Court of Criminal Appeal
Supreme Court

New South Wales

Case Name:	Paul Campbell v R
Medium Neutral Citation:	[2018] NSWCCA 87
Hearing Date(s):	26 March 2018
Date of Orders:	4 May 2018
Decision Date:	4 May 2018
Before:	Bathurst CJ at [1]; Schmidt J at [2]; Hamill J at [3]
Decision:	(1) Leave to appeal granted. (2) Allow the appeal. (3) Quash the sentence imposed by the District Court on 14 December 2017. (4) Remit the sentencing proceedings to the District Court to be dealt with according to law.
Catchwords:	CRIMINAL LAW – appeal against sentence – sentencing of children – relevant principles of sentencing – where 13 year old commits serious sexual offences on younger relatives – offences impulsive and opportunistic – appreciation of wrongfulness of acts and consequences – whether Judge erred in assessing objective criminality – strong evidence of rehabilitation – interference with education of offender – whether Judge erred in deciding there were no alternatives to a full time custodial sentence only appropriate sentence – whether Judge erred in deciding offences involved breach of trust – emphasis on rehabilitation – various errors established CRIMINAL LAW – sentence – sexual offence carrying life imprisonment included on Form 1– contrary to the

	statute – concession that proceedings miscarried – appropriate orders – remission or re-sentence?
Legislation Cited:	Children (Criminal Proceedings) Act 1987 (NSW) ss 3, 5, 6, 15A, 17 and 18 Crimes Act 1900 (NSW) s 66A Crimes (Sentencing Procedure) Act 1999 (NSW) ss 5, 12, 21A, 31, 32, 33, 34, 35, 35A and 53A Criminal Appeal Act 1912 (NSW) ss 6, 7 and 12
Cases Cited:	Abbas, Bodiotis, Taleb and Amoun v R [2013] NSWCCA 115, 231 A Crim R 413 AEL v R [2007] NSWCCA 97 Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002 (2002) 56 NSWLR 14; [2002] NSWCCA 518 BP v Regina, SW v Regina [2006] NSWCCA 172 Clappison v R [2017] NSWCCA 33 Dinsdale v R (2000) 202 CLR 321; [2000] HCA 54 Kentwell v The Queen (2014) 252 CLR 601; [2014] HCA 37 KT v R [2008] NSWCCA 51; (2008) 182 A Crim R 571 MS2 & Ors v Regina [2005] NSWCCA 397; (2005) 158 A Crim R 93 Parente v R [2017] NSWCCA 284 R v Elliott and Blessington [2006] NSWCCA 305; (2006) 68 NSWLR 1 R v GDP (1991) 53 A Crim R 112 R v Leete [2001] NSWCCA 337; (2001) 125 A Crim R 37 R v Mark Anthony Cooney [2004] NSWCCA 255 R v Zamagias [2002] NSWCCA 17 Raymond John Munro v R [2006] NSWCCA 350 Regina v JDB [2005] NSWCCA 102 Regina v KBM [2004] NSWCCA 123 Regina v KLH [2004] NSWCCA 312 Regina v SDM [2001] NSWCCA 158; (2001) 51 NSWLR 530 Robertson v R [2017] NSWCCA 205 RP v R [2015] NSWCCA 215 RP v The Queen [2016] HCA 53 Slade v The Queen [2005] NZCA 19; [2005] 2 NZLR 526 The Queen v De Simoni (1981) 147 CLR 383; [1981]

	HCA 31
Category:	Principal judgment
Parties:	Paul Campbell (a pseudonym) (Applicant) Regina (Respondent)
Representation:	Counsel: Mr M Johnston SC (Applicant) Mr B Hatfield (Respondent) Solicitors: Mr P McGirr (Applicant) Director of Public Prosecutions (Respondent)
File Number(s):	2016/00299506
Publication Restriction:	Pursuant to s 15A of the Children (Criminal Proceedings) Act 1987 (NSW) there is to be no publication of any material capable of identifying the applicant or the victims.
Decision under appeal:	
Court or Tribunal:	District Court
Jurisdiction:	Criminal
Citation:	[2017] NSWDC 359
Date of Decision:	14 December 2017
Before:	Berman SC DCJ
File Number(s):	2016/299506

JUDGMENT

1 **BATHURST CJ:** I agree with the orders proposed by Hamill J, and with his Honour's reasons.

2 **SCHMIDT J:** I agree with Hamill J.

3 **HAMILL J:** The applicant is a child and, accordingly, this judgment is published under the pseudonym adopted in the District Court. By operation of statute,

there is to be no publication of any material capable of identifying either the applicant or his two victims.[1]

4 On 2 October 2016, the applicant was a 13 year-old child. "A" and her sister “B” were two of the applicant’s younger relatives. A was aged 6 years and 3½ months. B was aged 7 years and 9 months. On 2 October 2016, the applicant and the two victims attended a family function to celebrate a religious holiday. The function commenced at around 5:30 pm and there were about 30 people in attendance. During the course of the evening a number of children, including the applicant, A and B, played a game of hide and seek while the adults remained in the dining area. During the course of that game, the applicant committed a number of serious sexual offences against A, and a serious sexual offence against B.

5 The victims disclosed the offences to their parents and the applicant was arrested and charged on 7 October 2016. The applicant admitted the offences and entered pleas of guilty in relation to two offences of sexual intercourse with a child under the age of 10 and one offence of indecent assault on a person under the age of 16. The applicant asked for a number of offences to be taken into account in sentencing under s 33 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The offences were identified on two Form 1 documents. At the hearing of the appeal against sentence there emerged a fundamental defect arising from the nature of one of the offences taken into account on the first Form 1. As a consequence, the applicant was given leave to amend his notice of appeal and the respondent conceded that the amended ground of appeal must be upheld. However, the respondent contended that the grounds of appeal initially raised by the applicant should be rejected. There was also a question, given the nature of the defect giving rise to the concession by the respondent as to the new ground, whether the Court should move to re-sentence or whether it was more appropriate to remit the matter to the District Court. The Court determined to hear arguments on the remaining grounds of appeal and to determine the appropriate course (that is, whether to resentence or to remit) after considering the entirety of the parties’ arguments.

