SUPREME COURT OF QUEENSLAND

CITATION:	*R v SDF* [2018] QCA 316
PARTIES:	**R** **v** **SDF** (applicant)
FILE NO/S:	CA No 233 of 2018 DC No 257 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Cairns – Date of Sentence: 11 September 2018 (Fantin DCJ)
DELIVERED ON:	14 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	9 November 2018
JUDGES:	Fraser and Philippides JJA and Boddice J
ORDERS:	**1. Grant the application.** **2. Allow the appeal.** **3. Vary the sentence imposed in the District Court by substituting imprisonment for eight months instead of 12 months and substituting two months and four days instead of four months as the period after which the term of imprisonment is suspended for an operational period of 12 months.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of indecent assault with a circumstance of aggravation that the offence was a domestic violence offence – where the applicant was sentenced to imprisonment for 12 months, suspended after four months for an operational period of 12 months – where the applicant was the complainant's grandfather – where the at the time of the offence the applicant was 63 and the complainant was 18 – where the complainant was at home alone and had been unwell – where the applicant came over to care for her – where the applicant gave the complainant a massage and then the complainant fell asleep – where the complainant awoke to find the applicant's hand in her pants, on the outside of her underwear, rubbing the area of her genitals for a short time –

where the complainant rolled over and pretended to be asleep and the applicant left – where the applicant pleaded guilty on the day set for trial after another count was discontinued – where the applicant had no previous criminal convictions, a good work history and had not offended while on bail – where the applicant suffered from depression – where the sentencing judge found that the offence was a serious breach of trust – where it was not submitted that the offence was premeditated – where the sentencing judge made provisional comments in the course of the sentencing hearing – whether those statements demonstrated errors in finding that the offending was more serious than the comparable authorities cited to the sentencing judge – whether the sentence imposed was manifestly excessive

Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, cited
R v Bradford [2007] QCA 293, distinguished
R v Caulfield [2012] QCA 204, distinguished
R v Conway (2012) 223 A Crim R 244; [2012] QCA 142, applied
R v Lothian [2018] QCA 207, distinguished

COUNSEL: J Crawford for the applicant
C Cook for the respondent

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

[1] **FRASER JA:** The applicant was charged with two counts of indecent assault, each alleged to be a domestic violence offence. On the day appointed for the commencement of the trial one count was discontinued and the applicant pleaded guilty to the remaining count. He was convicted and sentenced to imprisonment for 12 months, suspended after four months for an operational period of 12 months. The applicant applies for leave to appeal against the sentence upon two grounds: (Ground 1) the sentencing judge erred in finding that the offending in this case was more serious than the comparable authorities to which the sentencing judge had been taken; and (Ground 2) the sentence is manifestly excessive.

[2] The applicant is the complainant's grandfather. At the time of the offence the applicant was 63 and the complainant was 18. The complainant resided with her parents and their foster children. On or about 9 July 2017 the complainant's parents were away for the weekend. The applicant called to check on the complainant because she was unwell. She had been vomiting. The complainant said that she did not want to be alone and the applicant offered to come to the house. She agreed and the applicant arrived shortly afterwards. There had been a family agreement that the applicant was not allowed to sleep at the house. (Defence counsel submitted that the applicant had told the complainant that he was going to stay the night because she had been unwell for a second day running and she had contacted the applicant against the background of her mother telling her to contact the applicant if she needed help.) The applicant told the complainant that he was going to stay the night

and asked where she wanted him to sleep. She said that she didn't care. At about 10 pm the complainant went to bed in her parents' room. She got up a few times during the night to get ice blocks. The applicant was watching TV. He later came in to the room, lay on the bed, and offered to rub the complainant's back. (Defence counsel submitted that the applicant offered the massage because the complainant had indicated that her belly was sore and aching from being unwell.) The complainant agreed. The applicant lifted up her shirt and rubbed her lower back. The complainant fell asleep. Later she awoke to find the applicant's hand in her pants, on the outside of her underwear, for a short time. The applicant was rubbing over the area of her genitals. The complainant rolled onto her side and faced the wall, pretending to be asleep. The applicant left the room. He left the house the following day at about 9 am.

