SUPREME COURT OF QUEENSLAND

CITATION:	*R v HBT* [2018] QCA 227
PARTIES:	**R** **v** **HBT** (appellant/applicant)
FILE NO/S:	CA No 145 of 2017 CA No 102 of 2017 DC No 375 of 2016
DIVISION:	Court of Appeal
PROCEEDINGS:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 10 March 2017; Date of Sentence: 27 April 2017 (Durward SC DCJ)
DELIVERED ON:	21 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	18 April 2018
JUDGES:	Morrison and McMurdo JJA and Bowskill J
ORDERS:	**1. The appeal against conviction in CA No. 145 of 2017 is dismissed.** **2. The application for leave to appeal against sentence in CA No. 102 of 2017 is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – REVIEW OF EVIDENCE – where the appellant was convicted after a three day trial of one count of maintaining an unlawful sexual relationship with a child, three counts of indecent treatment and one count of permitting a person under 18 years to sodomise him – where the learned trial judge referred to a letter put in evidence through the complainant's mother in the summing up – where the complainant's mother gave evidence that the letter had been left for her on the appellant's laptop – where it was suggested that the letter was a fabrication – where the learned trial judge directed the jury that there was no dispute about the contents of the letter and that no evidence existed to contradict the prosecution case that the letter had been prepared by the appellant – where it was submitted that the directions effectively reversed the onus of proof as the jury were asked to infer that the prosecution's case was stronger due to the absence of contradictory evidence – where the learned trial judge read the letter aloud to the jury during the summing up and asked the rhetorical question "do you disbelieve her?" referring to the evidence of

the complainant's mother – where it was submitted that to pose the questions in the way done was objectionable as per *Palmer v The Queen* – whether a miscarriage of justice occurred

APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant was sentenced to 15 years' imprisonment on count 1 and not further punished on counts 2-5 and 7 as each of those counts formed part of the particulars of count 1, together constituting the maintenance of a sexual relationship over a six and a half year period – where the applicant was convicted and sentenced for the entirety of that period notwithstanding that some of the offending had occurred after the complainant turned 16 – where count 7 was comprised of an act of sodomy under s 208 of the *Criminal Code* (Qld) which had been repealed – where it was submitted that the finding by the learned sentencing judge that the period of maintaining a sexual relationship was one of six and a half years was in error as it took into account conduct that no longer reflected an offence known to law as the inclusion of count 7 effectively lengthened the period of maintaining past the prescribed age of 16 – where it was submitted that per s 11(2) of the Code the shorter period of maintaining should have been reflected in the penalty – whether the sentence was manifestly excessive due to the learned sentencing judge erring in taking into account conduct that no longer reflected an offence known to law

APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where at the time of sentencing it was contended that the sentence should be 12 years – where the applicant was between 46 and 52 years of age at the time of offending and 55 at sentence – where the offending involved the applicant's biological son and a significant breach of trust – where the complainant was aged between 10 and a half years and 17 years of age during the period of offending – where the offending was described as "abominable" – where it was submitted by counsel for the applicant that the relevant factors in this case did not extend to a sentence at the very top of the range – where the Crown submitted that whilst a lesser sentence may have been open, it cannot be concluded that the sentence of 15 years was manifestly excessive, nor unreasonable or unjust – whether the sentence was manifestly excessive

Acts Interpretation Act 1954 (Qld), s 20
Criminal Code (Qld), s 11, s 229
Health and Other Legislation Amendment Act 2016 (Qld), s 9

Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25,

cited
Palmer v The Queen (1998) 193 CLR 1; [1998] HCA 2, followed
R v AP [2003] QCA 445, considered
R v BAO [2004] QCA 445, considered
R v BAY (2005) 157 A Crim R 309; [2005] QCA 427, considered
R v BBM [2008] QCA 162, considered
R v BCA [2011] QCA 278, considered
R v CBO [2016] QCA 24, considered
R v GQ [2005] QCA 53, considered
R v HAP [2008] QCA 137, considered
R v HXY & Ors [2017] QSC 108, cited
R v PAZ [2017] QCA 263, followed
R v Robinson [2007] QCA 99, considered
R v SAG (2004) 147 A Crim R 301; [2004] QCA 286, considered
R v SBJ [2009] QCA 100, considered
R v TS [2009] 2 Qd R 276; [2008] QCA 370, considered

COUNSEL: S Bain for the appellant/applicant
J A Wooldridge for the respondent

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

[1] **MORRISON JA:** The appellant was convicted after a three day trial on the following counts:

> Count 1: maintaining an unlawful sexual relationship with the complainant, a child under the prescribed age;
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> Count 2, 3 and 4: indecent treatment of a child under 16, under 12, who is a lineal descendant;
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> Count 5: sodomy of a child under 12, of a lineal descendant; and
>
> Count 7: permitting the complainant, a male person under 18 years, to sodomise him (a Domestic Violence Offence).

[2] He was sentenced to 15 years' imprisonment on Count 1, that being declared to be a serious violent offence pursuant to s 161A of the *Penalties and Sentences Act* 1992 (Qld).[1] He was not further punished on Counts 2 – 5 and 7 as each of those five counts formed part of the particulars of Count 1, together constituting the maintenance of a sexual relationship over a six and a-half year period between 6 February 2007 and 1 September 2013. Count 7 was declared a domestic violence offence.[2]

[3] The complainant was born on 6 September 1996 and aged between 10 and a-half years and 16 years during the period of maintaining. The appellant was convicted and sentenced for the entirety of that period, notwithstanding that some of the offending had occurred after the complainant turned 16, including the conduct constituting count 7. This count comprised of an act of sodomy under s 208 of the *Criminal*

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1 Pursuant to s 182 of the *Corrective Services Act* 2006 (Qld) the applicant will be eligible for parole the day after the day on which the prisoner has served 80 per cent of his sentence; in this case, twelve years.

2 A further charge of indecent treatment (Count 6) was the subject of a *nolle prosequi*.

Code (Qld) which was repealed by the *Health and Other Legislation Amendment Act* 2016 (Qld) on 23 September 2016.[3]

[4] The appellant challenges his conviction on two grounds, contending that there was a substantial miscarriage of justice by reason of:

(a) a misdirection in relation to a letter said to be received from the appellant, the jury being told that there was no evidence to contradict the prosecution case; and

(b) a misdirection as to how the jury should consider the evidence of the complainant's mother, the jury being asked to consider if they disbelieved her and whether there was a valid reason to disbelieve her.

[5] In relation to the sentence, the applicant seeks leave to appeal on the basis of two grounds:

(a) the sentence imposed was manifestly excessive in that the learned sentencing judge erred in taking into account conduct that no longer reflected an offence known to law; and

(b) the sentence imposed was manifestly excessive.

[6] For the reasons which follow I would dismiss the appeal against conviction, and refuse the application for leave to appeal against sentence.

Appeal against Conviction

[7] The challenge to conviction focuses upon two passages in the summing up where the learned trial judge referred to a letter put in evidence through the complainant's mother. Some short factual background is necessary in order to properly consider the point.

[8] The complainant's mother gave evidence that on 23 June 2015 the appellant had gone for a drive and she "received a text message from him stating that he'd left the letter that he'd written me on his laptop".[4] She said he had provided his password in the text message and she started the laptop and entered the password. When she did the screen revealed a letter which he had written. She identified the letter which became exhibit 18.

[9] Her evidence was that shortly after the receipt of that letter she separated from the appellant.[5]

[10] The appellant did not give or call evidence at the trial.

[11] In cross-examination of the complainant's mother the following points were made, and the following questions and answers were given:

(a) she had written the words "received 23/06/15" on the letter for one of the investigating police officers;[6]

(b) "… you didn't print that off the printer you had at home, did you? --- I don't recall where I printed it.";[7]

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3 *Criminal Code*, s 4.
4 Appeal Book (**AB**) 100 l 22.
5 AB 102 ll 18-21.
6 AB 107 ll 30-35.
7 AB 107 l 37.

