SUPREME COURT OF QUEENSLAND

CITATION:	*R v WBG* [2018] QCA 284
PARTIES:	**R** **v** **WBG** (applicant)
FILE NO/S:	CA No 30 of 2018 DC No 2160 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 24 January 2018 (Reid DCJ)
DELIVERED ON:	23 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	16 August 2018
JUDGES:	Morrison and Philippides JJA and Flanagan J
ORDER:	**The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted, on his own pleas of guilty, of multiple sexual offences against his three biological daughters – where each of the applicant's daughters was under the age of 12 at the time of the offending – where the offending occurred while the applicant's daughters were under his care, pursuant to a custody agreement the applicant had reached with his former wife – where the applicant had sought to persuade his two eldest daughters that his offending formed part of a normal father-daughter relationship, and to convince his middle daughter to keep the offending secret – where the learned sentencing judge imposed various concurrent terms of imprisonment in respect of the offences, with a head sentence of 10 years' imprisonment – whether the head sentence is manifestly excessive *Criminal Code* (Qld), s 210, s 221, s 229B, s 349 *Barbaro v The Queen* (2014) 253 CLR 58; [2014] HCA 2, cited *R v BBM* [2008] QCA 162, considered *R v EK* [2013] QCA 278, considered

R v MCT [2018] QCA 189, applied

COUNSEL: M J Copley QC for the applicant
C N Marco for the respondent

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

[1] **MORRISON JA:** I agree with the reasons of Flanagan J and the order his Honour proposes.

[2] **PHILIPPIDES JA:** I agree with the order proposed by Flanagan J for the reasons given by his Honour.

[3] **FLANAGAN J:** On 21 September 2017, the applicant was convicted, on his own pleas of guilty, of 20 sexual offences. The offences were committed against his three biological daughters. At the time of the offending, Child 1 was nine years old, Child 2 was six to seven years old and Child 3 was six years old.

[4] The offences in respect of Child 1 were maintaining a sexual relationship with a child (count 2); indecent treatment of a child under 16, under 12, who was a lineal descendant under care (counts 9 to 17 and 19); and incest (count 18).

[5] The offences in respect of Child 2 were maintaining a sexual relationship with a child (count 1); indecent treatment of a child under 16, under 12, who was a lineal descendant under care (counts 3, 6, 7 and 8); and rape (counts 4 and 5).

[6] The offence in respect of Child 3 was one count of indecent treatment of a child under 16, under 12, who was a lineal descendant, under care (count 20).

[7] The maximum penalty for the offences of maintaining a sexual relationship with a child, rape and incest is life imprisonment.[1] Indecent treatment of a child carries a maximum penalty of 20 years.[2]

[8] The applicant was sentenced to various concurrent terms of imprisonment for each of the 20 offences. The effective head sentence was one of 10 years' imprisonment, which was imposed for each of the two counts of maintaining a sexual relationship with a child. The sentences of 10 years' imprisonment required the making of serious violent offence declarations.[3]

[9] The only proposed ground of appeal is that the head sentence is manifestly excessive and does not adequately reflect the applicant's pleas of guilty.[4] In the course of oral submissions, Senior Counsel for the applicant confined the proposed ground of appeal to one that the head sentence is manifestly excessive.[5] The applicant's contention is that the sentence "is simply too long",[6] when regard is had to the decisions of this Court in *R v EK*[7] and *R v BBM*.[8]

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1 *Criminal Code* (Qld) s 349(1), s 221(1) and s 229B(1).
2 *Criminal Code* (Qld) s 210(3)-(4).
3 *Penalties and Sentences Act* 1992 (Qld), s 161A(a) and s 161B(1).
4 RB, page 2.
5 Transcript of application, 1-3, lines 19 to 28.
6 Transcript of application, 1-4, line 26.

[10] For the reasons which follow, on no view is the head sentence imposed manifestly excessive. The application for leave to appeal against sentence should be refused.

Circumstances of the offending

[11] The applicant and his wife separated in 2012 and were subsequently divorced in 2013. The wife entered into a new relationship. The applicant had custody of his three daughters every second weekend and for half the school holidays.