[1] Children (Criminal Procedure) Act 1987 (NSW), s 15A.

6 The matter came before his Honour Judge Berman SC for sentence on 17 November 2017 and sentence was imposed on 14 December 2017. Pursuant to s 53A of the *Crimes (Sentencing Procedure) Act*, his Honour imposed an aggregate sentence of 16 months with an aggregate non-parole period of 8 months. Pursuant to s 53A(2), his Honour indicated sentences of 12 months and 10 months respectively for the two counts of sexual intercourse with a child under the age of 10, and a sentence of 4 months for the offence of indecent assault on a person under the age of 16.

7 In advance of the hearing of the application for leave to appeal against sentence the applicant raised the following grounds of appeal: –

(1) The sentencing judge erred by sentencing on the basis that the Crown's concession that "*a sentence of other than full-time custody was within range"* was contrary to sentencing principle and inconsistent with the comparative cases.

(2) The sentencing judge erred in failing to consider an alternative to fulltime custody.

(3) The sentencing judge erred in assessing the seriousness of the offence.

(4) The sentencing judge erred in finding that the applicant used his position as a trusted family member to commit the offences.

(5) The sentencing judge erred in arriving at indicative sentences that would have been manifestly excessive had they been imposed, and in arriving at an aggregate sentence that is manifestly excessive.

8 The additional ground advanced at the hearing of the appeal was to the effect that the sentencing proceedings miscarried because one of the offences taken into account on sentence was an offence carrying life imprisonment, a course prohibited by s 33(4)(b) of the *Crimes (Sentencing Procedure) Act*. This problem was not identified by the legal representatives or by the sentencing Judge. It was only identified by counsel for the respondent during final preparation for the hearing of the appeal and communicated with Senior Counsel appearing for the applicant. The respondent conceded correctly that the proposed amended ground of appeal was established and that the sentencing proceedings had miscarried as a result. It was the respondent's submission that the only appropriate resolution was for this Court to remit the matter to the District Court pursuant to s 12(2) of the *Criminal Appeal Act 1912* (NSW). The applicant submitted that it was still open to the Court, if the

amended ground or any other ground was upheld, to re-sentence the applicant in accordance with s 6(3) of the *Criminal Appeal Act* and the High Court's decision in *Kentwell v The Queen*.[2]

The facts

9 The facts agreed between the parties became part of exhibit 1 and included:

> During the course of the hide and seek game the applicant took A into the room under the stairs and closed the door. Whilst in the room the applicant pulled down his pants and exposed his penis. A could see hair on his penis (Form 1 — Act of indecency toward a person under 16).
>
> A then pulled down her underpants, “because if I didn't then he, he will pull my pants down then”. The applicant placed his finger inside A's vagina and it hurt. (Form 1 offence — Act of sexual intercourse child under 10).
>
> The applicant then performed cunnilingus on A. He licked her vagina “with his tongue for a second”. (Section 66A offence - Act of sexual intercourse with a child under 10).
>
> The applicant then had A perform an act of fellatio on him. He placed his penis in her mouth. She said, “this made her choke and that she felt sad”. (Section 66A offence - Act of sexual intercourse child under 10).
>
> Whilst in the room under the stairs the applicant told A he would give her a chocolate and that he would be her best cousin.
>
> The applicant and A went to the bathroom adjoining the playroom. The applicant sat on the toilet with his pants down and placed A on top of him so they were facing each other. Whilst in that position he rubbed his exposed penis on A's exposed body in the area of her groin. (Form 1 offence - Aggravated Indecent Assault).
>
> Following this he lifted A's dress and licked her breasts (Form 1 Aggravated Indecent Assault).
>
> During the course of the evening the applicant took B into the room under the stairs and closed the door. He pulled down B's pants, licked his fingers and touched B in the anal area. A cousin came into the room and the incident ended.
>
> At approximately 10pm A and B left the house with their parents. Upon arriving home A made a disclosure to her parents about the act of cunnilingus. She told her parents she did not want to get the applicant into trouble as “he pinky promised me not to tell”. The following day she made further disclosures. A few days later B disclosed the incident involving her.
>
> On 4 October 2016 A was taken to Sydney Children's Hospital and the matter was reported to police.
>
> The applicant was arrested soon afterwards. He pleaded guilty at the earliest opportunity and was committed for sentence.

[2] (2014) 252 CLR 601; [2014] HCA 37.

10 A report from the Sydney Children's Hospital set out the impact of the offences on A. She was having a terrible time, "experiencing persistent nightmares and flashbacks of the assault, anxiety, mood swings, aggressive and escalated behaviours, and feelings of shame and confusion." She experienced "great reassurance and relief that the perpetrator of her sexual assault, [the applicant], is not present at school". She had attended five counselling sessions in the company of one or other of her parents.

The applicant's personal case and other matters in mitigation

11 At the forefront of the applicant's case before the sentencing Judge was the fact that he too was a child at the time of the offences and that the sentencing exercise should primarily focus on his rehabilitation.

12 The applicant was born in late May 2003. He was aged 13 years and 4 months at the time of the offences and 14½ years when sentenced. He had no previous encounters with the criminal law and came from a good family. His parents were separated and the applicant lived between the two homes. As a result of the offences, he was taken out of school because the victims attended the same school. His parents made arrangements for him to attend a different high school. A sentence of full-time imprisonment would disrupt his education.

