SUPREME COURT OF QUEENSLAND

CITATION:	*R v TAK* [2018] QCA 333
PARTIES:	**R** **v** **TAK** (applicant)
FILE NO/S:	CA No 231 of 2018 DC No 1864 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 22 August 2018 (Reid DCJ)
DELIVERED ON:	4 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	22 November 2018
JUDGES:	Gotterson and Philippides JJA and Boddice J
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant pleaded guilty to two counts of wilfully and unlawfully exposing a child under 16 to an indecent act and one count of procuring a person to witness an act of gross indecency without consent – where the complainant was the applicant's stepdaughter – where the applicant was sentenced to two years imprisonment for the former counts and 18 months imprisonment for the latter count – where the sentences are to be suspended after eight months for an operational period of three years – where the offending did not involve any touching – whether the sentence is manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant contends that the learned sentencing judge sentenced on an incorrect set of facts, gave "undue weight" to the victim impact statement, and attributed "insufficient weight" to the applicant having himself been a victim of sexual abuse – whether the learned sentencing judge failed to properly exercise the sentencing discretion *Penalties and Sentences Act* 1992 (Qld), s 9(2), s 9(4), s 9(6)

R v GAW [2015] QCA 166, considered
R v Goodall [2013] QCA 72, considered
R v GZ [2007] QCA 225, considered
R v Porter; Ex parte Attorney-General (Qld) [2009] QCA 353, considered
R v Tootell; Ex parte Attorney General (Qld) [2012] QCA 273, considered

COUNSEL: B J Peters (*sol*) for the applicant
C N Marco for the respondent

SOLICITORS: Brisbane Criminal Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** The applicant, TAK, pleaded guilty to counts of wilfully and unlawfully exposing a child under 16 years of age to an indecent act in September 2005 at Fraser Island (Count 1) and again in November 2005 at Chermside West (Count 2). This offending was against s 210(1)(d) of the *Criminal Code* (Qld). The complainant was then 15 years of age. She was the applicant's stepdaughter. A third count (Count 3) to which the applicant also pleaded guilty, alleged an offence against s 352(1)(b)(ii) of the *Code* in that the applicant in January 2010 at Chermside West procured the same complainant without her consent, to witness an act of gross indecency which he committed.

[2] The pleas were entered in the District Court at Brisbane on 22 August 2018. A sentence hearing ensued at the conclusion of which, the applicant was sentenced to a term of imprisonment for two years for each of Counts 1 and 2 and of 18 months for Count 3, all to be served concurrently. All sentences are suspended after the applicant has served eight months in custody, for an operational period of three years.

[3] On 12 September 2018, the applicant filed an application for leave to appeal to this Court against the sentence.[1]

Circumstances of the offending

[4] A Statement of Facts was tendered at the sentence hearing.[2] The applicant had become romantically involved with the complainant's mother in 1992 when the complainant was about two years old. He moved into the household and acted as a father figure for her as she grew up.

[5] The first offending occurred in a rented house during a family trip to Fraser Island. The complainant was sleeping on a couch. At about 11 pm, she heard footsteps coming towards her. She saw that it was the applicant. He was naked. His penis was erect and he was masturbating. She pretended to be asleep. He pointed his penis at her. It was about 30 centimetres from her face. He continued to masturbate and breathe heavily for about five minutes. The complainant observed the applicant walk away to a bench in the kitchen, retrieve some tissues and ejaculate into them.

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1 AB1-3.
2 Exhibit 1: AB45-48.

[6] Some months later, after the complainant had gone to bed in her bedroom at the family home in Chermside West, she heard the door open. Thinking it was the applicant, she rolled towards the wall to avoid seeing him. He walked towards her. She could hear his heavy breathing and the rubbing noise of skin on skin. The applicant masturbated himself for about five minutes. She heard him walk away. When she rolled back, she saw him leave her room naked.

[7] On 27 January 2010, the complainant was in bed at night. She rolled over when she heard the door open. She heard the applicant walk over to her and masturbate. It continued for about two minutes. She thought she heard him leave and rolled back. When she opened her eyes, she saw the applicant lying on the bedroom floor next to the bed. He was on his back, naked and masturbating his penis. The complainant screamed and the applicant jumped from the floor and fled the room.

[8] That night, the complainant left the house and went to her boyfriend's residence. She told her sister what had happened. The following day, the applicant called at a store where the complainant worked. He told her that if she told no one, especially her mother, he would leave the house. The complainant told him to leave the store before she called the police. The applicant departed but continued to leave voicemails on her phone seeking to speak to her.

[9] The complainant went with her sister to tell her mother what had happened. Her mother packed his belongings and left a voicemail for him telling him to come home because they needed to talk.

