SUPREME COURT OF QUEENSLAND

CITATION:	*R v Atkinson* [2022] QCA 252
PARTIES:	**R** **v** **ATKINSON, Richard Charles** (applicant)
FILE NO/S:	CA No 165 of 2022 DC No 1962 of 2021
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 28 July 2022 (Kent KC DCJ)
DELIVERED ON:	9 December 2022
DELIVERED AT:	Brisbane
HEARING DATE:	20 September 2022
JUDGES:	Dalton JA and Jackson and Crow JJ
ORDER:	**Application dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant pleaded guilty to four counts of indecent treatment of a child under 16 years – where the applicant was sentenced to a head sentence of 15 months imprisonment suspended after serving three months in custody with an operational period of two years – where the complainant was 13 years old and the applicant was 70 years old at the time of the offending – where the complainant was wearing his school uniform during the offending – where there was an agreed factual compromise that the applicant had an honest, but unreasonable, belief that the complainant was at least 16 years old – where s 9(4)(c) of the *Penalties and Sentences Act 1992* (Qld) (**PSA**) requires a court to sentence an offender for any sexual offence in relation to a child under 16 years to an actual term of imprisonment unless there are exceptional circumstances – where the applicant submits that the primary judge failed to place sufficient weight upon the applicant's honest, but unreasonable, belief that the complainant was at least 16 years old – whether the primary judge erred in finding that there were no exceptional circumstances within the meaning of s 9(4)(c) of the PSA *Criminal Code* (Qld), s 210, s 229

Penalties and Sentences Act 1992 (Qld), s 9(4)

Corby v R [2010] NSWCCA 146, considered
Fisher v R; R v Fisher [2021] NSWCCA 91, cited
Glade v The Queen [2020] SASCFC 83, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Norbis v Norbis (1986) 161 CLR 513; [1986] HCA 17, cited
R v BCX (2015) 255 A Crim R 456; [2015] QCA 188, applied

COUNSEL: A J Kimmins and M L Longhurst for the applicant
C W Wallis for the respondent

SOLICITORS: Bosscher Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **DALTON JA:** The applicant seeks leave to appeal against sentence so that he can advance an argument on appeal that the primary judge erred in finding that there were no exceptional circumstances within the meaning of s 9(4)(c) of the *Penalties and Sentences Act 1992* (Qld) (PSA). The relevant provisions of that Act, and the *Criminal Code* are set out in the judgment of Crow J.

[2] The primary judge had before him an agreed statement of facts. That showed that at the time of the offences the complainant was 13 years old, and the applicant was 70 years old. On 13 September 2020 the complainant logged onto an anonymous chatroom website. In order to log on, the complainant had to specify his gender and geographical location. He had to check a box confirming that he was at least 18 years old. He was then prompted to choose whether he wished to "talk" or "flirt". The complainant selected "flirt" and was directed to a chatroom where he met the applicant. Both the complainant and applicant had their cameras activated so they could see one another. Although the complainant was 13, he weighed 140 kg and was 170 cm tall. The agreed statement of facts does not say what the complainant was wearing when the applicant could see him via the chatroom camera.

[3] Count 1 on the indictment was indecent treatment of a child under 16, s 210(1)(d) of the Code. The facts relied upon were that when connected via the chatroom, the applicant positioned his camera so that the complainant could watch him masturbate.

[4] The complainant and applicant then arranged to meet the following evening in the street where the complainant lived with his parents. They did meet somewhere between 8.00 pm and 9.00 pm the next night. The complainant was wearing his school uniform. He got into the applicant's car. The applicant drove him to a nearby park where they left the car and walked to a darker area. However there were apparently passers-by, so the pair returned to the car and drove back to a location near the complainant's parents' house. There the applicant masturbated the complainant; had the complainant masturbate him, and the applicant performed oral sex upon the complainant. These were counts 4, 5 and 6, indecent treatment of a child under 16, s 210(1)(a) of the Code.

[5] There is no suggestion that the complainant was an unwilling participant in the offending. The complainant's mother noticed the applicant's email on the complainant's phone, and contacted the police.

