SUPREME COURT OF QUEENSLAND

CITATION:	*R v Margaritis; Ex parte Attorney-General (Qld)* [2014] QCA 219
PARTIES:	**R** **v** **MARGARITIS, Luke Euthimios** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 47 of 2014 DC No 6 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	2 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	25 July 2014
JUDGES:	Muir JA and Philip McMurdo and Peter Lyons JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal be dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY INADEQUATE – where the respondent was convicted after a plea of guilty to one count of supplying a dangerous drug with a circumstance of aggravation and three counts of indecent treatment of a child under 16 – where the respondent was sentenced to a term of imprisonment for 12 months with a parole eligibility date of 13 July 2015 for each offence – where the terms were made concurrent but were ordered to be served cumulatively upon a four year term of imprisonment for prior maintaining offences – where the respondent was eligible to apply for parole on 13 March 2015 – where the respondent was one of the complainant's teachers – whether the primary judge misapplied the totality principle – whether the sentence was manifestly inadequate *Dinsdale v The Queen* (2000) 202 CLR 321; [2000] HCA 54, cited *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45, considered

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, considered
Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, cited
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, followed
R v Baker [2011] QCA 104, cited
R v Denboon [1993] QCA 357, considered
R v F [1998] QCA 131, considered
R v K [1995] QCA 226, considered
R v Knight (2005) 155 A Crim R 252; [2005] NSWCCA 253, cited
R v M, ex parte Attorney-General of Queensland [2000] 2 Qd R 543; [1999] QCA 442, considered
R v MAK (2006) 167 A Crim R 159; [2006] NSWCCA 381, followed
R v Margaritis [2013] QCA 401, considered
R v Reading; ex parte Attorney-General of Queensland [2002] QCA 278, considered
R v Schneider; ex parte A-G (Qld) [2008] QCA 25, considered
Vlek v The Queen [1999] WASCA 1038, followed

COUNSEL: M R Byrne QC for the appellant
S A Lynch for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Trevor Watt & Associates for the respondent

[1] **MUIR JA**: **Introduction** The respondent was convicted on 19 February 2014 after a plea of guilty to one count of supplying a dangerous drug with a circumstance of aggravation and three counts of indecent treatment of a child under 16. He was sentenced to a term of imprisonment for 12 months with a parole eligibility date of 13 July 2015 for each offence. The terms were made concurrent but were ordered to be served cumulatively upon a four year term of imprisonment commencing on 13 March 2013 imposed on that date for offences of maintaining an unlawful relationship of a sexual nature with another child under 16 years with a circumstance of aggravation. The respondent's full time discharge date under the earlier sentences was 12 March 2017. He was eligible to apply for parole on 13 March 2015. The appellant appeals against the sentences on the grounds of manifest inadequacy.

[2] All the subject offending took place on an unspecified date between 31 December 1993 and 1 January 1995. The complainant boy was aged 14 or 15. The respondent was one of his teachers. He was then 25 or 26 years of age.

The offending conduct

[3] The complainant, when in grade 10, went on invitation to the respondent's house where he found the respondent and two friends drinking and smoking pot. The respondent packed a "really huge cone" of cannabis for the complainant who smoked it (count 1). He was also offered alcohol. After he smoked the cannabis, he

felt very sick and was told by the respondent to lie down on the respondent's bed. He did so.

[4] The respondent played a pornographic film on the television in the bedroom (count 2). He then lay on the bed next to the complainant, pulled down the complainant's pants and underpants, took off his own pants and underpants and performed oral sex on the complainant until the complainant ejaculated (count 3). The complainant then started to perform oral sex on the respondent but stopped when he felt sick (count 4). He put his clothes back on and fell asleep on the bed.

[5] The respondent drove the complainant home. He gave the complainant some pot and told him that if he told anyone about what had happened he would have him killed.

[6] The complainant had no further sexual encounters with the respondent but subsequently went to the respondent's house to socialise and was supplied by the respondent with cannabis.

