were manifestly excessive; and

(b) that the sentencing judge erred in failing to consider whether they should be suspended.

The conduct

[7] The applicant was born on 25 August 1981,[1] and the complainant was born on 30 January 1991.

[8] The applicant was sentenced on the basis he was a juvenile when he committed the offences. The complainant was aged between four and seven years.

[9] In the indictment,[2] the dates upon which the applicant committed the various offences were not stated with precision: rather, he was charged with having committed each offence between two dates. The particulars which were tendered in the sentence proceeding[3] had been prepared in relation to an earlier indictment which contained 19 counts. In his written submissions before this court, counsel for the applicant endeavoured to reconcile those particulars with the indictment on which the applicant was arraigned.[4] In relation to the rape charge, the sentencing judge found, from the evidence given at trial, that the offence was committed before the applicant turned 17.[5] The particulars narrowed the periods in which the indecent treatment offences were committed; importantly, they all ended before the applicant turned 17.

[10] Adopting the dates in the particulars, the offences occurred as follows –

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1 At sentence, counsel for the Crown stated that the accused was born on 28 August 1981: AR 35. Counsel for the applicant stated that the accused was born on 25 August 1981: AR 28. A psychiatrist's report and a psychologist's report tendered at sentence both stated that the applicant was born on 25 August 1981: AR 47; AR 52.

2 AR 2 – 4.

3 AR 54 – 57.

4 Outline of Submissions on behalf of the Applicant (27 September 2011) paragraph 9.2.

5 AR 25. This was despite the fact that at the start of the hearing, counsel for the Crown amended the period on the indictment from between 1 September 1995 and 24 August 1998, to between 1 February 1997 and 16 July 2001: AR 10.

COUNT	OFFENCE	DATE OF OFFENCE	AGE OF COMPLAINANT	AGE OF APPLICANT
1	Unlawful and indecent dealing (child under 12 years)	Between 1 September 1995 and 28 February 1997	4 – 6 years	14 – 15 years
2	Unlawful and indecent dealing (child under 12 years)	Between 1 September 1995 and 28 February 1997	4 – 6 years	14 – 15 years
3	Unlawfully permitting himself to be unlawfully and indecently dealt with (by a child under 12 years)	Between 1 September 1995 and 28 February 1997	4 – 6 years	14 – 15 years
4	Unlawful and indecent dealing (child under 12 years)	Between 1 September 1995 and 28 February 1997	4 – 6 years	14 – 15 years
5	Unlawfully permitting himself to be unlawfully and indecently dealt with (by a child under 12 years)	Between 1 September 1995 and 28 February 1997	4 – 6 years	14 – 15 years
6	Unlawfully permitting himself to be unlawfully and indecently dealt with (by a child under 12 years)	Between 1 September 1995 and 24 August 1998	4 – 7 years	14 – 16 years
8	Unlawful and indecent dealing (child under 12 years)	Between 1 September 1995 and 24 August 1998	4 – 7 years	14 – 16 years
9	Unlawful and indecent dealing (child under 12 years)	Between 1 September 1995 and 24 August 1998	4 – 7 years	14 – 16 years
10	Unlawful and indecent dealing (child under 12 years)	Between 1 September 1995 and 24 August 1998	4 – 7 years	14 – 16 years
11	Unlawful and indecent dealing (child under 12 years)	Between 1 September 1995 and 24 August 1998	4 – 7 years	14 – 16 years

12	Unlawful and indecent dealing (child under 12 years)	Between 1 September 1995 and 24 August 1998	4 – 7 years	14 – 16 years
13	Permitting himself to be unlawfully and indecently dealt with (by a child under 12 years)	Between 1 February 1997 and 24 August 1998	6 – 7 years	14 – 16 years
14	Rape	Between 1 February 1997 and 24 August 1998	6 – 7 years	14 – 16 years

[11] The indecent treatment consisted of the applicant touching the complainant on her vagina and allowing her to touch his penis in the context of a tickling game, his rubbing his penis on her vagina and his licking her vagina. The rape was constituted by partial penetration of her vagina by his penis: there was very limited penetration and no suggestion of resulting physical trauma.

