SUPREME COURT OF QUEENSLAND

CITATION:	*R v DBQ* [2018] QCA 210
PARTIES:	**R** **v** **DBQ** (applicant)
FILE NO/S:	CA No 43 of 2018 DC No 333 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 2 March 2018 (Richards DCJ)
DELIVERED ON:	11 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	25 July 2018
JUDGES:	Philippides JA and Boddice and Bond JJ
ORDERS:	**1. The application for leave to appeal against sentence is granted.** **2. The appeal be allowed.** **3. The sentence is varied to the extent that the head sentence of seven years imprisonment is set aside and, in lieu thereof, a head sentence of six years is imposed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where in Victoria the applicant had sexual intercourse with the complainant when she was 13 years old and he was 33 years old – where shortly afterwards the applicant and complainant moved to Queensland – where the applicant maintained a relationship with her until after she turned 16 – where during the period of maintaining the applicant had regular sexual interactions with the complainant – where the applicant was prosecuted in Victoria for sexual penetration of a child – where the applicant was sentenced to two years imprisonment, wholly suspended for a period of three years and the applicant was declared

a registered sex offender for a period of 15 years – where the applicant was then extradited to Queensland and convicted of one count of maintaining a sexual relationship with a child under 16, with a circumstance of aggravation that he had unlawful carnal knowledge of a child under 16 – where the applicant was sentenced to seven years imprisonment with a parole eligibility date fixed after serving two years and three months – where the sentencing judge observed that the sentence in Victoria was a factor to be taken into account, however noted that if the offending in Victoria had been included it would have extended the period of offending – where the applicant seeks leave to appeal against the sentence – whether the sentence imposed was manifestly excessive in all the circumstances – whether the sentencing judge failed to give effect to totality considerations

Criminal Code (Qld), s 229B
Sex Offenders Registration Act 2004 (Vic), s 34

Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, applied
R v AAF [2008] QCA 235, considered
R v B [1995] QCA 636, considered
R v Beattie; Ex parte Attorney-General (Qld) (2014) 244 A Crim R 177; [2014] QCA 206, considered
R v H (1993) 66 A Crim R 505; [1993] QCA 240, cited
R v KN [2005] QCA 74, considered
R v MAN [2005] QCA 413, considered
R v McAnally [2016] QCA 329, considered
R v MCK [2017] QCA 56, considered
R v SAG (2004) 147 A Crim R 301; [2004] QCA 286, considered
R v Todd [1982] 2 NSWLR 517, considered
R v V [1998] QCA 129, considered

COUNSEL: J Crawford for the applicant
S Cupina for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **PHILIPPIDES JA:**

Background

[2] The applicant was convicted on his plea on 26 February 2018 to one count of maintaining a sexual relationship with a child under 16 between 1 January 1992 and 4 May 1994 pursuant to s 299B of the *Criminal Code* (Qld), with a circumstance of aggravation that he had unlawful carnal knowledge of a child under 16. On 2 March 2018, he was sentenced by Richards DCJ to seven years imprisonment with a

parole eligibility date fixed after serving two years and three months (2 June 2020). A declaration was made as to 80 days of presentence custody.

[3] The applicant seeks leave to appeal against that sentence on the basis that the sentence was manifestly excessive in all the circumstances in that the sentencing judge failed to give effect to totality considerations.

Circumstances of Queensland offending

[4] The sentence proceeded on the basis of a schedule of facts tendered by the Crown. The applicant was aged 33 to 35 years during the period of offending of two years and four months. During that time, the complainant was aged between 13 and 15 years. The applicant was aged 59 at sentence.

[5] Prior to beginning the relationship with the complainant, the applicant was in an intimate relationship with the complainant's mother (between 1990 and 1991). They were living in Ballarat, Victoria. The complainant saw the applicant as a father figure. The complainant and her sister moved to Mildura to stay with the applicant, with their mother later joining them.

