SUPREME COURT OF QUEENSLAND

CITATION:	*R v AAV* [2014] QCA 343
PARTIES:	**R** **v** **AAV** (applicant)
FILE NO/S:	CA No 40 of 2014 DC No 20 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Childrens Court at Maroochydore
DELIVERED ON:	19 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	29 October 2014
JUDGES:	Fraser and Gotterson JJA and Henry J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Refuse the amended application for leave to adduce evidence.** **2. Refuse the application for leave to appeal against sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to two counts of rape and four counts of aggravated indecent dealing with a child under 16 years, all committed when he was 16 years of age – where the applicant was sentenced at the age of 17 years to an effective sentence of two years and six months detention, with parole release after serving 50 per cent – where the applicant argues the sentence is not in accord with the principle that a detention order should be for the shortest appropriate period – whether the sentence is manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – FRESH EVIDENCE AND EVENTS OCCURRING AFTER SENTENCE – where in sentencing the applicant the sentencing judge declined to make a transfer order pursuant to s 276B of the *Youth Justice Act* 1992 as in force at the time of sentence – where the Act was amended after the applicant was sentenced so that he had to be transferred to an adult

prison facility – where the applicant sought to adduce evidence that rehabilitation programs were not available to him at the prison facility – where the applicant argued this required a reduction in the length of his sentence – whether the evidence established the availability of rehabilitation had been a significant factor in sentencing – whether, in any event, legislative activity after sentencing means a different sentence was warranted in law and should have been passed

Criminal Code 1899 (Qld), s 668E(3)
Youth Justice Act 1992 (Qld), s 267B, s 267D, s 276B, s 276C, s 364
Youth Justice and Other Legislation Amendment Act 2014 (Qld)

Elliott v The Queen (2007) 234 CLR 38; [2007] HCA 51, considered
R v AAQ [2012] QCA 335, cited
R v EI [2011] 2 Qd R 237; [2009] QCA 278, cited
R v Hughes [2004] 1 Qd R 541; [2003] QCA 460, considered
R v JAJ [2003] QCA 554, cited
R v Maniadis [1997] 1 Qd R 593; [1996] QCA 242, cited
R v PZ; ex parte Attorney-General (Qld) [2005] QCA 459, cited

COUNSEL: D C Shepherd for the applicant
M R Byrne QC for the respondent

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

[1] **FRASER JA:** On 30 September 2013 the applicant, who was then 17 years old, pleaded guilty in the Childrens Court of Queensland to six offences: two counts of rape (counts 3 and 5) and four counts of indecently dealing with a child under 16 years with the circumstance of aggravation that the child was under 12 years (counts 1, 2, 4 and 6). At the time of the offences the complainant was 11 years old and the applicant was 16 years old.

[2] On 22 January 2014, when the applicant was still 17 years old, he was sentenced to concurrent periods of two years and six months detention for each of the counts of rape, three months detention for the indecent dealing offence in count 1, and 12 months detention for each of the other indecent dealing offences. In the case of each offence, the sentencing judge found that there were special circumstances in the applicant's case and ordered that the applicant be released from custody after serving 50 per cent of the detention order. Convictions were recorded for all offences. The sentencing judge decided not to make an order under s 276B(3)(a) of the *Youth Justice Act* 1992 (a "transfer order") that, from the day when the applicant was eighteen years old, the unserved part of the period of detention should be served as a period of imprisonment.

[3] The applicant has applied for leave to appeal against the sentence of two years and six months detention imposed on counts 3 and 5. The ground of the application is that the sentence is manifestly excessive in all the circumstances. The applicant

advanced two arguments in support of that ground. The first argument was that "the circumstances of the offending and sentences imposed in other cases are such that another lesser sentence is warranted". The second argument was that a less severe sentence was warranted because, as a result of amendments made to the *Youth Justice Act* 1992 after the sentences were imposed, the applicant was transferred to an adult prison notwithstanding the sentencing judge's decision not to make a transfer order. I will discuss those arguments after I have summarised the circumstances of the offences and the applicant's personal circumstances.