13 Between the time of the offences and the date of sentence the applicant attended upon a psychologist (Mr Nunn) and had made significant progress in gaining an understanding of the nature of his offending and the consequences for the victims. Mr Nunn provided a report and gave evidence at the sentencing hearing. He said the applicant was intelligent and likeable and was "open to counselling and receptive to therapeutic intervention". He described the rapid developments in adolescent children, noting their vulnerability to mental health issues. The applicant had shown signs of depression since being taken out of school but there were no previous signs of mental health issues, prior offending or sexualised behaviour. Mr Nunn described the events of 2 October 2016 as "isolated". The applicant expressed "deep regret" and felt guilty for what he described as taking advantage of younger children who trusted him. He showed empathy and expressed concern for the impact of his behaviour on others. Mr Nunn's opinion was that the applicant "does not pose a risk to

members of the community" and "strongly recommended that [he] be able to continue his education and engage in ongoing counselling".

14 In cross-examination Mr Nunn addressed an issue concerning an incident that occurred when the applicant was 3 or 4 years-old that, so it was suggested, demonstrated "sexualised" behaviour. Mr Nunn did not consider the earlier incident to be of relevance. Caseworkers and psychologists retained by Juvenile Justice also investigated this earlier incident and came to the same conclusion as Mr Nunn.

15 There were two Juvenile Justice reports tendered during the sentencing proceedings dated 2 November 2017 and 8 December 2017. The reports were very positive, noting that the narrative of events was suggestive of "impulsive thinking and behavioural patterns with limited foresight into consequences." It was noted that the applicant now "acknowledges harm and wrongdoing and identified potential trauma the victims may endure". The first report stated:

> Without minimising the seriousness of his offending, it is respectfully highlighted that [the applicant] was 13 years old on the night of the offences. As such his capacity to challenge impulsive cognitions may have been limited. [The applicant] expressed feelings of embarrassment and guilt as a result of his actions.

16 The opinion of a psychologist engaged by Juvenile Justice included:

> There appears to be no consistent pattern of deviant arousal or child sexual abuse perpetrated by the young person and the offences appeared to be opportunistic in nature. Biological and psychosocial changes in adolescence and a premature exposure to pornography may have precipitated sexual offending. The current assessment has identified that at the time of offending, [the applicant] held attitudes and beliefs that justified and minimised his sexually abusive behaviour. As such, [the applicant] may benefit from psychoeducation and offence focussed counselling to address this and develop insight. [The applicant] presents with numerous protective factors against sexual recidivism, including a stable living and family environment, psychological stability, and an internal motivation to change for the better.

17 The second Juvenile Justice report set out the investigations into the so-called "sexualised" behaviour when the applicant was 3 or 4 years-old. The investigations were extensive. The authors of the report remained positive in their assessment of the applicant and supported a non-custodial sentencing alternative, notwithstanding the seriousness of the offences.

18 The applicant tendered a letter he wrote to the sentencing Judge. The letter apologised to the victims and demonstrated insight into his behaviour. He explained the benefits of his counselling sessions with Mr Nunn and set out the things he had learned since being charged. His father had taught him to "think ahead before I make any decision as it could change my life forever, just as this has done". On his father's advice he had implemented a "5 second rule", forcing him to think about the consequences of his actions before acting on his impulses.

19 The applicant's parents also provided a letter to the Court in which they spoke of the applicant's response to the disclosure of the offences and the difficulties he had endured. This included being subject to "malicious cyber bullying". His emotional state "was crumbling" and he went from being "a confident and popular 13 year old" to a "frail, vulnerable, defenceless child". The therapy with Mr Nunn had been of great benefit and the applicant had expressed "authentic remorse and regret" recognising that his actions were "unacceptable, illegal and inappropriate". He had constantly asked to be allowed to write a letter of apology to his cousins but his bail conditions prohibited any contact.

The criminal liability and punishment of children

20 Before turning to the grounds of appeal it is worth emphasising that the criminal law in Australia treats children differently to adults who commit criminal offences. This is the result of the common law, legislation and, to a lesser extent, an international treaty to which Australia is a party. The critical statute in New South Wales is the *Children (Criminal Proceedings) Act 1987* (NSW) ('*CCP Act*').

21 Section 5 of the Act creates a conclusive presumption that no child under the age of 10 years can be guilty of an offence. The common law creates a presumption that a child under the age of 14 years "lacks the capacity to be criminally responsible for his or her acts".[3] This is known as "doli incapax" (incapacity for crime).[4] The rationale for the presumption is that children are "not sufficiently intellectually and morally developed to appreciate the

[3] RP v The Queen [2016] HCA 53 at [4].
[4] Ibid at [38] (Gageler J).

difference between right and wrong and thus lack the capacity for *mens rea*".[5] To rebut the presumption the prosecution must establish beyond reasonable doubt that the child knew that the act constituting the crime with which they are charged is "gravely wrong" or "seriously wrong". No matter how obviously wrong that act is, the presumption cannot be rebutted by reference to the act alone.[6] What suffices to rebut the presumption will vary from case to case and the High Court in *RP v The Queen* explained some of the ways in which the presumption might be displaced.[7] It requires a consideration of the child's capacity to comprehend the wrongfulness of their acts and "directs attention to the intellectual and moral development of the particular child".[8]

22 In the present case, the applicant admitted that he knew what he did was seriously or gravely wrong by admitting and pleading guilty to the offences.

23 If the presumption is rebutted, or if the child pleads guilty, he is liable to punishment. However, the sentencing regime applying to children is also very different to that applying to adults. At its core, that regime focuses on the desirability of fostering the rehabilitation of children.