[6] The first incident of sexual intercourse between the applicant and the complainant took place in Victoria in December 1991, prior to the period of the maintaining offence, when she was 13 years old and the applicant was 33 years old. The incident occurred when they were walking in the bush. The applicant removed the complainant's underwear, pulled down his own pants and underwear and penetrated the complainant causing her pain. He persisted in other attempts over her protests and efforts to push him off.

[7] The complainant's mother raised concerns with police as a result of which the complainant was questioned by police. She denied any sexual relationship with the applicant and said he had told her she would go to girl's prison if she told anyone. The complainant was placed in a welfare house. The applicant visited the complainant there. Shortly after, the complainant was returned to the welfare house after escaping from it. The complainant again ran away from the welfare house in January 1992 and met up with the applicant. They then travelled to New South Wales.

[8] At the time of beginning the relationship, the complainant was in the applicant's care. Initially, they lived in the bush and then moved to a caravan park in Queensland. The sexual relationship between them continued after the complainant turned 16.

[9] From the commencement of the relationship, in 1992, the pair used an alias at the applicant's instigation. The applicant told the complainant to act like his wife so that no one would suspect she was underage. He told her that she had to act like his wife in the bedroom also.

[10] During the period of maintaining, sexual interactions between the applicant and the complainant occurred several times per week. The conduct engaged in included various acts of sexual intercourse and oral sex. The complainant particularised seven incidents of sexual interactions, including the following:

1. Penile vaginal intercourse which occurred on the first night they were together in a caravan which the applicant coerced the complainant into engaging in by telling her that she "had to" and that she "owed him".

2. Fellatio which the applicant taught the complainant to perform him on the second night in the caravan. She was required to swallow the ejaculate.

3. Another occasion of fellatio some months into the relationship that the complainant was required to perform on the applicant to the point where she gagged and vomited bile. The applicant told her she was not very good and would go to a girl's prison.

4. Sexual intercourse with the applicant on her birthday notwithstanding the complainant's protests utilising different positions and causing pain to the complainant.

5. A further incidence of sexual intercourse which occurred when the complainant acquiesced after the applicant told her she "owed him".

[11] During the relationship, the complainant suffered three miscarriages while still a child due to intercourse with the applicant. She had four children to the applicant. They married in 2004, when she was 25 years old (and the applicant was 45 years old). The complainant did not want to marry but did so at the applicant's insistence. The complainant ended the relationship in March 2010, at which time they were living in Ballarat.

[12] The complainant first made a complaint to police in July 2010 after the couple's marriage was dissolved. The applicant was interviewed in August 2010 and February 2011.

[13] In 2013, the applicant was prosecuted in Victoria for the first occasion of sexual offending against the complainant. On 27 May 2013, he was sentenced on his plea to sexual penetration of a child to two years imprisonment, wholly suspended for a period of three years and he was declared to be a registered sex offender for a period of 15 years.[1]

[14] The applicant was then extradited to Queensland to face further charges relating to the complainant. He was charged in October 2015 with the offences committed in Queensland. He served 80 days on remand before being admitted to bail. The matter was initially listed as a trial and resolved to a plea the week before the trial was due to start. The complainant had travelled to Queensland for the trial but had not been subjected to any cross examination.

Criminal history

[15] The applicant had no prior Queensland criminal history. He had a dated and irrelevant NSW criminal history. His Victorian history has already been referred to.

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[1] AB at 33. The applicant was then subject to s 34 of the *Sex Offenders Registration Act* 2004 (Vic) imposing a reporting period of 15 years.

Sentencing remarks

[16] In imposing sentence, the sentencing judge had regard to the serious and prolonged nature of the offending, which included regular sexual intercourse and oral sex. Added to the seriousness were the three pregnancies resulting in miscarriages, which were indicative that, despite the complainant's young age, the applicant did not consistently pay sufficient care to using contraception to stop the pregnancies. The offending occurred during the complainant's formative years. The relationship involved a significant power imbalance with the applicant having a strong influence over the complainant. The applicant was overbearing and manipulative and discouraged any disclosure by threatening that she would go to prison. Her Honour noted the importance of considerations of general deterrence and community denunciation in relation to such offending.