The applicant

[12] The applicant was 29 at sentence, and gainfully employed. He had no criminal history. He was in a long-term relationship with a woman with whom he had three children. Those children were in foster care, after an intervention by the Department of Child Safety as a result of his being charged with these offences. The judge described him as, in an overall sense, remorseful – despite his contesting one count of indecent treatment of which he was found guilty and the rape.

[13] He had a dysfunctional upbringing. His parents' relationship ended acrimoniously when he was about eight. His mother entered into another relationship within a couple of years, and the applicant was subjected to a considerable degree of violence at the hands of his step-father as he grew up. He told Dr Barbara McGuire, a forensic psychiatrist who assessed him in April 2010, he was himself sexually abused when he was seven or eight by an older girl who touched him and his brother on their genitalia often. Dr McGuire reported that he had suffered from depressive disorders, difficulty with impulse control and anger management, poor judgment and lack of empathy. At the time of his offending, his capacity to know what he was doing and his capacity to control his actions were impaired.

[14] After being charged, he undertook counselling by a psychologist from September 2010 to February 2011.

[15] The sentencing judge said –

> "Overall, it would appear that the attempts at rehabilitation that you have undergone, as indicated by those two specialists, show that there is some prospect of full rehabilitation in the future."

Victim impact

[16] The sentencing judge said –

> "I do take into account that the effect on the complainant… has been significant. It is clear that she was under enormous stress when she

> gave evidence, and I've read carefully her victim impact statement. It does show, unsurprisingly, that she has now had a destroyed childhood, in the sense of an enjoyable one, and that for a long term at least she will suffer the after effects of what occurred. It's also a sad effect of these matters that her relationship with her mother, in fact, has been severed."

[17] The applicant was entitled to plead not guilty to offences alleged against him, and the fact that the complainant was distressed by having to give evidence could not be taken into account as an aggravating feature.[6] On the other hand where a complainant is spared such distress by an offender's pleading guilty, that saving may be taken into account in mitigation. When the sentencing judge's observation that the complainant was under enormous stress when she gave evidence is read in context, I do not think that his Honour erred in this regard. Rather, it seems that because of his appreciation of the stress she was under at trial, his Honour relied on her victim impact statement in determining the effect the offending had had on her.

Principles

[18] So far as presently relevant, ss 140 and 144 of the *Youth Justice Act* 1992 (Qld)[7] provide –

> "**140 When offender must be treated as an adult**
>
> (1) If 1 year has passed after an offender has become an adult—
>
> (a) a proceeding afterwards started against the offender for a child offence must be taken as if the offender were an adult at the time of the commission of the child offence; and
>
> (b) if found guilty in the proceeding—the offender must be sentenced as an adult.
>
> ...
>
> (4) An offender must not be treated as an adult under this section if the court is satisfied that there was undue delay on the part of the prosecution in starting or completing the proceeding.
>
> ...
>
> **144 Sentencing offender as adult**
>
> (1) Subject to subsections (2) and (3), a court sentencing an offender as an adult under section 140, 141 or 143 has jurisdiction to sentence the offender in any way that an adult may be sentenced.
>
> (2) The court must have regard to—
>
> (a) the fact that the offender was a child when the child offence was committed; and

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6 *Siganto v The Queen* (1998) 194 CLR 656; [1998] HCA 74; *R v M* [1999] QCA 118.

7 Previously called the *Juvenile Justice Act* 1992 (Qld).

> (b) the sentence that might have been imposed on the offender if sentenced as a child.
>
> (3) The court can not order the offender—
>
> (a) to serve a term of imprisonment longer than the period of detention that the court could have imposed on the offender if sentenced as a child; or
>
> (b) to pay an amount by way of fine, restitution or compensation greater than that which the court could have ordered the offender to pay if sentenced as a child.
>
> (4) Subsection (3) applies even though an adult would otherwise be liable to a heavier penalty which by operation of law could not be reduced."

[19] In the present case the long time lapse between the commission of the offences and the applicant's being charged was attributable to the complainant's not making any complaint until 2009.

