DISTRICT COURT OF QUEENSLAND

CITATION:	*R v Maleki* [2020] QDC 131
PARTIES:	**R** **v** **Hossein Maleki** **(applicant)**
FILE NO:	DC No 2138 of 2017
DIVISION:	Trial
PROCEEDING:	Application to reopen sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	24 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	10 June 2020
JUDGE:	Devereaux SC DCJ
ORDER:	**1. Application to re-open sentencing proceeding allowed;** **2. Applicant resentenced, on each count concurrently, to two years' imprisonment; and** **3. Two years between 24 June 2018 and 23 June 2020 to be imprisonment already served under the sentences.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING PROCEDURE – FACTUAL BASIS FOR SENTENCE – where the applicant was convicted at trial of two counts of rape – where the applicant was sentenced to a period of 6 years imprisonment on each count – where a co-accused child was sentenced to a period of 2 years imprisonment – where the applicant was sentenced on the basis that he was 18 years old at the time of the offending and 22 years old at the time of sentence – where the applicant argues that he was 16 years old at the time of the offending and 20 years old at the time of sentence – whether the sentence was imposed on a clear factual error of substance.
COUNSEL:	P Wilson for the Applicant S Cupina for the Respondent

SOLICITORS: Howden Saggers for the Applicant

Director of Public Prosecutions (Qld) for the Respondent

[1] On 1 December 2017, after a trial, the applicant was convicted of two counts of rape. Sentencing was delayed because of an appeal. The applicant was sentenced on 7 December 2018 to six years' imprisonment on each count, concurrent. I declared that 371 days pre-sentence custody be taken to be imprisonment already served under the sentence. A co-accused child was sentenced to two years' detention with an order that he be released after serving 50 per cent of the term. An older, adult, co-accused was acquitted.

[2] This is an application brought under s 188 of the *Penalties and Sentences Act* 1992 to reopen the sentence proceeding on the ground that the court imposed a sentence decided on a clear factual error of substance. The error alleged is that the applicant was sentenced on the basis that he was born in 1996 whereas it is submitted the evidence no presented shows that he was born in 1998. If I am satisfied the applicant was born in 1998, it would follow that he was aged 16 years and 7 months at the date of the offences, 7 March 2015. He was sentenced on the basis that he was then aged 22 years and 4 months. If he was indeed born on 17 July 1998, the applicant would have been 20 years and 4 months at sentence. In either case, s 140 of the *Youth Justice Act* 1992 provides that he must be sentenced as an adult. But if he were a child at the time of the offences, section 144 provides that, in sentencing him, the court must have regard to that fact and the sentence that might have been imposed on him if sentenced as a child. The outcome would be then, that the applicant would be resentenced and parity with the sentence imposed on the co-accused child would be a relevant consideration.

[3] The applicant relied on evidence he gave himself and evidence from his mother. He purported to give evidence of his own date of birth, 17 July 1998, and said he is 21 years old now. In an affidavit which he affirmed in the witness box, he said that when the family came to Australia, his birth date was transcribed incorrectly. Thereafter, he was considered to have been born in 1996. He said he did not have a birth certificate but relied on a vaccination card which is referred to in his mother's evidence.

[4] Before going to the mother's evidence, I will briefly set out material relied on by the respondent prosecution. The applicant agreed, having been shown documents by Ms Cupina for the prosecution, that in July 2014 he applied for a driver's licence. He also agreed he applied for a renewal in February 2015. In the 2014 document, in answer to the question, "Do you have a driver licence issued to you by another Australian state, territory or country?" the 'no' box has been ticked. In the 2015 application, the 'yes' box has been ticked and the number and expiry date of a licence are inserted. The effective date is said to be 5 July 2012 and the country of issue is stated to be Iran. A copy of the document is attached, which has been translated. The document purports to be a licence. In that document, the date of birth inserted is 17 July 1996. The defendant gave some evidence about that document in order to explain why it might not contain the correct date but no clear answer was made nor was any relied on by his counsel, Mr Wilson, in final submissions. When he was interviewed by police on 30 March 2015 in relation to the offences he was ultimately convicted of, the applicant told police his date of birth was 17 July and spoke in English the numbers 1-9-9-6. He explained under cross-examination that he repeated that date because it was on the Australian documents. The recording of that part of the interview was played during the

hearing of the application. The applicant declared the birth date with such confidence that, if it were not correct and he knew it not to be the truth, he was a persuasive liar.

[5] Ultimately, I do not place reliance on the applicant's evidence. His evidence of his own date of birth is, of course, hearsay and really all of his evidence was hearsay. The document that purported to be a driver's licence is entitled "Islamic Republic State of Afghanistan". It was not therefore an Iranian licence. The mother's evidence, which I accept, was that her children were all born in Iran. The result is, that at the time the document was obtained, the applicant was in Iran, not Afghanistan. The document also records the applicant's place of birth as Kabul, Afghanistan. That is inconsistent with the mother's evidence that he was born in Mushhad, Iran.[1] The document, which is relied upon by the prosecution in proof of the assertion that the applicant was born in 1996, is in my view not worthy of further consideration.