[17] The sentencing judge referred to the complainant's isolation at the time of the commencement of the relationship; and that the complainant had a difficult relationship with her mother who was "troubled" and an alcoholic. Her Honour also referred to the significant impact upon the complainant as described in her victim impact statement; she was scared of the applicant, felt degraded and missed out on a proper education. She experienced grief. The multiple miscarriages resulted in significant emotional distress which has required counselling and other treatment.

[18] By way of mitigation, her Honour had regard to the applicant's guilty plea, which, although not early, had saved the complainant from cross examination. Her Honour took into account the applicant's personal circumstances; he has borderline to low average age of intelligence and health difficulties.

[19] Her Honour observed that the sentence in Victoria for the act that preceded the maintaining offence was a factor to be taken into account but also noted that if the offending had been included it would have extended the period of offending.

The submissions

[20] The applicant argued that, although he was sentenced separately for the offending in Victoria, it was related to the offending committed in Queensland and could be seen as part of continuous offending that took place across State borders. The sentencing judge erred in approaching the sentencing task as if the offending in Queensland was a discreetly separate matter when it was not. In so submitting, the applicant referred to the following discussion as to the Victorian sentence in the course of the sentence hearing:[2]

> "MS LOODE: … On the records of the police officer that were to be relevant at trial, it's clear from those police records that [the complainant] … was incarcerated into the welfare home on the 16th of December 1991 which she indicates was a few days after that incident with [the applicant] in Victoria.

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2 AB at 19.04-19.44.

> So it appeared that offending occurred in about early December 1991 and your Honour will note that the offending before your Honour today – the commencement period is the 1st of January 1992. So within a month of the commencement is the time frame in respect of that offence. On that occasion in Victoria [the applicant] was sentenced to two years imprisonment wholly suspended for a period of three years and he was declared to be a registered sex offender.
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> Given the proximity of that offending to the commencement of the maintaining it's my submission there is an element of totality that arises in respect of that conviction. That your Honour would take into account. Ultimately it's my submission that that would operate to moderate the head sentence that your Honour imposes in respect of this sentence.
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> HER HONOUR: It's difficult to know how to take it into account, isn't it, because really the question is what would he have got if he'd been sentenced for all of it at the same time.
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> MS LOODE: Yes, and it's - - -
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> HER HONOUR: Because he really hasn't been to jail for that.
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> MS LOODE: No, that's why my submission is that it would moderate the head sentence. It reflects, in my submission, an offence which occurs very shortly before the maintaining. Had the offences all occurred in the one state perhaps the maintaining charge would have looked slightly different in terms of the commencement period. That's why, in my submission, totality does arise in respect of that offence.
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> HER HONOUR: Well, it doesn't make anything worse. I suppose that's what it does. He doesn't have previous convictions - - -
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> MS LOODE: No.
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> HER HONOUR: - - - of a like nature.
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> MS LOODE: No, he doesn't."

[21] The applicant submitted that, the sentencing judge's comment that the applicant, "really hasn't been to jail for that", supported his submission that her Honour diminished the serious nature of the Victorian suspended term of imprisonment. Further, her Honour's statement that the applicant's Victorian offending did not make his Queensland offending any "worse", indicated an approach that limited a consideration of the Victorian sentence to matters of aggravation rather than considerations of totality. The applicant also referred to the sentencing judge's remark that, if the Victorian offending had been before the Court, it would have increased the maintaining period. It was submitted that, while that was correct, the extension of the period would have been at most for a single month and that, had the whole period of offending been dealt with in Queensland, that would have made little, if any, discernible difference to the sentence imposed.

[22] It was submitted that the suspended sentence imposed in Victoria ought to have been regarded as a significant punishment,[3] which the applicant completed without incident, including subjecting him to reporting obligations under the *Sex Offenders Registration Act* 2004 (Vic) for a minimum period of 15 years.