[20] The applicant stood to be sentenced as an adult – but he could not be ordered to serve a term of imprisonment longer than the period of detention that could have been imposed if he had been sentenced as a child, and regard had to be paid to the sentence that might have been imposed on him if he had been sentenced as a child. For example, in a case where, had the offender been sentenced as a child, he would not have been placed in custody ("in detention"), the court would have to recognise that circumstance. In *R v PGW*[8] the Chief Justice (with whom McPherson JA and Mullins J agreed) said of the requirement to "have regard to" the sentence that might have been imposed had the offender been sentenced as a child –

> "That does not tie the Court to that sentence. Circumstances may warrant imposing a sterner penalty than would have been visited upon the child."

Maximum penalties

[21] As I shall explain in paras [22] – [27], the maximum penalty which might have been imposed on the applicant for each of the indecent treatment offences if sentenced as a child was two years' imprisonment, and the maximum penalty which might have been imposed on him for the rape if sentenced as a child was 10 years' imprisonment.

[22] The indecent treatment charges were brought pursuant to s 210 of the *Criminal Code* 1899 (Qld). That section was amended, with effect from 1 July 1997.[9] The effect of the amendment was to increase the maximum penalty which might be imposed on an adult offender for indecent treatment of a child where the child was under 12 years from 10 years to 14 years.

[23] For offences committed before the amendment took effect, the applicant could not be punished to any greater extent than was authorized by law prior to the

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8 (2003) 134 A Crim R 593; [2002] QCA 462.

9 By the *Criminal Law Amendment Act* 1997 (Act No 3 of 1997) s 23.

amendment, and the increase in the maximum penalty did not apply.[10] Five of the indecent treatment offences were committed before the amendment. For them, the maximum sentence which might be imposed on an adult offender was 10 years.

[24] The amendment took effect on a date within the limits of the period within which the other seven of those offences were committed. In relation to those seven offences, the sentencing judge correctly adopted the lesser (pre-amendment) maximum sentence as the maximum which might be imposed on an adult offender.[11]

[25] As 10 years was the maximum term of imprisonment which might have been imposed on an adult offender for all of the indecent treatment offences under consideration, none of those offences was a "serious offence" within the meaning of ss 8 and 121 of the *Juvenile Justice Act* 1992 (Qld).[12] The maximum period of detention which might have been imposed on a child offender for the indecent treatment offences, determined in accordance with s 120(1)(f)(ii) of the *Juvenile Justice Act* 1992 (Qld), was two years.[13]

[26] At all material times the maximum penalty for rape was life imprisonment.[14] It was a "serious offence" within the meaning of ss 8 and 121 of the *Juvenile Justice Act* 1992 (Qld), and the maximum period of detention which might have been imposed on a child offender was, in the circumstances of this case, 10 years.[15]

[27] I note in passing that amendments to the *Juvenile Justice Act* 1992 (Qld) increasing the maximum period of detention which might be imposed by a judge took effect on 2 April 1997.[16] But, because those were amendments which took effect within the limits of the period in which the other seven indecent treatment offences were committed, the lesser (pre-amendment) maximum period of detention was relevant in considering the maximum which might be imposed on this applicant.

Parole eligibility

[28] The offences committed by the applicant were "sexual offences" within the meaning of the *Corrective Services Act* 2006 (Qld) and the *Penalties and Sentences Act* 1992 (Qld). Sentenced as an adult, the applicant was subject to the parole provisions in Chapter 5 of the *Corrective Services Act* and Part 9 Division 3 of the *Penalties and Sentences Act*.

[29] By s 160D(3) of the *Penalties and Sentences Act*, the sentencing judge had a discretion to fix the date upon which the applicant would become eligible for parole. If he did not exercise that discretion, the applicant would become eligible for parole after serving half of the period of his imprisonment, pursuant to s 184 of the *Corrective Services Act.* If the sentencing judge chose to exercise that discretion, he might set the parole eligibility date before, at or after the half-way point.

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10 See *Criminal Code* s 11(2); *Acts Interpretation Act* 1954 (Qld) s 20C; *Penalties and Sentences Act* 1992 (Qld) s 180. See also *R v Ianculescu* [2000] 2 Qd R 521; [1999] QCA 439 at [32] – [34].