[10] The complainant did not stay at the house that night. The following day the applicant called her. He wished to speak to her face to face. He told her on the phone that his relationship with her mother was not going well. The complainant was upset. She returned home. The applicant had departed. She received a call from police asking if she wished to give a statement. She told them that she did not.

[11] A week or so later, the complainant found the applicant in the house. She called the police. He told her that she wasn't welcome in the house anymore; that she was only a step-child; and that she was tearing the family apart. The applicant was escorted out by police.

[12] The complainant returned the following day to pack her belongings and move out. The applicant came into her bedroom when she was packing. He gave her a letter in which he apologised for his behaviour and said that he needed help.

[13] During the following years the complainant struggled with the effects that the applicant's offending had had on her. Eventually, on 21 January 2018, she made a statement to police about it.

The applicant's personal circumstances

[14] The applicant was 38 years old at the time of the offending in 2005 and 42 years old when he offended in 2010. He maintained a continuous work record in whitegoods sales. He had no criminal history prior to or after the offending.

[15] In an interview with police in February 2018, he admitted to masturbating in the complainant's room. He said that it probably happened because she was "only a

step-child" whereas the other children were related to him by blood. The applicant said that he would engage in these acts because of the thrill of getting caught.

[16] A medical report prepared by a psychiatrist was tendered at the sentence hearing.[3] The applicant was diagnosed as having some persistent features of ADHD for which he had received some intermittent treatment. However, his offending was not attributed to that condition. The psychiatrist suggested that relying on the applicant's self-reporting, impulsiveness with a lack of spontaneous regard for the consequences of his actions seemed to be the best explanation for his behaviour.

The victim impact statement

[17] The complainant was given leave to read aloud her victim impact statement at the sentence hearing.[4] That was unopposed. There was no challenge to what the complainant said in it.

[18] The complainant spoke of her fear of the applicant and that it had begun the first night he offended. She would lie in bed petrified that he would come into her room. Because she felt embarrassed, she did not speak up.

[19] Her fear has continued. She does not sleep properly at night. She looks behind her when she walks down the street. She panics if she sees someone who reminds her of the applicant. The complainant lamented that she no longer had a relationship with her mother who, she said, had chosen to stand by the applicant.

The sentencing remarks

[20] The learned sentencing judge referred to the circumstances of the offending. He described it as deliberate rather than spontaneous because it had been repeated. He considered it clear that the applicant had a sexual interest in the complainant to which he was prepared to give effect.

[21] His Honour referred to the admissions that the applicant had made to police and his pleas of guilty. Mention was made of the applicant's good work history and absence of a criminal record. Having regard to efforts that the applicant had made to deal with his diagnosed condition, his Honour regarded the prospects of reoffending as low.

[22] The sentencing remarks also addressed a submission made on behalf of the applicant that exceptional circumstances existed that displaced the operation of s 9(4) of the *Penalties and Sentences Act* 1992 (Qld) ("PS Act"). That provision mandates that unless such circumstances exist, an offender who commits an offence of a sexual nature in relation to a child under 16 years must serve an actual term of imprisonment.

[23] It was in the course of speaking of the effect of the offending on the complainant, and then rejecting that submission, that the learned sentencing judge made the following observations:[5]

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3 Exhibit 3: AB51-53.
4 Exhibit 2: AB49-50; AB19 Tr1-11 l9 – AB20 Tr1-12 l22.
5 AB41 ll21-45.

> "Men who take on relationships with women who have children from previous relationships take on the responsibilities of a stepfather. The Complainant, in her victim impact statement, said to the Court that she considered you more as her dad than her own biological dad. I take it that that would have been a fact known to you, and yet you were engaged in this significant misconduct. It has had a significant adverse effect on the Complainant. I cannot tell from the victim impact statement whether or not there might have been other features which have contributed to her current psychological condition, because I do not have a full history of her life, but what I can say is that men who abuse young girls in this way, particularly by breaching a very significant relationship as existed in this case, are highly likely to place the emotional wellbeing and sometimes the physical wellbeing as a result of suicide attempts as here occurred, in very significant jeopardy.
>
> Men who behave in this way must understand that the consequences of their misconduct are likely to be far reaching, and likely to be of very significant duration, and are very likely to significantly impact on the capacity of their victims to enjoy a meaningful, fruitful life, including engaging in meaningful and fruitful relationships. For that reason, I think your offending on this occasion is of a significantly serious nature, despite the fact that, as your counsel has said, there was no physical contact, that you did not touch her or penetrate in any way. But one cannot divorce your misconduct from the significant adverse effects that she describes. In my view, the nature of the breach of the relationship and the significant effects it has had upon your stepdaughter militate strongly against any finding that there are, in the circumstance of this case, exceptional circumstances within the meaning of that term as used in the Act."