(c) she received the letter at a time when she and the appellant were still living in the same house and talking regularly;

(d) "Well, I'd suggest to you that this letter is a fabrication by you? --- I suggest that you are incorrect.";[8]

(e) she disagreed with the proposition that any time the appellant sent her a letter he sent it by email, though she did agree that subsequently the appellant sent letters to her by email;[9]

(f) she said the text message was on her phone, which she still had, and which had been given to the police;[10]

(g) the morning she received the letter she told the appellant that she could not continue in the marriage;[11]

(h) "See, the font in that letter is not … a font that [the appellant] normally uses in … when he writes to you, is it? --- I don't know.";[12]

(i) "Well, I'd suggest to you that [the appellant] never sent you such a text message? --- What you are suggesting is incorrect.";[13]

(j) she copied the letter from the computer by copying it on to a USB;

(k) she did not recall printing the letter out at her house;[14]

(l) after the day the letter was received she and the appellant were no longer sleeping in the same bed, and she moved out and they did not remain living at the same house after 12 or 13 July;[15]

(m) "And I take it in the format … that letter is in, you could alter that document if you wanted? --- Correct.";[16]

(n) "Well, I'd suggest to you that there was no discussion and no text messages about such a letter? --- What you're suggesting is incorrect.";[17] and

(o) at the time she had a computer of her own.[18]

[12] In the course of his address to the jury, the appellant's Counsel turned to the letter, making a number of points in respect of it. The points made included the following:

(a) it was not in the appellant's handwriting and not signed;

(b) it was not sent by mail or email, counsel asking why not and why would the appellant simply not have printed it out;

(c) he asked "Where is the text if it exists?", and "What does it say if it was said?";

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8 AB 108 l 1.
9 AB 108 ll 4-6.
10 AB 108 ll 8-13.
11 AB 108 ll 18-29.
12 AB 109 l 4.
13 AB 109 l 15.
14 AB 109 l 29.
15 AB 109 ll 34-38.
16 AB 109 l 44.
17 AB 114 l 19.
18 AB 114 l 22.

(d) there was no phone account to show that the text was actually sent;

(e) there was nothing to show that there was a document on the computer, saying "There's nothing. There's no evidence of that";

(f) there was no evidence that anything of the appellant's, such as his phone or computer, had been examined, and there was no examination of the data for the document itself;

(g) there was nothing to show when it was produced; and

(h) there was nothing to show whether it had since been altered.

[13] Defence Counsel then said:

> "It's a matter for you if you want to accept that, but, members of the jury, there are serious questions about that. It's been disputed. And, similarly, the conversation that she says she had, my client said things to her has been disputed."[19]

[14] In the absence of the jury the learned trial judge raised some issues with the appellant's Counsel. The passage commences as follows:

> "His Honour: … your client's pleas of not guilty put the Crown to proof; nothing more.
>
> [Trial Counsel]: Yes.
>
> His Honour: You've just said to the jury that the letter is disputed.
>
> [Trial Counsel]: I'll withdraw that, your Honour.
>
> His Honour: Well, that's not the first thing you've said. There are two other matters I want to raise with you, and I'm getting fed up with this.
>
> [Trial Counsel]: Yes.
>
> His Honour: You know better than this as a senior person at the [Bar]. You said that in questioning the complainant, that you put to the complainant:
>
> '*You've never been to the work site*'.
>
> Well, he may have done, but he didn't agree with that, did he?
>
> [Trial Counsel]: No.
>
> His Honour: The question's of no value at all.
>
> [Trial Counsel]: I'll withdraw that too, your Honour."[20]

[15] After a few more comments the discussion on that topic resumed in this way:

> "His Honour: And thirdly is the matter that I've just mentioned. You need now to withdraw that …

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19 Transcript of the Addresses p 12.

20 AB 148 ll 14-37.

> [Trial Counsel]: Yes.
>
> His Honour: … because there is no denial – or is no issue about the content of the letter. You may raise the question that they need to be satisfied beyond reasonable doubt on the evidence of the mother that what she says is true, but it doesn't go anything beyond that.
>
> [Trial Counsel]: I'll correct that, your Honour."[21]

[16] When the jury returned, trial Counsel for the appellant said this:

> "Members of the jury, before I go on and finish my address, I want to correct a couple of things, which – I said, which were not correct.
>
> …
>
> The other aspect; I spoke about there being a dispute about the letter. There is no evidence from another source about the letter. The use of the term dispute is not correct. It's for you, having considered the issue what you make or what you accept of that evidence."[22]

Submissions

[17] Ms Bain, appearing for the appellant on the appeal, submitted that to comment that there was no evidence to contradict the prosecution case was to ask the jury to infer that the prosecution evidence was stronger or had more value because it was not contradicted. By doing so it effectively undermined the fundamental right of a defendant not to give evidence.

[18] Further, it was submitted that to ask the rhetorical questions, do you disbelieve the mother, and is there reason to disbelieve her, was objectionable according to the principles in *Palmer v The Queen*.[23] The effect was to reverse the onus of proof. Even if the jury rejected that there was a reason for the mother to lie, that did not mean that she was truthful.[24]

[19] Ms Wooldridge, appearing for the Crown, submitted that when the summing up as a whole was examined, there was no imbalance in the directions of which complaint was made. The jury were given detailed directions as to the onus of proof, and the standard of proof and specifically as to the appellant's right not to give or call evidence. The comment about the absence of contradictory evidence was in the context of directing the jury that propositions put to witnesses, and denied, did not amount to evidence. The specific context was that it had been put to the mother, and denied, that the letter was fabricated. The direction pointed to the fact that there was no evidence contradicting that it was authored by the appellant.

[20] The direction did not ask the jury to reason that the prosecution evidence was of greater value because it was not relevantly contradicted, nor to undermine the right not to give evidence.

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21 AB 149 ll 9-19.
22 Transcript of the Addresses p 13.
23 (1998) 193 CLR 1; [1998] HCA 2.
24 *R v Cross* [2016] QCA 44.

[21] It was submitted that the second direction, when seen in context, was no more than suggesting some indicators that may assist in the jury's assessment of the mother's credibility and reliability. It did not introduce any question of motive to lie. It did not go so far as to suggest that in the absence of a reason to disbelieve the mother, her evidence was to be accepted.

[22] No error of law or other misdirection had been demonstrated which could be said to have deprived the appellant of a reasonable chance of acquittal.[25] There was therefore no miscarriage of justice. Finally it was submitted that if the court concluded that there was a miscarriage of justice, then the proviso under s 668E(4) of the *Criminal Code* was applicable.[26]

Discussion

[23] The passages referred to above make it clear, in my view, that what the learned trial judge was referring to as the vice in saying that the letter was "disputed", was that the questions put to the mother in that respect had all been the subject of her disagreement. Therefore, as the learned trial judge said, the questions were of no value at all. Given that there was no evidence, beyond those questions and answers, that did attack the mother, or that could be said to cast doubt upon the authenticity of the letter, the learned trial judge's point at AB 149 in the passages at paragraphs [14] and [15] above was correct. No doubt that is why trial Counsel readily accepted the proposition and indicated he would correct what he had said.

[24] Early in the summing up the learned trial judge gave standard directions concerning the significance of a plea of not guilty, the fact that his comments on the evidence were non-binding and should only be accepted by the jury if they coincided with their own independent view, that the jury were the sole arbiters of fact, and as to what did not constitute evidence. As to the latter point his Honour said:

> "It's important to remember that the evidence lies in the answers given to questions. I mean, questions are quite often asked of a witness. Something might be suggested to a witness or, as lawyers sometimes use, the expression 'put'. It is, 'I put it to you that something happened'. Well, if the witness says, 'No' or disagrees, then that question just falls away. It disappears, because there hasn't been agreement with it. However, if the witness says, 'Yes, that's right' or 'Yes, that probably happened: I accept that', for example, then the question and answer become the evidence because it has been accepted. That is, what's contained in the question has been accepted."[27]

[25] Further, standard directions were given as to the burden of proof and the presumption of innocence. On numerous occasions the learned trial judge emphasised that the jury needed to be satisfied beyond reasonable doubt as to the evidence on each element, and that it was a matter for them as to what evidence they accepted.