[12] On 8 September 2016 the offending came to light and was reported to police on 9 September 2016. The last time the applicant had custody of his three daughters was the weekend of 26 to 28 August 2016. The relevant period of maintaining a sexual relationship with both Child 1 and 2 was for approximately three months between 3 June 2016 and 29 August 2016. The end date of 29 August 2016 reflects the Monday following the last weekend the applicant had custody of his three daughters.

[13] Child 1 identified three specific occasions of sexual conduct throughout the charged period of maintaining a sexual relationship. The sexual acts included the defendant showering with Child 1 and rubbing his penis up and down against her vagina. A further act in the shower involved the applicant's penis rubbing against Child 1's clitoris. On another occasion the applicant caused Child 1 to watch pornographic videos and to touch his penis. The applicant explained to Child 1 that Child 2 was an "early one" and that she was a "late one" because most girls commence a sexual relationship with their fathers at seven years old. Later that night, the applicant performed oral sex on Child 1. Subsequently, the applicant placed cream on Child 1's vagina and bottom, placed her on top of his erect penis and commenced rubbing his penis in the middle part of her vagina. A further sexual act described by Child 1 was the applicant penetrating her anus and rubbing his penis on the outside of her vagina. The anal penetration constitutes the incest offence, which is count 18.

[14] For the same period, 3 June 2000 to 29 August 2016, the applicant also maintained a sexual relationship with Child 2. The applicant groomed Child 2, who was only seven years old, by telling her that he was teaching her how to have sex "with boys in the future". He told Child 2 that she was to keep their sexual acts secret. The acts commenced by Child 2 fondling the applicant's exposed genitals in the shower. Child 2 was also required to perform oral sex on the applicant in the shower. On subsequent occasions, the applicant performed oral sex on Child 2 and rubbed his penis between her legs close to her vagina, with the aid of lubricant. Child 2 stated to police that she believed the offending would cease when she turned 18 years of age, as that was "when Daddy's going to allow us to marry". The two occasions on which Child 2 performed oral sex on the applicant constitute the two rape offences. The conduct also included the applicant showing Child 2 pornographic videos involving sexual misconduct between fathers and allegedly their daughters, and rubbing his penis close to her vagina and to her anus.

[15] The indecent act in relation to Child 3 occurred when she was only six years of age. The incident involved the applicant showering with Child 3. The applicant asked Child 3 if she wanted to

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7 [2013] QCA 278.
8 [2008] QCA 162.

play with it to which she replied "no". Child 3 described the applicant's penis as being erect.

[16] The learned sentencing Judge identified the following factors as being significant:

(a) the tender ages of Child 1 and Child 2;

(b) the act of anal intercourse with Child 1;

(c) the applicant's unlawful carnal knowledge of Child 1 and Child 2;

(d) the oral sex the applicant had with Child 2;

(e) the fact that Child 1 and Child 2 were the natural daughters of the applicant;

(f) the fact that Child 1 and Child 2 were under the care of the applicant;

(g) the fact that the applicant urged Child 2 to keep the sexual conduct secret; and

(h) the applicant emotionally manipulating Child 1 and 2 by suggesting that such conduct was normal.

[17] His Honour considered that the offending in relation to Child 3, whilst less serious, was against a six-year-old daughter, which was a further aggravating feature to be taken into account in setting an overall sentence.[9] To these factors may be added other considerations. The effect of the offending on the applicant's three daughters was profound. This was supported by a psychological report. There was an element of the applicant grooming the children and using emotional blackmail and manipulation. In committing the incest offence, Child 1 explained to the applicant that she was in pain and asked the defendant to remove his penis from her anus. In spite of this protest the applicant continued.

[18] The only mitigating factors in the applicant's favour were his timely pleas of guilty and his lack of any relevant prior criminal history. The applicant did, however, have prior convictions for property offences and drug offences.

[19] The learned sentencing Judge took these matters into account, as well as the fact that the offending extended over a relatively short period of approximately three months and the fact that there was no penile-vaginal intercourse.[10]

Consideration

[20] The applicant's references to *R v EK* and *R v BBM* do not assist in establishing that the head sentence imposed of 10 years with an automatic declaration is manifestly excessive.