24 Where the child is to be punished for committing a "serious children's indictable offence" the child is to be dealt with "according to law".[9] A serious children's indictable offence is defined in s 3 of the *CCP Act*. The definition includes offences carrying a maximum penalty of 25 years or life imprisonment. In the applicant's case, each of the offences of sexual intercourse with a child under 10 years carried a maximum penalty of life imprisonment. Accordingly, he was to be dealt with according to law for those offences.

25 Where the child is charged with any other indictable offence, the sentencing court must determine whether to sentence them according to law or in accordance with Division 4 of Part 3 of the *CCP Act*.[10] That Division provides for different and specific penalties. Section 17 provides the criteria by which the determination is to be made. In the applicant's case, the sentencing Judge

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[5] Ibid at [8] (Kiefel, Bell, Keane & Gordon JJ).
[6] Ibid at [9].
[7] [2016] HCA 53.
[8] Ibid at [12].
[9] Children (Criminal Proceedings) Act 1987 (NSW), s 17.
[10] Ibid, s 18.

(correctly and uncontroversially) determined to deal with the applicant according to law in relation to the charges of aggravated indecent assault.

26 The fact that a child is to be dealt with according to law does not displace the general provisions in the *CCP Act* concerning the treatment of children under the criminal law. The central provision is s 6:

> **6 PRINCIPLES RELATING TO EXERCISE OF FUNCTIONS UNDER ACT**
>
> A person or body that has functions under this Act is to exercise those functions having regard to the following principles:
>
> (a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,
>
> (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,
>
> (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,
>
> (d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,
>
> (e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,
>
> (f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,
>
> (g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,
>
> (h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

27 It is significant that paragraph (h) provides that the effect of the crime on the victim (or victims) is to be considered but that this is "subject to" the principles set out in paragraphs (a)-(g).

28 This provision echoes the articles of the *Conventions on the Rights of the Child* to which Australia is a signatory.[11]

29 The fundamental principles set out in s 6 remain relevant where the offence is to be dealt with according to law: see for example *Regina v SDM.*[12]

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[11] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), see for example, Article 3.1, 9.1, 28-29, 37, 40.

[12] [2001] NSWCCA 158; (2001) 51 NSWLR 530 at [22] (Simpson J).

30 In *R v Elliott and Blessington*[13]*,* Kirby J (dissenting in the outcome) observed that "a jurisprudence has developed in the context of sentencing young offenders, which recognises the important differences, in terms of responsibility, between adults and children." His Honour referred to *Slade v The Queen,*[14] where the New Zealand Court Appeal appeared to accept the following opinion of a psychologist:

> It is widely accepted that adolescents do not possess either the same developmental level of cognitive or psychological maturity as adults (Steinberg & Scott, 2003). Adolescents have difficulty regulating their moods, impulses and behaviours (Spear, 2001). Immediate and concrete rewards, along with the reward of peer approval, weigh more heavily in their decisions and hence they are less likely than adults to think through the consequences of their actions. Adolescents' decision-making capacities are immature and their autonomy constrained.

31 In *MS2 & Ors v Regina,*[15] Adams J identified two of the reasons that the youthfulness of an offender is considered to be a significant factor in sentencing. The first is the “substantial public interest in the rehabilitation of young offenders”.[16] The second is “that immaturity is relevant to culpability or criminality” because “children do not have adult value judgments, adult experience, adult appreciation of consequences”.[17]

32 When children are to be sentenced, greater weight is given to rehabilitation and less weight to deterrence: see, for example: *R v GDP* and *KT v R.*[18] However, the closer a child is to adulthood and the more serious the offending, the more likely that deterrence and retribution will be significant factors.

Ground 1: The sentencing judge erred in finding that the Crown's concession that a sentence other than full-time custody was within range was wrong in sentencing principle

33 The prosecutor’s concession came towards the end of the sentencing submissions made in the District Court where the Crown Prosecutor said:

> Your Honour, ultimately the Crown agrees with the defence that given the youth of the offender rehabilitation is a primary focus. Your Honour has the authority that the Crown provided on the last occasion which provides some

[13] [2006] NSWCCA 305; (2006) 68 NSWLR 1 at [127].
[14] [2005] NZCA 19; [2005] 2 NZLR 526 at [43].
[15] [2005] NSWCCA 397; (2005) 158 A Crim R 93.
[16] Ibid at [15].
[17] Ibid at [16].
[18] (1991) 53 A Crim R 112 at [115]-[116], [2008] NSWCCA 51; (2008) 182 A Crim R 571 at [22]-[26] (McClellan CJ at CL).

> examples, that is *RP v Regina*, starting at Para 108 of a series of cases in which certain sentences have been imposed. Obviously each case will turn on its own facts. It is within your Honour's sentencing discretion to impose a sentence other than full-time, but of course, as indicated in that earlier judgment, it is not the case that young persons placed in this position, it is to be assumed will always receive non-custodial sentences.
>
> Unless there is something you require specific assistance with?

34 The sentencing Judge replied "No. Thank you, Madam Crown" and called on Senior Counsel for the applicant for any submissions in reply.

35 The Crown Prosecutor's submission was balanced and fair. The sentencing Judge did not invite any elucidation of the submission that a sentence other than full-time custody was within the range of his sentencing discretion. However, in the remarks on sentence the sentencing Judge criticised the submission, saying:

> Counsel for the offender submitted that a custodial sentence was not required or appropriate. The Crown even went so far as to concede that a sentence other than full-time custody was within range. I do not agree.

