SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dendle* [2019] QCA 194
PARTIES:	**R** **v** **DENDLE, Robert Jon** (appellant/applicant)
FILE NO/S:	CA No 125 of 2018 DC No 1333 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction and Sentence: 4 May 2018 (Rafter SC DCJ)
DELIVERED ON:	24 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	3 June 2019
JUDGES:	Fraser and Philippides JJA and Lyons SJA
ORDERS:	**1. Appeal dismissed.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the appellant was convicted of two counts of rape and three counts of indecent treatment – where the complainant was a 13-year-old boy – where the complainant gave a s 93A record of interview – where the complainant died before the trial – where the appellant made an application pursuant to s 590AA *Criminal Code* to exclude the complainant's s 93A statement – where the appellant argued the record of interview was unreliable – where the judge was satisfied that the statement was made in circumstances making it highly probable that the representations were reliable – where it was a matter for the jury to assess the reliability – whether there was an error in the judge's exercise of discretion to not exclude the evidence of the s 93A statement being admitted pursuant to s 93B of the *Evidence Act* CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the Crown made an

application pursuant to s 590AA *Criminal Code* to admit the s 93A statement with respect to the charges in counts 1, 3, 4 and 5 under s 21AF of the *Evidence Act* and s 110A of the *Justices Act* – where the statement was contained in a DVD – where in addition the appellant applied pursuant to s 590AA *Criminal Code* to exclude the s 93A statement on the grounds of unfairness – where the appellant argues that the conditions which allowed for the tendering of the s 93A statement were not met and it should not have been admitted – where the appellant argues the s 93A statement was not tendered nor endorsed at the committal proceedings – where the Crown relies on a certificate signed by the Magistrate at the committal that the statement was tendered in the presence of the appellant – whether there was an error in the judge's exercise of discretion to not exclude the evidence of the s 93A statement DVD being admitted pursuant to s 110A and s 111 of the *Justices Act* and s 21AF *Evidence Act*

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – where the appellant was convicted of two counts of rape and three counts of indecent treatment – where the appellant argues that the Crown failed to comply with its disclosure obligation in particular by not informing the appellant that the complainant had died – where the appellant argues he was misrepresented over the course of the proceedings but does not identify any specific errors of defence counsel – where the appellant submits that the verdict was unsafe and unsatisfactory based on the admission of the s 93A statement into evidence – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was convicted of two counts of rape and three counts of indecent treatment – where the appellant was sentenced to 12 years' imprisonment for the most serious offence of rape, and lesser concurrent sentences in relation to the other four counts of which he was convicted – where the complainant was a 13-year-old boy – where the appellant was residing in the same home as the complainant – where the complainant committed suicide 10 weeks after the offending occurred – where the appellant submits there was an error in the exercise of the sentencing discretion having regard to the relevant factors of aggravation – whether the head sentence was manifestly excessive – whether leave to appeal against sentence should granted

Criminal Code (Qld), s 590AA, s 590AC, s 590AH, s 590AI
Evidence Act 1977 (Qld), s 93A, s 93B, s 21AF
Justices Act 1886 (Qld), s 110A, s 111

Penalties and Sentences Act 1992 (Qld), s 9
Police Powers and Responsibilities Act 2000 (Qld), s 403

R v BAO [2004] QCA 445, cited
R v Cleland [2018] QCA 14, cited
R v Daphney [2010] QCA 236, cited
R v Dendle [2018] QDCPR 16, cited
R v GAR [2014] QCA 30, cited
R v McGrane [2002] QCA 173, cited
R v PAM [2011] QCA 36, cited
R v Sanchez [2017] QSC 143, cited
R v SBJ [2009] QCA 100, cited
R v SCJ; Ex parte Attorney-General (Qld) (2015) 252 A Crim R 325; [2015] QCA 123, cited
R v SCQ [2017] QCA 49, cited
R v Stoian [2012] QCA 41, cited
R v Williams; Ex parte Attorney-General (Qld) (2014) 247 A Crim R 250; [2014] QCA 346, cited

COUNSEL: B J Power for the applicant (sentence)
The appellant appeared on his own behalf (conviction)
M A Green for the respondent

SOLICITORS: Legal Aid Queensland for the applicant (sentence)
The appellant appeared on his own behalf (conviction)
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Lyons SJA and the orders proposed by her Honour.

[2] **PHILIPPIDES JA:** For the reasons given by Lyons SJA, I agree with the orders proposed by her Honour.

[3] **LYONS SJA:** The appellant was charged on indictment with four counts of indecent treatment of a child under 16 and two counts of rape. All of the offences were alleged to have occurred on 21 November 2015.

[4] After a five day trial in the District Court, he was found guilty on 4 May 2018 of all counts except for Count 4 of which he was found not guilty.

[5] The appellant was sentenced in relation to the five counts of which he had been convicted as follows:

> Count 1: Indecent treatment of a child under 16 - 12 months' imprisonment;
>
> Count 2: Rape - 12 years' imprisonment with a serious violent offence declaration;
>
> Count 3: Indecent treatment of a child under 16 - five years' imprisonment;

Count 5: Indecent treatment of a child under 16 - seven years' imprisonment;

Count 6: Rape - nine years' imprisonment.

[6] All sentences were to be served concurrently and, pursuant to s 159A of the *Penalties and Sentences Act* 1992, 894 days of pre-sentence custody were declared as days served towards the sentence.

[7] The appellant now seeks leave to adduce evidence at the hearing of his appeal, appeals his conviction on the basis that there has been a miscarriage of justice, and argues that the sentence imposed was manifestly excessive.

