Queensland Sentencing Advisory Council

Key Concepts

Cooperation with law enforcement, admissions, community protection, punishment, denunciation, serious violent offence, parole eligibility, head sentence, legislative reform, mitigating factors.

CASE IN FOCUS

R v Free; Ex parte Attorney-General (Qld) [2020] QCA 58; (2020) 4 QR 80

Case law summary

The Queensland Director of Public Prosecutions, representing the Attorney-General (the prosecution), appealed to the Queensland Court of Appeal against Sterling Mervyn Free's 8-year prison sentence for taking a child under 12 years for an immoral purpose.

WARNING TO READERS: This summary 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

Prior to abducting the child victim, CCTV footage recorded Mr Free entering various shops in a public shopping centre, looking at young girls and following mothers and their young daughters. [8]–[9]

The child, aged 7, was shopping with her mother in the toy section of a department store.

Mr Free approached her after following her for about 20 minutes. He claimed to be a friend of her mother's and persuaded her to leave the shopping centre with him. [3]

He drove her to a secluded, isolated area of bushland, approximately 30 minutes away.

Remaining clothed throughout, he touched her vagina on both the top of her underwear and on her bare skin.

Afterwards, he returned her to the shopping centre. He helped her cross the road and walked her to the entrance, where he left her alone. [14]–[16]

The child was missing for a total of 1 hour and 23 minutes. [5] She was unable to tell her parents or police what happened and did not disclose any sexual offending. [6]

Mr Free made extensive admissions to police. DNA analysis later identified his bodily fluids. [18]–[19]

He participated in a recorded re-enactment and disclosed that he 'had always had sexual thoughts and fantasies about young girls' and had been unable to stop the 'urges' that day. [14]

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The sentence

Mr Free stayed in custody and indicated he would plead guilty 2 weeks after the offences, before the DNA evidence was available.

He pleaded guilty at an early stage in the District Court to 3 charges, meaning the child did not have to give evidence. [87]

He spent 306 days in pre-sentence custody that was declared as time served under the sentences. [23]

The charges and the sentences imposed (by the sentencing court, and then on appeal) were:

1. Taking a child under 12 for an immoral purpose (s 219, *Criminal Code*): 8 years, with parole eligibility after serving about one third, or 2 years and 8 months (changed on appeal to 8 years, with no recommendation for eligibility for parole, so that legislation deems him eligible after serving half of the sentence)
2. Deprivation of liberty (s 355, *Criminal Code*): 2 years (unchanged on appeal)
3. Indecent treatment of a child under 12 (s 210, *Criminal Code*): 2 years (unchanged on appeal).

These sentences were made concurrent (served at the same time, not one after the other) so that the effective head sentence was 8 years. A head sentence is the total effective period of imprisonment imposed (for all offences combined if there are several charges).

The sentencing judge decided against making a serious violent offence (SVO) declaration for count 1.

An SVO declaration is an order in the *Penalties and Sentences Act 1992* (Qld) that applies to listed offences. It requires the offender to serve 80 per cent of their head sentence in custody (or 15 years' imprisonment, whichever is less).

A declaration is mandatory for head sentences of 10 years or more, but at the judge's discretion (choice) in some other circumstances where the sentence is shorter.

The sentencing judge accepted that Mr Free's actions had been 'predatory' and 'clearly involved some premeditation'. [11] They had 'a severely traumatising impact' on the child, her mother, wider family and friends. [21]

The judge had regard to Mr Free's early pleas of guilty, extensive admissions, remorse and shame for his actions, and that he had been the victim of sexual abuse as a child.

She referred to research demonstrating that child sexual abuse victims are at increased risk of committing adult sex offences. [26]

About the offender

Mr Free was 26 at the time of the offence, and 27 at the time of sentence. He had a relatively minor criminal history of mostly property offences, but no prior convictions for sexual offences.