[23] In accordance with submissions made before the sentencing judge, it was not submitted that the penalty previously imposed in Victoria ought to have had a moderating effect on the period of actual imprisonment imposed by her Honour. Rather, the argument was that her Honour erred in failing to moderate the head sentence imposed.[4] The applicant argued that the penalty imposed in Victoria ought to have resulted in the head sentence being moderated from that imposed to one of five years imprisonment. In relation to that five year sentence, it was submitted that it should be suspended after a period of 12 to 18 months imprisonment.

[24] Citing *R v McAnally*,[5] and authorities discussed therein, the respondent submitted that the relevant authorities indicate that the scope of the totality principle looks to the total period spent in custody. It was submitted that the sentencing judge rightly identified that there was no time spent in custody in Victoria. The import of the Victorian sentence therefore was limited in its effect on the appropriate sentence for the present offending and was appropriately taken into account. Further, to reduce the head sentence by two years, on the basis that that was the head sentence imposed in Victoria, would be to give an impermissible benefit. In contending that the sentencing discretion was appropriately exercised, reference was made to *R v KN*,[6] *R v AAF*[7] and *R v B*;[8] and the general considerations as outlined by Jerrard JA in *R v SAG*.[9]

Consideration

The totality principle

[25] In *Mill v The Queen*,[10] the High Court adopted, as a succinct description of the totality principle, the following statement from Thomas, *Principles of Sentencing*, 2nd ed. (1979), pp 56-57:[11]

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3 *R v H* (1993) 66 A Crim R 505 at 510; [1993] QCA 240 at 9.

4 Applicant's outline para [29].

5 [2016] QCA 329.

6 [2005] QCA 74.

7 [2008] QCA 235.

8 [1995] QCA 636.

9 (2004) 147 A Crim R 301; [2004] QCA 286.

10 (1988) 166 CLR 59.

11 (1988) 166 CLR 59 at 63.

> "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong['']; 'when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."

[26] As observed in *Mill*,[12] the application of the principle becomes more complicated where the offender commits a number of offences within a short space of time in more than one State. Upon the offender being apprehended and sentenced to a term of imprisonment in one State, the other State cannot proceed to deal with him in respect of an offence committed in that State until he is released from custody in the first State. That may involve a deferment of the processes of the criminal law in the second State for a period of years.

[27] The applicant was correct to take issue with the respondent's submission that the totality principle is directed to the moderation of a sentence to take into account the custodial component of the sentences in total. In advancing its submission, the respondent relied on the adoption in *McAnally*[13] of the following expression of the totality principle by McMurdo J in *R v Beattie; Ex parte Attorney-General (Qld)*:[14]

> "The ambit of the totality principle has been extended in at least two ways. The first, which is illustrated by *Mill v The Queen*, is where an offender commits a number of offences within a short space of time but in more than one State. Upon being sentenced to a term of imprisonment in one State, the offender cannot be sentenced in the other State until he is released from custody under the first sentence. In such a case, it is necessary for the second sentencing judge to consider in aggregate the sentences and if necessary to moderate the sentence then to be imposed. *The principle has also been extended in the sentencing of an offender who is then serving an existing sentence. In such a case, 'the judge must take into account that existing sentence so that the total period to be spent in custody*

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12 (1988) 166 CLR 59 at 63.

13 [2016] QCA 329 at [41].

14 (2014) 244 A Crim R 177 at 181; [2014] QCA 206 at [19] (emphasis added; footnotes omitted).

> *adequately and fairly represents the totality of criminality involved in all of the offences to which that total period is attributable*'."

[28] The above statement of the totality principal is not to be understood as supporting the proposition contended for by the respondent. The italicised portion simply identifies an example of one of the ways the totality principle may be relevant in the sentencing process.

[29] There is no basis whatsoever for confining the totality principal to a consideration only of the custodial component of the combination of sentences. So much was made clear in *Mill*. There the High Court referred with approval to the dicta of Street CJ (with whom the other members of the Court agreed) in *R v Todd*[15] concerning a just and principled approach to the problem of sentencing reflected in the totality principle. It was observed that, although there was no challenge to the head sentence imposed in *Todd*, Street CJ made[16] "it plain that the pre-existing sentence, and the aggregate term which would result from the sentence passed by the second judge, were relevant matters necessary to be taken into account by him in determining the head sentence". Rejecting the argument that the totality principle is confined in its operation to the fixing of a non-parole period, the High Court explained that:[17]

> "… It applies also to the fixing of a head sentence which, when considered in association with the head sentence imposed by the first sentencing court, must be seen to be appropriate in all the circumstances… The intervention of a State boundary denies to an offender the opportunity of having the series of offences dealt with together by a sentencing court which can avail itself of the flexibility in sentencing provided by concurrent sentences."