Application for leave to adduce further evidence

[8] In his application for leave to adduce evidence filed on 14 March 2019, the appellant sets out a number of documents which he seeks leave to adduce including letters between his solicitors and himself; between Legal Aid and himself; as well as documents from the Department of Child Services, Queensland Health records, a copy of the school records of the complainant together with the transcripts of the committal proceeding in the Caboolture Magistrates Court on 30 March 2016. His application in relation to all that material, except with respect to the transcript of the committal, was dismissed for the reasons given by Fraser JA at the hearing of the Application. Whilst the transcript was provisionally received into evidence the ruling with respect to its relevance was reserved and will be discussed later in these reasons.

Factual Background

[9] The complainant was a 13 year old boy who lived with his father. The appellant knew the complainant's father, having worked with him previously, and they remained friends after the appellant moved to Sydney. The complainant's father offered the appellant accommodation when he moved to Brisbane in October 2015. He occupied a bedroom at the back of the house which was close to the complainant's bedroom and they shared a bathroom. The offences the subject of the charges on the indictment occurred about a month later. It was a hot day, and the appellant and the complainant's father had bought a blow-up swimming pool. They had all spent the day in the pool with the appellant drinking considerable amounts of alcohol. He became heavily intoxicated. He was also taking codeine tablets for a back injury. The complainant was also drinking beer and on the appellant's evidence had three or four beers over the course of the afternoon.

[10] The evidence at trial indicated that after dinner that evening the complainant's father fell asleep around 10.30 pm. It was alleged that the appellant then went into the complainant's bedroom and asked him to come to his bedroom to talk. The complainant did so but the appellant closed the door and turned the light off. The appellant then pushed the complainant onto his bed, put his hand over his mouth and then put a pillow over his face. The complainant was held down on the bed and at one point, in an effort to escape his grip, the complainant head butted him. The appellant then sexually abused him over a period of about three or four hours. A summary of the appellant's conduct in relation to each of the five counts of which he was convicted is:

Count 1: Trying to kiss the complainant and licking the complainant's stomach, chest and neck.

Count 2: Penetrating the complainant's anus with his penis while wearing a condom and continuing with that penetration for "a prolonged period"[1].

Count 3: Placing his penis into the complainant's mouth.

Count 5: Making threats to the complainant to cause the complainant to penetrate the appellant's anus with his penis while the complainant was wearing a condom.

Count 6: Forcing his penis into the complainant's mouth for "a considerable period of time"[2].

[11] Count 4, of which he was acquitted, related to an allegation that the appellant was trying to finger the complainant whilst the appellant was sucking the complainant's penis.

[12] When the appellant was finished he threatened the complainant and said that if he went to his father "you know what I am gonna do". He also said to the complainant "it's good to be bi". It was also alleged that the appellant had told the complainant later in the morning that he should not have done what he did and he tried to blackmail him. After that, at around 8.00 am, the complainant and his father went to check the crab pots and in the car on the way home he told his father that the appellant had raped him for approximately four hours after his father had gone to bed. His father took him straight to a police station where the complainant participated in an interview and in a recording, made in accordance with s 93A of the *Evidence Act* 1977 (Qld), he described the offending against him.

[13] Police attended at the residence and found the appellant asleep in a bed with no linen on it. Linen was found in a washing machine and the shower was considered to have been recently used. The appellant was arrested at the house but as he was ill he was taken to hospital for assessment. Both the complainant and appellant were examined at the hospital. Two condoms were located in the house and were forensically examined. The evidence indicated that DNA consistent with that of the appellant was found on the complainant's neck, chest and the shaft of the complainant's penis. Evidence consistent with the complainant's DNA was found in saliva on the appellant's penis and further DNA consistent with the complainant being a contributor was found on a rectal swab taken from the appellant. The forensic examination of the two condoms revealed that DNA consistent with the complainant was on one condom and the second condom revealed a mixed profile with both the complainant and the appellant being likely contributors.

[14] The appellant took part in an interview with police in which he made some partial admissions. In particular, he stated he was drunk and his memory was blurred. He stated that he was not sure what had happened but he recalled being in bed with the complainant and they were both naked. He stated he did not recall doing what was alleged but he did not specifically deny the allegations either.

[15] Tragically, in February 2016 the complainant committed suicide. The complainant died six weeks before the committal proceeding and never gave a statement under oath or affirmation. The evidence at trial consisted of the electronically recorded record of interview between the appellant and police, the preliminary complaint which had been made to the complainant's father, the forensic evidence consisting of a DNA

---

1 ARB 2 at 262 l 47.
2 ARB 2 at 263 l 7.

expert and the evidence of a paediatrician who had examined the complainant. Her evidence was that she found bruising to the complainant's right arm, his legs and the left side of his forehead. He also had petechial bruising to the hard palate of his mouth consistent with forced penetration. She did not observe any anal injuries but that was not unusual.

[16] The appellant gave evidence at the trial. His evidence was that he had not raped the complainant or otherwise sexually abused the complainant. He stated that he had woken up in the middle of the night with the complainant in his bed and that the complainant had said to him, "Please don't tell Dad"[3]. The appellant said that he had then gone back to sleep and not seen the complainant again until the following morning. He indicated that he was drunk that evening and that he observed that some condoms were missing.

Grounds of Appeal with respect to the Conviction

[17] Ground 1 – Miscarriage of justice, wrongful admission of evidence - S 93A statement admitted at trial pursuant to s 93B of the *Evidence Act* was a wrongful admission of evidence.

[18] Ground 2 – Miscarriage of justice, wrongful admission of evidence - S 93A statement admitted pursuant to s 110A of the *Justices Act* 1886 (Qld) was wrongfully admitted.

[19] Ground 3 – Miscarriage of justice - Failure of the prosecution to disclose all of the evidence pursuant to the *Criminal Code* 1899 (Qld).

[20] Ground 4 – Miscarriage of justice - The verdict was unsafe and unsatisfactory and not according to law.

