SUPREME COURT OF QUEENSLAND

CITATION:	*R v AAQ* [2012] QCA 335
PARTIES:	**R** **v** **AAQ** (applicant)
FILE NO/S:	CA No 206 of 2012 DC No 14 of 2012 DC No 48 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Childrens Court at Ipswich
DELIVERED ON:	4 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	22 November 2012
JUDGES:	Margaret McMurdo P, Muir and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to one count of rape and three counts of indecent treatment of a child – where rape was committed against five year old boy – where indecent treatment was committed against a girl aged five to seven years over the time of the offences – where applicant aged between 13 and 15 years during the offending – where applicant sentenced to three years detention with a fixed release after serving 50 per cent of that time in custody and 12 months detention for each indecent treatment offence – where no convictions were recorded – whether sentence manifestly excessive *Youth Justice Act* 1992 (Qld), s 3, s 150(2)(e), s 207(3), s 276B *R v JAJ* [2003] QCA 554, cited *R v MAC* [2004] QCA 317, cited *R v MBQ; ex parte Attorney-General (Qld)* [2012] QCA 202, distinguished *R v PZ; ex parte Attorney-General (Qld)* [2005] QCA 459, considered

R v S [2003] QCA 107, cited

COUNSEL: M A Green for the applicant (pro bono)
D Meredith for the respondent

SOLICITORS: No appearance for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Gotterson JA that this application for leave to appeal against sentence should be refused.

[2] The applicant was sentenced to three years detention with release after serving 50 per cent of that sentence. As he had not committed any prior offences, no conviction was recorded. Under the *Youth Justice Act* 1992 (Qld), a detention order should be imposed only as a last resort and for the shortest appropriate period.[1] In all the circumstances of this case outlined by Gotterson JA in his reasons, the primary judge was entitled to conclude that detention was the only appropriate sentence and that this was the shortest justifiable period of detention.

[3] **MUIR JA**: I agree with that the application should be refused for the reasons given by Gotterson JA.

[4] **GOTTERSON JA**: On 5 April 2012, the applicant, AAQ, pleaded guilty to one count of rape and two counts of indecent treatment of a child under 16 years of age on an indictment dated 30 March 2012, and on 10 August 2012 to a further count of indecent treatment on an indictment dated 9 August 2012. For the rape, the applicant was sentenced to three years detention with a fixed release after serving 50 per cent of that time in custody. He was sentenced to 12 months detention for each indecent treatment offence. All periods of detention are to be served concurrently. As this was his first offending, no convictions were recorded.

[5] The rape offence occurred on 18 October 2011. The victim was a boy then aged five years of age. The indecent treatment offences, the subject of the counts in the first indictment, occurred between 31 December 2008 and 1 November 2009, whilst the indecent treatment offence, the subject of the count in the later indictment, occurred between 23 January 2011 and 14 December 2011. All indecent treatment offences concerned the same victim, a girl, who is the boy's sister. She was aged between five and seven years over the time span of those offences.

[6] The applicant applies for leave to appeal against sentence. The sole proposed ground of appeal is that the sentences are manifestly excessive. On his behalf, it is submitted that the sentence for the rape offence should be two years detention with a fixed release at 50 per cent of that time and shorter concurrent terms of detention for the indecent treatment offences.

Circumstances of the offending

[7] The applicant was born on 18 December 1995. He was 13 years of age when he committed the first two indecent treatment offences and 15 years of age for the third. He was 15 years 10 months old at the time of the rape.

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1 *Youth Justice Act* 1992 (Qld) s 3, s 150(2)(e) and Sch 1 – Charter of Youth Justice Principles, para 17.

[8] The applicant's mother acted as a carer for the two complainant children from time to time. The offences occurred at the applicant's home. The indecent treatment offences involve two separate occasions on which he "poked" the complainant's vagina when her pants were removed and an offence almost 12 months later when she was directed by the applicant to lick his penis in exchange for watching television. The rape involved penetration of the male complainant's anus by the applicant's penis and resulted in bleeding, pain and a 12 millimetre laceration to the anus. Each complainant was severely affected by these experiences.

[9] The applicant had no history of similar behaviour. He cooperated with police by voluntarily participating in an interview where he made admissions with respect to the earlier two indecent treatment offences and the rape offence. The record before this Court does not disclose how the third indecent treatment offence came to light or whether the applicant was interviewed by the police with respect to it. The count for it was brought by way of an ex officio indictment.