The later offending

[7] The complainant in respect of the maintaining offence which was committed between the end of February and the beginning of December 1995 was also one of the respondent's pupils. He was aged 13 or 14 at the time of the offending that involved the respondent: showing the complainant pornographic films (counts 2 and 3); performing fellatio on him (count 4); touching his penis through his shorts (count 5); showing him a pornographic film (count 6); fellating him (count 7); supplying him with cannabis (count 8); rubbing and touching his penis through his shorts (count 10); procuring him to touch the respondent's penis through his clothing (count 11); and committing fellatio on the complainant (count 9). The offending conduct occurred in the respondent's home on three separate occasions.

[8] The sentence of five years imprisonment imposed in respect of count 1, the maintaining count, was reduced on appeal to four years imprisonment.

The respondent's antecedents

[9] It is useful to quote paragraphs in the reasons of Gotterson JA[1] in the respondent's appeal against his 13 March sentence that record the respondent's personal circumstances and antecedents:

> "[21] The [respondent] was 26 and then 27 years old at the time of the offending. He was 44 years old at the time of [the earlier] sentence. He was educated to tertiary level having obtained the degree of Bachelor of Applied Science in Built Environment, Architecture and Industrial Design and a graduate Diploma in Secondary teaching.
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> [22] From January 1991 to August 1998 he worked at the secondary school which the complainant attended. Contemporaneously with that, he built a house renovation business which in due course became insolvent. In 1998 he left Australia and lived

[1] *R v Margaritis* [2013] QCA 401 at [21]–[24].

> in the United Kingdom until the end of 2010 when he returned and began to reside in a rural town in Western Australia. He was employed there as a secondary school teacher from January 2011 until his arrest in March 2012. He set up, with his employer's approval, a renovation and repair business and also established a monthly community market for which he received an Australia Day award from the local council.
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> [23] The [respondent] was extradited to Queensland by consent. Here, while he was on bail, he obtained employment as a catering supervisor and worked at weekends. As well, he set up and furnished a coffee shop which he was forced to close once he was sentenced to imprisonment.
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> [24] The [respondent] had no prior criminal history."

The appellant's argument

[10] The appellant submitted as follows. The effective sentence of five years imprisonment, with parole eligibility after 28 months, imposed by the primary judge was manifestly inadequate having regard to the respondent's overall criminality. That criminality involved the respondent targeting, on separate occasions, two students at his school to satisfy his own sexual interests and the use of alcohol and/or drugs to achieve his goals. The fact that two children were involved on separate occasions adds a considerably different dimension to the respondent's offending compared with the respondent's 1995 offending.

[11] The complainant was a vulnerable child. On attending the respondent's premises, he was disinhibited or disadvantaged by cannabis provided by the respondent and taken advantage of. The fact that the respondent felt the need to threaten the complainant evidenced the respondent's awareness that the complainant was not a completely willing party. That circumstance is also evidenced by his distancing himself from the respondent after the incidents.

[12] The application of the totality principle does not require that there must invariably be some reduction in the accumulation of otherwise appropriate sentences to avoid the so called "crushing" effect. The appropriate course is to arrive at an appropriate sentence and then assess the cumulative effect to gauge whether the overall sentence is disproportionate to the offender's criminality.[2]

[13] When considered in the light of the totality principle, the present offences lose their characterisation as an isolated series of offences on the one day. The sentencing judge made that point in the course of submissions but his apparent reliance on sentences for single or very abbreviated, close in time offending and the imposition of a head sentence less than those sentences suggests that the sentencing judge has accepted 18 months imprisonment as an appropriate sentence and then reduced it to accommodate the totality principle.

[14] The sentencing judge did state that he needed to impose a sentence which took into account the "totality of the sentence you would get for the combined offences against the two boys". Nevertheless, the resulting sentences appear to be the product of

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2 *Mill v The Queen* (1988) 166 CLR 59; *R v Baker* [2011] QCA 104 at [39], [47].

a different process. They are effective sentences of five years imprisonment with parole eligibility after 28 months. They are manifestly inadequate having regard to the respondent's overall criminality, regardless of what processes were used to arrive at the sentences imposed.