[30] The High Court observed that in the circumstances in *Mill*,[18] the proper approach to sentencing of that offender "was to ask what would be likely to have been the effective head sentence imposed if the applicant had committed all [the] offences … in one jurisdiction and had been sentenced at one time".

Did the sentencing discretion miscarry?

[31] During the course of the sentencing submissions extracted above, the sentencing judge rightly expressed the question for consideration as one of what the applicant

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15 [1982] 2 NSWLR 517 at 519-520.

16 *Mill v The Queen* (1988) 166 CLR 59 at 64. See also the additional comments of Moffitt P in *R v Todd* [1982] 2 NSWLR 517 at 521-522.

17 (1988) 166 CLR 59 at 66.

18 (1988) 166 CLR 59 at 66.

would have received had he been sentenced for all the offending at the same time. Of more relevance are the following sentencing remarks:[19]

> "I do take into account the fact that there was a sentence in Victoria of two years suspended, wholly suspended, for the initial act, which effectively took the virginity of the Complainant when she was 13, and that is a factor I also take into account. Of course, if it had been sentenced for that offending as well, it would have been a longer period of maintaining."

[32] These observations support the applicant's argument that, despite the apparent acceptance by the sentencing judge that totality considerations were relevant, the sentence imposed was not in fact appropriately moderated to reflect that matter. The term of seven years imprisonment thus failed to have proper regard to the totality of the sentences imposed for the Victorian offending which continued to require compliance with reporting conditions. A consideration of the authorities also supports the contention that when totality considerations were taken into account, a combined head sentence of nine years was manifestly excessive had the applicant been dealt with for all the offending including the Victorian offending.

[33] As identified by Jerrard JA in *SAG*,[20] matters that are likely to increase the sentence to be imposed are the young age of the child when the relationship thereafter maintained first began; the length of the period for which the relationship continued; if penile rape occurred during the course of that relationship; if there was unlawful carnal knowledge of the victim, if so, whether that was over a prolonged period; if the victim bore a child to the offender; if there had been a parental or protective relationship; if the offender was being dealt with for offences against more than one child victim; and if there had been actual physical violence used by the offender and, if not, whether there was evidence of emotional blackmail or other manipulation of the victims. Matters which mitigate the penalty were also identified by Jerrard JA[21] to include conduct showing remorse (such as the offender voluntarily approaching the authorities or seeking help for all the family); cooperation with investigating bodies; admissions of offending; cooperating with the administration of justice; and sparing victims from any contested hearing.

[34] In *R v MCK*,[22] a sentence of nine years and 11 months was reduced on appeal to four years, suspended after 12 months on the 40 year old applicant's plea to one count of maintaining with a girl under 16 with aggravating circumstances. The period of the maintaining was 12 months. At the time of the offending, the applicant was aged 21 and the complainant was 14 to 15 years old. The relationship continued after the complainant came of age and children were born to that

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19 AB at 26.37-26.42.

20 (2004) 147 A Crim R 301 at 306-307; [2004] QCA 286 at [19].

21 (2004) 147 A Crim R 301 at 307; [2004] QCA 286 at [20].

22 [2017] QCA 56.

relationship. While the plea was timely, the appeal against conviction precluded any conclusion of remorse. That decision may be distinguished given that the age disparity was not as great as in this case and the period of maintaining was significantly shorter.

[35] Nor is *R v V*[23] a useful comparative since it concerned an offence of maintaining over a nine month period. In that case, a sentence of four years with a parole recommendation after 16 months was imposed on a plea. The applicant was the brother in law of the complainant, who was aged 15 at the time of the offending and some 20 years younger than the applicant. A significant delay occurred before the applicant was charged. The plea was entered on the second day of trial, after the complainant's evidence had begun.