[21] Ground 5 – Miscarriage of justice - Conduct of the defence including Counsel at trial.

[22] Ground 6 – Miscarriage of justice, wrongful admission of evidence - Interview between the appellant and the police was a wrongful admission of evidence.

Ground 1 – Miscarriage of justice – Wrongfully admitted evidence of the s 93A statement admitted at trial pursuant to s 93B Evidence Act

[23] On 24 February 2017, there was a pre-trial application by the appellant pursuant to s 590AA of the *Criminal Code* to exclude the complainant's recorded statement to police in the exercise of discretion. At that hearing, the appellant sought to have the statement, made pursuant to s 93A of the *Evidence Act*, excluded on the basis that the complainant was unable to be cross-examined in relation to his statement in circumstances where it was unreliable, because at the end of the recorded interview the complainant had admitted that he had not been completely truthful about whether he had worn a condom. The application was brought on the basis that where the circumstances surrounding the interview make it unreliable, then the entire statement should not be able to be relied upon by the prosecution.

[24] At that hearing, Counsel for the appellant argued that whilst s 93B made the s 93A recording admissible, subsections 93B(2)(a) and (b) require that the statement be

---

3 ARB 2 at 181 l 23.

made shortly after the asserted fact happened and it must be made in circumstances making it highly probable that the representation is reliable. In this case, it was argued that the recording was made in circumstances where the complainant stated he had been forcibly raped but at the end of the interview he accepted that he was wearing a condom at one point of the incident. Counsel argued that the complainant's statement had discrepancies and he was also unable to answer some of the questions asked of him by police.

[25] That application was refused by Judge Martin SC who held:[4]

> "The application of the accused in the written outline is to exclude, in the exercise of discretion, the complainant's recorded statements to police, which, in the usual course of events, would have been admissible pursuant to section 93A of the *Evidence Act*. However, the complainant is now deceased, and the complainant has not been cross-examined. The evidence, therefore, is not admissible under the provision. The written outline addresses section 93B of the *Evidence Act*. The recorded statement to police was made by the complainant approximate to the alleged offending. Indeed, the transcript notes that the statement was given to police on the 22nd of November 2015. Whilst the recorded statement is now hearsay evidence, it is, of course, the recorded words of the complainant himself. In the circumstances, I am positively satisfied that the recorded statement was made in circumstances making it highly probable that the representations are reliable. I refuse the application to exercise the discretion in favour of the accused.
>
> On behalf of the accused, Mr Hardcastle argued orally that in the absence of cross-examination, the contents of the recorded statement are inherently unreliable, and, in the exercise of the discretion, the recorded statement should be excluded. The passages relied on to found this submission relate to the complainant telling police, contrary to what he had earlier stated, that he had not been entirely truthful and that he, the complainant, had a condom, and, indeed, that he was wearing a condom at the relevant time. Following on from that, the police officers advised him of the importance of being truthful, and then, in response to the question "Is everything you've told me been the truth?", the complainant replied, "Pretty much". In my view, it is plainly a matter for the jury to assess this evidence. Of course, it must be remembered that the complainant replied, "Pretty much", in the context of his having just immediately before made a correction to what he had previously told police. The oral application to exclude the evidence is refused.
>
> Mr Cowen of Queen's Counsel has bought to the attention of the court and the accused that the offences of indecent dealing do not fall within the purview of section 93B of the *Evidence Act*. However, subject to proof of relevant conditions, the Crown relies on sections 110A and section 111 of the *Justices Act*. The Crown has made it perfectly clear that if the conditions are not met, the Crown will not proceed with the indecent dealing charges, however, noting

---

4 ARB 2 at 12 ll 4-41.

> that the evidence remains relevant – the evidence in respect of those charges remains relevant to the rape charges. The matter doesn't call for any ruling today. If there is any subsequent disagreement about any of this, the parties, of course, have the right to bring an application and argue the matters further, or argue this matter further."

[26] There was of course a discretion to exclude the evidence pursuant to s 98 and s 130 of the *Evidence Act* however, in my view, the judge at the pre-trial hearing was clearly correct in his evaluation of the reliability of the statement, particularly when considering the objective evidence capable of corroborating the complainant's account including the forensic evidence. As has already been noted, there was compelling DNA evidence, including that which was found on the two used condoms found at the residence by police. DNA consistent with the appellant's was also found in saliva on the complainant's penis, neck and chest. DNA consistent with the complainant's was also found on the appellant's penis. The forensic examination conducted of the complainant also showed petechial bruising to his hard palate which was consistent with forced penetration of his mouth.

[27] The appellant relies in his Outline of Submissions on a raft of decisions, particularly the decisions of the Court of Appeal in *R v McGrane*,[5] and by Burns J in *R v Sanchez*,[6] to argue that the requirements of s 93B must be strictly made out. The appellant also sought to distinguish a number of decisions including the Court of Appeal decision in *R v SCJ; Ex parte Attorney-General (Qld)*,[7] on the basis that they did not involve s 93A statements. Each case clearly turns on its own particular facts.

[28] In my view, the learned judge was correct in determining that it was plainly a matter for the jury as to assess the reliability of the complainant's evidence and that it was to be considered in the context in which it was made. As Counsel for the Crown noted, s 93B is not aimed at truthfulness but is instead concerned with the objective circumstances in which it was made. That principle was clearly endorsed in both *R v McGrane* and *R v Sanchez*. In the present case, the statement was made very soon after the alleged offending as it was made on the same morning of the incident, and probably within six or seven hours given the offences were alleged to have occurred over a period of hours ending around 3.00 am. The appellant has identified no error in the judge's exercise of discretion not to exclude the evidence of the s 93A statement being admitted pursuant to s 93B of the *Evidence Act*.