The respondent's argument

[15] The respondent took no issue with the appellant's statements of principle. Reliance was placed on *R v Reading; ex parte Attorney-General of Queensland*[3] and *R v F*.[4]

[16] In *Reading*, the 69 year old offender was sentenced, after pleas of guilty, to effective terms of three years imprisonment for each of three offences of maintaining a sexual relationship with a girl under 16 and 12 months of imprisonment for each of 16 counts of unlawfully procuring a child under 16 to commit an indecent act. The ages of the five children involved ranged from 10 to 14 years. Over a period of about four to five months, the complainants, either individually or in groups, were paid by the offender to masturbate him. On occasions, a complainant would insert a finger in the offender's anus in order to stimulate an ejaculation. In his reasons, McPherson JA said that the most serious feature of the offending was the offender's conduct in paying young girls to engage in such revolting behaviour. It was a corrupting form of conduct that society could not condone.[5] The sentences imposed for the maintaining offences were increased from three to five years with a recommendation for parole after two years. Initially, parole was recommended after 12 months.

[17] In *F*, the 49 year old offender, with no relevant prior convictions, was sentenced to concurrent terms of imprisonment of seven years for each of four offences of maintaining a sexual relationship with a child under the age of 16 years, with a recommendation that he be eligible for release on parole after three years. There were four children involved: two pairs of sisters. The applicant was in a position of trust in relation to the girls, of whom the eldest was 13. The youngest was seven. The offender's conduct included performing oral sex on the girls and having them masturbate him to ejaculation. At times, two or three girls were involved in the sexual activities. The offender not only pleaded guilty but confessed to police prior to the making of any complaint. His sentences were set aside and concurrent sentences of five years imprisonment with a recommendation of parole eligibility after 18 months were substituted.

The comparable sentences considered at first instance

[18] The sentencing judge was referred by the prosecutor to *R v Schneider; ex parte A-G (Qld)*;[6] *R v Denboon*;[7] *R v K*;[8] and *R v M; ex parte Attorney-General of Queensland*.[9]

[19] In *Schneider*, the respondent teacher was sentenced after early pleas of guilty to five years imprisonment for the offence of maintaining a sexual relationship with a child under 16. He was also sentenced in respect of three counts of rape, one count of indecent treatment of a child and seven counts of indecent treatment of a child under

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3 [2002] QCA 278.
4 [1998] QCA 131.
5 *R v Reading; ex parte Attorney-General of Queensland* [2002] QCA 278 at 7.
6 [2008] QCA 25.
7 [1993] QCA 357.
8 [1995] QCA 226.
9 [2000] 2 Qd R 543.

his care. He had no previous criminal history. The complainant for the maintaining offence was aged 13 and 14 years at the time of the offending, which included the respondent performing oral sex on the complainant, the complainant being made to perform oral sex on the respondent, the complainant being made to watch whilst he masturbated and digital penetration of the complainant's vagina on three occasions. The respondent threatened that if the complainant stopped coming to see him he would make school a difficult place for her. He also threatened her with expulsion and told her that it would be her fault if he lost his job.

[20] There were three other complainants, two of whom attended the same school as the first mentioned complainant. The respondent's behaviour in relation to them included indecent touching of the genital area inside and outside of clothing and the exposure of one of the complainant's to an indecent film.

[21] The offending was over a 15 month period. It was remarked by the majority in dismissing the appeal that the effective sentence of six years and three months imprisonment with eligibility for release on parole after serving 17 months was towards the lower end of the appropriate range.

[22] The respondent had been sentenced earlier to 15 months imprisonment, suspended after five months for a period of three years for seven counts of indecent treatment of children who were also students at the school attended by the first mentioned complainant.

[23] This Court in *Denboon* refused an application for leave to appeal against a sentence of 18 months imprisonment with a recommendation for consideration for parole after six months imposed after guilty pleas for the offence of indecently dealing with the 14 year old complainant who was under the applicant's care. The 46 year old applicant, a family friend, with the complainant's parent's consent took the complainant to his house where he attempted to have her bathe with him, tried to remove her clothing, exposed his penis to her, attempted to show her an indecent video and generally caused her considerable distress.

[24] In *K*, the 45 year old applicant, who had a prior conviction for rape and a number of convictions for assault, was unsuccessful in his application for leave to appeal against a sentence of 18 months imprisonment for indecently dealing with a 13 year old boy. The applicant required the complainant to masturbate him but made no attempt to interfere with him in any other way. The sentence was said to be at the high end of the range, although not manifestly excessive.