[6] In his interview with police the complainant told them that the applicant asked him how old he was, and he told the applicant the truth, 13 years old. When cross-examined during a pre-recording of evidence, the complainant said that he might have been mistaken about saying he was 13. The agreed statement of facts initially contained the sentence, "the [applicant] used the chat-typing system to ask the complainant his age, and the complainant responded by saying that he was 13 years old." After some debate about the matter before the primary judge, that sentence was deleted from the agreed statement of facts. Instead, the judge was told that the parties proceeded on an agreed basis the applicant had an honest, but unreasonable, belief that the complainant was at least 16 years old.

[7] As is the way with sentences which proceed on an agreed factual compromise, rather than agreed actual facts, this position was somewhat unsatisfactory. Although the complainant was tall and heavy, the Crown prosecutor told the primary judge without objection that he looked young, in that his facial features were young. He was in school uniform and that was relied upon by the Crown as showing that the applicant's belief was unreasonable. The defence below did not fully accept that, saying to the primary judge that students can be at school until 18 years of age. That point was made again on appeal.

[8] The primary judge was well aware of the provisions of s 9(4) of the PSA, and addressed himself to the criteria listed in subsections (5) and (6). He noted the 56 year age disparity between the applicant and the complainant – see s 9(5) of the PSA. There is no doubt that this was a very important factor in considering whether there were exceptional circumstances shown by the applicant and, as the primary judge remarked, it was a factor against the applicant.

[9] The primary judge went on to consider that the complainant was at a vulnerable age. Again that was a relevant factor – s 9(6)(b) PSA, and one which the primary judge recognised as being important because, as an early adolescent, the complainant was vulnerable. The primary judge considered the offending was serious because it involved ejaculation and oral sex. Again, this was a relevant consideration – s 9(6)(c), and in my view the primary judge dealt with it appropriately.

[10] It is also clear from the sentencing remarks that the judge had in mind the consideration at s 9(6)(d), the need to protect the child, or other children, from the risk of the offender reoffending. This consideration was against the applicant even though the complainant child was willing to engage in the sexual acts which constituted the offending. The case law in this area emphasises the need to protect children of the complainant's age, notwithstanding their willingness to engage in sexual exploration. It is also the aim of the law to prevent persons such as the applicant exploiting the vulnerability of these children – see the passage from *Corby v R*[1] extracted by Crow J in his judgment.

[11] In assessing whether or not there were exceptional circumstances the primary judge had regard to the fact that the applicant had good antecedents and character and the fact of his guilty plea – s 9(6)(h) and (i). The primary judge assumed in the applicant's favour that he was a low risk of recidivism and had good prospects of rehabilitation. I am not entirely sure what that assessment was based upon, but it was in the applicant's favour.

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1 [2010] NSWCCA 146, [77].

[12] The primary judge had regard to the agreed basis for sentencing that the applicant had an honest, but unreasonable, belief that the complainant was 16 years or over. He discussed the factual considerations which must have been obvious to the applicant in his encounter with the complainant, and the complainant's willingness to engage in the activity. He concluded:

> "My conclusion, Mr Atkinson, it that this is a somewhat marginal case, but at the end of the day I cannot find myself satisfied that exceptional circumstances do exist and that is partly because the factor that Mr Wilson relies on which is the honest but unreasonable mistaken belief is one that does not carry at least decisive weight in my mind. It is a belief which – the Crown not contradicting its honesty – nevertheless was quite unreasonable in the circumstances and, certainly, you should have been placed very much on notice by the appearance of a child in his school uniform in your car. That being the case, consistent with my conclusion on that issue, it is essential pursuant to the legislation that a custodial component of the sentence must be served in custody."

[13] The assessment of whether or not exceptional circumstances existed was a matter for the primary judge. It was the type of issue which did not have one uniquely right answer.[2] Consequently, it was necessary for the appellant to demonstrate an error of the type discussed by the High Court in *House v The King*.[3] In my view the applicant has not done so. The learned primary judge proceeded correctly according to principle. He took into account relevant considerations, and made an assessment which I think was comfortably within the discretion accorded to him by statute. The application for leave to appeal this sentence ought to be dismissed.

[14] **JACKSON J:** I agree with Dalton JA and Crow J.

[15] **CROW J:** This is an application for leave to appeal against a sentence on the sole ground that the learned sentencing judge erred in finding that exceptional circumstances did not exist pursuant to s 9(4) of the *Penalties and Sentences Act 1992* (Qld) (PSA), resulting in an excessive sentence.