Sentencing reports

[10] At sentence both a pre-sentence report ("PSR") dated 8 August 2012 and a report from the Griffith Youth Forensic Service ("GYFS") dated 7 August 2012 were tendered. The author of the latter report knew of the allegations upon which the third indecent treatment count was based but did not address them with the applicant because the relevant knowledge was not acquired until 2 August 2012 after the applicant had been interviewed during June and July 2012.

[11] The PSR identified the applicant's minimal school attendance and social isolation in his formative and early adolescent years as having had a significant impact on him. They resulted in his having difficulty in self-monitoring and in exhibiting socially appropriate behaviours particularly when applied to relationships during the period when the offences occurred. This report contained the following summary of the applicant:

> " … AAQ is a young person who has been confronted with a range of challenging situations such as extreme bullying, loss of home, changes to the family environment, structure and functioning. During this traumatic period he disengaged from school and gravitated toward social isolation. AAQ's social isolation during an important stage of his adolescent development subsequently affected his understanding of healthy relationships and limited his exposure to positive modelling through peers. Further contributing to his offending was his relatively unsupervised access to the victims."[2]

[12] The report also recorded that the applicant expressed regret and remorse for his offending and expressed the opinion that he possessed some insight regarding the effect his actions could have on the complainants.

[13] The GYFS report also noted the applicant's disrupted schooling, family housing instability, bullying and limited peer relationships. This report observed that there may not have been some level of planning of the offences and that they may have not been entirely opportunistic given that the applicant had invited the complainants to a private location where the offences were committed in order to minimise risk of detection. His expression of remorse was noted but a full understanding on his part of the impact of the offences on the complainants was queried.

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2 AB 44.

[14] This report concluded as follows:

> "AAQ is a 16-year-old male who exhibited inconsistent and sometimes poor engagement during the assessment process. Given his limited disclosure throughout the assessment process, a level of uncertainty remains in relation to AAQ's pre-existing vulnerabilities and pre-offence motivations. The current assessment findings suggest that a combination of individual and situational factors may have contributed to his sexual offences. It is likely that lack of appropriate education about sexual behaviour and poor social skills were predisposing factors for AAQ's sexual offending. At the time of his offences, there was a lack of parental supervision and AAQ had the opportunity to offend against the victims with minimal chance of immediate detection. It is likely that the self-reinforcing nature of the sexual behaviour in the absence of any punishment or intervention has encouraged his offending to persist over time. …"[3]

The GYFS report also contained observations with respect to the applicant's likelihood of re-offending. Those observations are considered later in these reasons.

Applicant's submissions on appeal

[15] No issue was taken by the applicant with the learned judge's assessment that detention was the only appropriate sentence in his case. However, the applicant's outline of argument submits that the sentencing discretion miscarried in three respects. The first relates to observations made by her Honour concerning the applicant's risk of re-offending; the second to her Honour's reference to a general statement in *R v PZ; ex parte Attorney-General (Qld)*[4] that a sentence of three to five years detention was appropriate; and the third, to the specific use which it is said that her Honour made of the decision in *PZ* in determining the appropriate range in this case. In the course of oral submissions, the second and third aspects were addressed together.

Applicant's risk of re-offending

[16] The GYFS assessed the applicant under the *Juvenile Sex Offender Assessment Protocol – II* and concluded that his probable level of risk of re-offending is moderate.[5]

[17] The assessment was a guarded one. The author of the GYFS report left open the possibility that the assessment was conservative, stating:

> "Given the limited information AAQ provided about his pre-offence motivations, his level of planning in the offence and insights into his sexual arousal patterns and behaviour, this risk assessment may be conservative. If AAQ invested significant time fantasising about and setting up the offences, or if he exhibits a heightened levels of sexual preoccupation, his assessed level of risk would be higher."[6]

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3 Para 68; AB 69-70.
4 [2005] QCA 459.
5 GYFS report para 64; AB68.
6 *Ibid* para 65; AB68.