[3] On 18 July 2017 the complainant told her parents what had happened and it was reported to police on the following day. The applicant voluntarily attended the police station the next day. In a police interview the applicant admitted to sleeping next to the complainant at some point during the night and giving her a back massage. He admitted lifting up her shirt so he could rub her back. He denied the offending.

[4] In a victim impact statement the complainant referred to her life having been changed by the incident. She cried a lot, lost interest in just about everything, on some days struggled to get out of bed, was scared to see men, and panicked if she had her back to men. She was anxious when she left the house and her emotions were stirred up by things that reminded her of the offence.

[5] The applicant's plea was entered after the complainant and other witnesses had participated in conferences and were ready to give evidence. The sentencing judge accepted that the plea demonstrated the applicant assuming responsibility for the offence, remorse and a willingness to facilitate the course of justice. It saved the community resources and allowed the complainant to avoid the ordeal of a trial and cross-examination. The sentencing judge took into account that the applicant had no previous criminal convictions and had not offended again whilst on bail. He had a good work history and was employed as a bus driver at a local school. As a result of the offence he lost his blue card and was unemployed at the time he was sentenced. He was married with adult children, grandchildren and great grandchildren. At the time of the offence he suffered from depression for which he took prescription medicine. The offending was out of character upon the basis of the criminal history.

[6] Because no information had been given to the sentencing judge explaining the offending or whether any steps had been taken by the applicant to obtain treatment or counselling, it was difficult to form any view about the applicant's risk of re-offending. The sentencing judge took into account that an effect of the conviction was that the applicant would become a reportable offender for five years, with onerous reporting requirements.

[7] The sentencing judge considered that the aggravating features of the offence were that it was a serious breach of trust by the applicant upon a vulnerable complainant, his own granddaughter, who was asleep and sick in bed at night in her own home. The sentencing judge found that the applicant took advantage of the complainant's vulnerable state for his own sexual pleasure and his behaviour was deliberate and predatory. The sentencing judge also found that the applicant used the excuse of the complainant's illness to stay the night, knowing he would ordinarily not have been

allowed to do so if her parents were there. There was a very significant disparity of some 45 years in their ages. The sentencing judge balanced against those aggravating factors that the sexual offending, although involving rubbing the complainants groin or genital area, was not prolonged, it was relatively brief, it did not involve actual or threatened violence, it did not involve skin on skin contact, and the applicant stopped and left the room when the complainant pretended to be asleep.

[8] The applicant gave no explanation for the offending conduct and did not apologise to the complainant. The sentencing judge noted that pursuant to s 9(10A) of the *Penalties and Sentences Act* 1992 (Qld) the court was obliged to treat the fact that this was a domestic violence offence as an aggravating factor unless the court considered that was not reasonable because of the exceptional circumstances of the case. The sentencing judge concluded that there were no exceptional circumstances.

[9] The sentencing judge considered that in a case of sexual offending involving a serious breach of trust as in this case denunciation was relevant, and personal and general deterrence were particularly important. It was the nature of the offending and the need for deterrence which required a period of time in actual custody notwithstanding the mitigating circumstances, including the plea, lack of prior convictions, the applicant's personal circumstances, age and remorse demonstrated by the plea.

Ground 1: Error in finding that the offending was more serious than the comparable authorities cited to the sentencing judge

[10] At the sentence hearing the Crown relied upon *R v Caulfield* [2012] QCA 204 and *R v Bradford* [2007] QCA 293. Defence counsel relied upon *R v Lothian* [2018] QCA 207, *R v M'Bie* [2017] QCA 14 (and some District Court decisions upon which no reliance is placed in this application). The facts of those and other cases are discussed in relation to ground 2.

