Queensland Sentencing Advisory Council

Key Concepts

Comparative sentences, increased maximum penalty, parole eligibility, sentencing principles for sexual offences, suspended sentences, when appeal courts will change a sentence.

CASE IN FOCUS

R v CBI [2013] QCA 186

Case law summary

'CBI' applied to the Queensland Court of Appeal for leave (permission) to appeal against his sentence. Leave is required because people do not have an automatic right to appeal their sentence. To protect the complainant's identity, his name was not published.

WARNING TO READERS: This report contains subject matter that may be distressing to readers. Explicit material describing an offence against a child, drawn from the Court's judgment, is included in this case summary

The facts

CBI twice sexually touched a child, 8, to whom he was a grandfather figure. The child's mother was then in a relationship with CBI's son.

The child and her sister stayed at CBI's farm over Christmas 2010. [2]

When the child visited CBI's bedroom and lay on top of his bed, he manipulated her to go under the covers. He then lay on top of her, and flexed his hand over her genitals, over her clothing, while tickling her. This stopped when the sister entered the room and tried to pull CBI off of the child. [3]

The second offence occurred when CBI's wife took the older sister shopping, leaving the younger child alone with CBI. He took the child from the house to a vehicle. He laid her down inside it, pulled her underwear down and touched her genital area in the same way, but this time on her bare skin. [3]

About the offender

CBI was 66 and 67 when he offended and 69 at the appeal. He had worked as a farmer for 36 years and had 4 adult children.

He had no criminal history, which the Court noted 'favours relative leniency in his case'. [4], [18]

He was in good health for a person of his age but the sentencing judge accepted prison would be more difficult 'to some extent' because of his age.

The Court of Appeal did 'not accept that his age justified significant mitigation [reduction] of the sentence' [6], [22]

NOTE: This summary is an incomplete summary of the Court's reasons and is not legal advice. It includes explanations of legal concepts not set out in the judgment. It is not approved by, or affiliated with, Queensland Courts and is not to be regarded as a substitute for the Court of Appeal's judgment. *Numbers in square brackets refer to paragraph numbers in the judgment.*

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The sentence

There were two charges (called 'counts') of unlawfully and indecently dealing with a child under 16, with a circumstance of aggravation (she was under 12) (see s 210 of the *Criminal Code*[1]).

CBI pleaded not guilty and was convicted after a trial by a jury. The sentences were 12 months' imprisonment on count 1 and 18 months on count 2, to run concurrently (served at the same time, not one after the other). [1]–[2], [23]

Convictions were recorded (this must happen for any sentence of imprisonment). The sentencing judge fixed a parole eligibility date after CBI had served 9 months. This marked the time when CBI could apply to the Parole Board for conditional release, under supervision on parole. [1]

The sentencing judge accepted the child had likely become withdrawn because of the offending. The relationship between her mother and CBI's son had ended. Aggravating features (those that make the offence more serious) included that CBI showed no remorse, the child's young age and the skin on skin contact in the second count. [6]

The offending was described as 'opportunistic'. This was relevant to considering whether the prison sentence should be partially suspended, which would mean that CBI would have a guaranteed release date and would not be supervised in the community. However, 'there was too little information about the likelihood of [CBI] re-offending' so parole eligibility was ordered instead of a partially suspended sentence. [7]

[1] *Criminal Code Act 1899* (Qld) schedule 1 ('Criminal Code').

Why the sentence was appealed

CBI's reason ('ground') for applying for leave to appeal against his sentence was that it was 'manifestly excessive'. [1] He argued that the sentences should be 6 months and 12 to 15 months respectively.

Further, instead of parole, the sentences should be suspended after serving 6 months, for an operational period of 2 years [The operational period is the set period of time that the suspended part of the prison sentence is hanging over the offender's head. He or she can breach the sentence by reoffending during that time. If the order is breached, the court must order the offender to serve the whole of the suspended prison sentence, unless of the opinion it would be unjust to do so].

This was because 'there was no reason to suspect that he would offend again' considering his 'age, absence of previous convictions, and long work history'. He should not be 'burdened by the uncertainty inherent in a parole eligibility date'. Instead, he would have the suspended imprisonment hanging over his head. [8]

What the court decided

The judgment was written by one of the three appeal judges – Justice of Appeal ('JA') Fraser. The other two judges agreed with his judgment.

CBI's lawyers relied on three comparative cases (cases with some similarities to CBI's case) but Fraser JA discussed differences between those cases and CBI's case. These included the fact that CBI offended twice, his behaviour was more serious the second time, he did not cooperate with authorities, the maximum penalty increased after those cases (and the increased maximums applied at the time that CBI committed the offences) and sentencing principles in legislation had also changed. [12]–[14], [17]–[18]

The prosecution referred to two other comparative cases that did not support disturbing the sentence. [15]–[16]

There were four important legislative changes made by the Queensland Parliament that Fraser JA discussed. [9]–[10], [14]–[16], [18]

The first, from 2003, stops two sentencing principles from applying to any sexual offence committed against a child under 16. They are that courts should (1) only impose imprisonment as a last resort and (2) should prefer a sentence allowing the offender to stay in the community.