[24] The learned sentencing judge noted that a number of sentencing decisions had been referred to him including *R v Porter; Ex parte Attorney-General (Qld)*[6] in which the 36-year-old offender had been sentenced to two years imprisonment suspended after 248 days being the period that the offender had spent in pre-sentence custody. His Honour noted that the offender in that case had been the victim's teacher and notwithstanding an earlier head injury that resulted in some disinhibition on his part, he had been able to complete a university degree.

[25] Before passing sentence, the learned sentencing judge noted that he regarded as exacerbating features of the applicant's case the effects on the complainant of his offending, the nature of his relationship with the complainant and the disruption it had caused in her relationship with her mother.

The grounds of appeal

[26] The applicant relies on the following grounds of appeal:

> "1. The sentence is manifestly excessive; and

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6 [2009] QCA 353.

2. There was a failure to properly exercise the sentencing discretion by mistake of the facts, a failure to take into account a material consideration and giving undue weight to the victim impact statement."

[27] There was no challenge to the finding of absence of exceptional circumstances. That that is so is reflected in the submission for the applicant that the sentence for Counts 1 and 2 should be 18 months imprisonment suspended after serving 92 days (up to the date of hearing of this application, which occurred on 22 November 2018) with an operational period of three years, and for Count 3, a sentence of 12 months imprisonment suspended after 30 days for an operational period of three years.[7]

[28] It is convenient to consider Ground 2 first.

Ground 2

[29] There are several discrete elements to this ground.

[30] First, it is submitted for the applicant that the learned sentencing judge sentenced on an incorrect set of facts. Reference is made to amendments made to the Statement of Facts during submissions to delete references to statements by both the complainant and the applicant which indicated that the latter carried out this type of offending against the former with a regular frequency. In the course of submissions, his Honour referred to an "abuse of the relationship of stepfather and stepdaughter over 13 years from age two to 15 and then again when (the complainant is) 19".[8]

[31] It is submitted that the learned sentencing judge sentenced the applicant on that basis. I disagree. It is evident from the sentencing remarks that his Honour sentenced on the basis only of the criminality in the three counts of offending for which he was charged. He was not sentenced for habitual offending over many years.

[32] Next, there are a series of submissions relating to the victim impact statement. It is said that his Honour placed "considerable emphasis" on it "which may have miscarried the sentencing discretion".[9]

[33] Section 9(6) of the PS Act requires the court in sentencing an offender to whom s 9(4) applies (as the applicant was), to have regard primarily to a number factors, the first of which is the effect of the offending on the child.[10] In oral submissions, it was contended that, here, the regard to be given to this factor should have been very significantly moderated because the complainant did not report the offending for many years.

[34] This submission must be rejected. The complainant provided a credible reason why she did not report the offending to police earlier. It repudiated any conjecture that she did not report it to police because of the effects on her were not significant.

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7 Applicant's Outline of Submissions ("AOS") at [38].
8 AB34 Tr1-26 ll19-23.
9 AOS at [26].
10 PS Act s 9(6)(a).

[35] A further submission made orally for the applicant is that a reference made by the learned sentencing judge in the course of submissions to offences of physical violence[11] suggested that he had used those offences as a "benchmark" for sentencing the applicant.

[36] That submission is ill-founded. His Honour was merely making the point that effect on the victim is relevant to sentencing for all types of offending. That that is so is statutorily-based in s 9(2)(c) of the PS Act.

[37] Further, criticism is made of his Honour's reference in the sentencing remarks to significant impact on the capacity of a child-victim of this kind of offending to engage in a meaningful and fruitful life. The criticism characterises this as a finding made by his Honour that the effect on the complainant of the applicant's offending had been of that kind.

[38] His Honour did not, in fact, make such a finding. As can be seen from the extract from the sentencing remarks which I have set out, his remark was as to the likelihood that offending of that kind might have such an effect. Moreover, the remark was made in the course of rejecting the exceptional circumstances submission.

[39] The finding that his Honour did in fact make is that the applicant's offending had had a significant adverse effect on the complainant.[12] That finding is unexceptional.

[40] Lastly, it is submitted for the applicant that the learned sentencing judge attributed "insufficient weight" to the applicant's having himself been a victim of sexual abuse.[13] This submission is, in form, defective. The giving of insufficient weight to a factor in the exercise of the sentencing discretion does not amount to vitiating error, consistently with the principles enunciated in *House v The King*.[14]

[41] That aside, there was no evidence before the learned sentencing judge as to the nature of the alleged sexual offending against the applicant. In particular, there was no evidence to explain how it might have been a contributing factor towards his sexual offending against the complainant step-daughter.