[11] In relation to ground 1, the applicant argued that the sentencing judge wrongly found that *Caulfield* was less serious because there was a lesser age disparity, there was no breach of trust because there was no family relationship, and the complainant in *Caulfield* was not sick and asleep in bed. There are no such findings in the sentencing remarks. The argument is based upon observations by the sentencing judge during the sentence hearing. In the course of submissions by the prosecutor, the sentencing judge questioned whether *Caulfield* was comparable, given that it involved a lesser age disparity, it was not a domestic violence offence, there was not a breach of trust in the sense of the biological family relationship, and that the complainant, although in bed, was not a vulnerable complainant in the sense of being sick and asleep in bed at night. The sentencing judge expressed the view, obviously provisionally, that the offending in the present case was more serious than *Caulfield*, but the sentencing judge also noted that the sentence in *Caulfield* was imposed after a trial whereas the applicant pleaded guilty. In the course of the applicant's counsel's submissions, the sentencing judge invited submissions, and counsel made submissions, in relation to her Honour's provisional view that *Caulfield* was not a more serious case apart from the fact that the offender in that case touched the complainant for a couple of seconds on her genitals and there was more than one offence. The applicant's argument also refers to *Bradford*, but the sentencing judge observed in the course of argument only that the offender in

Bradford was only 11 years older than his victim and was a step-brother, so there was not the significant age disparity that there was in this case.

[12] It is generally to be assumed that a sentencing judge's observations in the course of argument indicate only a provisional view for the purpose of facilitating argument by counsel. Such observations are generally incapable of supporting an appeal. In this case, the sentencing judge's observations were manifestly made for the purpose of facilitating argument by counsel. In no sense can those observations be equated to findings, as is contended for in ground 1. The fact that the observations were made supplies no support for the applicant's additional argument that findings to the same effect should be implied in the sentencing remarks merely because, as was submitted, the severity of the sentence is consistent with such findings having been made.

[13] In the sentencing remarks, the sentencing judge observed that she had carefully considered and taken into account the cases referred to by counsel to the extent that they were relevant as a guide to sentencing, and that each case turned on its own particular facts. Whether or not the sentence is consistent with the guidance supplied by the cited cases may be an issue under the ground that the sentence is manifestly excessive but it is irrelevant to ground 1.

[14] There is no merit in ground 1.

Ground 2: The sentence is manifestly excessive

[15] The maximum penalty for the applicant's offence is ten years imprisonment.

[16] The applicant's argument under this ground includes contentions that the sentencing judge made findings against the applicant on a number of issues upon which there was no evidence and in respect of which the applicant was not expected to adduce any evidence.

[17] Contrary to one of the applicant's arguments, the sentencing judge did not overstate the applicant's offence by describing it as involving a serious breach of trust and deliberate, predatory conduct. The applicant's position of trust arose from the significant difference in their ages (the applicant being 63 and the complainant having only just attained adulthood), he was her grandfather, she was sick and asleep for some of the time, the applicant had accepted the responsibility of caring her, and he had in fact administered care with her permission, a massage, whilst she was in bed. The combination of those circumstances rendered the complainant vulnerable to any abuse by the applicant of his more powerful position. It is not a misuse of language in those circumstances to describe the applicant's opportunistic conduct of using the complainant for his own sexual pleasure as a serious breach of trust and deliberate and predatory conduct. Findings to that effect had been sought by the prosecutor and the sentencing judge did not err in making them.

[18] It does not follow that the offence was premeditated. In the course of argument, the sentencing judge indicated a provisional view that the applicant's offence was premeditated. No such view is expressed in the sentencing remarks. The sentencing judge did remark that the applicant "used the excuse of her illness to stay the night, knowing [he] would ordinarily had not been allowed to do so if her parents had been there" but, consistently with the prosecutor's submissions at the sentence hearing, the respondent did not submit that this should be construed as an

indication that the offence was premeditated. Rather, as the respondent submitted, the applicant was sentenced upon the basis that the offence was not premeditated, the applicant instead committed the offence opportunistically, the offence occupied only a few seconds, and the applicant desisted and left the room immediately upon the complainant rolling over whilst she feigned to continue sleeping.