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25 Referring to *R v Dhanhoa* (2003) 217 CLR 1; [2003] HCA 40.

26 Reference was made to *Weiss v The Queen* (2005) 224 CLR 300; [2005] HCA 81 and *Kalbasi v The State of Western Australia* (2018) 92 ALJR 305; [2018] HCA 7.

27 AB 153 ll 37-44.

[26] Immediately before the passage which is central to the ground of appeal concerning the conviction, the learned trial judge turned to an explanation of the significance or otherwise of the appellant not having given or called evidence. The passage is as follows:

> "The defendant has not given or called evidence. That is his right. He's not bound to give or call evidence. He's entitled to insist that the prosecution prove the case against him if it can. The prosecution bears the burden of proving the guilt of the defendant beyond reasonable doubt and the fact that he did not give evidence is not evidence against him. It does not constitute an admission of guilt by conduct and it may not be used to fill any gaps in the evidence led by the prosecution. It proves nothing at all and you must not assume that because he did not give evidence that adds in some way to the case against him. It cannot be considered at all when deciding whether the prosecution has proved its case beyond reasonable doubt and most certainly does not make the task confronting the prosecution any easier. It cannot change the fact that the prosecution retains the responsibility to prove the guilt of the defendant beyond reasonable doubt."[28]

[27] Having given that express direction the next thing said by the learned trial judge was that which is impugned on this ground of appeal:

> "A number of suggestions were made to the complainant and his mother, indeed, that they rejected. The suggestions are not evidence. For example, it was put to the mother that the letter that is in evidence was a fabrication and she denied this. In other words, it was put that, in a sense, by implication that she was being untruthful; that she or someone else must have typed it. That's the clear implication of the allegation of fabrication. It can't be anything else. But there is no evidence to contradict the prosecution case that the letter was prepared by the defendant. There's no evidence given by anybody to the contrary."[29]

[28] When understood in its context, I do not consider that the jury would have been misled by what was said at the end of that passage, to believe that they should infer or engage in logic that the evidence of the mother took on greater value because it was not contradicted by sworn evidence. The jury had just been told in very plain language that the absence of evidence by the appellant could not be used against him in any way and was irrelevant to the question of whether the prosecution had proved its case beyond a reasonable doubt. That direction was given with respect to whether the appellant had "given or called evidence", the jury being told that was the appellant's right and that he was not bound to do so. Bearing that in mind, in my view, the passage to which objection is taken is properly seen as no more than the learned trial judge pointing out that suggestions which were not accepted did not constitute evidence, and that there was no evidence contradicting what the mother had said.

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28 AB 163 l 39 to AB 164 l 3.

29 AB 164 ll 5-12.

[29] I do not consider that passage to improperly suggest that the prosecution evidence was of greater value because it was not contradicted by sworn evidence,[30] nor that the prosecution case was strengthened by the appellant's failure to give or call evidence.

[30] The learned trial judge then dealt with other evidence concerning preliminary complaint, what was contended to be admissions made in a telephone call, and overheard by the complainant's partner. His Honour then returned to the letter:

> "Now, how the letter came into existence – there's no evidence precisely about the electronic parts, but the letter is in existence. And when you read it you might think that it can only refer to the matters which [the complainant] has complained of.
>
> And it could not have come from anybody else. And, indeed, the evidence is, and the only evidence is in the case, that it was on the computer of the defendant; that [the mother] received a text message saying that there was a letter there and giving her the password. … But, in any event, she was accessing the computer. It was on the computer. Perhaps it was such a private document that it was not something that might be emailed. And the privacy of the document is pretty apparent from how it's expressed."[31]

[31] That passage in the summing up is not the subject of complaint in this appeal. That no complaint is made as to that passage diminishes the force of the suggestion that the previous passage misled the jury.

[32] The learned trial judge then read the letter to the jury, and made some observations about features of it which might suggest a link to the complainant's evidence. His Honour then concluded:

> "Well, the letter speaks for itself. It is for you, not for me or anyone else, to determine what it means and whether it refers to the conduct alleged by [the complainant] or refers to something else; no evidence of anything else but it is a matter for you. And the other thing really is this: so far as [the mother's] evidence is concerned, do you disbelieve her? Is there any valid reason to disbelieve her? There is no evidence that contradicts her testimony."[32]

[33] The vice upon which the appellant's counsel concentrated on appeal is in the last three sentences of that passage. It is first said that to pose the questions in the way that was done was objectionable for the reasons dealt with in the High Court decision in *Palmer v The Queen*.[33] The relevant principle extracted from *Palmer* is that from the decision of Brennan CJ, Gaudron and Gummow JJ, that if the credibility which the jury would otherwise attribute to a complainant's account is strengthened by an accused's inability to furnish evidence of a motive for the complainant to lie, the standard of proof is diminished. The High Court referred to a decision of the New South Wales Court of Criminal Appeal in *R v E*[34] where

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30 Cf *R v JJT* [2006] NSWCCA 283 at [75].
31 AB 165 l 33 to AB 166 l 2.
32 AB 167 ll 16-21.
33 (1998) 193 CLR 1; [1998] HCA 2.
34 (1996) 39 NSWLR 450 at 464.

Sperling J said that one of the effects of questioning an accused about his lacking knowledge of any reason why the complainant would lie was that it reversed the onus of proof: "The question implies that, unless the jury is satisfied that the complainant is a liar, they should accept the complainant's evidence and convict".[35]

[34] Their Honours in *Palmer* said of that observation that:

> "The third observation may overstate the effect of the question in a particular case, especially if the trial judge gives the jury a direction to the contrary. A firm and clear direction from the trial judge may prevent the impropriety of asking the question from causing justice to miscarry. Nevertheless, as the question is irrelevant to any issue in the case, it ought not be asked. As Hunt CJ at CL pointed out in *R v Uhrig*, to ask the question 'Why would the witness lie?':
>
> > 'invites the jury to speculate … to the conclusion that, unless they are satisfied by the accused that the witness has a motive to lie, they should accept the evidence of that witness and convict. In my view, that danger of such illegitimate speculation is a sufficient reason for saying that the rhetorical question should not be raised in such a case.'"[36]

[35] Their Honours continued:

> "With respect, a complainant's account gains no legitimate credibility from the absence of evidence of motive. If credibility which the jury would otherwise attribute to the complainant's account is strengthened by an accused's inability to furnish evidence of a motive for a complainant to lie, the standard of proof is to that extent diminished. That is the converse of the proposition stated by Creswell J in the case cited by *Wills* where his Lordship acknowledged that proof of a motive to lie weakened a complainant's credibility. The correct view is that absence of proof of motive is entirely neutral."[37]

[36] *Palmer* was a case where the objectionable questions arose in the cross-examination of the accused person. The contention here is that the learned trial judge crossed the line by asking "Do you believe her?" and "Is there any valid reason to disbelieve her?"

[37] Unlike *Palmer* the case here did not involve any question of motive. None was suggested, either in cross-examination or in address, and, not surprisingly, none was referred to in the summing up. In light of the learned trial judge's repeated direction that the jury were the sole judges of the fact, and it was for them to assess what evidence they accepted or rejected, and in light also of the non-objectionable direction that any comment made by the judge about the evidence was just that, and the jury were not obliged to accept it but could ignore it, I do not consider that the comments in the passage at paragraph [32] above did more than exhort the jury to make their own decision on the mother's evidence. That consideration would in the ordinary course include matters such as credibility (honesty) and reliability. It would certainly involve factors apart from motive.

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35 *Palmer* at 8.
36 *Palmer* at 8-9.
37 *Palmer* at 9.