[29] It was clear that s 93B only directly allowed the evidence to be admitted in relation to Counts 2 and 6 and there can be no doubt that the judge correctly identified the basis upon which the complainant's statement could be admissible in relation to the remaining counts on the indictment.

Ground 2 – Miscarriage of Justice – Wrongful admission of evidence in that the s 93A statement was admitted pursuant to s 110A of the Justices Act

[30] As the decision of Judge Martin SC noted, a particular feature was that s 93B of the *Evidence Act* only applies to Chapters 28-32 of the *Criminal Code* which related to the rape charges but it did not include the indecent treatment charges. Accordingly,

---

5 [2002] QCA 173.
6 [2017] QSC 143.
7 [2015] QCA 123.

because of s 93B, the s 93A statement could be used for Counts 2 and 6, but could not be used in relation to the indecent treatment charges in Counts 1, 3, 4 and 5. However, s 110A and s 111 of the *Justices Act* contained provisions which the Crown argued would allow the evidence tendered at committal to be relied upon.

[31] As had been foreshadowed, the Crown made an application pursuant to s 590AA of the *Criminal Code* on 7 September 2017 that the s 93A record of interview be admitted on the indecent treatment charges under s 21AF of the *Evidence Act*, and s 110A of the *Justices Act.* The defence also made an application pursuant to s 590AA of the *Criminal Code* to have the s 93A material excluded on the grounds of unfairness pursuant to s 98 and s 130 of the *Evidence Act*.

[32] In this appeal the appellant argues that the conditions which allowed for the tendering of the s 93A statement were not met and therefore the DVD should not have been admitted into evidence at the trial. In particular, it was argued that the video recording of the interview was not evidence and that "the s 93A statement was not tendered nor was it endorsed or signed by his Honour at the committal proceedings with the other witness statements as per s 110A of the *Justice Act*"[8].

[33] The Crown relied on a certificate signed by the presiding Magistrate at the committal that the s 93A DVD had been tendered at committal on 30 March 2016 in the presence of the appellant. It was argued that s 21AF of the *Evidence Act* amended s 110A and s 111 of the *Justices Act* such that a statement for the purposes of s 110A is to be taken as a reference to a written statement if it is contained in a document as defined under Schedule 3 of the *Evidence Act.* That definition included "any disc". Section 110A(13) then provided that the reference in s 111 to deposition was to be read as substituting for the deposition the term 'written statement'.

[34] It was argued that s 111(1) then provided that the DVD could therefore be read without further proof at trial if certain conditions were satisfied. Those conditions were set out in s 111(3)(a), which required that the written statement (DVD) must be of a witness who was dead at the time of trial. Section 111(3)(b) provided that proof at the trial may be received by a certificate signed by the Magistrate at committal that the evidence was received in the presence of the accused.

[35] Judge Devereaux SC held that the DVD recording of the deceased child which was tendered at committal in the presence of the appellant thereby became admissible at trial not under s 93A but by the mechanism of s 110A and s 111 of the *Justices Act* together with the amendments of s 21AF of the *Evidence Act.* Section 21AF provides that at committal proceedings an affected child's evidence in chief must be given as a statement without the child being called as a witness. He held that s 21AF(2) provides that s 110A of the *Justices Act* applies with all necessary changes and as though a reference in that section to a written statement included a reference to a statement contained in a document as defined under Schedule 3. The recording was therefore in that definition of a document.

[36] His Honour held:[9]

> "It seems to me that that is a complete scheme for the admission of a statement tendered at committal under s 110A in a subsequent trial.

---

8 Appellant's Outline of Submissions at [2.17].

9 ARB 3 at 26 ll 26-29.

> The condition in section 111(3)(a) is, relevantly to this case, that the witness is dead. As I have said that is common ground."

[37] His Honour continued:[10]

> "So the order is, in effect, that the recording is admissible in the prosecution case on the charges of indecent dealing and the application for its exclusion, in the exercise of discretion, is dismissed."

[38] In relation to this ground of appeal the appellant sought leave to adduce further evidence by tendering a transcript of the committal hearing. Whilst the transcript is relevant to this issue it is completely unnecessary given the Certificate by the Magistrate that the DVD was tendered in the presence of the appellant. I note that the Transcript sought to be adduced does in fact confirm the fact the DVD was formally tendered and that the appellant was present at the time. Accordingly the application to adduce that evidence is refused.

[39] As Mr Green for the Crown noted, the appellant seems to completely misunderstand the interaction between s 93A and s 93B. The ruling by his Honour was entirely correct and there is no basis for this ground of appeal. The judge did not exercise his discretion to exclude the evidence and once again no error is identified in the approach that his Honour took.

Ground 3 – Miscarriage of Justice – Failure by the prosecution to follow its disclosure obligations under the Criminal Code

[40] The appellant submits that the prosecution has failed to comply with its disclosure obligations pursuant to s 590AH and s 590AI of the *Criminal Code*. In particular, it is argued by the appellant that the prosecution did not disclose to him prior to the committal proceedings that the complainant had died.

[41] There is currently no evidence before the court in relation to this alleged failure. I note that the committal proceedings were conducted in accordance with the usual practice by the Queensland Police Service prosecutions and it is not able yet to be determined whether the appellant's legal representatives were given the required notices. However, I infer that such notice was given because there were the pre-trial applications to exclude the evidence. In any event, s 590AC(2) of the *Criminal Code* provides that a failure to comply with the disclosure provision does not affect the validity of the proceedings.

[42] There is no substance to this ground of appeal.