[19] In *Bradford*, in which Muir JA gave the leading judgment, concurrent sentences of 12 months imprisonment with parole eligibility after five months on three counts of indecent assault were varied by suspending the term of imprisonment forthwith (after the offender had served three months and one week) for an operational period of 12 months. McMurdo P and Lyons J observed that a sentence of 12 months imprisonment fully suspended or suspended after a short term of imprisonment would have been open. In counts 1 and 2 which occurred on one occasion, the 29 year old offender asked his 18 year old step-sister to expose her breasts whilst they were in a car he was driving; when she refused the offender touched her breast inside her shirt and bra, withdrew his hands when she protested, put his hands between her legs, rubbing in the area of her vulva outside her pants, and made sexual remarks. In count 4, which was committed nine months later, the complainant was in the offender's house caring for the offender's child. The offender made inappropriate remarks, wrestled the complainant to the bed, sought her agreement to sexual intercourse, and subsequently followed her into the bathroom and held an activated electric razor on her clothes outside her breasts. The complainant moved out of the house to avoid further contact with the offender. The offender initially denied the conduct in counts 1 and 2 but admitted and sought to explain away the conduct in count 4. After the Crown discontinued count 3, the offender immediately entered a guilty plea to counts 1, 2 and 4. He had no prior criminal history, did not reoffend whilst on bail for a long period, had a good work history, and cared for his young child.

[20] In this case the applicant's relationship with the complainant involved a greater power imbalance for the reasons already given. Furthermore, the utility of *Bradford* as a comparable sentence is limited, because some of the comparable sentencing decisions cited in it are dated and it was decided before the enactment in 2016 of s 9(10A) of the *Penalties and Sentences Act*, pursuant to which it is an aggravating factor in this case that the applicant's offence was a domestic violence offence. If that aggravating factor had been included in the circumstances in *Bradford*, his sentence might well have been more severe.

[21] Even so, and bearing in mind the observation in *Bradford* that a wholly suspended sentence would have been open in that case, a comparison with the sentence as varied on appeal in that case suggests that the applicant's sentence is excessive. The offending in *Bradford* was very much more serious than the applicant's momentary and opportunistic offence: in *Bradford* the offender persisted in his unwelcome conduct despite his victim's protests and attempts to prevent it, he committed three sexual offences on two separate occasions, the criminality in counts 1 and 2 alone was markedly worse than the applicant's single offence, and he used force in count 4.

[22] In *Caulfield*, for one count of common assault and two counts of indecent assault of a 16 year old student committed on the same day, the 52 year old offender was sentenced to wholly suspended terms of one month imprisonment and six months imprisonment, and six months imprisonment suspended after nearly three months, the suspensions having an operational period of two years. In that case the

complainant lived with the offender and his wife. In the first offence, on two or three occasions the offender patted and grabbed the complainant's buttocks as she walked away. In the second offence, the offender patted the complainant's chest, although not specifically her breasts, the neighbour and the offender made sexually suggestive remarks about the complainant, the offender got into bed with the complainant and kissed her on the lips, and despite the complainant pushing him away the offender kissed her neck a couple of times. In the third offence, the offender got into the complainant's bed, she repeatedly pushed him away and said that his wife was coming home or was home, the offender kept trying to touch her vagina, and although the complainant kept moving his hand away he managed to touch her genitals inside her pyjama shorts and underwear for a couple of seconds.