Circumstances of the offences and the applicant's personal circumstances

[4] The applicant was a high school friend of the complainant's older brother. He had known the complainant's family for about four years and regularly stayed at their home during the school period and on holidays. Sometime between 31 July and 1 October 2012 the applicant was at the family's house sitting in the lounge room next to the complainant when he reached over and touched the complainant's penis on the outside of the complainant's clothing for several seconds (count 1: indecent treatment). About two or three weeks later, the applicant was alone with the complainant in a bedroom in the house. The applicant locked the bedroom door, forced the complainant onto his back, pulled down the complainant's tracksuit pants and underwear, and touched and squeezed the complainant's penis and testicles, causing him pain (count 2: indecent treatment). This episode occupied about two minutes. The applicant then forced the complainant onto his stomach and had anal intercourse with him for one or two minutes whilst holding him in place (count 3: rape). This scared the complainant and caused him pain. The applicant forced the complainant to touch the applicant's penis and testicles (count 4: indecent treatment). Subsequently the applicant grabbed the complainant's head and made the complainant suck on the applicant's penis for a short time (count 5: rape). The applicant then begun to perform oral sex on the complainant for a short time (count 6: indecent treatment). The applicant stopped the offending when someone else in the house knocked on the door and that person and others walked into the bedroom.

[5] At the sentence hearing counsel for the applicant accepted that the complainant had said that he did not want to participate, although the complainant's reaction was more benign than fighting back, and that the complainant must have been shocked and had undergone a difficult experience. It was accepted at the sentence hearing that it was likely that the complainant was traumatised by the offences. It was also accepted that the applicant was aware that the complainant did not consent.

[6] The applicant's parents separated after he was born. The applicant was initially brought up by his father, with whom the applicant had a positive relationship. The applicant's mother, however, had concerns about his development and it also appears that he was often cared for by his paternal grandparents instead of his father. In 2006 the applicant's father handed the applicant to the applicant's mother, who had formed a relationship with someone else. In 2008 the applicant's mother with her then husband moved from their home in New Zealand to Queensland, taking the applicant with them. Despite frustration and anger felt by the applicant, he performed well at school up until about six months before the offences, when his grades declined. This may have coincided with the applicant's mother separating from her husband and moving to a different place in Queensland. The applicant's offending may have been contributed to by a sexual relationship he had with an older male, who was a superior officer in Cadets. The applicant appears to have been exploited by that man, with whom the applicant had his first sexual relationship.

[7] When the offending came to light as a result of conversations between the complainant and others who had been present at house and were suspicious of what had occurred, the applicant initially admitted one occasion of indecent dealing but denied the other and more serious offending. However the applicant entered timely pleas of guilty and he expressed remorse to a psychologist and in a handwritten note which was tendered in evidence. He had no previous criminal history. The psychologist reported that the applicant presented with a number of protective factors that mitigated the potential risk of future re-offending and that he possessed the intellectual capacity and moral reasoning to benefit from recommended treatment strategies. The applicant had re-located to New Zealand and undertaken counselling there. He returned to Queensland from New Zealand for the preparation of the pre-sentence report and to be sentenced.

The first argument: was a lesser sentence warranted in light of the circumstances of the offending and sentences imposed in other cases?

[8] When the applicant was sentenced, the *Youth Justice Act* 1992 obliged the sentencing judge to have regard to the principle that "a detention order should be imposed only as a last resort and for the shortest appropriate period".[1] Counsel for the applicant accepted that the sentencing judge's remarks demonstrated a careful and thorough consideration of the issues, including the need for rehabilitation, the importance of deterrence, the protection of the public, and the principle that the shortest appropriate sentence should be imposed. It was not submitted that the sentencing judge made any specific error in the sentence. Instead, the applicant's argument under the present heading was that the sentencing judge's conclusion that the shortest appropriate period of detention was two and a half years was "unreasonable or plainly unjust" such as to justify the inference that the sentencing discretion must have miscarried although no specific error could be identified.[2]

[9] That argument encounters the substantial hurdle that in *R v PZ; ex parte Attorney-General (Qld)*[3] the Court observed that "…recent decisions of this Court in *R v MAC*, *R v S* and *R v JAJ* confirm that a range of three to five years detention is appropriate in a case of juvenile offenders who commit rape and plead guilty to the offence" and that it was "clear…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…". The sentencing judge's careful reasons for concluding that there were no such exceptional circumstances here were not criticised.