[16] On 25 July 2022, the applicant pled guilty to three counts of indecently dealing with a child under the age of 16 years and one count of exposing a child under 16 years to an indecent act. He was sentenced to a period of imprisonment of 15 months suspended after he had served 3 months' imprisonment with an operational period of 2 years.

[17] As each offence was an offence of a sexual nature committed in relation to a child under 16 years of age, s 9(4), (5) and (6) of the PSA were engaged and required to be applied in addition to the matters referred to in s 9(2).

[18] Relevantly, s 9(4)(c), (5) and (6) provide:

> "**9 Sentencing guidelines**
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> […]

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2 *R v BCX* [2015] QCA 188, [33] per Burns J, citing Mason and Deane JJ in *Norbis v Norbis* (1986) 161 CLR 513.

3 (1936) 55 CLR 499.

(4) Also, in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years or a child exploitation material offence—

[…]

(c) the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.

[…]

(5) For subsection (4)(c), in deciding whether there are exceptional circumstances, a court may have regard to the closeness in age between the offender and the child.

(6) In sentencing an offender to whom subsection (4) applies, the court must have regard primarily to—

(a) the effect of the offence on the child; and

(b) the age of the child; and

(c) the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another; and

(d) the need to protect the child, or other children, from the risk of the offender reoffending; and

(e) any relationship between the offender and the child; and

(f) the need to deter similar behaviour by other offenders to protect children; and

(g) the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community; and

(h) the offender's antecedents, age and character; and

(i) any remorse or lack of remorse of the offender; and

(j) any medical, psychiatric, prison or other relevant report relating to the offender; and

(k) anything else about the safety of children under 16 the sentencing court considers relevant."

[19] As Burns J observed,[4] "there is no statutory definition of what may amount to "exceptional circumstances" for the purposes of s 9(4) PSA" and that "[w]hat is required is a careful consideration of all of the circumstances in order to determine whether, alone or in aggregation, they constitute exceptional circumstances so as to warrant the conclusion that the offender should be spared imprisonment".

[20] Burns J also pointed out that in any given case a finding of exceptional circumstances is a matter for the discretionary judgment of the sentencing judge

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4 *R v BCX* (2015) 255 A Crim R 456; [2015] QCA 188 at [29].

such that an appellate court will not lightly interfere unless error of the kind in *House v The King*[5] is identified.[6] Where it is demonstrated that a sentencing judge has erred in a *House v The King* sense, then the appellate court will proceed to make its own assessment of whether exceptional circumstances exist and substitute its own decision if there is sufficient material before the appellate court to do so.[7]

[21] The applicant accepts that a specific error must be shown and argues that the sentencing judge fell into an error of principle "in his approach to considering the nature of the offence"[8] as is required under s 9(6)(c) of the PSA. The applicant argues that as the sentence proceeded on the agreed basis that the applicant held an honest though unreasonable belief that the child was aged 16 or above, the sentencing judge, in considering and approaching the nature of the offence committed, did not place sufficient weight upon the applicant's honest but unreasonable belief.

[22] In terms of the nature of the offences, as referred to in s 9(6)(c) of the PSA, Count 1 was an offence against s 210(1)(d) of the *Criminal Code* (Qld) (the Code) and Counts 4, 5, 6 were offences against s 210(1)(a) of the Code. Section 210(1)(a) and (d) provide:

> "**210 Indecent treatment of children under 16**
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> (1) Any person who—
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> (a) unlawfully and indecently deals with a child under the age of 16 years; or
>
> […]
>
> (d) wilfully and unlawfully exposes a child under the age of 16 years to an indecent act by the offender or any other person; or
>
> […]"

[23] Section 210(5) provides:

> "(5) If the offence is alleged to have been committed in respect of a child of or above the age of 12 years, it is a defence to prove that the accused person believed, on reasonable grounds, that the child was of or above the age of 16 years."

[24] Section 229 provides:

> "**229 Knowledge of age immaterial**
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> Except as otherwise expressly stated, it is immaterial, in the case of any of the offences defined in this chapter committed with respect to a person under a specified age, that the accused person did not know that the person was under that age, or believed that the person was not under that age."

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5 (1936) 55 CLR 499 at 504 to 505.
6 *R v BCX* (2015) 255 A Crim R 456; [2015] QCA 188 at [32].
7 *R v BCX* [2015] QCA 188 at [32].
8 Outline of submissions on behalf of the applicant dated 7 September 2022 at [11].