[38] The jury had been directed about how they might go about the assessment of evidence[38] and in that respect had been directed that they might look at the credibility and reliability of a witness and the reliability of their evidence, that credibility concerns honesty and that it was for the jury to decide what parts of a witness's evidence they might accept. Specifically they were directed that it was a matter for them "to judge whether a witness is telling the truth and correctly recalling the facts about which he or she has testified".[39]

[39] The learned trial judge then gave a number of examples that the jury might take into account, including presentation in the witness box, the likelihood of the account, apparent reliability when compared with other evidence, whether the witness had a good memory, and whether inconsistent things had been said. It is in that context that the questions were posed to the jury about whether they disbelieved or had reason to disbelieve the mother's evidence. I do not consider that the jury would have understood that in the way found impermissible in *Palmer*.

[40] In context, the aspect of the mother's evidence that was being referred to was that concerning the letter, rather than any wider aspect of her testimony. The context includes the passage referred to at paragraph [30] above, which, in my view, demonstrates why the scope of the direction was confined to the mother's evidence in respect of her attention being drawn to the letter and that it was on the appellant's computer. In that respect the direction did no more than urge the jury to consider whether they accepted her evidence or not. The direction did not introduce or refer to a motive to lie, nor did it go so far as to suggest that in the absence of a valid reason to disbelieve the mother, her evidence was to be accepted. Shortly before those comments the learned trial judge had explicitly directed the jury that conclusions on factual matters were a matter for them.

[41] Secondly, it was said that even if it did not offend against the principle in *Palmer*, it was part of a continuum of comments that distorted the burden of proof and detracted from a fair and balanced summing up.

[42] I reject that contention. The directions referred to above made it very clear that the burden of proof lay at all times on the prosecution and never shifted.

[43] The appeal against conviction should be dismissed.

Leave to appeal against sentence

[44] The main contention on this application centred upon the fact that the sentence was based upon the entirety of the period of maintaining, notwithstanding that the conduct constituting count 7 had occurred after the complainant turned 16. This count comprised of an act of sodomy under s 208 of the Code, which was repealed by the *Health and Other Legislation Amendment Act* 2016 (Qld) on 23 September 2016.[40]

Legislative Provisions

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38 AB 161.
39 AB 161 l 32.
40 *Criminal Code*, s 4.

[45] It is necessary to first consider the statutory framework under which the applicant was charged. The indictment is dated 9 September 2016, prior to the amendments referred to above. At that time, s 229B(10) of the *Criminal Code* specified:

> "***prescribed age***, for a child, means –
>
> (a) if the unlawful sexual relationship involves an act that constitutes, or would constitute (if it were sufficiently particularised), an offence defined in section 208 – 18 years; or
>
> (b) in any other case – 16 years."

[46] In 2016, s 9 of the *Health and Other Legislation Amendment Act* amended s 229B of the *Code* to read:

> "Any adult who maintains an unlawful sexual relationship with a child under the age of 16 years commits a crime."

[47] Section 11 of the *Criminal Code* refers to the liability of offenders and their punishment where an offence has been repealed or amended:

> "**11 Effect of changes in law**
>
> (1) A person can not be punished for doing or omitting to do an act unless the act or omission constituted an offence under the law in force when it occurred; nor unless doing or omitting to do the act under the same circumstances would constitute an offence under the law in force at the time when the person is charged with the offence.
>
> (2) If the law in force when the act or omission occurred differs from that in force at the time of the conviction, the offender can not be punished to any greater extent than was authorised by the former law, or to any greater extent than is authorised by the latter law."

Submissions

[48] For the applicant Ms Bain submitted that the finding by the learned sentencing judge that the period of maintaining a sexual relationship was one of six and a-half years was in error as it took into account conduct that no longer reflected an offence known to law. The inclusion of Count 7 as a particular of Count 1 effectively lengthened the period of maintaining past the prescribed age of 16, until the complainant was five days short of his 17th birthday. In this case, the issue was not whether the charge of sodomy still existed at the time of conviction as it had been effectively subsumed into other sections.[41]

[49] It was submitted that the shorter period of maintaining should thus have been reflected in the penalty: s 11(2) of the *Code*. It was submitted that the sentencing discretion had not been informed as to the repeal of the offence of sodomy, the change in the prescribed age and that there should not have been regard to the uncharged offences arising throughout the period of maintaining after the complainant turned 16. It follows, it was submitted, that the sentencing discretion

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41 *Criminal Code*, s 222.

had miscarried and the error ought to be considered "material" so as to require this Court to exercise the overall sentencing discretion anew.[42]

[50] In relation to Ground 2, it was submitted that the inclusion of the extended period of offending, of almost 12 months, and the consideration of the continuation of uncharged offending within that illicit sexual relationship, was a discernible error that necessitated this Court exercising the discretion afresh. The issue to be determined by the learned sentencing judge was where the matter fell to be sentenced within the range for offences of this nature, depending upon the matters that increase a sentence for the offence of maintaining, such as the length of the maintaining period. It was submitted that in this case, the accumulation of relevant factors would militate toward a sentence not at the very top of the range.

[51] For the Crown, Ms Wooldridge submitted that the observation by the learned sentencing judge in describing Count 7 as a particular of Count 11 was consistent with the date span and wording of Count 1 as charged and on the indictment, the manner in which the trial had been conducted, and an approach commonly adopted in relation to sentencing for offences under s 229B of the Code.

[52] It was further submitted in relation to Ground 1 that s 11 of the Code does not apply to preclude the applicant from being punished for Count 7 because, as accepted by the applicant, the acts constituted an offence both at the time of the applicant's committing the offence and at the time he was charged. It is submitted that pursuant to s 20 of the *Acts Interpretation Act* 1954 (Qld) (the **AIA**), the repeal of s 208 of the Code does not adversely affect the applicant's liability to prosecution and penalty. Section 20(2) provides for situations where an Act has been repealed:[43]

> "The repeal or amendment of an Act does not –
>
> (a) revive anything not in force or existing at the time the repeal or amendment takes effect; or
>
> (b) affect the previous operation of the Act or anything suffered, done or begun under the Act; or
>
> (c) affect a right, privilege or liability acquired, accrued or incurred under the Act; or
>
> (d) affect a penalty incurred in relation to an offence arising under the Act; or
>
> (e) affect an investigation, proceeding or remedy in relation to a right, privilege, liability or penalty mentioned in paragraph (c) or (d)."

[53] In oral address, it was submitted that it had not been shown why s 20 would not have application in the present case, and *R v PAZ*[44] was applicable on this aspect. *PAZ* held that the legislative history of s 20 is consistent with it being afforded primacy over s 11. Further, it was submitted that a consideration of the law "in force" as referred to in s 11(2) included all applicable law, such as s 20 of the *AIA*, not just the specific offence provision charged.

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42 *R v Baxter* (2007) 173 A Crim R 284 per Kirby J at 294-295; [2007] NSWCCA 237.

43 *Acts Interpretation Act* 1954 (Qld).

44 [2017] QCA 262.

[54] In relation to Ground 2, Ms Wooldridge submitted that there was little that could be said by way of mitigation on behalf of the applicant, and that in the circumstances, while a lesser sentence may also have been open, this Court would not conclude that the ultimate sentence imposed was manifestly excessive.

Discussion – ground 1

[55] The suggested error on the part of the learned sentencing judge related to the determination that the period of offending was one of six and a-half years. The contentions were that his Honour's discretion was not informed by: (i) the repeal of the offence of sodomy; (ii) the change in the prescribed age; and (iii) the anomalous circumstance that Count 7 was taken into account whereas regard was not had to the uncharged offences arising in the 12 month period after the complainant turned 16.[45]

[56] The sentencing judge's findings regarding the period of maintaining are as follows:[46]

> "You were the biological father of the complainant. He was aged between 10 and a-half years of age and 17 years during the period of offending. It involved mutual masturbation, oral sex, anal intercourse and touching. Whilst there was no accompanying physical violence per se, nevertheless the offending behaviour was abominable. You grossly abused your son by sexual grooming and then offending over a six and a-half year period."

