SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kane* [2019] QCA 86
PARTIES:	**R** **v** **KANE, Eden James** (applicant)
FILE NO/S:	CA No 97 of 2019 DC No 2191 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Bundaberg – Date of Sentence: 17 April 2019 (Jarro DCJ)
DELIVERED ON:	17 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	13 May 2019
JUDGES:	Sofronoff P and Morrison JA and Davis J
ORDERS:	**1. Leave to appeal against the sentences imposed on each of counts 1 and 2 on the indictment is granted.** **2. The appeal against the sentences on each of counts 1 and 2 is allowed.** **3. The sentences imposed on each of counts 1 and 2 on the indictment are set aside.** **4. On each of counts 1 and 2 the applicant is sentenced to a term of imprisonment of three years imprisonment with those terms to run concurrently.** **5. The period of 417 days pre-sentence custody between 15 April 2014 and 5 June 2015 is declared as time already served under the sentences.** **6. The applicant be admitted on parole on 17 May 2019.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of burglary and one count of child stealing – where the applicant was sentenced to three years and six months imprisonment, and four years and six months imprisonment on each count respectively, with parole eligibility set four months after the date of sentence – where the applicant's bipolar disorder was the underlying cause of the offending – where the applicant did not have a sexual or violent intention

in abducting the child – where the child was unharmed and voluntarily returned after two days – where comparative cases show a wide range of sentences – whether the sentence was manifestly excessive in the circumstances

CRIMINAL LAW – SENTENCE – RELEVANT FACTORS – NATURE AND CIRCUMSTANCES OF OFFENDER – MENTAL DISORDER – where the applicant pleaded guilty to one count of burglary and one count of child stealing – where the applicant was sentenced to three years and six months imprisonment, and four years and six months imprisonment on each count respectively, with parole eligibility set four months after the date of sentence – where the applicant's bipolar disorder was the underlying cause of the offending – where the applicant has successfully sought ongoing treatment of his bipolar disorder and is now in remission – where the learned sentencing judge referred to deterrence in his remarks – whether the applicant's bipolar disorder made it an inappropriate matter to express the importance of deterrence

Criminal Code (Qld), s 27

Barbaro v The Queen (2014) 253 CLR 58; [2014] HCA 2, cited
Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
R v HBL [2014] QCA 270, cited
R v Tsiaras [1996] 1 VR 398; [1996] VicRp 26, cited
R v Verdins (2007) 16 VR 269; [2007] VSCA 102, cited
R v Yarwood (2011) 220 A Crim R 497; [2011] QCA 367, applied
Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, cited

COUNSEL: J McInnes for the applicant
N W Needham for the respondent

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

[1] **THE COURT:** On his plea of guilty entered in the District Court sitting in Bundaberg on 17 April 2019, the applicant was convicted of five counts, four of which arose from his abduction of a three-year-old girl to whom we will refer as "Jane", who was unknown to him. The final charge concerned a separate incident. The applicant was sentenced and he seeks leave to appeal against sentence.

[2] Two of the charges concerning the child's abduction were dealt with on indictment. They are as follows:

(i) that on the tenth day of April, 2014 at Childers in the State of Queensland, Eden James Kane entered the dwelling of [redacted] and unlawfully took Jane

an unmarried child under sixteen years, out of the custody or protection of and against the will of [redacted], her mother in the dwelling;[1] and

(ii) that between the ninth day of April, 2014 and the thirteenth day of April, 2014 at South Isis or elsewhere in the State of Queensland, Eden James Kane knowing that Jane, a child under sixteen years had been forcibly taken, harboured Jane with the intent to deprive [redacted], the parent of Jane of the possession of the child.[2]

[3] There was no factual contest at the sentencing hearing. An agreed statement of facts was tendered to the sentencing judge.[3]

[4] The child's mother and her partner resided at an address in Childers with their three children. By the time their parents went to bed at about 12.30 am on 10 April 2014, all three children were asleep on a mattress on the lounge room floor. The doors of the dwelling were locked and the windows were closed when the adults retired for the night.

[5] Some time between 12.30 am and 7.30 am the applicant stood on the roof of Jane's father's car, opened a window above the car and entered the house. He then removed Jane and left with her.[4] Jane remained with the applicant at his residence[5] until he returned her. He did this by leaving her at the local showgrounds near her home. Police located Jane at approximately 12.20 am on 12 April 2014, about 48 hours after she was abducted.