[6] The applicant's mother, Kimiya Maleki, purported to give evidence by affidavit of the dates of birth of her children. Paragraph 19 of her affidavit reads:

> "My English is not very good and I was assisted in writing this my affidavit by my daughter, Fatemeh Maleki. She was present during a conference with Emily Lewsey from Howden Saggers Lawyers, where I swore this affidavit."

Ms Maleki gave evidence that she was illiterate. By the end of Ms Maleki's evidence it was clear that her evidence about dates of birth was unreliable because she could not give evidence about the year in which an event occurred. But her

[1] She grew up and married in Iran and all of her children were born there: 1-22.45

evidence was important for two reasons – she explained the document that has been referred to as the vaccination card and she gave evidence of her age at marriage and the pattern of her children's births. She said she was married at the age of 18 (this too might be unreliable if her date of birth was in fact 30 October 1977) and that a year later her daughter was born. She said her next child, Hossein, the applicant, came four years later. She thought she was 21 years when Hossein was born. About one year and four months later her third child, a son named Hassan, was born. There was a fourth child after that. Ms Maleki commented that the applicant was a small baby and that people thought that the applicant and his younger brother were twins.

[7] No issue was taken with my having regard to the document referred to as the vaccination card. The document is obviously a copy of an original which appears to have been stamped. The document is also stamped by a certified translator. Both the Crown and defence obtained translations of the document and there is no issue between the parties about the accuracy of the translation. The document has a heading "In the Name of God" and under that, "Health Care Form for Children under 6 Years of Age". It has a file number and a child's name matching the applicant's. The date of birth recorded is 17.07.1998. Significantly, the birth weight in kilograms is recorded as 2 kilograms. The rest of the form seems not to be filled in. There was some evidence from the applicant's mother, which to some degree the applicant tried to give as well, that because she and her family were Afghani they were not well treated in Iran. This document was the best information she could produce about her son's age. It is unclear whether this document was used when the family came to Australia as refugees after being interviewed by the

United Nations. This document, with Ms Maleki's evidence, is the best material in the applicant's case.

[8] The Crown produced a document entitled Document for Travel to Australia. It is an Australian government document and records the applicant's details, including his date of birth as 17 July 1996. The inference is that whatever material or representations were made to immigration included the applicant's date of birth as being in 1996.

[9] I have already referred to the other material relied upon by the Crown:

- the document purported purporting to be a driving licence – the applicant said it was from Iran and he admitted presenting it to Queensland Transport to obtain a driver's licence renewal. It represented his date of birth as being in 1996.

- The extract of a police interview in which the applicant confidently declared his date of birth to police as being in 1996.

[10] Despite those assertions I am satisfied, on the basis of the document I have referred to as the vaccination card and Ms Maleki's evidence, that on the balance of probabilities, the applicant was born in 1996. The result is as I outlined earlier - that at the time of the offences he was not 17 years old. I am satisfied then that I imposed a sentence decided on a clear factual error of substance; I reopen the proceeding and, the parties having had an opportunity to be heard, resentence the offender.

[11] The complainant left a club or bar very late in the evening and was walking towards her brother's home at Logan. She had had a considerable amount to drink. She

came upon the applicant and his two co-accused and got into their car. The applicant sat in the front passenger seat. The third accused, who was older, was the driver. The complainant was driven to a place she did not recognise. She gave evidence of acts by the co-accused child in the back of the seat of the car which gave rise to charges of indecent assault and rape - the applicant and the co-accused were acquitted of those charges.

[12] At the secluded place the driver and the applicant got out of the car, the co-accused child raped the complainant. There was no particular violence involved but the sexual intercourse was clearly without the complainant's consent. She repeatedly swore at the offenders saying she wanted to go home. After the co-accused child had sex with the complainant he got out of the car and the applicant got in and put his penis in her vagina. Again this was over her protests that she wanted to go home but there was no particular other violence involved.

[13] The Crown Prosecutor at trial had said "I had considered that it was difficult to firmly assert that there was always a plan to rape a person. That is though what happened."

[14] The applicant had a short criminal history which post-dated the offences. He had fallen into drug use and taken steps to overcome it.

[15] I sentenced him on the basis that he had arrived in Australia as a refugee, originally coming from Afghanistan. He arrived aged about 15 years. He had some schooling in Afghanistan but lived a very poor existence. It was represented to me that he was the eldest of four. I am satisfied that that representation was probably mistakenly made by counsel or it was my misinterpretation of what I was told. The material before me suggested the applicant had taken steps towards to his own rehabilitation,

he presented a comprehensive relapse prevention management plan which included support from his mother, siblings and the Holland Park Mosque. I commented that, if he were allowed to stay in Australia after the actual custody period of his sentence, he could become a useful and contributing citizen.

[16] Sentencing the applicant as an adult for the offences committed as a child, I take into account the purposes set out in section 9 of the *Penalties and Sentences Act* 1992, the matters referred to above including the applicant's age then and now, and the sentence imposed on the co-accused child for similar offending. Although the applicant was older than the co-accused child, I see no basis for concluding that he should receive a sentence any higher than the co-accused child. In the circumstances, I resentence him to two years' imprisonment on each count, concurrent. The applicant has already served 934 days in pre-sentence custody. I declare two years between 24 June 2018 and 23 June 2020 to be imprisonment already served under the sentences.