[36] In *KN*,[24] the applicant, who had no prior convictions, pleaded guilty to maintaining a sexual relationship with a child, seven counts of incest and two counts of indecent treatment of a child under 12 years old. A sentence of eight years imprisonment imposed for the maintaining offence was not disturbed on appeal. The maintaining took place over a five year period. The complainant, who was the applicant's stepdaughter, was nine years old when the sexual conduct commenced and 12 years old when the first act of sexual intercourse took place.

[37] In *B*,[25] a sentence of seven years imprisonment with a parole recommendation at three years was imposed on appeal (in lieu of a term of nine years imprisonment) on a plea of guilty to maintaining a sexual relationship with a child under the age of 16 years with a circumstance of aggravation (committing an act of unlawful carnal knowledge). That offence was part of eight offences to which the applicant pleaded guilty. The maintaining covered a period of three and a half years. The complainant was his stepdaughter. He commenced offending against her when she was 13 years old and the offending included vaginal penetration of her by the applicant's fingers and penis. The applicant had entered a guilty plea. There was a contested committal with extensive cross examination of the complainant. Following the committal hearing, charges of rape were not continued. The applicant, who was 42 years old at sentence, was of prior good character and work history with no previous convictions.

[38] In *AAF*,[26] an extension of time to appeal against the sentence of seven years imprisonment with parole eligibility after 28 months was refused in respect of a conviction on the applicant's plea to one count of maintaining a sexual relationship with a child under 16 who was in his care. The maintaining took place over a seven year period when the applicant was aged 30 to 37 years and the complainant, who was his stepdaughter, was aged nine to 16 years. It did not

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23 [1998] QCA 129.

24 [2005] QCA 74.

25 [1995] QCA 636.

26 [2008] QCA 235.

include engaging in vaginal penetration. Keane JA[27] (with whom the rest of the Court agreed) stated that the offending "could well have attracted a substantially heavier sentence (notwithstanding the applicant's co-operation with the authorities and the absence of violence and penile penetration of the vagina) without exceeding the bounds of a sound exercise of the sentencing discretion".

[39] In *R v MAN*,[28] the applicant's sentence on his guilty pleas to two counts of maintaining with a circumstance of aggravation with two complainants (aged between 12 and 15) was reduced on appeal from nine years imprisonment to five years with release after serving 18 months. There was no violence or intimidation. Both complainants had two children each with the applicant. Three of those children were born before the complainants turned 16 years old. The age gap between the complainants and the applicant was seven years and there was a 10 year delay in prosecuting the applicant. By the time he was sentenced, the applicant had full time custody of one of the children. He cooperated with police, made full admissions and was considered unlikely to reoffend.

Conclusion

[40] The applicant was not being dealt with for offences against more than one child victim. Having regard to other authorities put forward at sentence and before this Court, as a yardstick, a combined head sentence of nine years would not have fallen within the sentencing discretion had the applicant been dealt with on the one occasion for all the offending including the Victorian offending.

[41] I would allow the application and re-exercise the sentencing discretion by sentencing the applicant to a term of six years imprisonment in lieu of the term of seven years. That sentence cannot be the subject of suspension. In re-exercising the discretion, I would order a parole eligibility date set at the same date as the previously imposed sentence (2 June 2020). I am conscious that that results in a date a little over a third of the sentence of six years. However, in my view, in the circumstances of this case, that is appropriate given the lateness of the plea.

Order

[42] The orders I propose are:

1. The application for leave to appeal against sentence is granted.
2. The appeal be allowed.
3. The sentence is varied to the extent that the head sentence of seven years imprisonment is set aside and, in lieu thereof, a head sentence of six years is imposed.

[43] **BODDICE J:** I agree with Philippides JA.

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27 [2008] QCA 235 at [14].

28 [2005] QCA 413.

[44] **BOND J:** I agree with the reasons for judgment of Philippides JA and with the orders proposed by her Honour.