He had been in a relationship for 6 years and had young twin daughters. [22]

A psychologist assessed him and wrote a report after the offences. The report stated Mr Free had a long history of struggling with impulse control, increased vulnerability to impulsive and reckless behaviours, a pornography addiction and a likely paedophilic disorder.

The report stated given 'the unique nature of the offences, it is difficult to ascertain (with a high level of psychological certainty) the risk of recidivism [i.e. reoffending]'.

Mr Free expressed deep remorse and shame for his behaviour and was reported as being eager to engage in treatment. [28]

Why the sentence was appealed

The prosecution successfully appealed against the sentence for count 1 for two related reasons ('grounds of appeal').

The first was that the sentence was manifestly inadequate. [1]–[2]

The second related to the decision to not make the SVO declaration and the legal principles and considerations relating to it. [37]

The prosecution's alternative position was a criticism of setting parole eligibility at the one-third mark. This is conventionally done for offenders who enter an early guilty plea accompanied by genuine remorse.

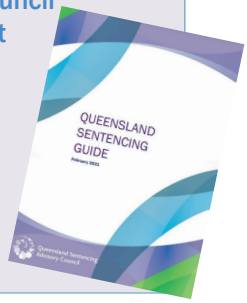
It argued there should have been no parole eligibility order at all, meaning automatic statutory eligibility after half of the sentence was served. [2], [38]

SVO scheme Terms of Reference

The Attorney-General has asked the Council to review the SVO scheme and to report on its findings by 11 April 2022.
For more information, see our website.

Looking for more information?

Our *Queensland Sentencing Guide* contains more general information about appeals, sentencing and parole.



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What the Court decided

In a joint judgment, the Court considered case law (other court decisions) regarding how courts decide whether to make discretionary SVO declarations. [43]–[48]

The first error it found in the sentencing process was a focus 'on a perceived need to find factors which take the case outside the norm for the type of offence' to justify making a SVO declaration. [49]

The Court acknowledged that, while this approach was 'too narrow', it was 'likely to have been the approach regularly taken by sentencing courts' when deciding this question. [50]

An SVO decision is part of the wider 'integrated process of arriving at a just sentence'. [46] The sentencing judge should have considered 'whether there were other factors, including factors relevant to community protection or adequate punishment, which warranted an order requiring [Mr Free] to serve 80 per cent, as part of a just penalty'. [54]

Ultimately, the court did not find those circumstances and a SVO declaration was not required. [90]

The Court noted it is uncomfortable for judges to describe offences as 'normal' or not: 'There is nothing normal … about this offending. It is shocking, and to speak of a "norm" is justifiably jarring, for victims of the offending, and also for the broader community, let alone for the sentencing judge'. [51]

The Court found a second error: moving directly from the SVO decision to setting the 'conventional' one-third parole eligibility date 'without considering the overall effect of that conclusion'.

Judges should consider 'whether there were factors (including punishment, denunciation, deterrence and community protection) favouring a later release date … there can be no mathematical approach to fixing that date, including on the basis of convention'. [55]

There was a third error. Although neither party disputed the head sentence, 'the starting point of 8 years was too low'.

It was imposed to reflect Mr Free's plea of guilty and cooperation. This raised the question of 'whether further leniency, in terms of an earlier parole eligibility date, was warranted' (it was not). [56], [93]

At sentence in 2019, both parties had relied on a 2004 appeal decision that involved similar offending and a head sentence of 5 years, with no recommendation for early parole. [62] An SVO had not been an option in that case. [70]

The facts may have seemed 'broadly comparable'. [65] But this did not address 'the legislative changes which have taken place since [2004], mirrored by changing attitudes within the community, and a greater understanding by courts of the impact of child sexual abuse'.