Ground 4 – Miscarriage of Justice – Verdict is unsafe and unsatisfactory

[43] The basis for this ground of appeal is essentially a further reliance on the fact that the DVD was wrongly admitted at the trial and therefore the verdict was unsafe and unsatisfactory. As Counsel for the Crown points out, the case against the appellant was a strong one. The learned trial judge also gave all the appropriate directions in relation to how the jury should approach their task and how they should assess the

---

10 ARB 3 at 27 ll 21-23.

evidence. In particular his Honour gave the following direction in relation to the assessment of the evidence of the complainant:[11]

> "Another aspect that follows on from the onus of proof resting upon the Crown, members of the jury, is that; it was mentioned by Mr Buckland in his address to you yesterday, that sometimes there are situations where a person finds it convenient not to tell the truth. This was a submission that Mr Buckland made to you in respect of K's evidence. He referred in particular to K's problems at school and conflict that he had with his father. There is of course no onus on the defendant to establish a motive for K to lie. The defence have not been able to test this possibility by cross-examination, and so that's one aspect that you should bear in mind. Any failure to establish a motive to lie on the part of the defence does not mean that such a motive does not in fact exist. If a motive to lie did exist, the defendant may not know of it.
>
> The prosecution is required to prove the defendant's guilt beyond reasonable doubt. It follows that the Crown must satisfy you beyond reasonable doubt that K is telling the truth in his police interview on the 22nd of November 2015. So the mere fact that Mr Buckland mentioned possible reasons why K may have found it convenient to tell lies, does not in any way cast an onus upon the defence to prove that K was telling lies. The prosecution at all stages has the responsibility of proving the defendant's guilt beyond reasonable doubt."

[44] His Honour also referred to the preliminary complaint evidence as to what the complainant had said to his father on the morning of 22 November 2015 and indicated that the preliminary complaint evidence had been led by the Crown for the "credibility of the complainant's evidence" and that:[12]

> "The evidence of preliminary complaint may be used in relation to K's credibility. Consistency between the account of [the complainant's father] and K's evidence is something that you may take into account as possibly enhancing the likelihood that his testimony is true. However, you cannot regard the things said in his out-of-court statement during the police interview as proof of what actually happened. In other words, evidence of what K said when he was interviewed by the police may, depending on the view taken of it, bolster his credit because of consistency, but it does not independently prove anything. In considering the preliminary complaint evidence, you are comparing what K said to his father about the alleged offences with the allegations he made in the police interview. So if you regard things he said in the police interview as being consistent with what he said to his father, that may, depending on the view you take of it, bolster K's credibility.
>
> Similarly, any inconsistencies between the account of [the complainant's father] and K's evidence may cause you to have doubts about his credibility or reliability. Whether consistencies or inconsistencies

---

11 ARB 1 at 68 l 37 - 69 l 7.
12 ARB 1 at 70 ll 7-25.

> impact upon the reliability of the complainant is a matter for you. Inconsistencies in describing events are relevant to whether or not evidence about them is truthful and reliable, and any inconsistencies are a matter for you to consider in the course of your deliberations."

[45] His Honour also told the jury that usually the evidence of children is presented in the form of a pre-recorded interview but that it also usually includes a cross-examination in Court at a hearing before the trial. He reminded the jury that that could not occur in this case as the complainant child had died and his interview with police was not given on oath or affirmation. He continued:[13]

> "K's police interview on the 22nd of November 2015 was not given on oath or affirmation. The defence have not had the opportunity to explore alternative possibilities or scenarios by cross-examining K. The defence have not had the opportunity of testing K's evidence by cross-examination. The testing of evidence by cross-examination is an important feature of a fair trial. You must therefore approach K's evidence in the police interview with caution. You must carefully scrutinise his evidence before arriving at a conclusion of guilt. If, having carefully scrutinised K's evidence in the police interview, you are satisfied beyond reasonable doubt that it is truthful, accurate and reliable, then, of course, you may act on it. You must then consider where you are satisfied beyond reasonable doubt of the elements of the six charges."

[46] Furthermore the learned trial judge correctly directed the jury in relation to how they could use the DNA evidence and directed them that the evidence is not "absolute proof"[14]. He also gave all the appropriate directions in relation to the elements of each offence and the question of intoxication. The learned trial judge also gave comprehensive directions with respect to the appellant's post offence conduct of the washing of the sheets and the Crown's argument that it showed a consciousness of guilt and warned the jury that before they could use that evidence as consciousness of guilt they would first have to find that he washed the sheets because he was aware that he was guilty and for no other reason.[15]

[47] This ground of appeal has not been made out.

Ground 5 – Miscarriage of Justice – Conduct of defence representation including Counsel at trial

[48] The appellant has not made any specific allegations in relation to the conduct of his trial but rather argues that the Court should consider "if he was misrepresented over the course of the legal proceedings"[16]. Whilst he states that Counsel was only briefed nine weeks before the trial he has not identified any specific errors. He has produced no evidence in this regard but has made vague allegations that his Counsel should have cross-examined the DNA experts and police witnesses.

[49] An examination of the transcript however indicates that Counsel for the appellant cross-examined the DNA scientist Mr Pippia extensively in relation to the

---

13 ARB 1 at 75 ll 36-46.
14 ARB 1 at 74 l 12.
15 ARB 1 at 74 l 34-43.
16 Appellant's Outline of Submissions at [5.1].

possibility of DNA transfer,[17] and in his closing address to the jury he relied heavily on this possibility. The evidence of the police witnesses related to the search of the house where the appellant was living by Sergeant Sanderson who was cross-examined by Counsel for the appellant in relation to that search, as well as Sergeant Oldham who took the photos of the crime scene. Whilst he was not cross-examined by Counsel for the appellant, that is understandable given he simply explained his process for photographing various locations and items at the house including the pool area, a number of empty alcohol bottles, two condoms, a can of canola oil and Codeine tablets. I can see no basis for the appellant's criticism of the approach taken by his Counsel in relation to the evidence of these witnesses. The appellant's complaint is without foundation.

[50] The appellant also argues that a lack of competent representation at the committal led to an inadmissible statement being handed up. The issues in relation to the admissibility of the s 93A statement have already been addressed.