[57] I reject the contention that these findings were made without knowledge of the 2016 amendment to 229B. The learned sentencing judge presided over the trial, at the outset of which the prosecutor raised this aspect.[47] Further, the amendments were again mentioned at the conclusion of the trial in the context of discussing a jury direction.[48] The trial concluded on 10 March 2017 and the applicant was sentenced on 11 April 2017. In the circumstances it could not be said that these matters had been forgotten when the sentence was imposed.

[58] The applicant does not contend that the Crown was not entitled to proceed to trial on the offences as charged in Counts 1, 5 and 7. At the sentencing hearing, neither Counsel contended that the criminality the subject of Count 7 would be considered separate and distinct from that encompassed in Count 1. As the respondent submitted, even if the learned sentencing judge had not had specific regard to the legislative amendment, the question for this Court would remain whether there had been non-compliance with applicable law or legal principle such that it would conclude that the sentencing discretion had miscarried.

[59] In oral address, Counsel for the applicant submitted that the very wording of s 11(2) contemplates a difference between the law in force at the time when the offences were committed and the penalty enforced at the time of conviction, specifically where it says:

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45 Applicant's outline at paragraph 30.
46 AB 37.
47 AB 23-24.
48 AB 128-129.

> "…the offender can not be punished to any greater extent than … is authorised by the latter law".

It was contended that the specificity of those words must overcome the general provisions of s 20 of the AIA.

[60] This issue was recently considered by this Court in *R v PAZ*.[49] Counsel for the applicant submitted that *PAZ* was not applicable in this case, as it considered a different aspect of the way the charge of sodomy was repealed. In that case, the applicant had also been convicted by jury of an offence of maintaining a sexual relationship with a child under the prescribed age of 18 years, as well as a number of offences which were particulars of the maintaining charge, including sodomy under s 208 of the Code. The offences were committed, and the applicant charged with them, before the commencement of the relevant provisions of the *Health and Other Legislation Amendment Act* 2016 (Qld). It was held that the legislative history of s 20 of the AIA revealed an intention that its operation was not overridden by s 11 of the *Criminal Code*.[50] The repeal of s 208 did not mean that the prosecution for those offences could no longer be maintained, and nor did it mean that the penalty could not be imposed.[51] In *PAZ* the charge had been laid, and the indictment presented, before the amendments.

[61] Before this Court the applicant contended that the focus in *PAZ* on s 11(1), and the discussion regarding s 20 as it is applicable to conviction rather than penalties, distinguishes it from the present case. The respondent submitted that *PAZ* was relevant because the same offences and the same legislative amendments were under consideration.

[62] Unless this Court considers that *PAZ* was wrongly decided it should follow it.[52]

[63] In *PAZ* the Court said that the effect of s 20 was to preserve the offence and to preserve the penalty incurred when the offence was committed:[53]

> "[178] The effect of s 20(2)(d) is that the repeal of s 208 of the *Criminal Code* and the amendment to s 229B of the *Criminal Code* do not affect the penalty incurred in relation to each offence. As *Deputy Commissioner of Taxation v Price* establishes, those penalties were incurred when the offence was committed. Here that was well before the 2016 amendments. Because the repeal and amendment does not affect the penalty, nor the proceedings in relation to it, s 11(2) should not be construed, in my view, as meaning that the "law in force" at the time of conviction refers to the amended law."[54]

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49 [2017] QCA 263.

50 *R v PAZ* at 28-31.

51 *R v PAZ* at [137].

52 On 17 August 2018, an application for special leave to appeal to the High Court from *PAZ* was heard and determined. The application was dismissed.

53 *Deputy Commissioner of Taxation v Price* [2006] 2 Qd R 316; [2006] QCA 108; *The Queen v Brancourt* (2013) 280 FLR 356; [2013] NTSC 56; *Mansray v Rigby* (2014) 292 FLR 404; [2014] NTSC 62; *Wilson v Director of Public Prosecutions (NSW)* [2017] NSWCA 128; *R v Pritchard* [1999] 107 A Crim R 88; [1999] NSWCCA 182.

54 Support for this conclusion lies in *R v HXY & Ors* [2017] QSC 108 at [33]-[35]; *R v Brancourt* (2013) 280 FLR 356; [2013] NTSC 56 at [19]-[20]; *Mansray v Rigby* (2014) 292 FLR 404 at [20]-[23]; [2014] NTSC 62 and *R v Pritchard* [1999] 107 A Crim R 88; [1999] NSWCCA 182 at [52]-[53].

[64] Section 20 of the AIA also applies to where an Act is amended as well as when it is repealed.[55]

[65] I do not consider that any basis has been shown to doubt or distinguish *PAZ*. In the present case the indictment was presented prior to the amendments.

[66] Since writing the reasons above I have read the reasons prepared by McMurdo JA. I agree with his Honour's reasons in paragraph [117] below, that s 11(2) of the *Criminal Code* has no scope for operation. For that reason I do not find it necessary to express a view on his Honour's alternative construction.

[67] *R v AP*[56] was a case where the sentence for maintaining included conduct that predated the introduction of s 229B on 3 July 1989. AP was convicted after a trial of one count of maintaining an unlawful sexual relationship with a child under 16 with a circumstance of aggravation and sentenced to 15 years' imprisonment. The indictment was worded to cover the entire period of the relationship, spanning from 26 July 1985 to 1998. The period from 26 July 1985 until the introduction of s 229B on 3 July 1989 was contended to be an offence not known to law. McMurdo P granted the respondent's application to amend the count of maintaining to begin from 3 July 1989 and substituted 14 years' imprisonment for the sentence:[57]

> "[34] Whilst recognising that the applicant must not be sentenced to a greater term of imprisonment for his conduct before 3 July 1989, the comparable cases of *R v L*, *R v Krieger*, *R v S* and *R v Myers* nevertheless support a sentence of 14 years imprisonment. The reduction in sentence from 15 years sufficiently recognises the error into which the primary judge was led of taking into account the period of offending behaviour prior to July 1989."

[68] The applicant submits that *R v AP* has application in the present case. However, *R v AP* differs significantly. In the present case it was conceded by both the applicant and the respondent that the amendment of s 229B did not remove the illegality of the act that made up Count 7. Further, as noted below, the maximum applicable penalty remained the same.

[69] In this matter, the applicant was convicted of all counts as they were worded on Indictment No. 375 of 2016. The learned sentencing judge was aware of the legislative amendment and commented that the law at the time the applicant was charged "captured … all [of] the conduct" in that indictment. This was no doubt upon the basis that where a person commits an offence under the law then in force, and then that law is repealed, that person can still be punished. It follows then that the penalty for that offence under the law in force at that time was also preserved, as set out in s 20(2)(d) of the AIA.

[70] In this case, the maximum penalty prior to the amendments in 2016 was imprisonment for life: s 208(2)(b)(ii) of the Code. The maximum penalty now in force for incest, or carnal knowledge with the person's offspring, is also imprisonment for life. The approach of the learned sentencing judge was to sentence on count 1 and not further punish on the remaining counts, on the basis

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55 *R v PAZ* at [187].
56 [2003] QCA 445.
57 Citations excluded.

that those remaining counts formed part of the particulars of Count 1.[58] This was an approach open to his Honour.[59]

[71] I am not persuaded that there has been shown to be a misapplication of the sentencing discretion. This ground fails.

Discussion – ground 2

[72] Counsel for the applicant conceded that the learned sentencing judge took into account all relevant sentencing considerations in an integrated approach.[60] It was contended that the sentence should be 12 years, in accordance with the submissions made on the applicant's behalf at the sentencing hearing.[61]

[73] The applicant was between 46 and 52 years of age at the time of the offending and was aged 55 at sentence. The offending involved the applicant's biological son and a significant breach of trust. The complainant was aged between 10 and a-half years of age and 17 years during the period of offending, and was subject to mutual masturbation, oral sex and anal intercourse. This offending was described as "abominable".[62] The learned sentencing judge identified that there had been no particular violence but there was an aspect of mental manipulation, as the applicant sought to justify his actions through prayer after each occasion of offending, indicating to the complainant that he was a "sinner".[63]

[74] The learned sentencing judge held that the applicant had demonstrated no remorse for his conduct at all,[64] particularly as during the trial, the applicant made allegations of fraud and dishonesty against his former wife and the complainant.