[18] The learned judge noted this qualification in the sentencing remarks.[7] The applicant's complaint is that her Honour focused on that alone and had no or insufficient regard for the role that intervention strategies might have in reducing the risk of re-offending. In that respect, the GYFS report stated:

> "In assessing risk, structured risk assessment tools should not be considered in isolation. It is also important to note that any given individual's likelihood of reoffending is influenced by both personal and environmental factors. Therefore, clinical and situational variables are also pertinent in assessing risk. In AAQ's case, he continues to exhibit social isolation, limited social skills and low self-esteem. These factors may hinder AAQ's ability to form positive friendships and age-appropriate romantic relationships, and may either promote further isolation or encourage association with younger peers who require a lower standard of social ability. Intervention to assist AAQ with developing social skills and building opportunities for him to associate with same-aged peers may serve to decrease his risk. AAQ also presents with depressive symptoms, which may increase his desire to engage in sexual behaviour to self-soothe. Intervention for AAQ's mood difficulties may also serve to reduce his risk of reoffending.
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> Situational factors account for more variance than dispositional factors in explaining human behaviour (Ross & Nisbett, 1991). Family, peer group and other interpersonal stressors are associated with an increased risk for sexual offending (Borum, 2000). In AAQ's case, risk for sexual offending behaviour may depend on his level of unsupervised and unstructured time, and contact with children. Currently, AAQ is not attending school and is not employed. He has expressed an intention to enrol in TAFE in the near future, which will likely decrease his risk and should be encouraged. …"[8]

[19] At the hearing of the appeal, the applicant's counsel tendered without objection, an email from the GYFS[9] dated 13 November 2012 which indicates that the applicant has attended 10 out of 10 scheduled weekly appointments with it and has been open and forthcoming, and has completed homework tasks. Apparently, coursework for him involving offence disclosure is now only at the planning stage. The email does not offer a prognosis or timeframe with respect to progress with relapse prevention.

[20] I do not consider that the statements with respect to intervention strategies made in the GYFS report would have warranted a conclusion by her Honour that the strategies, if adopted, are likely to succeed and are likely to result in the assessment risk of moderate being modified to a lower level. Indeed, events to date as recounted in the email document do not justify such a conclusion at this point either. The statements and email do, however, reveal that whilst in detention, the applicant is able to participate in a GYFS program which may ultimately benefit him.

[21] In my view, the learned judge had appropriate regard for the evidence before her with respect to the issue of re-offending and did not err as the applicant's submissions contend she did.

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7 AB32 LL50-58.

8 GYFSR paras 66, 67; AB68, 69.

9 Exhibit 1.

Reliance on the decision in *PZ*

[22] In the sentencing remarks, her Honour read from two passages in the decision in *PZ* as follows:

> "More recent decisions of this Court in *R v MAC*[10], *R v S*[11] and *R v JAJ*[12] confirm that a range of three to five years detention is appropriate in the case of juvenile offenders who commit rape and plead guilty to the offence.";[13] and
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> "In *R v JAJ*, for example, the applicant had pleaded guilty to anally raping his three and a half year old step brother. JAJ had been 16 years old at the time of the offence, had no prior convictions and came from a background that McMurdo P said was "startling and remarkable in the extent and degree of dysfunctionality".[14] JAJ's explanation for his offending was that it had been committed in a moment of anger and frustration at being left to babysit the child against his wishes. He expressed real remorse for what he had done. This Court, by majority, reduced the original sentence of four years detention imposed on JAJ to three years and affirmed the order made by the learned sentencing judge that JAJ be released after serving 50 per cent of his detention. What is clear is that, even after making all allowances that might be made for a plea of guilty, the absence of any prior offending and a dysfunctional upbringing, a 16 year old who is convicted of rape should, unless the circumstances are truly exceptional, be sentenced to a substantial period of time in detention."[15]

[23] The applicant submits that the learned judge, in effect, adopted the range of three to five years detention as setting finite boundaries for the sentence she was to impose and that in so doing, she failed to have regard to the circumstances of the case at hand. Building upon that submission, the applicant in the course of oral submissions suggested that in order to have arrived at the sentence imposed by her, her Honour must have considered four years as a starting point and then adjusted it to three years to allow for mitigating circumstances. For the applicant, a shorter starting period of three or three and a half years was proposed, to be adjusted for such circumstances to two years.

[24] Central to the comparison that the applicant makes is that in *PZ*, this Court was of the view that a head sentence of four years detention was required before circumstances of mitigation were taken into account[16]. The applicant submits that the circumstances of the offending in *PZ* were "far more serious" than those here and that, accordingly, four years ought not to have been the starting point in his case.

[25] However, the applicant's submissions in this regard lose force when account is taken of factors present in that case and the present case respectively and also of sentences imposed in other comparable cases.

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10 [2004] QCA 317.
11 [2003] QCA 107.
12 [2003] QCA 554.
13 At [29].
14 *R v JAJ* [2003] QCA 554 at [33].
15 At [30].
16 At [31].