36 His Honour went on to describe the behaviour of the offender (quite correctly) as "serious criminal behaviour involving multiple offences committed on two family members, significantly younger than he was, in circumstances where the offender knew what he was doing was seriously wrong." He then said:

> The Crown's concession was contrary to both sentencing principle and inconsistent with the comparative cases which the Crown provided to me.

37 The applicant's case is that this passage disclosed error in two respects. First, a careful analysis of the comparable cases to which his Honour was referred and considered in *RP v R* demonstrates that serious sexual offending committed by children as young as the applicant does not necessarily result in full-time incarceration.[19] Accordingly, it was wrong to conclude that the Crown's concession was "inconsistent with the comparative cases which the Crown provided" at the sentencing hearing. The second error asserted was that it is not apparent what "sentencing principle" his Honour was referring to.

38 It is unnecessary to examine in great detail the comparative cases because, as the Crown submitted at first instance, and the parties agreed on the hearing of the appeal, each case necessarily turns on its own facts. However, the

[19] [2015] NSWCCA 215.

comparable cases do demonstrate that there is considerable flexibility in sentencing young offenders even where, as here, had the sexual offending been committed by an adult an extremely long sentence of full-time imprisonment would be imposed. The comparable cases included examples of serious sexual offending which did not result in the imposition of full-time custodial sentences.[20] In other cases, sentences of full-time imprisonment imposed on young offenders resulted in successful appeals and resentencing whereby the applicant was immediately or soon released from custody.[21]

39 *RP v R* itself was a case where the High Court intervened to quash the convictions altogether on the basis that the evidence was not capable of displacing the presumption of *doli incapax*.[22] This Court had, by majority, dismissed the appeal against conviction and sentence but (in dissent) I would have quashed one, but not both, of the convictions ultimately quashed by the High Court) and concluded that the sentence should be suspended.[23] A significant distinguishing feature of *RP v R* was that the offences in question took place over a period of months and involved separate and distinct incidents whereas all of the offences in the present case took place in the course of one evening.[24]

40 Further, it is not apparent what his Honour meant when he said that the Crown's concession was “contrary to sentencing principle". The applicable principles in sentencing children are those discussed earlier in this judgment. Counsel for the respondent could not identify any general “sentencing principle” to which his Honour may have been referring. He submitted that the "sentencing principle" his Honour had in mind must have been the application of general principles to the sentencing outcome in this particular case. Needless to say, this is not a “sentencing principle” in any real sense. If his Honour meant by this remark that there was a sentencing principle that

[20] See for example AEL v R [2007] NSWCCA 97 where the child offender was originally placed on a bond. It was only after repeated breaches of the bond that a full time custodial sentence was imposed. See also BP v Regina, SW v Regina [2006] NSWCCA 172 in which SW was sentenced to a 2 year suspended sentence.
[21] See Regina v JDB [2005] NSWCCA 102, Regina v KBM [2004] NSWCCA 123 and Regina v KLH [2004] NSWCCA 312.
[22] RP v The Queen [2016] HCA 53.
[23] RP v R [2015] NSWCCA 215 at [172]-[181].
[24] [2016] HCA 53.

children charged with offences of this kind and seriousness could never escape a full-time custodial sentence, his Honour fell into error. As Senior Counsel for the applicant submitted, the passage suggests that the sentencing Judge (incorrectly and impermissibly) felt himself "constrained" in the exercise of the sentencing discretion and bound to impose a full time custodial sentence.[25] He was not so bound.

41 I am satisfied that ground 1 should be upheld.

Ground 2: The sentencing judge erred in failing to consider an alternative to full-time custody

42 In some respects, the submissions under this ground overlapped with the submissions concerning ground 1 and the written submissions dealt with the grounds together. Judge Berman's rejection of any alternative to full-time imprisonment was encompassed in the passages to which ground 1 related. It is clear that his Honour felt that there was no alternative to a full-time custodial sentence and this was made plain throughout his remarks.

43 There were, however, at law and on the evidence led on sentence, a number of alternatives available to the Court. Whether those alternatives were appropriate was a matter to be considered as part of the instinctive sentencing synthesis in two ways. The first flowed from the command in s 5(1) of the *Crimes (Sentencing Procedure) Act*:

> (1) A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.

44 The Juvenile Justice reports dealt with alternatives to any sentence of imprisonment. This included the imposition of a "community based order" with supervision and an individual case plan including strategies to address the applicant's areas of need. The report said:

> [The applicant] is eligible to be sentenced to a community-based order. If such an order is made, Juvenile Justice is able to provide ongoing supervision. Should the Court impose a community-based order with Juvenile Justice supervision, an individualised case plan would include strategies to address the areas of need aforementioned in the previous report.

[25] Cf Robertson v R [2017] NSWCCA 205 at [97] (Simpson JA) and Parente v R [2017] NSWCCA 284.

45 The report said that "the applicant's criminogenic needs are able to be met via a community-based order" and that "the court may wish to include Juvenile Justice supervision to ensure [the applicant] receives offence focused intervention."

46 It was open to the Judge to decide that such an order was not an appropriate alternative in view of the seriousness of the offences and it is clear that his Honour did so. However, there is nothing in the remarks on sentence to suggest that this alternative was specifically considered, as s 5 required. The conclusion that no penalty other than a sentence of imprisonment was appropriate is clearly implicit in his Honour's remarks on sentence and I would not, by virtue of this matter alone, have concluded that ground 2 was established.

47 His Honour, having concluded that the term of imprisonment should be one of 2 years or less, also had to give consideration to alternatives other than a full-time custodial sentence. There was at least one alternative available under s 12 of the *Crimes (Sentencing Procedure) Act*. The outcome urged for the applicant in the court below, which was accepted by the Crown to be a possible lawful outcome, was that a sentence of imprisonment might be imposed, but the sentence be suspended, subject to a conditional bond.