[75] The impact upon the complainant was very significant and included monetary, emotional, physical and psychological impacts. Because of the applicant's offending conduct, the complainant considered himself desensitised to sexual affection with his partner, causing a rift in his relationship.

[76] The applicant's criminal history from Tasmania involved three separate instances of sexual offending against three separate complainants, including a family member, occurring over a period of around six years from 1980 to 1986. He received suspended sentences of imprisonment for these offences in 1983, 2008 and 2015. Whilst those offences predated those against his son in this matter, it was brought to the learned sentencing judge's attention that the current offending had occurred in that context, and his Honour correctly noted that those matters were relevant because they demonstrated the applicant's issues "with sexuality and with offending in a sexual manner from an early time in your life".[65] It was also the case that some of the offending in the present case occurred while the applicant was subject to the suspended sentence.

[77] The applicant was sentenced to 15 years' imprisonment. Counsel for the applicant submitted that the issue is where the matter fell to be sentenced within the range for

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58 AB 37 ll 25-28.
59 *R v SBJ* [2009] QCA 100 at [21].
60 *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25.
61 Applicant's outline paragraph 77.
62 AB 37 l 26.
63 AB 37 ll 32-41.
64 AB 38 ll 11.
65 AB 37 ll 15-16.

offences of this nature, and that the relevant factors in this case did not extend to a sentence at the very top of the range. The respondent, however, contended that whilst a lesser sentence may have been open, it cannot be concluded by this Court that the ultimate sentence imposed was manifestly excessive, nor unreasonable or unjust.

[78] A sentence is not established to be manifestly excessive merely if the sentence is markedly different from other sentences in other cases. It is necessary to demonstrate that the difference is such that there must have been a misapplication of principle or that the sentence is "unreasonable or plainly unjust".[66] In *R v Pham*[67] it was stated:

> "Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle."[68]

[79] As set out in *Barbaro v The Queen*:[69]

> "… in seeking consistency sentencing judges must have regard to what has been done in other cases. Those other cases may well establish a range of sentences which have been imposed. But that history does not establish that the sentences which have been imposed mark the outer bounds of the permissible discretion."

[80] Similarly, in *Markarian v The Queen*, it was stated:[70]

> "Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path that a sentencer, passing a sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. 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."

[81] In cases such as these, when determining where a matter falls within a range, significant circumstances may substantially increase a sentence for an offence of maintaining a sexual relationship. These were outlined in *R v SAG*:[71]

(a) a young age of the child when the relationship thereafter maintained first began;

(b) a lengthy period for which that relationship continued;

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66 *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45 at [58] and [59]. See also *R v Tout* [2012] QCA 296 at [8].

67 (2015) 256 CLR 550; [2015] HCA 39.

68 *R v Pham* at [28]; citations omitted; referring to *Wong v The Queen* (2001) 207 CLR 584; [2001] HCA 64 at [58] and *Barbaro v The Queen* (2014) 253 CLR 58 at [61].

69 (2014) 253 CLR 58 at [41]. See also *Hili v The Queen* at [54].

70 (2005) 228 CLR 357 at 371; [2005] HCA 25.

71 (2004) 147 A Crim R 301; [2004] QCA 286 at [19].

(c) if penile rape occurred during the course of that relationship;

(d) if there was unlawful carnal knowledge of the victim;

(e) if so, whether that was over a prolonged period;

(f) if the victim bore a child to the offender;

(g) if there had been a parental or protective relationship;

(h) if the offender was being dealt with for offences against more than one child victim; and

(i) 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.

[82] As evidenced above, it is a serious aggravating factor that the period of maintaining is "prolonged", particularly where the nature of the offending has been protracted and serious,[72] or involves escalating corruptive behaviour,[73] or where the offending was frequent or regular[74] throughout the period.

[83] Whilst the length of the period of maintaining is a significant consideration, the importance of other aggravating and mitigating factors, when taken into account in an integrated approach, must not be overlooked, as outlined in *R v SAG*. The learned sentencing judge found the period of maintaining in this matter to be six and a-half years. Even if this finding was to be considered an error, a period of five and a-half years is still a significant length of time where it could be said that the offending had been "prolonged". As discussed above, however, I do not consider the finding as to the period of maintaining to have been in error.

[84] At the sentencing hearing, the Crown referred to *R v TS*[75] and *R v Robinson*,[76] and submitted that because of the applicant's prior offending and lack of remorse, 14 or 15 years would be appropriate.[77]

[85] On appeal in *R v Robinson*, sentences of life imprisonment were set aside in respect of one count of maintaining and two counts of rape, and concurrent sentences of 18 years substituted. This was a very significant sentence. The applicant was convicted after trial and was a friend of the complainant's parents. He was between 51 and 53 years of age at the time of offences and the complainant aged between five and seven years old. Fraser JA noted in *R v TS* that other than *Robinson*, "no other decision cited to this Court could be regarded as supporting a sentence approaching that crushing severity".[78]

[86] In *R v TS* it was submitted to the sentencing judge that it was a more serious matter than *Robinson*, as the applicant had been sexually interfering with the child since she was three years old and prior to the family's move to Queensland. The period of maintaining charged however, was six years, and featured the penetration of a young girl and the use of threats. The applicant, who was the complainant's father,

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72 *R v TS* (2009) 2 Qd R 276; [2008] QCA 370.
73 *R v AP* [2003] QCA 445.
74 *R v C; ex parte Attorney-General (Qld)* [2003] QCA 134 and *R v SBJ* [2009] QCA 100.
75 [2009] 2 Qd R 276; [2008] QCA 370.
76 [2007] QCA 99.
77 AB 26 ll 1-4.
78 *R v TS* at [2].

entered a plea of guilty. He was sentenced to 20 years. On appeal that was set aside on the basis that the sentencing court was not entitled to take into account, except for limited purposes, the offences which had occurred before the family moved to Queensland.[79] A sentence of 12 years was substituted.

[87] Before this Court, it was conceded that at the sentencing hearing counsel for the applicant submitted that a head sentence of 12 years should be imposed.[80]

[88] A considerable number of comparable cases were drawn to this Court's attention by both the applicant and the respondent. There is no need to refer to all of them.

[89] *R v C; ex parte Attorney-General (Qld)*,[81] *R v L*,[82] and *R v R*[83] were the result of pleas and involved counts of maintaining an unlawful relationship over periods of two and a-half years. *R v Myers*[84] consisted of offending over an eight-month period, with serious aggravating features such as threats to kill the complainant if she ever told anyone. These cases are not of assistance in the present case.

[90] *R v BAO*[85] involved maintaining for a period of three years against a complainant of a similar age, although she was not a lineal descendant. It is of little utility as the applicant in that matter pleaded guilty and had no previous convictions.

[91] *R v GQ*[86] and *R v HAP*[87] both consisted of periods of maintaining for protracted periods. Both involved pleas of guilty and a confession in the former and remorse in the latter. In *R v GQ*, the complainant was aged 11 years old when the offending began, and on appeal the head sentence of 10 years was not disturbed. In *R v HAP*, the complainant was aged seven and on appeal a sentence of 11 years' imprisonment was imposed. In both cases the offenders' cooperation reflected in their pleas (and remorse otherwise) was a factor in the sentence imposed. In the result, both support the imposition of a higher sentence in cases where little or no remorse is shown.

[92] In *R v SBJ*[88] the offender pleaded guilty to one count of maintaining a sexual relationship with his daughter, five counts of indecent treatment during the maintaining period, one count of attempted incest and two counts of incest. The complainant was aged around nine and 11 when the offending commenced, and it continued until she was about 14 years old. The offender was sentenced to nine years' imprisonment with parole eligibility after four years. The early parole date was due to the sentencing judge's consideration of his remorse and a positive prognosis of rehabilitation, but the head sentence was imposed on the basis that the period of offending had been lengthy and involved intercourse three to four times a week for two years of that period. The mitigating factors mean that *SBJ* is of little utility here.