[42] For these reasons, I conclude that Ground 2 has not been established.

Ground 1

[43] The essence of the applicant's submission on this ground is that the sentence is manifestly excessive having regard to the absence of any touching in the offending, his good work history, the absence of a criminal record and the delay of eight years between the offending and the sentencing during which he sought medical help from a psychiatrist.[15]

[44] As to comparable sentencing decisions, the applicant submits that the offending in *Porter* was more serious and relies in particular on the decisions in *R v GAW*[16] and *R v Tootell; Ex parte Attorney General (Qld)*.[17]

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11 AB20 Tr1-12 ll39-43.
12 AB41 ll25-26, ll40-41.
13 AOS at [33].
14 (1936) 55 CLR 499 at 504-505; [1936] HCA 40. See also *R v Galleghan* [2017] QCA 186 at 6-7.
15 AOS at [12].
16 [2015] QCA 166.

[45] The respondent refers to *Porter*, *Tootell*, *R v Goodall*[18] and *R v GZ*.[19] Those decisions, the respondent submits, stand in the way of a conclusion necessary for a determination that a sentence is manifestly excessive, that there must have been a misapplication of principle or that the applicant's sentence is unreasonable or plainly unjust.[20]

[46] The sexual offending in *Porter* is comparable to that of the applicant in that three acts of masturbation in front of the victim were involved. There was no touching. The offender was also sentenced to a concurrent sentence of three months imprisonment on two counts of breaching a bail condition, but no further punishment was imposed for an additional count of possession of a small quantity of cannabis sativa. Significantly, the sentence to which I have referred was not disturbed on an Attorney's appeal.

[47] In *GAW*, the offending, for which the offender was sentenced to six months imprisonment suspended forthwith, occurred only once. It was a brief touching confined to the buttock area outside the complainant's underwear for which the offender was remorseful. The offending was characterised as of a "low" or "exceptionally low" order.[21] The applicant's offending is, in my view, markedly more serious than that in *GAW* by reason of its repetition and sexualised content.

[48] The offender in *Tootell* was sentenced to 14 months imprisonment suspended after two months. He was a 24-year-old male who worked at a childcare centre. He had a borderline impaired range of intellectual functioning. He pleaded guilty to three counts of touching young girls in his care on the outside of their clothing but in the vaginal area. On two occasions, he ejaculated. The offender's limited intellectual functioning limits the comparability of this sentencing decision for present purposes.

[49] Turning to the additional cases to which the respondent refers, I note that the offending in *Goodall* did not involve touching. The 46-year-old offender who had been approached via an adult website by a 12 year old boy who claimed to be 14 or 15, engaged with the boy on three occasions in sessions in which each strip naked and masturbated in the view of the other. The offender was sentenced on a plea of guilty to two years imprisonment with parole eligibility after serving one third. On appeal, the sentence was held to be manifestly excessive with regard to the period to be served in actual custody. The sentence was varied to one of two years suspended after six months for an operational period of three years. A significant factor in the amelioration of the sentence was the absence of any procuring on the offender's part.

[50] In *GZ*, the offender pleaded guilty to one count of attempting without legitimate reason to record an indecent visible image of a 13 year old girl to whom he was guardian. No touching was involved. The offending was discovered when the unactiviated camera that the offender had installed in a shower fell to the floor as the victim was about to use it. She required counselling from her medical practitioner. The offender was sentenced to nine months imprisonment suspended after two

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17 [2012] QCA 273.
18 [2013] QCA 72.
19 [2007] QCA 225.
20 *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45 at [58], [59].
21 At [64], [65].

months for an operational period of 12 months. His application for leave to appeal against the sentence was refused.

[51] The offending in *GZ* was less serious than that of the applicant. A single attempt was involved and the effect on the victim was of a much lower order than in the present case.

[52] The cases to which the respondent has referred indicate that the applicant's sentence is comparable with that imposed for similar offending. I conclude that the sentence of two years imprisonment is not manifestly excessive. Nor is the sentence manifestly excessive in that the applicant must serve eight months in custody before it is suspended.

[53] This ground of appeal also has not been established.

Disposition

[54] As neither ground of appeal can succeed, leave to appeal against sentence must be refused.

Order

[55] I would propose the following order:

1. Application for leave to appeal against sentence refused.

[56] **PHILIPPIDES JA:** I agree that the application for leave to appeal against sentence should be refused for the reasons given by Gotterson JA.

[57] **BODDICE J:** I agree with Gotterson JA.