[6] On her return to her family it was evident that Jane had been bathed and her clothes had been washed. By inference then she had been undressed by the applicant. The Crown do not allege that the applicant physically harmed Jane in any way. Medical examination revealed no evidence of any sexual assault. Jane described going to a man's house and having "a fun time".

[7] There were three charges which were transferred from the Magistrates Court. The first of these is that the applicant entered the premises of the Rossendale Tennis Club and stole sporting equipment.[6] That offence was committed on 15 April 2014.

[8] The applicant was arrested by police on 15 April 2014 on charges arising from Jane's abduction. While in police custody, he kicked and damaged a police car and the walls of the watch house. Two charges of wilful damage[7] were laid as a result.

[9] Bail was not granted to the applicant and he remained in custody until 5 June 2015. It was common ground that the 417 days spent in prison between 15 April 2014 and 5 June 2015 were time served on any sentence to be imposed.

[10] The applicant was at large on bail from 5 June 2015 until 17 April 2019.

[11] The sentences imposed were:

(i) Count 1 on the indictment – burglary; three years and six months imprisonment;

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1 An offence against s 419(4) of the *Criminal Code* (Qld).
2 An offence against s 363(1)(b) of the *Criminal Code* (Qld).
3 Exhibit 5 Appeal Record Book (ARB) 51.
4 Count 1 on the indictment.
5 Count 2 on the indictment.
6 An offence against ss 421(2) and (3) of the *Criminal Code* (Qld).
7 An offence against s 469 of the *Criminal Code* (Qld).

(ii) Count 2 on the indictment – child stealing; four years and six months imprisonment.

[12] In relation to each of the offences transferred from the Magistrates Court, the applicant was convicted, convictions were recorded and no further action was taken.

[13] The terms of imprisonment ordered on the indictable offences were ordered to be served concurrently. The pre-sentence custody was declared as time served and the applicant was ordered to be eligible for parole on 17 August 2019.

[14] In practical terms, the sentences required the return of the applicant to custody, after being at large for almost four years, for a period of four months before being eligible for applying for parole. At that point the applicant will have served a total of 18 months in custody. He has presently served about 15 months.

Other issues relevant to sentence

[15] When the applicant was arrested by police, a search of his residence revealed a fire pit which contained hard drives, a mobile telephone and some other electronic equipment that had been recently burnt. The Crown submits that shows the applicant had sufficient awareness and state of mind to destroy evidence which might incriminate him.

[16] When arrested, the applicant participated in an interview with police. He told police that he had no knowledge of Jane or her family before attending the house and abducting her. He told police that Jane was happy and content while she was with him and he thought that he could look after Jane better than her parents whom he described as "junkies". He told police that the devil directed him to take the child.

[17] A number of psychiatrists examined the applicant and opinions have differed about the relationship between his mental state and his offending. In the agreed written statement of facts for sentence, this appears.

> "The defendant is to be sentenced on the basis that at the time of the offending he was affected by alcohol and cannabis and that prior to the offending he had a deterioration in his overall mental state that developed after his arrest into a psychiatric condition, namely Bipolar Affective Disorder Type 1, manic episode".

[18] A referral to the Mental Health Court was made but a defence under s 27 of the *Criminal Code* (Qld) was not established.

[19] The applicant has a criminal history in New South Wales, Queensland and the Australian Capital Territory. The Crown relied in particular on convictions in the Bundaberg District Court on 10 August 2005. On that day the applicant pleaded guilty to a string of offences committed on New Year's Day 2005 including acts of threatening violence. That incident was described in the present proceedings as "a siege-type incident". Police attended the applicant's residence to find him armed with a sword and knives and acting erratically. At one stage he set off an explosion. The Crown relied on this as a previous example of criminal violence by the applicant but these offences clearly occurred when the applicant was mentally unstable. He was sentenced to 18 months imprisonment wholly suspended for a period of three years and he was placed on probation.

[20] The applicant, now 50 years of age suffers from Bipolar Disorder (Type 1) for which he receives medication. He lives with his mother and appears stable.[8] Even though Jane was not physically harmed, the effect upon her family has been significant. Jane's father provided a victim impact statement in which he explains that the offending placed pressure upon his relationship with Jane's mother and that relationship has now ended. He is now raising the children alone and has been unable to meet the resulting financial burdens. He has suffered significantly from Jane's abduction. Jane suffers from nightmares and can rarely sleep in her own bed.

[21] Even though a s 27 defence was sought to be established on his behalf, the applicant has never denied the offending and the plea is accepted by the Crown to be a timely one.