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79 Per Mackenzie AJA at [34] and citing *R v Warn* (1937) 26 Cr App R 115; *R v Simons* (1953) 2 All ER 599 and *R v H, ML* (2006) 96 SASR 139.
80 AB 29 ll 42-45.
81 [2003] QCA 134.
82 [1999] QCA 423.
83 [2000] QCA 279.
84 [2002] QCA 143.
85 [2004] QCA 445.
86 [2005] QCA 53.
87 [2008] QCA 137.
88 [2009] QCA 100.

[93] In *R v AP*,[89] the offender was convicted after a trial of several counts, including one count of maintaining an unlawful sexual relationship with a child under 16 with a circumstance of aggravation. The complainant was the foster child of the applicant and evidence was given that he began to sexually abuse her when she was just three and-half years old. The indictment covered a period of nine years from when the complainant was aged seven to 16 years. Throughout this period, the applicant engaged in escalating corruptive behaviour that resulted in the complainant giving birth to his child when she was aged 14 and a-half. The applicant was 57 years old at sentence and showed no remorse for his conduct. He was sentenced to 14 years' imprisonment on appeal. *AP* is of some qualified assistance in the present case, because of the longer period of offending in that case.

[94] In *R v CBO*,[90] the applicant was found guilty after a trial of one count of maintaining, four counts of rape, two counts of indecent dealing with a circumstance of aggravation. The offender was in a relationship with the mother of the complainant and began dealing with her when she was around eight or nine years old. The period of maintaining was eight years and seven months, with hundreds of instances of offending conduct.[91] There was no cooperation or remorse shown by the applicant and he had been aged between 39 and 48 at the time of the offending. Unlike the applicant here, the applicant in *CBO* had no relevant criminal history and there was no suggestion of any subsequent offending. Therefore the sentence of 13 years' imprisonment in *CBO* lends some support to the sentence imposed upon the applicant here.

[95] In *R v BAY*,[92] the applicant was charged with 37 counts of indecent dealing and sentenced to 10 years' imprisonment with respect to a count of maintaining with circumstances of aggravation. The complainant was his daughter and was aged seven years old when he first began to sexually interfere with her. The applicant pleaded guilty and showed remorse. On appeal, when considering comparable cases Atkinson J commented:[93]

> "Each of these cases is very serious but the gravamen of the length of time over which the offending occurred in this case is that it essentially robbed the complainant of the whole of her childhood."

Atkinson J also referred to the fact that without the benefit of a plea, the applicant in that case would have received 12 years' imprisonment. The plea and demonstrated remorse set *BAY* apart from a case such as the present.

[96] In *R v BBM*,[94] Fraser JA referred to *R v SAG*, recognizing that sentences up to 15 years could be imposed for offences of the current nature:

> "[26] In *R v SAG* [2004] QCA 286 at [18] Jerrard JA referred to a large number of decisions in this Court in which offenders who had maintained an unlawful sexual relationship with one child victim for a lengthy period, as here, were sentenced for periods between 10 and 15 years, which sentences were imposed or upheld on appeal."

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89 [2003] QCA 445.
90 [2016] QCA 24.
91 *R v CBO* at [22].
92 (2005) 157 A Crim R 309; [2005] QCA 427.
93 *R v BAY* at [44].
94 [2008] QCA 162 at [26].

[97] *R v BCA*[95] also involved significant features of aggravation. It was found on appeal that the period of maintaining was from when the complainant was aged seven to 15 years old, and involved numerous acts of sodomy and simultaneous indecent dealing. The offender was the natural father of the complainant and showed no remorse. The complainant suffered devastating consequences including physical pain and faecal incontinence during the period of offending. For the count of maintaining, the sentence of 10 years was upheld on the basis that anything less was not appropriate.

[98] *BCA* was a case involving a conviction after a trial, where the sentencing judge erred by not determining the period of maintaining. Consequently this Court undertook that task as part of its sentencing, even though that was described as "an exceptional course".[96] The respondent in that case referred to two cases, each an Attorney-General's appeal, and each in the range of nine to 10 years.[97] The other cases referred to by the applicant were in the range of eight to nine years.[98] That fact, plus the Court's concern that a sentence of 10 years would require that the offender serve 80 per cent of the term, were the evident reasons as to why only 10 years was imposed.

[99] Given the sentences imposed in *AP* and *CBO*, and particularly what was said in *SAG* and *BBM*, I consider *BCA* to be an anomalous outcome. In any event the constrained set of comparable cases to which the Court was there referred to make it of no utility in this case.

[100] *AP*, *CBO* and *BAY* support a conclusion that a sentence of up to 15 years was open to the learned sentencing judge in this matter. The learned sentencing judge held that most (all but two) factors in *SAG* were present in this case. The offending conduct lasted for a significant portion of the complainant's childhood, beginning when he was 10 years of age; there existed an aspect of mental manipulation throughout that period; the offending was penetrative, painful and serious, and over a prolonged period; it was in the context of a parental relationship; and some of it occurred while the applicant was the subject of a suspended sentence for similar offending. Whilst the offences considered were against only one complainant, the applicant's relevant criminal history went against him. The lack of remorse and the fact that it went to trial, during which the applicant made allegations of fraud and dishonesty against members of his own family, meant that there existed no mitigating factors in the applicant's favour.

[101] Whilst a lesser sentence could have been imposed, I do not consider that the sentence of 15 years' imprisonment can be shown to be manifestly excessive. I do not consider the sentence to be unreasonable or plainly unjust.[99] I do not accept the contention that the accumulation of aggravating factors in the applicant's case suggested a sentence more towards the middle of the suggested range of 12 to 15 years.

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95 [2011] QCA 278.

96 *BCA* at [34].

97 *R v C; ex parte Attorney-General (Qld)* [2003] QCA 134; *R v Young; ex parte Attorney-General (Qld)* (2002) 135 A Crim R 253; [2002] QCA 474.

98 *R v BAO* [2004] QCA 445 and *R v SAR* [2005] QCA 426; *R v Walden* [2010] QCA 13, *R v PAK* [2010] QCA 187 and *R v W* [1998] QCA 343 were held to be of no use: [55]-[56].

99 *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45 at [58] and [59]. See also *R v Tout* [2012] QCA 296 at [8].

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

Proposed orders

[103] I would make the following orders:

1. The appeal against conviction in CA No. 145 of 2017 is dismissed.
2. The application for leave to appeal against sentence in CA No. 102 of 2017 is refused.

[104] **McMURDO JA:** I agree that the appeal against conviction should be dismissed for the reasons given by Morrison JA. I agree that the application for leave to appeal against sentence should be refused although for somewhat different reasons.

[105] I agree with Morrison JA that the sentence is not manifestly excessive. The other argument in challenging the sentence is based upon what is said to be the effect of the repeal of s 208 and the amendment of s 229B and s 215 of the *Criminal Code* (Qld) ("the Code"). Counts 5 and 7 on the indictment charged the appellant with offences against s 208, committed respectively in 2007 and 2013. Those counts, together with counts 2, 3 and 4, constituted particulars of the charge in count 1, which was the maintaining an unlawful sexual relationship with a child under the prescribed age. According to s 229B of the Code at the time of the conduct and at the time of the appellant being charged, the prescribed age was 18 years. When s 208 was repealed in 2016,[100] s 229B was amended so that the relevant age for an offence of maintaining an unlawful sexual relationship with a child became, in all cases, 16 years.

[106] The appellant's argument is that these changes to the Code ought to have affected the exercise of the sentencing discretion in the present case, and that the judge did not take them into account, with the result that the appellant was sentenced inconsistently with s 11(2) of the Code. For the respondent, it is submitted that s 11(2) has no application to this case, according to the judgment of this Court in *R v PAZ*.[101] I respectfully disagree with the reasoning in *PAZ*, and with the similar reasoning of Douglas J in *R v HXY & Ors*.[102] Since the present appeal was argued, special leave to appeal to the High Court from *PAZ* has been refused, but that does not provide a legal impediment to the reconsideration of *PAZ* by this Court in an appropriate case. As I will explain, this is not such a case. On my view about s 11(2), it did not apply to this case, and, it is necessary to explain that view as briefly as I can.