48 While it is also implicit in Judge Berman's remarks that his Honour rejected a suspended sentence as an appropriate sentencing outcome, the remarks did not explain why his Honour concluded that outcome was not appropriate, even though the law required that the rehabilitation of the applicant should be the primary focus of the proceedings.

49 In *Parente v R* a specially constituted bench of five (considering the appropriate approach to sentencing in drug cases) said:[26]

> 113 Finally, it is a requirement of the *Crimes (Sentencing Procedure) Act* that, 'A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate' (s 5(1)). This is a consideration of the possibility of options such as a fine, a bond, or a community service order (at present) rather than of the possible alternative ways in which a sentence of imprisonment might be served (presently, by way of full-time imprisonment,

[26] [2017] NSWCCA 284 at [113]–[115].

home detention or an intensive correction order). As Simpson JA noted in *Robertson v R* at [97]:

> 'T]here is nothing in s 5 that directs a judge, having decided that no alternative to imprisonment is a viable option, then to exclude from consideration any non-custodial means by which the sentence may be served.'

114 What her Honour said is consistent with the approach endorsed by this Court: *R v Foster* [2001] NSWCCA 215; 33 MVR 565 at [30]; *R v Zamagias* [2002] NSWCCA 17 at [22]-[29]; and *Douar v R* [2005] NSWCCA 455; 159 A Crim R 154 at [70]-[72]. That approach is to determine:

> (1) whether no sentence other than imprisonment is appropriate (regardless of how it might be served);
>
> (2) if so, the length of such a sentence (regardless of how it might be served); and
>
> (3) whether any alternatives to full-time incarceration are available and appropriate.

115 As to the appropriateness of imposing a sentence of imprisonment to be served in some alternative way, it is important to have regard to the following from the judgment of Howie J in *R v Zamagias* at [28] (and see similarly in the judgment of Johnson J in *Douar v R* at [72]):

> 'T]he appropriateness of an alternative to full time custody will depend on a number of factors, one of importance being whether such an alternative would result in a sentence that reflects the objective seriousness of the offence and fulfils the manifold purposes of punishment. The court in choosing an alternative to full time custody cannot lose sight of the fact that the more lenient the alternative the less likely it is to fulfil all the purposes of punishment.' (Citation of authority omitted)

50 Again, the Juvenile Justice report made reference to this alternative to a full-time gaol sentence. The report said:

> **Suspended control order**
>
> It is respectfully highlighted to the court that a custodial sentence is not the preferred option, due to [the applicant's] prospect for rehabilitation via community engagement and protective factors outlined in the previous report. If the Court deems a custodial sentence is the most appropriate option, it is again, respectfully highlighted that [the applicant] is eligible to be sentenced to a suspended control order with juvenile justice provision.

51 This passage, and statements to similar effect in the other reports were not referred to in any detail by the sentencing Judge. Nor did his Honour explain why this alternative was not, in all of the circumstances, appropriate.

52 I am satisfied that the sentencing Judge erred in failing to consider an alternative to full-time custody and that ground 2 should also be upheld.

53 Before leaving this ground, I should make it clear that a failure to approach the matter in two stages, as may be suggested by the passages from *Robertson*, *Parente* and *Zamagias* to which I have just referred, is not itself indicative of sentencing error. However, compliance with s 5 is a mandatory requirement and, where a sentence of less than 2 years is imposed and there are clear alternatives available, the preferable course is to make it clear that such alternatives have been considered and explain why they are not appropriate.

Grounds 3 and 4

3. The sentencing Judge erred in assessing the seriousness of the offence

4. The sentencing Judge erred in finding that the applicant used his position as a trusted family member to commit the offences

54 It is appropriate to deal with these grounds together because the error asserted by ground 4 is a specific aspect of the more general error asserted by ground 3. I have concluded that these grounds have also been established.

55 On a number of occasions in the course of the remarks on sentence, the sentencing Judge referred to the fact that the applicant acknowledged that he knew that the offending was "seriously wrong". Clearly enough, this was a reference to the fact that, by his plea of guilty, the applicant had eschewed reliance on the “defence” of *doli incapax*.[27] By his plea of guilty, the applicant acknowledged that he knew that what he was doing was seriously wrong and that his behaviour was at a level far higher than "mere naughtiness". That formal admission did not mean that he had the same appreciation of the wrongfulness of his act, or the same understanding of its possible impact on the victims, as would an adult or even an older teenager. The applicant was, after all, a 13 year-old child when he committed the offences. He was a little over 14 years-old when he was sentenced. The reports emphasised the impulsivity of the offences and the relevance of the applicant’s youth and less developed decision making capacity.

56 Further, the description of the offences provided in the summing up did not highlight the apparent brevity of the assaults. In particular, the offence of sexual intercourse (by cunnilingus), according to the agreed facts, occurred for

[27] RP v The Queen [2016] HCA 53 at [4], [8]-[12] (Kiefel CJ, Bell, Keane and Gordon JJ) and [38] (Gageler J).

"a second". His Honour said "the [applicant] then performed cunnilingus on [A] for a short time." A "short time" is a relative term. It might encompass an offence that takes place over "a second" but, equally, it could describe a crime that occurred over several minutes or longer. The description of the offence in the agreed facts, while not literally a reference to a unit of time comprising *one* second, was a reference to an act lasting for a moment. Times are not specified in relation to the other offences but the descriptions in the agreed facts suggest they were brief. For example, the offence of sexual intercourse (digital penetration) was described as "the offender put one finger in her [vagina] and it hurt." No doubt because of the tender age of the victims it was difficult to be more precise, but the agreed facts suggest that the whole incident involving A was opportunistic and brief, even taking into account that the two children moved from the area under the stairs to the bathroom where the final act of aggravated indecent assault took place.