[26] In *PZ*, a 16 year old complainant, having twice rejected the requests for sexual gratification of the offender who was of the same age, was assaulted by him several times, intimidated into smoking cannabis with other males, sat on top of by the offender and violated by him as he forced his fingers, and then a beer bottle, into her vagina. The offender was strongly affected by cannabis at the time. On an Attorney-General's appeal, a suspended sentence of three months for one rape and of release under supervision for three years with an order to participate in a program for three months for the other rape, was set aside as manifestly inadequate. A sentence of three years detention on each rape count was imposed, with release after serving 50 per cent. The rationale for the sentence imposed was explained by Keane JA as follows:

> "Although the circumstances of the respondent's upbringing were tragic, the mitigating circumstances personal to the respondent to which the learned sentencing judge referred can, in my opinion, be given sufficient recognition by a sentence of three years detention. Such a sentence also recognizes that he has been subject to, and complying with, community-based orders and subject to the threat of this appeal since 30 September 2005. An order that the respondent be released from detention after serving 50 per cent of that term pursuant to s 227(2) of the Act is, in my view, warranted by the special circumstances of this case. The special circumstances which justify that approach in this case are that the respondent is in full-time work, has not reoffended since the present offences were committed and has shown a commitment to treatment."[17]

[27] The circumstances of the single occasion offending in *PZ* were unquestionably more serious than those of the circumstances of each of the occasions on which the applicant offended. However, here, the applicant's offending involved a course of conduct over several years. It was conduct of increasing gravity culminating in a very damaging rape. His victims were much younger and more vulnerable than the victim in *PZ*, although he himself was younger by a year or more than PZ at the times of offending. As noted by Keane JA, by the time he was sentenced, PZ had been complying with the community based order and had lived with the threat of the appeal. In light of these factors I am not persuaded that the applicant's case necessarily called for a head sentence less than the sentences imposed by this Court in *PZ*.

Other cases

[28] Of the other cases to which the parties referred, *JAJ* is the most comparable factually. There, as was noted in *PZ*, this Court substituted a sentence of three years detention for a sentence of four years detention for a 16 year old offender who raped his three and a half year old step-brother on a single occasion. This sentence was adopted for comparative purposes in *MAC* where leave to appeal was refused to a 15 year old offender who was given a head sentence of four years detention in respect of several counts of indecent dealing and attempted rape involving several young children. It will be recalled that the Court referred to those two cases in *PZ* as confirming the range of three to five years.

[29] It remains to mention the decision in *R v MBQ*,[18] to which the applicant refers. The circumstances in that case were markedly different from those here. The offender

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17 At [35].

18 [2012] QCA 202.

was an immature 12 year old boy. He pleaded guilty to a single charge of penile rape of a three year old girl. A medical examination showed she was uninjured with a normal and intact hymen. The offender had a low risk of recidivism and an intervention program for him had a high probability of success. That this Court in that case considered that a non-custodial sentence of three years supervision with a condition that he attend an appropriate program and comply with its requirements, was not manifestly inadequate does not provide a sound basis for reasoning either that no period of detention ought to have been imposed here or that a period of detention substantially less than three years ought to have been imposed.

Disposition

[30] For these reasons, I do not accept the applicant's submissions that the head sentence imposed is manifestly excessive. I would refuse the application for leave to appeal in respect of that sentence. The applicant did not advance any separate submissions in support of shorter concurrent terms for each of the indecent treatment offences. The application ought to fail in respect of them also.

[31] The applicant's submissions question whether the learned judge had regard to the provisions of s 276B of the *Youth Justice Act* 1992 (Qld) when sentencing him. That section requires the Court to consider making an order under ss 3 thereof if it is sentencing a person who is 16 or more to a period of detention under which that person will be detained or continue to be detained when he or she is 18 or more. Section 207(3) empowers the Court to make a transfer order, the effect of which is that the unserved part of the detention period be served as a period of imprisonment. In the applicant's case, the period of imprisonment under a transfer order, had one been made, would begin when he turns 18 years old, that is, several months before the period of detention he is to serve expires.

[32] Whilst her Honour's remarks do not refer specifically to s 267B, quite possibly she did consider making a transfer order but decided not to do so. I am not prepared to infer that making such an order was not considered. It is sufficient for present purposes to state my view that it was quite appropriate that a transfer order was not made in this case.

Order

[33] I would propose the following order:

1. Application refused.