[107] In essence, this is a question of the interaction of s 11(2) of the Code and s 20(2)(d) of the *Acts Interpretation Act* 1954 (Qld) ("the AIA"). Section 11 of the Code provides as follows:

> "**11 Effect of changes in law**
>
> (1) A person can not be punished for doing or omitting to do an act unless the act or omission constituted an offence under the law in force when it occurred; nor unless doing or omitting to

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100 By the *Health and Other Legislation Amendment Act* 2016 (Qld).
101 [2017] QCA 263.
102 [2017] QSC 108.

do the act under the same circumstances would constitute an offence under the law in force at the time when the person is charged with the offence.

(2) If the law in force when the act or omission occurred differs from that in force at the time of the conviction, the offender can not be punished to any greater extent than was authorised by the former law, or to any greater extent than is authorised by the latter law."

[108] Section 20 of the AIA relevantly provides as follows:

"(1) In this section—

"Act" includes a provision of an Act.

"repeal" includes expiry.

(2) The repeal or amendment of an Act does not—

…

(d) affect a penalty incurred in relation to an offence arising under the Act; …".

[109] Until 1995, there was no arguable tension between these provisions, because the operation of s 20 was expressly excluded where s 11 of the Code applied by the then terms of s 20(3) of the AIA. In 1995 s 20 was amended by s 458 and schedule 2 of the *Criminal Code Act* 1995 (Qld). Those provisions had effect from assent being given to the 1995 Act. It was necessary to remove the exclusion of s 11 of the Code which had been within s 20 of the AIA because the Code itself was expressed to be repealed by the 1995 Act. But as it happened, the repeal of the Code, which was to occur by proclamation, [103] never occurred, and the 1995 Act was itself repealed in 1997.[104] Consequently, there are these two provisions, s 11 of the Code and s 20 of the AIA, each of which must be given effect.

[110] In *PAZ*, it was held that s 20 of the AIA was not overridden by s 11 of the Code,[105] and that its effect was that, at all times from the commission of the relevant acts, the offender was subject to a penalty according to the law as it was at the time of those acts, both before and after the repeal of s 208 of the Code. Therefore the repeal of s 208 and the amendment of s 229B of the Code meant that, in the terms of s 11(2), the law in force when the acts or acts occurred did not differ from that in force at the time of the conviction, because s 20(2)(d) resulted in the relevant law continuing to be that as it was before those changes to the Code in 2016.[106] Consequently s 11(2) was not engaged.

[111] That reasoning substantially accorded with the judgment in *HXY*, where Douglas J held that s 20(2)(d) "preserve[d] the potential liability of the applicants to a penalty incurred in relation to an offence arising under the *Drugs Misuse Act* as well as to a penalty incurred in relation to such an offence under the VLAD Act", where the

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103 s 2(4).
104 *Criminal Law Amendment Act* 1997 (Qld), s 121.
105 *PAZ* at [130].
106 Ibid at [278].

latter Act had been repealed before the applicants were convicted.[107] His Honour held that this meant that the law in force at the time of the conviction would include the potential liability to the mandatory penalty under the VLAD Act, so that it could not be said that the law at the time of the conviction differed from that applicable at the time that the relevant act occurred.[108]

[112] The effect of this reasoning is to substantially erode the operation of s 11(2). That provision has two limbs: the first preventing an offender from being punished to a greater extent than was authorised by the law in force when the act or omission occurred ("the former law"), and the second preventing an offender from being punished to any greater extent than is authorised by the law in force at the time of the conviction ("the latter law"). The second limb applies when the authorised punishment has been decreased between the commission of the offence and the conviction. The reasoning in *PAZ* and *HXY* would make the second limb redundant. In my opinion, that consequence should follow only if there is no other interpretation of s 11(2).

[113] Assuming that the operation of s 20(2)(d) is not impliedly excluded where s 11 would apply (as it was formerly expressly excluded), the interpretation which I would prefer is one by which s 11(2) qualifies the operation of s 20(2)(d), rather than the other way around. Suppose the maximum penalty for an offence is reduced by an amendment to the law after the commission of the offence but before the conviction in a particular case. The law in force at the time of the conviction, as it is described in s 11(2) is the law in force generally. Section 11(2) is engaged where the law changes, as it does in the example I have given. That is consistent with the uses of the expression "law in force" in s 11(1). The effect of s 20(2)(d) of the AIA is to preserve the offender's liability to punishment, but the extent of that punishment may be affected by the operation of s 11(2) of the Code.

[114] Further, there is an apparent tension between s 20(2)(d) and s 20C(3) of the AIA, under the reasoning in *PAZ*. By s 20C(3), if an Act increases the maximum or minimum penalty, or the penalty, for an offence, the increase applies only to an offence committed after the Act commences. There is no corresponding provision whereby a *decrease* in a penalty would apply only to an offence committed after the (amending) Act commences. By necessary implication, a *decrease* in a penalty for an offence would apply to an offence committed before that Act commences. But according to the reasoning in *PAZ*, by s 20(2)(d), the offender would have incurred a (higher) penalty, for which he would remain liable notwithstanding the repeal or amendment by which the maximum or minimum penalty for an offence of that kind was decreased.

[115] Under the interpretation which I prefer, s 11(2) and s 20(2)(d) can operate together. In my respectful opinion, where there is that alternative interpretation, it should be preferred to one which removes the beneficial operation of a provision which has been in place since the original enactment of the Code.

[116] What I have said is sufficient to show why, in essence, I respectfully disagree with *PAZ*, *HXY* and the other members of the Court in the present case. It is unnecessary to explain in more detail my reasoning, except that if this Court has an appropriate

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107 *HXY* at [40].
108 Ibid at [34].

occasion to reconsider *PAZ*, it will have to consider its decisions in *R v Inkerman*,[109] *R v Mason and Saunders*,[110] *R v Truong*,[111] *R v Pham*[112] and *R v Carlton*,[113] as well as a decision of the Court of Appeal of the Supreme Court of the Northern Territory in *Olsen v Sims*.[114]

[117] On the interpretation of these provisions which I prefer, does s 11(2) matter for the appellant's sentence? His argument is not that s 11 means that he was wrongly convicted; it is limited to s 11(2). In my view there has been no change in the law in force as it applies to his case. Before 2016, having been charged with the offences for which he was ultimately convicted, he was liable to be punished for those offences upon conviction, consistently with the operation of s 11(1). Apart from the acts which constituted the offences of sodomy, his other acts, as charged, constituted offences and on the jury's verdicts, those acts would prove an offence under the present terms of s 229B of the Code. At the time that those acts occurred, the punishment which was authorised by the "former law" was a maximum penalty of life imprisonment; that remained the case under the "latter law". For that reason s 11(2) did not apply. Once that conclusion is reached, the appellant's argument demonstrates no error by the sentencing judge. The application for leave to appeal should be refused.

[118] **BOWSKILL J:** I agree that, for the reasons given by Morrison JA, the appeal against conviction should be dismissed and that the application for leave to appeal against sentence should be refused. My agreement on the latter reflects, in part, my view that s 11(2) of the *Criminal Code* has no scope for operation in this case, for the reasons given by Morrison JA at [68] and [70] and by McMurdo JA at [117]. This is not a case in which the construction of and interaction between s 11(2) of the Code and s 20(2) of the *Acts Interpretation Act* 1954, addressed in *R v PAZ* [2017] QCA 263, affects the outcome. For that reason, I do not express a view on the alternative construction preferred by McMurdo JA.

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109 [1997] QCA 316.
110 [1998] 2 Qd R 186; 1997] QCA 421.
111 [2000] 1 Qd R 663; [1999] QCA 21.
112 (2009) 197 A Crim R 246; [2009] QCA 242.
113 [2010] 2 Qd R 340; [2009] QCA 241.
114 (2010) 206 A Crim R 454; [2010] NTCA 8.