57 None of this is to underestimate the seriousness of the offending, or to ignore the devastating impact of the offences on the victims. However, the offences were opportunistic and involved no planning at all. These important matters were not emphasised in his Honour's remarks on sentence.

58 Further, as contended by ground 4, the sentencing Judge erred by aggravating the assessment of the applicant's criminality by reference to his finding that "the offender used his position as a trusted member of the family to do what he did despite knowing that what he was doing was seriously wrong." While his Honour was probably not identifying the matter as an "aggravating factor" under s 21A(2)(k),[28] it is clear the offences, objectively, were treated more seriously because the applicant "used his position as a trusted family member to do what he did." The reality was that the applicant was one of a number of children present at a family function at a time when all of the adults were in one room and the group of children, of which the applicant was a member, were playing a game of hide and seek. There is nothing in the record of proceedings to support a finding that, in those circumstances, the applicant used any relevant position of trust in a calculated way. The evidence did not establish

[28] Section 21A(2)(k) of the Crimes (Sentencing Procedure) Act identifies provides that it is an aggravating factor if "the offender abused a position of trust or authority in relation to the victim".

that he was determined to abuse his younger cousins because of the opportunity that arose by virtue of the trust that the older members of the extended family had placed in him.

59 A similar ground of appeal was upheld in the case of *RP v R*.[29] RP was aged between 11½ and 12½ years of age at the time of the offences. His father left him in charge of his 6-7 year-old brother and another sibling. In assessing the object seriousness of the offences, the sentencing Judge said "the relationship between the complainant and the offender is also of some relevance in that, to a degree, the offender was in a position of trust with respect to the complainant." Davies J concluded at [83] that the Judge (contrary to the applicant's submission) did not take the matter into account under s 21A(2)(k) but held at [84] "nevertheless, on the basis of the evidence … it was not open to his Honour to conclude that the applicant was in a position of trust with respect to the complainant." Johnson J agreed with Davies J. I agreed with Davies J on this issue and added at [168]:

> The judge erred in finding that a child aged 11 or 12 years of age left in charge of his two younger siblings should be considered in a position of trust for the purposes of sentencing.

60 The sentence actually imposed on the present applicant, given his personal circumstances, also gives rise to an inference that the sentencing Judge erred in his assessment of the objective criminality of the offences.

61 Taking all of these matters into account, I am satisfied that the applicant has made good his complaint under grounds 3 and 4.

Ground 5: The sentencing Judge erred in arriving at indicative sentences that would have been manifestly excessive had they been imposed, and in arriving at an aggregate sentence that is manifestly excessive

62 Because error is established under the specific grounds of appeal, it is unnecessary to consider this ground. The Court must determine whether a "different (less severe) sentence is warranted" and, if so, decide whether to impose that sentence or to remit the matter to the District Court. In those circumstances, it is not necessary to determine whether the sentence, of itself,

[29] [2015] NSWCCA 215 at [81]-[87] (Davies J, Johnson J agreeing) and [168] (Hamill J). This part of the decision was not considered by the High Court.

manifested error in the sense that it was unjust, "plainly wrong" or "manifestly unreasonable".[30]

Ground 6: The sentencing proceedings miscarried because of the inclusion on a Form 1 of a charge of sexual intercourse with a child under the age of ten years, contrary to s 66A(1) of the Crimes Act 1900 (NSW) [31]

63 There were two Form 1 documents before the sentencing Judge. These set out the offences the applicant asked the sentencing Judge to take into account in sentencing him for the two offences of sexual intercourse with a child under 10 years. He was not to be sentenced separately for those offences but they increased the weight to be given to personal deterrence and retribution. The procedure is permitted by ss 31-35A of the *Crimes (Sentencing Procedure) Act.* The operation of these provisions has been considered in a number of cases.[32]

64 The first Form 1 in the applicant's case attached to the offence of sexual intercourse with a child under 10 years (the act of intercourse being fellatio). The second offence on the Form 1 was another offence of sexual intercourse with a child under 10 (in this case, the act being the act of digital penetration). This is an offence contrary to s 66A of the *Crimes Act* and carries a maximum penalty of life imprisonment.

65 Section 33(4)(b) of the *Crimes (Sentencing Procedure) Act* provides:

> (4) A court may not take a further offence into account:
>
> …
>
> (b) if the offence is an indictable offence that is punishable with imprisonment for life.

66 It is clear that the statute did not permit the sentencing Judge to take into account under s 33 the offence of sexual intercourse with a child under 10 years. That offence should not have been included on the Form 1 document. The Respondent's concession that this ground is established is properly made.

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[30] Criminal Appeal Act, s 6(3); Dinsdale v R (2000) 202 CLR 321; [2000] HCA 54.

[31] This paraphrases the amended ground of appeal articulated at the hearing and in relation to which the Court gave leave to amend the notice of appeal: Tcpt, 26 March 2018, pp 6 and 20.

[32] Most significantly, see the judgments of benches of five judges in Abbas, Bodiotis, Taleb and Amoun v R [2013] NSWCCA 115, 231 A Crim R 413 and Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002 (2002) 56 NSWLR 14; [2002] NSWCCA 518.

The appropriate disposition of the appeal

67 As a number of the grounds of appeal have been upheld, it is necessary to consider the appropriate orders to be made. The applicant submitted that the Court should proceed to re-sentence under s 6(3) of the *Criminal Appeal Act*. The respondent submitted the better course was to remit the matter to the District Court for re-sentence pursuant to the supplementary powers provided for in s 12(2). If the Court was to form the view that no different (less severe) sentence is warranted, it would dismiss the appeal.[33] If it is of the view that a less severe penalty is warranted, it must consider the alternative dispositions contended for by the parties.