'All of this supports the view that what might have been regarded as an appropriate penalty for this kind of offending in 2004 is not necessarily what should be considered appropriate now.' [66]

The Court wrote that the 5-year sentence in the 2004 case 'would be regarded as an affront to the community if imposed today'. [66]

The legislative changes concerned included:

- increasing the likelihood of imprisonment for child sex offences (effective 2003, and strengthened in 2010 (see sections 9(4), (5) and (6) of the *Penalties and Sentences Act 1992* (Qld))
- raising the maximum penalty for indecent dealing from 14 years to 20 years (effective 2003)
- adding the offence of taking a child for an immoral purpose to the SVO scheme (effective 2005). [67]–[70]

The Court concluded that, in the circumstances of this case, 'an appropriate penalty, before taking account of mitigating factors [facts or details about the offender or offence that may reduce the severity of the sentence] such as a plea, cooperation and prospects of rehabilitation could not be less than 10 years imprisonment'. [73]

This would mean an automatic SVO declaration, and at least 80 per cent of the sentence being served in prison.

The Court wrote that 'only such a penalty' could reflect the factors: seriousness of the offending, its significant effect on the child, protecting the community from predatory offending, strong denunciation and deterring similar behaviour by others. [73]

The Court affirmed this conclusion by testing it against two other child sexual offence comparative cases referred to the sentencing judge but distinguished as more serious. [74]–[80]

However, mitigating features such as Mr Free's admissions and very early guilty plea then needed to 'be factored into account by a reduction of the head sentence'. [81]

The Court balanced strong, competing factors of aggravation and mitigation [89] by imposing a head sentence of '8 years imprisonment, with no [SVO] declaration, and no early recommendation for parole … the mitigating effect of a guilty plea and cooperation, whilst still deserving of tangible recognition, must yield to other factors, such as denunciation and community protection'. [93]

By imposing an 8-year sentence, the Court reduced the overall time Mr Free may have to spend in custody (compared to a 10-year sentence) and relieved him from the burden of an automatic SVO declaration.

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Why this case is of interest

This case demonstrates that a sentence of imprisonment (that is not suspended or ordered by the court to be served by way of intensive supervision in the community) has two different but essential parts — the head sentence and the non-parole period.

The way they are decided can be complicated, involving the sentencing court balancing numerous factors.

It carries important guidance from the Court of Appeal about how to decide if a discretionary SVO declaration should be made.

It shows how appropriate sentences can change over time and how the courts reflect community attitudes to offences, as guided by Parliament.

Legislative reforms increasing maximum penalties for child sexual offences, and changes to related sentencing laws, 'are reflected also in the increasing understanding of and recognition by Courts, in more recent decades, of the profoundly damaging impact of sexual offences on child victims, which has also been reflected in increasing sentences'. [69]

While Mr Free's head sentence ultimately did not change from 8 years, the process for how the court reached that sentence did. This provides guidance to judges and magistrates, prosecutors and defence lawyers.

The non-parole period was changed substantially — a difference of at least 16 extra months in custody.

The Court explained how parole protects the community.

The Parole Board Queensland will assess Mr Free's parole application several years after the court considered his case. It was not known yet how Mr Free would 'respond to treatment programs undertaken whilst in custody'. [91]

The Court went on to state that, in cases involving eligibility for parole:

- A prisoner is not automatically released on their parole eligibility date. It is up to the Parole Board to determine the offender's suitability for release and what conditions are appropriate to protect the community. [Recommending a parole eligibility date is the only kind of a parole order a court can make for a sexual offence];
- 'Community protection is not achieved only by actual incarceration, it is also achieved by the oversight of the Parole Board, before a person may be released on parole; and by supervision of the person, on parole, if they are released, for the remainder of their sentence, whilst they make the adjustment from custody and back into the community.'
- There are 'two potential benefits' in 'allowing the possibility of a date for eligibility for parole at an earlier stage (than 80 per cent)'. One is to give a prisoner 'a basis for hope and, in turn, an incentive for rehabilitation'. The other is that 'in appropriate cases', a longer period of conditional supervision in the community 'may provide greater community protection in the long term'. [91]

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. 4442–4444), 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. 2308–2309), Scrutiny of Legislation Committee, *Legislation Alert* (Issue 9 of 2010) (at pp. 21–25)

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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 visit the Queensland Government's website.