[25] The sentences of 12 months imprisonment and three years probation imposed on the respondent in *M* after a plea of guilty for counts of indecent treatment of the seven year old complainant were set aside and replaced by sentences of imprisonment for 18 months with a recommendation that the applicant be considered for parole after six months. The applicant was 28 at the time of the offences. He had a minor criminal history which did not include sexual offending. The complainant was the son of the applicant's sister. When residing with his sister and her children, the applicant went to the complainant's bedroom one evening and sucked his penis. On the next night, the applicant returned to the bedroom and handled the complainant's penis. The applicant had been subjected to gross sexual abuse by his stepfather and had resorted to the abuse of alcohol and the use of illicit drugs. In consequence of the abuse suffered by him, he suffered from depression.

[26] The sentencing judge also had regard to *R v Margaritis*[10] in order to consider the overall criminality of the respondent's offending with a view to applying the totality principle. The respondent's 1995 offending was of a different order to the subject offending. It included maintaining an unlawful relationship of a sexual nature with a child under 16 with a circumstance of aggravation. Encompassed within the maintaining offence were three sets of offending on different occasions. In the first of these, the respondent fellated the unclad complainant to ejaculation, after procuring him to inhale amyl nitrate. The respondent also played an indecent film.

[27] In the course of the second set of offences, the respondent played a pornographic film, caused the complainant to inhale amyl nitrate and to consume alcoholic drinks. He then fellated the complainant to ejaculation and produced cannabis for the complainant to smoke.

[28] On the third occasion, the respondent plied the complainant with alcohol, attempted to cause the complainant to have an erection and commenced to fellate him.

[29] Significantly, conduct similar to that on the three occasions just discussed occurred on a weekly basis during the maintaining period, except when the respondent was absent during the school holidays.

[30] The 1995 offending thus involved conduct similar to that involved in the subject offending on numerous occasions. Had the subject offending been perpetrated against the other complainant, it would not have added appreciably to the gravity of the 1995 offending. Indeed, it would have been encompassed within the respondent's general unparticularised sexual misconduct. The subject offending, however, was in respect of a different complainant. That, and the impact of the offending on this complainant, necessarily added to the respondent's overall criminality.

Consideration

[31] The appellant's submissions concerning the general application of the totality principle are, with respect, accurate. They are not, however, an exhaustive exposition of the operation of the principle, either generally or in the circumstances under consideration.

[32] As the New South Wales Court of Criminal Appeal pointed out in *R v MAK*:[11]

> "The severity of a sentence is not simply the product of a linear relationship. That is to say severity may increase at a greater rate than an increase in the length of a sentence. As Malcolm CJ said in *Clinch v The Queen* (1994) 72 A Crim R 301 at 306:
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> > '… the severity of a sentence increases at a greater rate than any increase in the length of the sentence. Thus, a sentence of five years is more than five times as severe as a sentence of one year. Similarly, while a sentence of seven years may be appropriate for one set of offences and a sentence of eight years my be (sic) appropriate for another set of offences, each looked at in isolation.

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10 [2013] QCA 401.

11 (2006) 167 A Crim R 159 at 164.

> Where both sets were committed by the one offender a sentence of 15 years may be out of proportion to the degree of criminality involved because of the compounding effect on the severity of the total sentence of simply aggregating the two sets of sentences.'"

[33] A similar point was made by Anderson J with whom Pidgeon and Ipp JJ agreed, in *Vlek v The Queen*:[12]

> "I think it is also recognised (and this may be simply another aspect of the totality principle) that when a second sentencing court is considering the imposition of a cumulative sentence, there are mitigating factors arising out of that circumstance itself. When a sentence is to be cumulative on sentences already being served there is usually a discount, and the reasons for this include, no doubt, the instinctive acceptance by sentencing courts that a cumulative sentence is, in itself, a harsher sentence than one of the same length which is to take effect immediately. *Jarvis v The Queen*, especially per Ipp J." (citations omitted)