11 AR 20.

12 Reprint Nos 3 – 3A.

13 Reprint Nos 3 – 3A.

14 *Criminal Code* 1899 (Qld) s 348 (Reprint Nos 1B – 2B adopting the dates in the particulars).

15 *Juvenile Justice Act* 1992 (Qld) s 121(3)(a) (Reprint Nos 3 – 3A).

16 Amendments to s 120 and s 121 effected by *Juvenile Justice Legislation Amendment Act* 1996 (Qld) (Act No 22 of 1996).

[30] Under s 227 of the *Youth Justice Act* a child sentenced to a term of detention must be released after serving 70 per cent of the sentence. The sentencing judge has a discretion to order that the child be released after serving between 50 per cent and 70 per cent of the sentence if he or she considers that there are "special circumstances", such as a need to ensure parity with a sentence imposed on a co-offender.

[31] Had the applicant been sentenced as a child to two and a half years' detention, the sentencing judge would not have been able to order his release or to order that he be considered eligible for release after serving only about six months' actual detention.

Failure to consider other sentencing options

[32] Before the sentencing judge the prosecutor Ms Jerome submitted that a head sentence for the rape of between three and five years was open, and sentences of between 18 months and two years for the indecent treatment offences. She submitted that parole eligibility should be at the halfway mark.[17]

[33] Defence counsel Mr Collins urged his Honour to impose a penalty which did not involve any actual imprisonment. He submitted (correctly) that under the principles for sentencing juvenile offenders applicable at the time of the offending, imprisonment (ie "detention") should be imposed only as a last resort, and "the best option was to try to rehabilitate". He continued[18] –

> "Now, you've got a person who, in my submission, where you're dealing with him as a child, there'd be no real question about this. You'd be going down the path of rehabilitation rather than down the path of detention. Under those circumstances, your Honour, I would seek to persuade you to impose a penalty which does not involve an actual term of imprisonment.
>
> The question then is, what is the better course? Whether it be something like probation or perhaps a term of imprisonment with immediate parole release. In relation to both, of course, there would be a degree of supervision involved. That, in my submission, would be ultimately a just outcome under all the circumstances."

[34] The sentencing judge said[19] –

> "Your counsel has urged upon me that there should be no actual imprisonment. The circumstances in favour of that, of course, are your relative youth at the time these offences occurred, and the other matters in mitigation that I have canvassed in considerable detail in giving these reasons. Nevertheless, in the view that, taking into account the total criminality, it is important, for at least community denunciation reasons as well as the other general matters that I have mentioned, that some period of actual imprisonment be imposed. I therefore, with respect to that particular matter, I fix a parole eligibility date of six months from today, that is 29 January, 2012-----"

[35] There was then this exchange between counsel and his Honour[20] –

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17 AR 28.
18 AR 35.
19 AR 44 – 45.
20 AR 45.

> "MR COLLINS: Your Honour, as this matter is under three years----
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> HIS HONOUR: I'm sorry-----
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> MR COLLINS: -----As the head sentence is under three years, I think your Honour is obliged to make it parole release date, as opposed to-----
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> HIS HONOUR: But it's a sexual offence, isn't it?
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> MR COLLINS: That's true, my apologies.
>
> HIS HONOUR: Which I must make an eligibility date.[21]
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> MR COLLINS: Right, okay. Thank you.
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> HIS HONOUR: So is six months the 29th of January 2012?
>
> MS JEROME: That's so, your Honour.
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> HIS HONOUR: I fix a parole eligibility date of 29 January, 2012."

[36] On appeal, counsel for the applicant (who had not appeared on the sentence) sought a variation of the sentences in some way that would give his client a fixed release date. He began his oral submissions by asserting that at sentence his client's counsel had been under a misapprehension that the sentencing judge could fix a parole release date (as opposed to a parole eligibility date). His submission continued[22] –

> "Counsel as a consequence, it's submitted, did not direct his Honour's attention to the very salient matter that the applicant was most likely not to receive a practical benefit as a consequence of the parole eligibility date, and did not make submissions as to the alternative sentencing options such as a combination of probation and suspended imprisonment.
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> The applicant submits therefore, alternatively, that his Honour was led into error in failing to consider such options and alternatively and further, that the sentencing process is manifestly excessive as a consequence of its length, although its length of itself might not perhaps be described as manifestly excessive, but a combination of its length and the absence of any fixed date for release of the applicant."

