SUPREME COURT OF QUEENSLAND

CITATION:	*R v CCJ* [2019] QCA 236
PARTIES:	**R** **v** **CCJ** (appellant)
FILE NO/S:	CA No 204 of 2019 DC No 5 of 2016 DC No 13 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Childrens Court at Townsville – Dates of Conviction: 11 March 2016 (Baulch SC DCJ) and 21 September 2016 (Chief Judge O'Brien)
DELIVERED ON:	Date of Orders: 29 October 2019 Date of Publication of Reasons: 1 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	29 October 2019
JUDGES:	Sofronoff P and McMurdo JA and Davis J
ORDERS:	**Date of Orders: 29 October 2019** **1. Leave is granted to adduce the medical evidence referred to in the appellant's application for leave to adduce evidence filed on 28 October 2019.** **2. Appeal allowed.** **3. Convictions on counts 1 to 6 on the indictment and summary charges 1 to 3 be set aside.** **4. Retrial ordered on those counts and charges.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – FITNESS TO PLEAD OR BE TRIED – where the appellant pleaded guilty in the Childrens Court to eight counts and charges including rape, sexual assault, assault occasioning bodily harm, deprivation of liberty and wilful exposure – where the appellant was sentenced to four years detention to be released after serving 70 per cent of the period of detention – where the Attorney-General commenced proceedings under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 for the purposes of which risk assessment reports were prepared – where the risk assessment reports raised concerns about the appellant's fitness for trial and fitness to plead – where the Crown did not object to the admission of the medical evidence, or to the

appeal – whether the appellant was fit to plead

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 5, s 8, s 11, s 12, s 13
Mental Health Act 2016 (Qld), s 110, s 118
Youth Justice Act 1992 (Qld), s 227

Eastman v The Queen (2000) 203 CLR 1; [2000] HCA 29, cited
Kesavarajah v The Queen (1994) 181 CLR 230; [1994] HCA 41, cited
Ngatayi v The Queen (1980) 147 CLR 1; [1980] HCA 18, cited
R v Presser [1958] VR 45; [1958] VicRp 9, cited
R v Sitters [2018] QCA 35, cited
R v Spina [2012] QCA 179, cited
R v Sridharan [2017] QCA 160, cited

COUNSEL: S Robb for the appellant
D Balic for the respondent

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

[1] **SOFRONOFF P:** In this appeal, the administration of justice has been greatly assisted by the professionalism with which the representatives of the Director of Public Prosecutions have conducted the matter. I agree with the reasons of Davis J.

[2] **McMURDO JA:** I agree with the Reasons of Davis J and with the additional remarks by the President.

[3] **DAVIS J:** The appellant was convicted in 2016 of various offences including three counts of rape. He pleaded guilty to those offences but submits now that there has been a miscarriage of justice because there is a real and substantial question about his fitness to have entered pleas of guilty in 2016.

[4] On 2 September 2019, the court granted an extension of time to file an appeal against the convictions. On 29 October 2019 I joined in the making of the following orders:

1. Leave is granted to adduce the medical evidence[1] referred to in the appellant's application for leave to adduce evidence filed on 28 October 2019.

2. Appeal allowed.

3. Convictions on counts 1 to 6 on the indictment and summary charges 1 to 3 be set aside.

4. Retrial ordered on those counts and charges.

[5] The appellant was born on 17 April 1998. The offences occurred on 7 April 2015. The appellant was therefore 10 days away from his seventeenth birthday. By this time, the appellant, an indigenous boy who had already displayed behavioural problems, was in the care of the Department of Children Services.

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[1] The reports of Dr Sundin, Dr Harden, Dr McVie, Dr Bala, psychiatrists and Ms Bryant, neuropsychologist.

[6] It is unnecessary to describe the offending in any great detail. The victim was the appellant's childcare worker. He exposed himself to her, trapped her in a corner of a room and committed various sexual assaults upon her including raping her by penetrating her vagina with his penis.

[7] The appellant was charged and pleaded guilty on 11 March 2016 in the Childrens Court in Townsville to three counts of rape, one count of sexual assault, one count of assault occasioning bodily harm and one count of deprivation of liberty. On 21 September 2016 in the Childrens Court in Townsville, the appellant pleaded guilty to two counts of wilful exposure and was on that day sentenced in relation to all counts to an effective sentence of four years detention. The third summary charge was a breach of probation. There was no plea entered but the judge found the charge proved by the plea to the counts on the indictment. No action was taken consequent upon the breach of probation. By force of s 227 of the *Youth Justice Act* 1992, the appellant was to be released on a conditional release order after serving 70 per cent of the period of detention.

[8] On 26 March 2019, the Attorney-General commenced proceedings under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 to which I will refer simply as the *Dangerous Prisoners Act*.