[25] A s 210(5) defence of honest and reasonable belief that the person believed on reasonable grounds that the child was of or above the age of 16 years, unlike s 24 of the Code, casts a persuasive onus upon the accused. If the accused satisfies a jury or other trier of fact on the balance of probability that the accused person believed on reasonable grounds the child was of or above the age of 16 years, then that is a complete defence.

[26] In the absence of an accused proving they believed on reasonable grounds the child was of or above the age of 16 years, then s 229 continues to apply with respect to the nature of the offence such that the accused having an unreasonable belief is immaterial as to the nature of the offence. That is not to say that the accused's honest but unreasonable belief that the person was not underage is irrelevant to the proper exercise of the sentencing discretion. Depending upon the facts of the case, an honest but unreasonable belief of an accused person that the person was not underage may be an important matter to be taken into account.

[27] In *Corby v R*,[9] Johnson J with whom Beazley JA and Kirby J agreed, said in a case where the applicant had an honest but unreasonable belief that the victim was of or above the age of 16 years:

> "[77] Counsel for the Applicant submitted that this finding was relevant to the Applicant's moral culpability and thus operated to reduce the objective seriousness of his offence. This Court has emphasised that the criminal law in this area operates to protect children from themselves, as well as from those who may exploit their vulnerability: *R v Dagwell* at [41]. The age difference between the Applicant and the victim aggravated the objective seriousness of the offence, even making some allowance for his belief that the victim was 16 years' old: *R v Dagwell* at [35]; *Kenny v R* [2010] NSWCCA 6 at [3]–[8], [38]–[41]."

[28] The New South Wales Court of Criminal Appeal has recently expressed similar views,[10] as has the South Australian Court of Criminal Appeal.[11]

[29] The facts and circumstances of the offending conduct may require a sentencing judge to make some allowance for an honest but unreasonable belief that a victim of or above the age of 16 years, however, the degree of allowance again depends upon the facts and circumstances of the case. The sentencing judge is required to determine whether an honest but unreasonable belief alone or an aggregation with other circumstances do constitute exceptional circumstances for the purposes of s 9(4) of the PSA.

[30] On behalf of the applicant, it is not submitted that the sentencing judge did not take into account the applicant's honest but unreasonable belief in the age of the complainant child. Plainly the sentencing judge did, having referred to that aspect of the sentencing on seven occasions during his sentencing remarks. The submission rather, is that the sentencing judge failed to place sufficient weight upon

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9 [2010] NSWCCA 146.
10 *Fisher v R; R v Fisher* [2021] NSWCCA 91 at [56].
11 *Glade v The Queen* [2020] SASCFC 83 at [53].

it in determining exceptional circumstances under s 9(4) of the PSA. The sentencing judge expressed his conclusion upon this issue as follows:[12]

> "My conclusion … is that this is a somewhat marginal case, but at the end of the day I cannot find myself satisfied that exceptional circumstances do exist and that is partly because of the factor that Mr Wilson relies on which is the honest but unreasonable mistaken belief is one that does not carry at least decisive weight in my mind. It is a belief which – the Crown not contradicting its honesty – nevertheless was quite unreasonable in the circumstances and, certainly, you should have been placed very much on notice by the appearance of a child in his school uniform in your car…".

[31] It is plain, in my view, that the sentencing judge did make some allowance for the applicant's honest but unreasonable belief that the victim was of or above the age of 16 years old in describing the case as a "somewhat marginal case". The sentencing judge did reflect that the honest but unreasonable belief did carry some, but not decisive, weight. Even though the child was a large child for his age, approximately 170 cm tall and nearly 140 kgs, he presented in his school uniform. The sentencing judge's conclusion that the applicant's honest belief was quite unreasonable was open on the facts and material presented to the sentencing judge. The degree of unreasonableness of the applicant's belief is relevant and it was properly assessed by the sentencing judge. This is not a case like *Corby v R* where there was some support for the fact that the victim was telling the offender that he was over 16.[13]

[32] The applicant has not demonstrated an error of principle of the kind identified in *House v King*.

[33] I would dismiss the application for leave to appeal.

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12 Appeal Record Book (ARB) at page 41.

13 [2010] NSWCCA 146 at [76].