[51] This ground of appeal has not been made out.

Ground 6 – Miscarriage of Justice – Wrongful admission of evidence of the interview between the appellant and police on 22 November 2015

[52] As the appellant notes in his outline of submissions the voluntariness and reliability of this interview was not raised at any time prior to trial but he now seeks to argue that this Court should now consider this ground. The appellant argued that under s 403 of the *Police Powers and Responsibilities Act* 2000 (Qld) (PPRA) he was only to be in custody for a period of eight hours. As he was taken to hospital on the morning of 22 November 2015, his interview had not been completed within the eight hour period but rather he argued it expired some 24 minutes after the interview commenced. The basis of his argument on appeal was that the exact time that the interview commenced, as noted on the wall clock in the interview room, differed from the time stamp on the video recording. Accordingly, it is argued that the recording is inaccurate and he relies on *R v Cleland*[18] to argue that there has therefore been some unlawful or improper conduct and the evidence should therefore be excluded.

[53] On 6 April 2018, an application pursuant to s 590AA of the *Criminal Code* was heard by Judge Clare SC to exclude the field tape recording of police interaction with the appellant which had commenced at 10.11 am and continued until 11.21 am on the morning of 22 November 2015. The electronically recorded interview taken at the Caboolture Police Station commencing at 5.56 pm was also sought to be excluded.

[54] In the ruling published on 26 April 2018, I note that Judge Clare SC specifically stated the following:[19]

> "This application is for the exclusion of recorded statements made by Mr Dendle on the day of his arrest. Voluntariness and reliability are not in issue. The defence do not deny that Mr Dendle made the statements, and that he did so voluntarily. The court retains

---

17 ARB 2 at 160-162.
18 [2018] QCA 14.
19 *R v Dendle* [2018] QDCPR 16 at [3], ARB 2 p 51.

> a discretion to exclude a voluntary confession on the grounds of unfairness or public policy in addition to the general discretion under s 130 of the *Evidence Act*. The application referred to both grounds, although unfairness was not pressed. Defence counsel, Mr Buckland, conceded it was difficult to find any unfairness that could arise from the use of Mr Dendle's admissions. There is no suggestion that Mr Dendle falsely implicated himself. The main argument was about police impropriety and the public policy ground."

[55] Ultimately the field tape was excluded from evidence on the basis that the appellant had been denied the right to a lawyer as follows:[20]

> "Mr Dendle had been informed of his rights and cautioned in the terms set out in the Responsibilities Code. A partial version was repeated a number of times. Despite being woken up and nauseous and weak, he was responsive and rational. He demonstrated his understanding of the right to silence. Although he had exercised that right at one point, Sgt Sanderson offered him another opportunity to speak, before he was loaded into the ambulance. She also reminded him he could exercise his right to remain silent. He chose to speak. The defence do not contend an absence of free will. Mr Dendle gave Sgt Sanderson his version voluntarily.
>
> The real issue is in relation to Mr Dendle's right to contact a lawyer before being questioned. He had been fully informed of that right. He was told questioning could be delayed for a reasonable time. Although he did not directly ask for a lawyer he indicated a preference for one. He told Sgt Sanderson he thought he should get a lawyer, but was unsure whether he could "*get… a hold of them*." Sgt Sanderson did not offer him the opportunity to find out. They were at the house. There may or may not have been a phone book there but presumably police would have had access to the internet on their phones. Although Mr Dendle was being taken to hospital he still had the right to attempt to contact a lawyer before being questioned if he wished. After contemplating the need for a lawyer, he had earlier exercised his right to silence. The admission was obtained after Sgt Sanderson again invited him to give his version before he left in the ambulance, without clarifying whether Mr Dendle wanted to attempt to make contact with a lawyer. She had reminded him he had the right to remain silent but his position in relation to a lawyer still had not been clarified. Mr Finch pointed to earlier passages where Mr Dendle asserted himself. Even so, Mr Dendle's physical condition would have been a distraction for him. Only shortly before the admission, he had elected to exercise his rights. A man may change his mind, but in my view it would be unfair to admit Mr Dendle's statements against interest given the circumstances in which they were made at the house."

[56] In relation to the record of interview, Judge Clare SC ruled that by the time of the interview at the police station the appellant understood his rights in relation to

---

20 At [14]-[15].

having a lawyer present and his ability to speak to a lawyer but "knowing of his rights, he still chose to speak to police" [21]. Her Honour noted however that the power to detain under the PPRA was confined to eight hours and here the questioning extended beyond the eight hours. Whilst an extension of time was obtained by police from a Magistrate there was a real issue as to whether all four preconditions to such an extension as set out in s 405(5) had been satisfied. The real issue was whether the appellant had been given the opportunity to make submissions in relation to that extension. Her Honour held:[22]

> "Ultimately, there was a failure by police to secure Mr Dendle's right to be heard on the application and to ensure that everything required to be done for a valid order extending time, was done. Mr Buckland contended that SCon Hollywood's conduct was so reprehensible that as a matter of public policy the subsequent admissions should be excluded from evidence.
>
> The public policy discretion was explored in *Ridgeway v The Queen*:
>
> > "*The weight to be given to the public interest in the conviction and punishment of those guilty of crime will vary according to the degree of criminality involved…The weight to be given to the principal considerations of public policy favouring the exclusion of the evidence – the public interest in maintaining the integrity of the Courts and in ensuring the observance of the law and the minimum standards of propriety by those entrusted with powers of law enforcement – will vary according to other factors of which the most important will ordinarily be the nature, the seriousness and the effect of the illegal or improper conduct engaged in by the law enforcement officers and whether such conduct is encouraged or tolerated by those in higher authority in the police force or, in the case of illegal conduct, by those responsible for the institution of criminal proceedings.*"
>
> The strongest matters favouring admission of the evidence are as follows:
>
> (i) The gravity of the alleged crimes. The anal rape of a child is one of the most heinous crimes in this court. The maximum penalty is imprisonment for life. There is a strong public interest in the conviction of those who commit the offence.
> (ii) Mr Dendle's admissions are probative.
> (iii) They were made voluntarily.
> (iv) He does not challenge their reliability;
> (v) The expiration of the 8 hour detention period was not due to any unreasonable delay by police;
> (vi) Police did apply for an extension of time;
> (vii) The interview commenced within the detention period;
> (viii) The most significant admission was made if not within the 8 hour period, only minutes outside of it;
> (ix) The interview was finished only an hour outside of the 8 hours;