[21] The applicant relies on the following passage from the judgment of Muir JA in *R v EK*, where his Honour observed:

> "Putting aside the state of the applicant's health, it is my view that the comparable sentences relied on by the respondent, as well as *R v K*, provide support for the sentences imposed on the applicant, although these sentences are at the higher end of the established range. The offending in *BBM* commenced when the complainant, who was born with disabilities, was only eight years of age. The applicant in *HAA* was sentenced after a trial. His offending commenced when the

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9 RB 46, lines 25-37.

10 RB 46, lines 41-44.

> complainant was nine years of age. The offending in *GQ* included two rapes."[11]

[22] In *R v EK*, the original sentence of 10 years was reduced to nine years. In that case, the applicant was the stepfather of two complainant females. He maintained a sexual relationship with one of them from when she was 13 to when she was 16. He also maintained a sexual relationship with the other complainant commencing when she was 11 and concluding when she was 19. The applicant was not, however, charged with offending occurring after the second complainant turned 16.

[23] A distinguishing feature in *R v EK* was that the applicant had serious medical conditions, including psychiatric difficulties. Muir JA considered that the nature and extent of the applicant's physical ailments were such that imprisonment would be a far greater burden on him than it would be on most inmates and that there existed a substantial possibility that imprisonment would have a materially adverse effect on the applicant's health and well-being. Muir JA considered that the sentencing judge had failed to have due regard to these considerations, which informed the re-sentencing by the Court of Appeal. In those circumstances, the observation of Muir JA upon which the applicant relies does not support a submission that the present sentence is manifestly excessive simply because the length of the maintaining is significantly shorter. This is particularly so where, in the present case, the maintaining ceased when the relevant conduct was reported to police. Further, in the present case, the conduct was in respect of the applicant's three natural daughters, who were of more tender years than the complainants in *R v EK*. The present offences were also committed while the applicant's three daughters were under his care and away from their mother pursuant to custody arrangements.

[24] The applicant relies on *R v BBM* as constituting an example of the Court of Appeal exercising the sentencing discretion afresh. In that case, the application for leave to appeal was granted on the basis that the sentencing judge had failed to impose separate sentences. The Court of Appeal nevertheless imposed the same head sentence of 10 years for one count of maintaining a sexual relationship. The relationship was maintained with the applicant's adopted daughter over a period of approximately eight years. She was aged between eight and 15 years during the period the subject of the maintaining charge. Prior to the complainant turning 10 years of age the relevant conduct only involved kissing. No act of sexual intercourse occurred until the complainant was aged 14 years of age. Thereafter there were three occasions of sexual intercourse. The applicant used a condom on those three occasions. While the period of maintaining is significantly longer than the present case, only one complainant was involved who was not the natural daughter of the applicant. Further, any penetrative sexual acts occurred when the complainant was considerably older than Child 1.

[25] The difficulty with the applicant's reliance on *R v EK* and *R v BBM* is that it is well established that comparable cases do not mark the outer bounds of permissible sentencing discretion with numerical precision.[12] As observed by Morrison JA in *R v MCT*:[13]

> "To succeed on an application based on manifest excess, it is not enough to establish that the sentence imposed was different, or even markedly different, from sentences imposed in other matters. It is

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11 *R v EK* [2013] QCA 278 at [27].

12 *Barbaro v The Queen* (2014) 253 CLR 58 at [41]; *R v MCT* [2018] QCA 189 at [239].

13 [2018] QCA 189 at [240].

> 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'. Consistently with the accepted understanding that there is no single correct sentence, judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies." (footnotes omitted).

[26] The respondent referred both the learned sentencing judge and this Court to numerous comparable cases where sentences of 10 years with the automatic declaration have been imposed for such offending.[14] The applicant has, in my view, failed to identify any error in the exercise of the sentencing discretion.

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

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[14] *R v TS* [2009] 2 Qd R 276; *R v D* [2002] QCA 410; *R v Dickeson; Ex parte Attorney-General (Qld)* [2004] QCA 78; *R v ZA; Ex parte Attorney-General (Qld)* [2009] QCA 249; and *R v MBY* [2014] QCA 17.