68 The erroneous inclusion of an offence carrying life imprisonment on the Form 1 attaching to the first charge creates a complication in re-sentencing the applicant. There is no provision under the *Criminal Appeal Act* to allow the Court to sentence in relation to the outstanding count under s 66A, that is the offence mistakenly included on the Form 1. The circumstances do not fit within the "Powers of the Court in Special Cases" provided for in s 7 of the *Criminal Appeal Act*. It is obviously inappropriate to sentence on the basis that the additional s 66A is taken into account pursuant to ss 32-33 of the *Crimes (Sentencing Procedure) Act*. That would compound the error made in the Court below and the sentence imposed on appeal would be infected by the same legal error.

69 It is open to the Court to re-sentence on the basis of the facts tendered in the Court below, but not to impose a separate sentence in relation to the count involving digital penetration or to take the matter into account in the ways described by the Chief Justice in *Abbas and Ors*.[34] Contrary to the respondent's submission, this would not be in breach of the principles described by the High Court in *The Queen v De Simoni.*[35] It is reasonably common for particular criminal acts that form part of a course of conduct not to be charged individually. The sentencing court may take those uncharged acts

[33] Kentwell v The Queen (2014) 252 CLR 601; [2014] HCA 37 at [34].
[34] Above n 32.
[35] (1981) 147 CLR 383; [1981] HCA 31.

into account as indicating that the charged offences were not isolated and in order to understand the context in which the charged offences were committed.

70 Approaching the matter in that way and taking into account the principles of sentencing children, the particular facts of this case including the impact of the offence on the victims and the personal circumstances of the applicant, I am satisfied that a less severe sentence was warranted and ought to have been imposed. I have considered the additional material tendered by the applicant on the usual basis and, in particular, have noted that he is doing well at his new school. I have taken into account the desirability that his education not be disrupted.[36]

71 I am satisfied, having considered all possible alternatives, that a sentence of imprisonment is the only appropriate sentencing option.[37] However, if I were inclined to re-sentence, that sentence would be substantially less than 2 years. In accordance with the various reports provided by Juvenile Justice, the other subjective material and the principles central to the sentencing of children, I would order that the sentence be suspended under s 12 of the *Crimes (Sentencing Procedure) Act*. The suspended sentence would be subject to the applicant entering a bond with conditions and supervision. Having reached that conclusion, the appeal should be allowed.

72 However, the question remains whether such a sentence should be imposed on appeal or whether the better course is to remit the matter to the District Court. Section 12 of the *Criminal Appeal Act* provides the Court with certain "supplemental powers". These include the power "to remit a matter or issue to the court of trial for determination".[38] The circumstances in which this power will be exercised are varied and cannot be predicted in advance. For example, in *R v Leete* the Court upheld an appeal and remitted the matter to the District Court because (amongst other things) there was no up to date pre-sentence report.[39] Similarly, in *R v Mark Anthony Cooney* the Court remitted a matter, having upheld the appeal, on the basis that it did not have available "all the necessary

[36] See Children (Criminal Proceedings) Act 1987 (NSW), s 6(c).
[37] See Crimes (Sentencing Procedure) Act 1999 (NSW), s 5(1).
[38] Criminal Appeal Act 1912, s 12(2).
[39] [2001] NSWCCA 337; (2001) 125 A Crim R 37 at [33].

material to enable it to embark upon the task of resentencing".[40] In *Raymond John Munro v R* the Court remitted a matter where further evidence needed to be adduced concerning the applicant's deprived background and the Crown indicated it wished to test some of the proposed evidence.[41]

73 In the present case, it is not certain what the Director of Public Prosecutions will do with the outstanding charge under s 66A involving the allegation of digital penetration. At the hearing of the appeal, counsel for the respondent indicated that the matter had been raised "in a pertinent way this morning" (which I take to mean with the Director's office) and that "the likelihood is that it would proceed." If the Director exercises his discretion in this way, the applicant would be in a position where he would face a separate sentencing hearing at some stage in the future. It is obviously undesirable that the applicant be subject to sentencing in this Court and then be brought before the District Court on another, closely related, charge.

74 In *Clappison v R* the Court considered a similar case where an offence carrying a maximum penalty of life imprisonment was included on a Form 1.[42] Latham J (with whom Hoeben CJ at CL and Johnson J agreed) held that remittal to the District Court was "the only course available in the circumstances of [that] appeal."[43] As with the three cases referred to in the preceding paragraph, the Court allowed the appeal, quashed the sentence and remitted the matter for sentence in the District Court.

75 I am not convinced that remittal is the "only" course available in the applicant's case, but I am persuaded that it is the most desirable one. It would be possible to proceed to resentence, taking into account the digital penetration offence in the limited way envisaged above at [69]. However the Court proceeds, on the tentative indication provided by the Director through counsel, that the applicant faces the likelihood of again being required to appear for sentence in the District Court. The circumstances are such that there is no course that would guarantee that the matter will be brought to finality with the publication of this

[40] [2004] NSWCCA 255 at [34].
[41] [2006] NSWCCA 350.
[42] [2017] NSWCCA 33.
[43] [2017] NSWCCA 33 at [13].

Court’s judgment. For those reasons, I accept the respondent’s submission that it is appropriate to remit the matter to the District Court for sentence.

76 The orders I propose are as follows:

(1) Leave to appeal granted.

(2) Allow the appeal.

(3) Quash the sentence imposed by the District Court on 14 December 2017.

(4) Remit the sentencing proceedings to the District Court to be dealt with according to law.

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Amendments

08 May 2018 - 08 May 2018 - "(a pseudonym)" removed from the name of the judgment.