[34] The Court in *MAK* warned, however, referring to *R v Knight*[13] that the confidence in the administration of justice required the avoidance of the impression that, where an offender is already serving other sentences and is sentenced for additional offences, no or little penalty is imposed for the additional offences.[14]

[35] When regard is had to *Reading*, *F* and *Schneider*, all of which involved more serious offending against a greater number of complainants, many of whom were younger than the subject complainant, it becomes difficult to hold that it was not open to the sentencing judge to conclude that an effective head sentence of five years was within the range of a sound exercise of the sentencing discretion. There were other relevant considerations. The respondent had cooperated with the authorities. For many years after his offending and before his incarceration, he led a blameless and socially productive life. The respondent had taken steps to rehabilitate himself in and out of prison where his behaviour had been exemplary. The sentencing judge found that he had demonstrated an ability to rehabilitate himself. He was also a relatively young man at the time of offending.

[36] Gotterson JA in *Margaritis* concluded, with the concurrence with the other members of the Court, that the range applicable to the offending there under consideration was two to four years imprisonment. He was sentenced at the upper end of that range. The sentencing judge took that into account, as he was entitled to do.

[37] The respondent's parole eligibility date of 13 July 2015 is four months later than the date on which he was eligible to apply for parole under his earlier sentence. That is rather later than the one third point of a five year sentence and is thus hardly unconventional.

[38] In *Hili v The Queen*,[15] French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, after referring to the observation in *Dinsdale v The Queen*,[16] that "[m]anifest inadequacy of sentence, like manifest excess, is a conclusion", observed:

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12 [1999] WASCA 1038.
13 (2005) 155 A Crim R 252 at [112].
14 *R v MAK* (2006) 167 A Crim R 159 at 164–165.
15 (2010) 242 CLR 520 at 538–539.
16 (2000) 202 CLR 321 at 325.

> "And, as the plurality pointed out in *Wong*, appellate intervention on the ground that a sentence is manifestly excessive or manifestly inadequate 'is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases'. Rather, as the plurality went on to say in *Wong*, '[i]ntervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons'." (citations omitted)

[39] In his separate reasons, Heydon J, referring to Kirby J's reasons in *Postiglione v The Queen*,[17] said that the principles in *House v The King*[18] in respect of sentencing appeals give sentencing judges "a wide measure of latitude which will be respected by appellate courts".[19] In *Postiglione*,[20] Kirby J said:

> "3. Out of recognition of the discretionary character of the sentencing function, and the unavoidable scope for disparity where that function is performed by different judicial officers, it is well established that when performing their function sentencing judges must be accorded a wide measure of latitude which will be respected by appellate courts. So long as the sentencing judge has taken into account the relevant considerations of law and fact, the appellate court will not ordinarily intervene merely because some arguable discrepancy appears between the sentencing of otherwise apparently connected or like offenders… The proper approach is one of vigilance within a context of appellate restraint. It was recently expressed by Lamer CJ for the Supreme Court of Canada in *R v M* in words which are applicable here:
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> > 'Appellate courts, of course, serve an important function in reviewing and minimising the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed throughout Canada ... But in exercising this role, courts of appeal must still exercise a margin of deference before interfering in the specialised discretion that Parliament has explicitly vested in sentencing judges. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime ... Sentencing is an inherently individualised process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction…'" (citations omitted)

[40] The joint judgment in *Markarian v The Queen*[21] also emphasised the breadth of the sentencing discretion:

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17 (1997) 189 CLR 295 at 336.
18 (1936) 55 CLR 499.
19 *Postiglione v The Queen* (1997) 189 CLR 295 at 336.
20 (1997) 189 CLR 295 at 336–337.
21 (2005) 228 CLR 357 at 371.

> "The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies." (citations omitted)

[41] In this case there is neither a misstatement or misapplication of principle nor a level of sentencing which necessarily bespeaks error.

[42] For the above reasons, I would order that the appeal be dismissed.

[43] **PHILIP McMURDO J:** I agree with Muir JA.

[44] **PETER LYONS J:** I have had the advantage of reading in draft the reasons of Muir JA, with which I agree. I also agree with the order proposed by his Honour.