Structure of the sentences

[22] While the entering of the premises of the Rossendale Tennis Club was not directly related to Jane's abduction, it was committed at a time when the applicant's mental state was deteriorating. The wilful damage offences were also committed over this time and they were related to Jane's abduction as they were committed upon his arrest on the charges which ultimately appeared on the indictment. It was appropriate to dispose of those charges in the way his Honour did.

[23] The learned sentencing judge identified count 2 on the indictment (child stealing) as the most serious offence even though that count carried a maximum sentence of seven years while count 1 (burglary) carried life imprisonment. His Honour was correct to do that. The gravamen of the offending was reflected by count 2. The burglary was committed for the purpose of committing count 2.

The grounds of appeal

[24] Three grounds of appeal were argued. These were:

(i) The sentences were manifestly excessive;

(ii) The learned sentencing judge considered general deterrence as an important consideration and that was an error because the psychiatric condition of the applicant was such that the case was not an appropriate one to express general deterrence; and

(iii) The judge erred when finding that Jane was "terrified" during her abduction when the evidence pointed to the contrary.

Consideration

[25] The third ground of appeal can be dealt with shortly. It arose from the following passage in the sentencing remarks:

> "Now, you should obviously be thoroughly ashamed of your actions. Your actions, Mr Kane, were reckless and they were absolutely foolish. You showed no due deference to others – to think that you are entitled to go into someone's house and to abduct one of their children and to have that child over the course of two days is beyond comprehension. Clearly, it would have been, not only an extremely terrifying ordeal for that child, but also for the family associated with that child. You are a

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[8] ARB 60-61.

> stranger to them, and irrespective of whether or not you took drugs or alcohol certainly does not excuse your offending behaviour."[9]

[26] There is no direct evidence that Jane was terrified. However, the agreed facts were that a strange man entered the bedroom of a three year old girl in the night and took her away. He then left her alone in the dark while he went away to get his car. He told her that he was taking her home but then took her somewhere else where she had never been. When she asked for her parents he told her that she could not go home. This stranger then bathed her. Finally, he left her alone in a strange place, the showgrounds, where, because of her infancy she would have had no idea what was going to happen to her next. The agreed facts included that this little girl *still* suffers from nightmares and that she will not sleep in her bed *as she is frightened*.

[27] It is a fair inference, from its nature and from the undisputed consequences that this experience was a frightening ordeal for this child.

[28] Ground three is rejected.

[29] Grounds one and two can be considered together.

[30] Various comparative sentences were cited both to the learned sentencing judge and to us. A distinction can be drawn between offences of child stealing when the child is unknown to the offender and cases in which the child is a part of the offender's family, such as when a disgruntled parent takes the child.

[31] These cases show quite a wide range of sentences.[10] Features which appear in the cases as relevant to sentence include:

(i) The relationship between the child and the offender.

(ii) The period of time over which the child is kept from his or her rightful custodian.

(iii) Whether there was any violence perpetrated on the child.

(iv) Whether there was any sexual motivation in the abduction.

(v) Whether there was any sexual misconduct towards the child.

[32] It is not the function of the sentencing court or this court to reconcile all the comparative sentences. The comparative sentences simply stand "as a yardstick against which to examine a proposed sentence."[11]

[33] The relevant principles to be applied are those to be found in s 9 of the *Penalties and Sentences Act* 1992 (Qld). General deterrence, is usually an important consideration in cases such as this. The learned sentencing judge referred to deterrence.[12]

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9 ARB 39.

10 *R v HBL* [2014] QCA 270, *R v Humphrys* Unreported Court of Appeal 172 of 1985, *R v Cogdale* [2004] QCA 129 (a different offence to the present namely taking a child for immoral purposes *Criminal Code* (Qld) s 219), *R v Dickson* [1999] QCA 251 and *R v Wheldon* [1997] QCA 432.

11 *Hili v The Queen* (2010) 242 CLR 520 at [41] followed in *Barbaro v The Queen* (2014) 253 CLR 58, and see also *R v Goodwin; Ex parte Attorney General* (2014) 247 A Crim R 582 at [5].

12 ARB 41.

[34] Here, there are a number of factors which point to the sentence being manifestly excessive.