[10] The head sentence sufficiently took into account the inability of the sentencing judge to reduce the non-release period below 50 per cent of the period of the detention order. The applicant's counsel pointed to factors with reference to which the sentences of three years detention with release after 50 per cent of that period in *R v PZ* and *R v JAJ*[4] might be distinguished, but I am unpersuaded that it was outside the sentencing judge's discretion to find that the period of detention of two and a half years with release after 50 per cent of that period was the "shortest appropriate period" upon the distinctive facts

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1 *Youth Justice Act* 1992, ss 150(1)(c), 150(2)(e) and 208, and Principle 17 in Sch 1, Charter of Youth Justice Principles.

2 *House v The King* (1936) 55 CLR 499 at 504 – 505.

3 [2005] QCA 459 at [29] – [30] (citations omitted).

4 [2003] QCA 554.

of this case. Accepting that the cited cases should be regarded as more serious examples of this kind of offending, the sentence in this case was appropriately less severe. The applicant's sentence is also not shown to be manifestly excessive by the more severe sentences imposed for worse offending in *R v EI*[5] (three years detention with release after 70 per cent of that period) and *R v AAQ*[6] (three years detention with release after 50 per cent of that period).

[11] The sentence was within the sentencing judge's discretion.

The second argument: the consequences of amendments to the legislation

[12] I mentioned that the sentencing judge decided not to make a transfer order. After the applicant was sentenced, the legislation which conferred upon the sentencing judge the discretionary power to make a transfer order was amended by the *Youth Justice and Other Legislation Amendment Act* 2014 and, in relation to a relevant transitional provision, by the *Property Occupations Act* 2014. Before the amendments, s 276B of the *Youth Justice Act* conferred a discretionary power to make a transfer order where a Court sentenced a person who was 16 years or more to a period of detention under which the person would be detained or continued to be detained when the person was 18 years or more; in the case of a person, such as the applicant, who had not previously been held in custody in a prison or sentenced to serve a term of imprisonment, a transfer order required any unserved part of the period of detention to be served as a period of imprisonment from a day when the person was 18 or more.

[13] After the amendments, s 276C of the *Youth Justice Act* obliged the chief executive to give a written direction (a "prison transfer direction") to the child and the chief executive (corrective services) within 28 days after the child was sentenced, stating the "transfer day", that the child was to be transferred to a corrective services facility on the transfer day, and that the unserved period of detention must be served as a period of imprisonment. That provision applied to persons including an adult of 17 years sentenced for an offence committed as a child who was ordered to serve at least six months detention and would not be required to be released under s 227 within six months after being sentenced: s 267B(b)(i)(A), (ii) and (iii). The applicant is such a person. Any doubt about the retrospective application of s 276C was removed by s 364, which obliged the chief executive as soon as practicable after the commencement of the relevant division to comply with s 276C in relation to a person who (like the applicant) at the commencement was 17 years or more, was serving a period of detention, was not subject to an order made under s 276B or s 276C under the pre-amended Act, and would have at least six months to be served in detention.

[14] For present purposes the relevant effect of the amendments is that the transfer of the applicant to a corrective services facility became mandatory despite the sentencing judge's decision not to make a transfer order. The applicant was duly transferred to a corrective services facility on 5 June 2014. The applicant sought leave to adduce fresh evidence in the appeal for the purpose of establishing differences between the programs and facilities available at the detention centre where the applicant was originally detained and those available at the corrective services facility where the applicant is now imprisoned. The applicant argued that in fixing the length of the period of detention the sentencing judge took into account the availability in the detention centre of various programs, particularly a program offered by the "Griffith

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5 [2009] QCA 278.