---

21 *R v Dendle* [2018] QDCPR 16 at [23], ARB 2 at 57.
22 *R v Dendle* [2018] QDCPR 16 at [30]-[34], ARB 2 at 59-60.

(x) There was no suggestion the failure to properly present the application for extension of the detention period was institutionalised or tolerated by the Queensland Police Service. Indeed the police pro forma is designed to help focus attention of both the applicant and the Magistrate on essential matters; and

(xi) If S Con Hollywood had properly assisted the Magistrate, the same outcome was likely. His Counsel did not argue to the contrary on the application.

The matters that would support the exclusion of the interview are:

(i) The time limit for detention and the process for extending it, including the right to be heard, are not mere formalities. They are statutory limitations on the powers of police designed to protect against unfair interrogation. To detain after 8 hours, the police must persuade a Magistrate to exercise his discretion in accordance with the legislative test. The maintenance of such safeguards is in the interests of justice.

(ii) While S Con Hollywood may have made a full disclosure, he did not direct the Magistrate's attention to the significance of the outstanding requirement. The Act did not expressly place that responsibility on the police applicant. It was for the Magistrate to satisfy himself. Nonetheless when police make an application, there is an implied representation that the application is sustainable.

(iii) If S Con Hollywood had been more explicit the Magistrate could not have overlooked Mr Dendle's right to be heard under s 406 (1) (d); and

(iv) SCon Hollywood should have known that the order purporting to extend time was beyond the power of the Magistrate because the section had not been satisfied. Yet he continued to question Mr Dendle for more than an hour on the basis of that order.

It was for Mr Dendle to show that the discretion should be exercised in his favour. He has failed to do so. SCon Hollywood's conduct in relation to the extension of time is deserving of censure, but I am not persuaded the public interest warrants the exclusion of the confession in this case. It seems to me the balance weighs more heavily in favour of the admission of the evidence in furtherance of the prosecution of these serious offences."

[57] In my view, the learned judge correctly identified the facts and issues that were relevant in relation to the determination of that issue. I can discern no error in the exercise of the discretion to rule that the evidence was admissible despite the non-compliance with the requirements of s 405(5) of the PPRA.

[58] I would dismiss the appellant's application to set aside his conviction. I now turn to the argument that the sentences imposed were manifestly excessive.

Application for leave to appeal the sentence

[59] The appellant was sentenced to 12 years' imprisonment on Count 2, the most serious offence, carrying with it a serious violent offence declaration requiring him to serve 80 per cent of that sentence in actual custody. He received lesser, concurrent sentences in relation to the other four counts on which he was convicted. The appellant applies for leave to appeal the sentence and submits the appropriate range within which the sentence for Count 2 should have been imposed is in the vicinity of nine years' imprisonment.

[60] On sentence it was submitted by the Crown that the complainant's suicide was attributable to the offending. The learned trial judge took the fact of the complainant's suicide into account in sentencing on the basis that it could be inferred that sexual abuse was the predominant factor in the complainant's suicide.

[61] At the sentencing hearing the learned trial judge referred to a number of features which have been conveniently summarised by Counsel for the appellant with respect to this aspect of the appeal as follows:[23]

a) The appellant was a tall strongly built man, whilst the complainant was a small thirteen year old boy (R 263.38);
b) The appellant was a trusted friend of the complainant's father and he had been subjected to threats such that he had been *"scared throughout this lengthy ordeal"* (R 263.40);
c) The medical examination of the complainant showed bruising on the complainant's arms and the hard palate inside his mouth, with the later injury being consistent with forced penetration of the complainant's mouth (R 263.18);
d) The DNA evidence, including from one of the condoms seized by police, provided further supporting evidence (R 263.21);
e) There was evidence of a degree of pre-mediation in that the appellant had a can of spray canola oil in his room that the appellant directed the complainant to spray on himself (R 263.42);
f) It could be inferred that the appellant had sought to destroy evidence by washing the sheets on the bed (R 263.28);
g) The appellant had initially told police that he had *"a flashback memory of the boy being in your bed naked and you touching his penis inappropriately"*, but that by trial "*remarkably, in your evidence in court, you claimed that your memory has improved significantly in the two and a-half year period since the offences occurred"* and *"you denied committing any of the them"* (R 263.29);
h) The impact upon the complainant and his family had been catastrophic (R 264.15);
i) The complainant had committed suicide only ten weeks after the offences were committed against him. Whilst there had been other factors (such as school bullying and violence by his father towards the complainant) those factors *"pale into insignificance compared to the impact that these sexual offences must have had upon him"* (R 264.22);
j) Although the admissions made by the appellant in his initial police interview had shown *"a hint of remorse"*, his evidence at

---

23 Outline of Submission on behalf of the Appellant at [9.1].

trial had demonstrated *"a lack of any remorse whatsoever"* (R 264.22);

k) The appellant had no previous convictions, a good work history, and had been a model prisoner whilst on remand (R 264.32);

l) The appellant "*may have reasonable prospects of rehabilitation*", but the appellant's *"lack of insight"* as shown by his trial evidence was *"somewhat disturbing"* (R 264.35); and

m) The comparable cases his Honour regarded as providing the most guidance were *R v Daphney* [2010] QCA 236 and *R v Stoian* [2012] QCA 41 (R 264.28).