[23] That offending also involved an abuse of trust, the offender being found to be in a quasi-paternal position. In this case the applicant was in a more significant position of trust and there is the related aggravating factor that the applicant's offence was a domestic violence offence. But the totality of the criminality in *Caulfield* was much worse. Importantly, the complainant in that case was a child, being two years younger than the complainant in this case. Furthermore, the offender committed three offences, it was an aggravating feature that there were sexual innuendos in the offender's conversation with the neighbour who was present for some of the period of offending, and the offender persisted despite verbal protests and physical resistance by the complainant. The third offence alone was more serious than the applicant's offending because that offender touched the child's genitals with his hand. It is also significant that the effective sentence of six months imprisonment suspended after nearly three months in *Caulfield* was imposed after a trial, rather than on a plea of guilty as in this case. Muir JA remarked that a wholly suspended sentence might well have been imposed. For those reasons, the applicant's sentence is excessive when compared with the sentence considered by the court in *Caulfield*.

[24] The same sentence as in this case was imposed in *Lothian*, in which the offender, who had previously been in a relationship with the complainant, met her by coincidence at a nightclub and, on two occasions, lifted her dress and grabbed her on the vagina. The offender subsequently followed the complainant and pushed her onto a taxi, causing her to fall onto the road and sustain bodily harm. Overall that offending was much more serious than here because there were two quite separate offences, the offending was violent, the sexual assault was brazenly carried out in a public place, and it was apparently designed to humiliate the complainant. Importantly, that offender was convicted after a trial, there was no indication of remorse, and the offender had a criminal history, albeit not one involving sexual offending. Even having regard to the aggravating features of the applicant's offence already identified and the lateness of his plea, the applicant's sentence seems too severe in comparison with the same sentence for the much more serious offending in *Lothian*.

[25] In addition to *M'Bie* (nine months imprisonment suspended after four months imposed after a trial for much more serious offending against a 15 year old child staying in the offender's apartment), the applicant relies upon *R v Jones* [2003] QCA 450 (four months imprisonment imposed after a trial for somewhat less serious offending committed by a 70 year old bus driver against a 16 year old child on his bus) and *R v Baldwin* [2014] QCA 186 (wholly suspended imprisonment of three months imposed after a trial for less serious offending by a 39 year old man against a 20 year old complainant). In those cases, as in *Caulfield* and *Lothian*, this Court's

decision was that the sentence was not manifestly excessive. For that reason, none of those decisions could establish that the applicant's sentence was manifestly excessive. But, consistently with *Bradford*, *Caulfield* and *Lothian* the applicant's sentence seems too severe when it is viewed against this pattern of sentencing.

[26] Given that the applicant had not offered to plead guilty at any earlier point, the fact that the prosecutor discontinued the other count on the indictment on the morning of trial does not assist the applicant: see *R v Conway* [2012] QCA 142 at [31]. But for the reasons already given, despite the applicant's serious breach of trust, the sentence of 12 months' imprisonment with a custodial period of four months imposed upon a plea of guilty is too severe for the unpremeditated, and momentary offence committed by this 63 year old man with no prior convictions who was found to be remorseful. Denunciation of the applicant's serious offence and deterrence of others justify a term of imprisonment but not one as long as 12 months for this particular offending.

[27] Sentencing judges must be afforded "as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies" (*Markarian v The Queen* (2005) 228 CLR 357 at 371). For the reasons I have given, the sentence imposed upon the applicant is inconsistent with the guidance provided by comparable sentencing decisions and unreasonably severe. The sentence is therefore manifestly excessive: see *Hili v The Queen* (2010) 242 CLR 520 at [58].

[28] I would vary the sentence so that it imposes imprisonment for eight months, instead of 12 months. The applicant has already served two months and four days in prison. I would order that the imprisonment be suspended forthwith with an operational period of 12 months.

Proposed Order

[29] I would grant the application, allow the appeal, and vary the sentence imposed in the District Court by substituting imprisonment for eight months instead of 12 months and substituting two months and four days instead of four months as the period after which the term of imprisonment is suspended with an operational period of 12 months.

[30] **PHILIPPIDES JA:** I agree with the order proposed by Fraser JA for the reasons given by his Honour.

[31] **BODDICE J:** I agree with Fraser JA.