SUPREME COURT OF QUEENSLAND

CITATION:	*R v Husband* [2017] QCA 155
PARTIES:	**R** **v** **HUSBAND, Brett Andrew** (applicant)
FILE NO/S:	CA No 169 of 2016 DC No 2361 of 2015 DC No 2364 of 2015 DC No 983 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 26 May 2016
DELIVERED ON:	21 July 2017
DELIVERED AT:	Brisbane
HEARING DATE:	12 July 2017
JUDGES:	Gotterson JA and Atkinson and Applegarth JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant pleaded guilty to four counts of rape, one count of torture and a summary offence – where the applicant was sentenced to concurrent sentences of 10 years' imprisonment with a serious violent offence declaration on each count of rape and a concurrent sentence of 18 months' imprisonment on the count of torture – where the applicant contends that the sentence was manifestly excessive – whether the sentence was manifestly excessive *R v D* [2003] QCA 88, cited *R v MBJ* [2010] QCA 211, cited
COUNSEL:	The applicant appeared on his own behalf C W Heaton QC for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the order proposed by Atkinson J and with the reasons given by her Honour.

[2] **ATKINSON J:** The applicant, Brett Husband, applied for leave to appeal his sentence on the ground that it was manifestly excessive. Mr Husband did not file any written submissions nor did he make any oral submissions when called upon in court.

[3] The respondent filed comprehensive written submissions and also made oral submissions at the hearing in clear and concise terms so that the applicant could understand the nature of the submissions made against his application.

[4] These are my reasons for refusing the application for leave to appeal. Essentially the reason for refusing the application is that it could not be said that the sentence imposed was manifestly excessive given the very serious nature of the applicant's offending taking into account any mitigating circumstances.

[5] The applicant was sentenced in the District Court on 26 May 2016 on offences contained in two indictments and one summary offence. The offences on one indictment were four counts of rape and one of torture. The applicant was sentenced to concurrent sentences of 10 years' imprisonment with a serious violent offence declaration on each of the four counts of rape and a concurrent sentence of 18 months' imprisonment on the count of torture. On a second indictment the applicant was sentenced on one count of possessing child exploitation material to 18 months' imprisonment to be served concurrently with the sentences of imprisonment for rape and torture, with parole eligibility fixed at 80 per cent of the sentence. The summary offence was for breach of bail for which the applicant was convicted and not further punished.

[6] The circumstances of the applicant's offending were set out in a statement of facts tendered before the learned sentencing judge. The statement of facts reveals that the applicant commenced a relationship with a woman he met on an online dating site. Although they did not live together they spent nights at each other's residences. The woman had two children, one of whom was a five year old girl. About five months after the relationship commenced the woman and her children stayed the night at the applicant's home. At about 4.00 am the woman found the applicant in the carport outside the house. He was sitting on a chair with the woman's five year old daughter kneeling between his legs with her hands tied behind her back and the applicant's penis in her mouth. That constituted count 4. The complainant disclosed to her mother that the applicant had done this before.

[7] Count 1 of rape was the previous occasion on which the applicant had put his penis in the complainant's mouth and made her give him oral sex. After the offence the applicant told the complainant that if she told anyone about what had happened he would stab her with a knife.

[8] The other three counts of rape and one of torture occurred on the night when the applicant was found with the complainant by the complainant's mother. The applicant picked the five year old complainant up from her bed and took her outside to the carport. He had earlier tried to give the complainant some alcohol to drink. He used a telephone charging cord to tie the complainant's hands behind her back, laid the complainant on the ground and inserted his penis into her vagina. That was count 2.

[9] Subsequently he moved the complainant to the front of her mother's vehicle and inserted his fingers into her vagina. That was count 3.

[10] The applicant then burnt the complainant with a cigarette to her upper right and left arm, leaving marks consistent with cigarette burns. That was count 5.

[11] After police were called they conducted a forensic examination of the applicant's computer and found two external hard drives. The hard drive on the computer and the external hard drives each contained an extensive quantity of pornography. There were 96 images and 38 videos depicting child exploitation material. One of the videos was of the complainant child naked in the bath. Six of the images and two of the videos were in the category of child exploitation material described as "sadism/bestiality/humiliation". Ten of the images and 27 of the videos were in the category of child exploitation material described as "child/adult penetrate".

[12] The applicant denied committing the offences against the complainant when he was interviewed by the police. He was arrested and released on bail conditioned that he not contact the complainant or her family. In breach of that condition he contacted the complainant's mother with an endeavour to stop the continuation of the prosecution.

[13] Notwithstanding his denials to police, the applicant pleaded guilty in court to these appalling offences.

[14] In mitigation, the learned sentencing judge took account of the applicant's plea of guilty which saved the complainant having to give evidence about the offending, although, as the learned judge observed, the fact that he was seen by the complainant's mother in the act of committing one of the offences meant that conviction on at least that count was almost inevitable. The judge also took into account that the applicant had a criminal history which demonstrated a focus on sexual matters, although it was not particularly serious. The judge also took into account the applicant's troubled upbringing and that he suffered from an intellectual deficit and limited literacy.

[15] It was not suggested that there was any error in the circumstances taken into account when the sentence was imposed. It could not in any circumstances be considered that a sentence of 10 years' imprisonment was manifestly excessive for such offending, even given the circumstances of mitigation such as they were. This is demonstrated when reference is had to other cases which dealt with serious sexual offending against very young children.

[16] In *R v D*,[1] the applicant pleaded guilty to one count of rape and one count of deprivation of liberty. The applicant was sentenced to 12 years' imprisonment on the count of rape and three years' imprisonment on the count of deprivation of liberty. The complainant was a five year old child who lived next door to the applicant. The applicant removed the complainant from the front yard of her home and digitally raped her. The complainant's mother found the complainant in the applicant's bedroom.

[17] The applicant had a lengthy criminal history but did not have prior convictions for sexual offences. There was evidence that he had responded poorly to community

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1 [2003] QCA 88.

service and probation orders in the past. The applicant was aged 40 at the time of sentence and was about 19 years' old at the time of offending. A victim impact statement was tendered at sentence on behalf of the complainant's mother. Psychiatric and psychological reports indicated that the applicant suffered antisocial personality disorder and substance abuse.

[18] On appeal, the sentence of 12 years' imprisonment on the count of rape was set aside and substituted with a sentence of 10 years' imprisonment. McMurdo P noted that the offending was less serious than if the offence of rape against the five year old child had involved penile penetration.

[19] In *R v MBJ*,[2] The applicant pleaded guilty to the penile anal rape of his three year old nephew and was sentenced to 13 years' imprisonment. The applicant initially denied raping the complainant, later asserting that he was under the influence of drugs at the time and had little or no memory of the rape. The applicant was 21 years of age at the time of offending. On appeal, de Jersey CJ and Fraser JA (Muir JA dissenting) found that the sentence was not manifestly excessive.

Conclusion

[20] I would refuse the application for leave to appeal.

[21] **APPLEGARTH J:** I agree with the reasons of Atkinson J and with the order proposed by her Honour.

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2 [2010] QCA 211.