[37] As members of the court observed during the hearing, in determining whether the sentencing judge erred what mattered was whether his Honour laboured under the misapprehension said to have afflicted defence counsel. Clearly his Honour did not so labour: he clearly understood that he had no power to fix a parole release date. Further, defence counsel had urged his Honour to consider imposing a penalty that involved no actual imprisonment.

[38] The real thrust of Counsel for the applicant's submission was that the parole eligibility date was illusory because his client was unlikely to be released on parole

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21 Although the sentencing judge said that he "must make an eligibility date", s 160D(3) provides that in circumstances such as these, the Court "may fix the date the offender is eligible for parole."

22 Appeal Transcript 1-2.

at or near the parole eligibility date. In support of his submission that the parole eligibility date lacked utility, he referred (without objection) to the Sentencing Advisory Council's report *Sentencing of serious violent offences and sexual offences in Queensland* (June 2011), particularly –

> Figure 14: Average time served in custody and average sentence length (in years) for sentenced offenders discharged from custody with a serious sexual offence (as most serious offence), 2000-10; and
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> Figure 16: Average sentence served in custody as a proportion of average non-parole period (in years) for sentenced offenders discharged from custody with a sexual offence (as most serious offence), 2000-10.

[39] Figure 14 shows that offenders who committed serious sexual offences served more than 60 per cent of their sentences in actual custody, and figure 16 shows that they served more than 140 per cent of their non-parole periods. But these figures are of limited assistance to the applicant because, as counsel for the respondent observed, they do not distinguish between offenders who pleaded guilty and those who were convicted after trial.

[40] In providing that a judge who sentences an offender for a sexual offence may fix a parole eligibility date rather than a parole release date, the Legislature intended that, where such an offender is sentenced to a term of imprisonment, his or her suitability for release into the community should be determined only after a period of actual imprisonment. As the Sentencing Advisory Council said-

> "Parole is an important component of managing offenders. It provides an incentive for participation in rehabilitative programs, encourages good behaviour in custody, allows for the graduated, supervised release of offenders into the community (which reduces the risk of re-offending) and reduces offender management costs.
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> **Factors considered by parole boards when determining release to parole:**
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> - Ministerial Guidelines
> - *Corrective Services Act 2006* (Qld)
> - *Corrective Services Regulation 2006* (Qld)
> - a parole board assessment report prepared by Corrective Services staff which provides a summary of:
>   - any previous parole applications made by the offender
>   - the circumstances surrounding offences
>   - assessment outcomes
>   - progress in completing recommended interventions
>   - prison conduct
>   - health problems
>   - reintegration considerations
> - submissions from the offender
> - submissions from victims
> - psychiatric and psychological reports
> - home assessment reports."

[41] Counsel for the applicant told the court that his client would have to complete a sex offender's treatment program before having any realistic prospect of obtaining parole and that his instructing clerk had been told by a programs officer at the prison that the applicant would not even be assessed for such a program until the appeal process was complete. The court should not take into consideration anecdotal evidence about how the parole board has exercised its discretion in other cases. Nor should it receive hearsay evidence from the Bar table about assessment for treatment programs.

[42] The sentencing judge properly approached his task by considering the offending conduct, the effect of that conduct on the complainant, the maximum penalties available, relevant provisions of the *Youth Justice Act*, general deterrence (which his Honour found a difficult issue in the context of children aged 14 to 16 years), specific deterrence (which his Honour considered to be of "minor effect" in this case), community denunciation of the sort of behaviour in which the applicant had engaged, rehabilitation and the protection of the public, as well as the extent of the applicant's co-operation and his pleas of guilty, and his own background. His Honour considered whether actual imprisonment was called for, and determined that it was.

[43] A review of comparable sentencing decisions has satisfied me that the sentence his Honour imposed was not manifestly excessive.