The second change, also from 2003, is the creation of a list of factors to which the court 'must have regard primarily' when it sentences such offenders.

Third was a 2010 amendment requiring that in these kinds of cases, 'the offender must serve an actual term of imprisonment, unless there are exceptional circumstances'.[2] This principle already existed in case law, for instance, a 2006 Court of Appeal case.[3] CBI did not argue that exceptional circumstances existed in his case. [11]

Fourth, in 2003 the maximum penalty for aggravated indecent treatment of a child was increased from 14 to 20 years' imprisonment. [18]

Fraser JA wrote that 'those changes in the sentencing regime for this offence, especially the substantial increase in the maximum penalty, are significant. It is to be expected that they would produce a general increase in the severity of sentences, rendering the earlier cases of little utility as comparable sentencing decisions. That is so even though … the increase in the maximum penalty should not necessarily be reflected in proportionate increases in sentences'. [19]

[2] These three changes are found in the *Penalties and Sentences Act 1992* (Qld) ss 9(4), (5), (6) and (6A).

[3] *R v Quick; Ex parte A-G (Qld)* (2006) 166 A Crim R 588; [2006] QCA 477. See CBI judgment [5], [8], [11].

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What the Court decided *continued*

The Court referred the parties to a more recent comparative case, which Fraser JA decided showed that CBI's sentence was 'a severe one for the particular offences he committed'. [22] However, he was 'not persuaded that [CBI's] sentence was outside the sentencing discretion'. [22]

He quoted cases from the High Court (the highest court in the nation) that guide all appeals against sentence. [19], [22] Those cases say:

- 'There is no single correct sentence (unless it is lawfully fixed by Parliament)'.
- 'Sentencing is not a mechanical, numerical, arithmetical or rigid activity in which one starts from the maximum fixed by Parliament and works down in mathematical steps'.
- Evaluating the quantity of the penalty is 'necessarily imprecise'. There are 'a multitude of factors to be taken into account' pulling 'in opposite directions'.
- There can be 'differences of judicial view' which 'may occasionally favour the extension of leniency' but 'there must also be room for … a more punitive view'.
- If 'all relevant considerations are given due attention', an appeal court will be less likely to interfere because sentencing has a 'discretionary character'.[4]
- A sentence will not be manifestly excessive just because it 'is markedly different from sentences imposed in similar cases'. The difference must demonstrate 'a misapplication of principle or that the sentence is "unreasonable or plainly unjust"'.[5]

CBI had been 'regarded as a grandfather, committed sexual offences [twice], he only refrained from further offending in the first offence when interrupted by the complainant's sister, the second offence involved some escalation in seriousness, [he] did not plead guilty, and there was no significant evidence in favour of a finding that [he] had rehabilitated himself.

Those circumstances amply justified the sentencing judge's conclusion that there was too little information about the likelihood of [CBI] re-offending to determine that it was an appropriate case for suspension'. [23]

[4] *Markarian v The Queen* (2005) 228 CLR 357 at [133] (Kirby J). There are many other relevant cases also cited by Justice Kirby at [133].

[5] *Citing Hili v The Queen* (2010) 242 CLR 520 at [58]–[59].

Why this case is of interest

This case shows how the law changes over time. In the case of sexual offending, changing sentencing principles and increases in maximum penalties for these offences set by Parliament can result in higher penalties, and older cases may no longer be useful in identifying and understanding the type and length of sentence that is appropriate for an offence.

This case is an example of how judges use their discretion when sentencing, applying legal principles to the facts of each case. Each case will be different in some ways from other similar cases.

The Court of Appeal applied important case law from the High Court to make its decision that in this appeal, the sentence would not be changed (leave to appeal was not granted).

Further reading

2003 reforms: *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld), Explanatory Notes, Second Reading speech (Rod Welford, Attorney-General and Minister for Justice) (at pp. 4442–44), Scrutiny of Legislation Committee, *Alert Digest* (Issue No. 11 of 2002) (at pp. 17–21)

2010 reforms: *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld), Explanatory Notes, Second Reading speech (Cameron Dick, Attorney-General and Minister for Industrial Relations) (at pp. 2308–09), Scrutiny of Legislation Committee, *Legislation Alert* (Issue 9 of 2010) (at pp. 21–25)

Also see our *Queensland Sentencing Guide* for information of a general nature about appeals and sentencing, and our Case in Focus on *R v Free; Ex parte Attorney-General (Qld)* [2020] QCA 58 regarding other sexual offending and similar legal principles.

If anything in this case summary has raised issues for you and you need to talk to someone, support is available:

- Lifeline Australia: 13 11 14
- Kids Helpline: 1800 55 1800
- Victim Assist Queensland: 1300 546 587(business hours)
- MensLine Australia: 1300 78 99 78.

For information and assistance about child safety issues, please contact

- Queensland Family & Child Commission: (07) 3900 6000 (business hours).