[9] By s 5 of the *Dangerous Prisoners Act*, an application must be made for a preliminary hearing under s 8. The Attorney-General's application for final orders, be it a continuing detention order or a supervision order, will only proceed if at the preliminary hearing the court is satisfied that there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of an order under Division 3 of Part 2 of the *Dangerous Prisoners Act*. The orders which may be made are a continuing detention order[2] or a supervision order.[3]

[10] In order to satisfy the onus cast by s 8, the Attorney-General usually obtains a risk assessment report from a psychiatrist. That occurred here. In her report, Dr Josephine Sundin said "I do not think Mr CCJ satisfies Presser criteria." That is a reference to *R v Presser*[4] where Smith J explained the criteria for consideration of fitness for trial. His Honour said:[5]

> "He needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if

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2 Section 13(5)(a).
3 Section 13(5)(b).
4 [1958] VR 45.
5 At 48.

> necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any."

[11] *Presser* has been consistently followed.[6]

[12] Dr Sundin further expressed an opinion that the appellant "has been permanently unfit for trial for a considerable period of time and was unfit for trial at the time of the index offences". That view was based on her finding:

> "In my opinion, the combination of Mr CCJ's intellectual disability, language disorder, comprehension difficulties and attentional deficits, mean that he was not capable of adequately understanding the offences with which he was charged and the consequences of those charges. He did not understand that he had a right to challenge. He has a history of high levels of suggestibility and was likely passively compliant with suggestions made to him around his defence. He reports that he did not follow the proceedings of his hearing. He would not have been able to provide adequate instructions to his solicitor. He had only a very limited understanding of the functions of the court and did not truly appreciate his right to challenge."

[13] Reports tendered to the Childrens Court for the purposes of sentence raised serious issues as to the limited intellectual capacities of the appellant. No assessment though was made of the appellant's capacity to enter a plea.

[14] On 4 April 2019, Burns J, hearing the Attorney-General's application under s 8 of the *Dangerous Prisoners Act*, was satisfied that there were reasonable grounds for believing that the appellant is a serious danger to the community in the absence of an order under Division 3 and so his Honour set the Attorney-General's application for final hearing and nominated two psychiatrists,[7] Drs McVie and Harden,[8] to prepare assessment reports.[9]

[15] Dr McVie opined that the appellant's intellectual disability was such that he lacked fitness for trial. Dr Harden found significant intellectual disability in the appellant and raised with Crown Law, who instructed him on behalf of the Attorney-General, whether he ought to consider fitness for trial. He was advised in the negative and therefore expressed no opinion. The fact that he raised the issue is significant in itself.

[16] Consultant psychiatrist Dr Siva Bala and neuropsychologist Wendy Bryant were retained on the appellant's behalf to examine him and provide reports as to his fitness to have entered his pleas of guilty. These reports support the findings of Drs Sundin and McVie that the appellant lacked capacity.

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6 *Ngatayi v The Queen* (1980) 147 CLR 1 at 8, *Kesavarajah v The Queen* (1994) 181 CLR 230 at 244-245, *Eastman v The Queen* (2000) 203 CLR 1 at [58] and *R v Sridharan* [2017] QCA 160 per McMurdo JA at [17].

7 Section 8(2)(a).

8 As to their reports, see ss 9, 11, and 12.

9 *Dangerous Prisoners (Sexual Offenders) Act* 2003, ss 8(2)(a), 11 and 12.

[17] In *Eastman v The Queen*,[10] Hayne J said that a court of criminal appeal ought find a miscarriage of justice and set aside a conviction "if there is a real and substantial question to be considered about the accused's fitness".[11]

[18] That is the case here based on the medical evidence to which I have referred and which the appellant seeks to have admitted on his appeal. The medical evidence is technically not fresh evidence because it could have been obtained and led in the Childrens Court. However, the court may receive new evidence where it is in the interest of justice to do so: see *R v Spina*[12] and *R v Sitters*.[13] It is clearly appropriate here to admit the evidence.

[19] The Crown has taken a sensible and pragmatic approach. There was no objection to the admission of the medical evidence and the Crown agreed that the appeal be allowed and a retrial ordered. That attitude has assisted in the disposal of this unusual and potentially difficult appeal.

[20] Although it was appropriate to order a retrial, it is likely that the question of the appellant's fitness to plead will be referred to the Mental Health Court.[14]

[21] For those reasons, I joined in the making of the orders on 29 October 2019.

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10 (2000) 203 CLR 1.
11 At [319] and see *R v Sitters* [2018] QCA 35 at [20].
12 [2012] QCA 179.
13 [2018] QCA 35.
14 *Mental Health Act* 2016, ss 110, 118.