[44] In *R v JJ*[23] the applicant was convicted on trial of one count of rape. He was aged 14 at the time of the offence, and the complainant, his sister, was aged nine or 10. He forced her to have vaginal intercourse against her will. He was sentenced to two years' imprisonment for the rape and to concurrent sentences for other offences committed on different occasions – dangerous operation of a motor vehicle whilst adversely affected by alcohol, unlawful use of a motor vehicle with a circumstance of aggravation, stealing, and wilful damage and stealing. The Attorney-General appealed. The sentences were varied to the extent of increasing the sentence for the rape to three years, and making the other sentences be served cumulatively on that sentence.

[45] In *R v Watkins*[24] was a more serious instance of rape. The offender was aged 15 when he raped a 27 year old woman who was intellectually disabled. It was a case of penile rape. He was convicted on trial and sentenced to five and a half years' imprisonment. The sentencing judge having made an error of principle, this court set aside the sentence and re-sentenced. It imposed a sentence of three and a half years' imprisonment.

[46] In *R v SBR*[25]the offender pleaded guilty to three counts of indecent treatment of a child under 12 and one count of rape. He was aged between 13 and 15 at the time of the indecent treatment and about 15 at the time of the rape. The complainant, who was his sister, was aged between seven and ten at the time of the indecent treatment and between nine and 10 at the time of the rape. The rape was constituted by digital penetration of the girl's vagina. The offender was sentenced to four months' detention and 12 months' probation for the rape, and lesser concurrent sentences for the other offences. A conviction was recorded only in respect of the

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23 *R v JJ; R v JJ; ex parte A-G* [2005] QCA 153.

24 [2001] QCA 250.

25 [2010] QCA 94.

rape. The offender applied for leave to appeal against the sentence, the sole ground of appeal being that the recording of the conviction rendered the sentence for the rape manifestly excessive. The application for leave to appeal against sentence was allowed, and the appeal was allowed, only to the extent that the order recording the conviction was set aside. The main reasons were the offender's youth, his troubled background, poor supervision and direction by his parents, his good prospects of rehabilitation and the absence of an appreciable risk of re-offending. This case is of limited assistance on the present application, which relates to conduct at a time when the law did not treat digital penetration of the vagina as rape.[26] Here the rape was constituted by penile penetration, albeit to a limited extent.

[47] I do not derive any assistance from *R v J; ex parte A-G (Qld),*[27] which was cited by counsel for the applicant. The offender pleaded guilty to seven counts of rape, three counts of indecent dealing and one count of attempted rape. There were several complainants, all under 12. The offender was aged 13 to 16. The circumstances of the case were described by the President as unique, and the legislative provisions under which the offender was sentenced were different from those applicable in the present case. Further, it was an Attorney- General's appeal against sentence, decided before *Lacey v Attorney-General of Queensland*.[28]

[48] The present applicant was convicted of subjecting his young sister to abuse on 13 occasions over about three years. He went to trial on the rape charge of which he was found guilty and three indecent treatment charges on one of which he was found guilty. His remorse was qualified, and the sentencing judge's assessment of his prospects of rehabilitation was guarded.

[49] It is true that the rape, which involved partial penetration of the girls' vagina by his penis, was not in the worst category of that offence. But in my view the sentencing judge was correct to impose a head sentence for the rape within the range of two to three years' imprisonment, and to ameliorate that sentence by a very early parole eligibility date – after only one-fifth. In view of the applicant's qualified remorse and the sentencing judge's assessment of his prospects of rehabilitation it was desirable that he be subject to supervision on his release. Parole provided a means for such supervision; a suspended sentence did not. The sentencing judge crafted the sentence in a way within the range of sentencing options open to him. No error has been demonstrated.

[50] The application for leave to appeal against sentence should be refused.

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[26] At the beginning of the period specified on the indictment, which is the relevant time, the law did not treat digital penetration of the vagina as rape. The law was amended by the *Criminal Law Amendment Act* 2000 (Qld) (Act No 43 of 2000), s 24.

[27] [2001] QCA 216.

[28] (2011) 275 ALR 646; [2011] HCA 10.