[35] The applicant's conduct was to a substantial extent a product of his deteriorating mental health, a problem that began to appear as early as 2004 when the applicant lost his job. His condition became worse over time and involved episodes of bizarre behaviour. He had sufficient insight and sense to seek medical help but this treatment did not go far enough, as this offending shows. The applicant's mental health is an important factor that reduces his moral culpability. It also renders the case an inappropriate one to express the importance of deterrence.[13] According to the evidence, at a consultation with a psychiatric registrar at a clinic, he has been placed on a program of medication. He understands his condition and his symptoms as part of a mental illness. He has an ability to make informed decisions and agrees that he requires ongoing treatment. He is said to have "feasible plans and goals" and he is "aware of risks to self and others".[14] His adherence to his treatment plan, which requires him to take medication, is said to be good. The expert opinion is that his "aggression risk" is low and his vulnerability to a relapse is "low as the patient has demonstrated good insight, capacity and judgment and lives with his mum at home".[15] There is currently no evidence of depressive symptoms or mania. The underlying cause of the offending, namely the applicant's Bipolar Disorder, is now in remission and there is nothing to suggest he is a continuing threat.[16]

[36] Further, this is not a case in which the prosecution alleged that the applicant has an intention to sexually assault Jane or to do her physical harm. The child was in fact not harmed physically and she was not sexually interfered with. She was voluntarily returned after a short period – although that period must have seemed an excruciating eternity to her parents.

[37] In addition, as we have said, the applicant pleaded guilty at an early stage. Moreover, as the prosecutor acknowledged at the trial, this plea was entered although it appeared that a witness that was crucial to the Crown case was likely to be unavailable. In short, the applicant has done what he could to accept moral responsibility for his offending and to demonstrate that acceptance of responsibility in tangible ways.

[38] There is another factor in this application that, in addition to the applicant's mental state, makes this an unusual case. The applicant was arrested and held in remand from the day after he committed these offences, namely from 15 April 2014, until he was released on bail on 5 June 2015. He remained on bail until he was sentenced on 17 April 2019, a period of almost four years. During that period he has lived with his mother.

[39] We have already said that this is a case in which the factor of general deterrence, which inevitably looms large in most cases of child abduction, is of secondary importance here. That consideration necessarily affects the severity of the head sentence that is appropriate. It is also a case in which the applicant's personal circumstances are unusual for the reasons that we have explained.

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13 *R v Yarwood* [2011] QCA 367 at [22], and following *R v Tsiaras* [1996] 1 VR 398, and *R v Verdins* (2007) 16 VR 269, and see also *R v Goodger* [2009] QCA 377.

14 ARB 61.

15 ARB 61.

16 *Veen v The Queen [No 2]* (1988) 164 CLR 465.

[40] Nevertheless, while the applicant's moral culpability is less than can be seen in most cases of this kind of offending, it is not absent. The applicant pleaded guilty to these offences and they are serious offences. Notwithstanding the applicant's evident contrition and the medical evidence, the consequences to the child and her family of the applicant's actions have been severe, as can naturally be expected. It follows that a sentence of imprisonment is called for.

[41] However, the question remains whether any purpose to benefit the community would now be served by ordering the applicant to be imprisoned, after he has served a lengthy period on remand and a longer period at large while undergoing successful medical treatment. That question is to be asked now in circumstances in which he would be eligible to apply for parole in a very short time.

[42] The applicant's own circumstances and the circumstances of his offending are such that we do not see that there can be any such purpose. Punishment is needed but the applicant has served a substantial time in custody. His condition is such that a further period of custody of a few months is not called for by any consideration of personal deterrence, nor would it serve the purposes of general deterrence. The outrage that the applicant perpetrated upon Jane and her family by abducting her should be recognised by an appropriate head sentence.

[43] The appeal ought to be allowed and the sentences on counts 1 and 2 on the indictment set aside. Taking into account all the features of the case, the appropriate sentence for each of counts one and two is three years imprisonment.

[44] It is appropriate in the circumstances that the applicant be under supervision in the community for a period and consequently a parole order ought to be made.

[45] As already observed the applicant has now served a period of about 15 months and the parole date ought to be set as today.

[46] The orders of the Court are:

1. Leave to appeal against the sentences imposed on each of counts 1 and 2 on the indictment is granted.
2. The appeal against the sentences on each of counts 1 and 2 is allowed.
3. The sentences imposed on each of counts 1 and 2 on the indictment are set aside.
4. On each of counts 1 and 2 the applicant is sentenced to a term of imprisonment of three years imprisonment with those terms to run concurrently.
5. The period of 417 days pre-sentence custody between 15 April 2014 and 5 June 2015 is declared as time already served under the sentences.
6. The applicant be admitted on parole on 17 May 2019.