6 [2012] QCA 335.

Youth Forensic Service", and that such a program was not available in the corrective services facility. This situation was submitted to require a reduction in the length of the period of detention imposed by the sentencing judge.

[15] The evidence does not provide a solid foothold for that argument. The Griffith Youth Forensic Service program was mentioned in an annexure to the pre-sentence report concerning a "Conditional Release Order Program Proposal". The second page of the annexure included a statement that, "[g]iven the nature of the offences, the Court is also able to attach a special condition 'to attend the Griffith Youth Forensic Service or any other program as directed by the Department of Justice and Attorney General and to comply with all reasonable requirements of the program and maintain a rate of progress that is satisfactory to the treatment program'." Plainly enough that concerned the rehabilitation of the applicant in the community, rather than in detention. Similarly, the psychologist who supplied a report referred to specialist treatment programs including the "Griffith University's Adolescent Offender Treatment Program" after noting that the program could be offered in the community; that was apparently mentioned in support of a recommendation that the stronger prospects of rehabilitation and future integration remained in a community setting.[7] That the sentencing judge had in mind that this program might be availed of only after the applicant returned to the community is suggested by the sentencing judge's quotation of the psychologist's remark that "the strong prospects of rehabilitation and future integration remain in community settings as he has access to support, meaningful employment and appropriate treatment programs…". The sentencing judge went on to observe that the order must adequately allow for that "and also provide an appropriate response to your offending and balance all of the principles of youth justice to be applied". After referring to *R v E; ex parte Attorney-General (Qld)*,[8] in which Jerrard JA observed that courts were "not to overlook the fact that the protection of members of the community from the infliction of harm can be achieved not only by the means of rehabilitation of the individual causing that harm in the past, but also by sentences having a generally deterrent effect in the community", the sentencing judge explained why a period of detention was necessary.

[16] Accordingly, although the pre-sentence report also referred to the expectation that if the applicant was sentenced to detention he would be "expected to engage in offence-specific counselling, educational programs…in the detention centre environment which will further his opportunity for community integration upon release", it seems that the sentencing judge did not fix the length of detention with reference to an assumed availability during detention of the program offered by the Griffith Youth Forensic Service or any particular program. Whilst it is not difficult to accept that the sentencing judge anticipated that programs designed for the rehabilitation of children which would be available in detention would probably be unavailable in a corrective services facility, there is no sufficient basis for finding that the sentencing judge regarded that as significant in relation to the length of the period of detention.

[17] Nor is it clear that the sentencing judge took that into account when refusing a transfer order. It is a matter which could have been taken into account. Section 267D of the *Youth Justice Act* set out matters to which a sentencing court might have regard in deciding whether to make a transfer order. In addition to "any other relevant matter", the specified matters included the length of and earliest day upon which the person may be released from detention, the person's age, the length of any period of

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7 AB 78 – 79.

8 [2002] QCA 417.

community supervision after release from detention, issues relating to the vulnerability or maturity of the person known at the time of the decision, and "(e) the availability of relevant services and programs during a term of imprisonment…". In this case, however, the sentencing judge simply observed that in the circumstances of the case "and what appears to be some lack of maturity for your age and aspects of naiveté and your lack of prior exposure to the youth justice system, I have considered but will not make any transfer order pursuant to section 276B of the *Youth Justice Act*."

[18] In these circumstances, and also bearing in mind that the period of detention imposed by the sentencing judge accords with the comparable sentencing decisions, the evidence upon which the applicant sought to rely does not reveal sufficient grounds for the Court's intervention in the sentence.

[19] In any event the applicant's argument should be rejected even if the fresh evidence does have the effect for which the applicant contended. The power of the Court to substitute a different sentence from that imposed by a sentencing judge is conferred by s 668E(3) of the *Criminal Code* only where the different sentence "is warranted in law and should have been passed". The Court cannot intervene merely upon the basis of a change in the law after an applicant was sentenced. In *Elliott v The Queen*,[9] the High Court held in relation to an indistinguishable statutory provision, s 6(3) of the *Criminal Appeal Act* 1912 (NSW), that "the phrase 'is warranted in law' which appears in s 6(3) assumes no change in the relevant law between the imposition of the sentence and the determination of the appeal against it." In so far as the power to admit fresh evidence in a sentence appeal is to be exercised to avoid a miscarriage of justice,[10] it is not open to the Court to hold that the requirement imposed by the amendments to the *Youth Justice Act* that the applicant be transferred to a corrective services facility itself created a miscarriage of justice.[11] The applicant's argument that the amendments should be regarded as having been in effect at the time of sentence because those amendments operated retrospectively should not be accepted. The circumstance that the amendments required the transfer of a person who was sentenced before the commencement of the amendments does not justify the Court in proceeding upon an incorrect hypothesis that the amendments were in force when the applicant was sentenced.

[20] The applicant argued that the relevant circumstance justifying appellate intervention was not the change in the law but the differences between the programs and facilities available in the detention centre and those available in the corrective services facility where the applicant is imprisoned. The critical circumstance upon which the applicant relies to justify the Court's intervention in this respect – his transfer from the detention centre to a corrective services facility – arose after the applicant was sentenced. In *R v Hughes*,[12] McMurdo J, with whose reasons McPherson JA and Holmes J (as her Honour then was) agreed, held that the power to resentence under s 663D of the *Criminal Code* is not exercisable "simply because the Court feels that in the circumstances which have arisen subsequent to the sentence, another sentence is now warranted"; rather "the Court is concerned with the circumstances as they existed at the date of the sentence." McMurdo J went on to discuss *R v Maniadis*,[13] pointing out that the evidence admitted in the sentence appeal in that case concerned matters in existence at the date of the sentence, before concluding that:

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9 (2007) 234 CLR 38 at 49 [36]. See also *R v Cherry* [2014] QCA 262 at [7], [13].

10 *R v Maniadis* [1997] 1 Qd R 593 at 597.

11 See *Elliott v The Queen* (2007) 234 CLR 38 at 50 [41].

12 *R v Hughes* [2004] 1 Qd R 541 at 545 [14].

13 [1997] 1 Qd R 593.

> "[*Maniadis*] should not be treated as authority for the admission of evidence of matters arising after the sentence hearing unless that evidence is adduced to prove a fact existing when the sentence was imposed. Otherwise, the facts would not be relevant to the question of what sentence "should have been passed". The same limitation was recognised by the majority (McPherson and Pincus JJA) in *R v Cornale* [[1993] 2 Qd R 294] where it was held that this Court's power under s 668E(3) was limited to the powers of a sentencing court according to the law at the time of the sentence."[14]

[21] The applicant seeks to adduce evidence in the sentence application, not to prove facts existing at the time when the applicant was sentenced, but to prove that, as result of legislative activity after he was sentenced the circumstances of his detention have changed. That evidence has no bearing upon what sentence should have been passed. It is not relevant or admissible in the application for leave to appeal against sentence.

[22] For those reasons I would refuse the application for leave to adduce evidence in the sentence application and I would also refuse the application for leave to appeal against sentence. In light of that conclusion it is not necessary to discuss additional arguments which the respondent advanced in opposition to the application for leave to appeal.

Proposed Order

[23] I would refuse the amended application for leave to adduce evidence and the application for leave to appeal against sentence.

[24] **GOTTERSON JA:** I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.

[25] **HENRY J:** I have read the reasons of Fraser JA. I agree with those reasons and the orders proposed.

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[14] [2004] 1 Qd R 541 at 546 – 547 [16]. See also *R v Cherry* [2014] QCA 262 at [11], distinguishing cases in which the Court has intervened to order the early release of prisoners who have become terminally or very seriously ill in prison. In such cases, the illness might have been present although unknown at the time of sentence.