[62] A number of comparable cases are relied upon by Counsel for the appellant to argue that the sentence was manifestly excessive. It is argued that an effective head sentence with a requirement to serve 80 per cent is a very heavy sentence for a person with no previous criminal history. In particular, it was argued that the sentence was manifestly excessive when compared to the comparable decisions of *R v BAO*,[24] *R v SBJ*,[25] *R v Daphney*,[26] *R v PAM*,[27] *R v Stoian*,[28] *R v GAR*,[29] *R v Williams; Ex parte Attorney-General (Qld)*,[30] and *R v SCQ*.[31]

[63] It was accepted by Counsel for the appellant that the aggravating features of the offences of the rape were that the complainant was only 13 years old, the offending occurred over an extended period which included threats and some violence, there was a breach of trust and the serious consequences to the complainant which ultimately resulted in his suicide some 10 weeks after the offences.

[64] In *R v BAO*, the applicant pleaded guilty to one count of maintaining a sexual relationship with a child with a circumstance of aggravation, one count of sodomy and one count of indecent dealing with a circumstance of aggravation. He was sentenced to nine years' imprisonment without a serious violent offence declaration. The complainant was aged nine or 10 when the offences commenced and the offences continued over a period of some three years. The applicant was a mature man aged 48 when the offences commenced with no relevant previous convictions. Over a period of three years he had three times committed sodomy on the complainant, and on a weekly basis had performed oral sex on her and required her to perform oral sex on him. The applicant gave the complainant a vibrator when she was aged about 11 and had the complainant use it in his presence. The applicant was a family friend of the complainant, living on rural property owned by the complainant's parents. The close relationship between them aggravated the matter and thus involved a breach of trust.

[65] The applicant argued that there was no violence or vaginal intercourse in the offending and that he voluntarily ended the relationship by moving from the property, but the sentencing judge noted the true reason for his relocation was as a result of poor health. Williams JA stated "that though this sentence may be towards

---

24 [2004] QCA 445.
25 [2009] QCA 100.
26 [2010] QCA 236.
27 [2011] QCA 36.
28 [2012] QCA 41.
29 [2014] QCA 30.
30 [2014] QCA 346.
31 [2017] QCA 49.

the upper end of the range it is certainly not manifestly excessive."[32] The learned sentencing judge in not imposing a term of imprisonment of 10 years and a serious violent offence declaration gave "sufficient discount" to the applicant given "his early plea of guilty".[33] The application was dismissed.

[66] In my view, this decision is of no real assistance to the appellant as it was a sentence imposed after a plea of guilty and indeed endorses a sentence in excess of 10 years after a trial. As Williams JA observed, the learned trial judge considered that if the matter had gone to trial, a sentence of *at least* 10 years would have been imposed and that would have carried with it an automatic serious violent offence declaration.

[67] The appellant also relies on the decision in *R v SBJ*, where the applicant pleaded guilty to one count of maintaining a sexual relationship for over five years with his daughter who was under the age of 16. He also pleaded guilty to five counts of indecent treatment, one count of attempted incest and two counts of incest. On Count 1, he was sentenced to nine years' imprisonment with a parole eligibility date fixed after serving four years. On Counts 2 to 9 the sentencing judge imposed no further punishment as the offending in those counts constituted the conduct in Count 1, the maintaining offence.

[68] In *SBJ*, the applicant did not seek to appeal his head sentence, but rather sought to reduce the parole eligibility date to three years, rather than four years as the sentencing judge had ordered. The applicant was 38 years of age when the offending commenced and had no prior criminal history. The offending commenced when the complainant was aged between nine and 11 years with digital penetration in the complainant's bedroom. The offending continued with the applicant attempting to penetrate the complainant's vagina, but such act caused the complainant pain and the applicant would stop. Vaginal penetration commenced when the complainant was in year eight and continued for up to two years, occurring three to four times a week. Justice White summarised more of the offending as follows:[34]

> "Other sexual activity involved rubbing around her genital area and inserting his fingers into her vagina, oral sex and masturbation. On occasion the applicant would have money in his hand, usually $20 when he came into her room, and would give it to her after the sexual misconduct. The complainant said that she had started sleeping with the light on so that he would think that she was still awake and would not come into her room. From time to time sexual misconduct took place in the morning in her bedroom."

[69] The applicant expressed remorse to the complainant and family and admitted the wrong doing to Department of Child Safety officers who contacted police. The applicant took part in counselling where he was diagnosed with major depressive disorder. A forensic psychologist report predicted the applicant was unlikely to re-offend. It was an early plea of guilty. The application for leave to appeal against sentence was refused. Once again this was a sentence imposed after a plea of guilty and I do not consider this decision supports a sentence in the order of nine years after trial.

---

32 [2004] QCA 445 at 5.
33 [2004] QCA 445 at 6.
34 *R v SBJ* [2009] QCA 100 at [8].

[70] The offending in *R v Daphney* involved serious offending against an 11 year old girl and other violent offences against other people. At the time of the offending the applicant and complainant were residing in the same home with several other people. Against her will and in the night, the applicant took the complainant to nearby bushland and then to a nearby church where the offending occurred. The offending comprised of multiple counts of digital rape and indecent treatment. Penile rape had not occurred only because of the "appellant's physical inability".[35] The applicant's criminal history was summarised by the Muir JA:[36]

> "The appellant had been sentenced to 15 years imprisonment for a particularly violent rape in June 1988. He was released from custody on 17 January 2003 and committed his next offence, assault occasioning bodily harm, two months later. The subject offences were committed within a year of the appellant's release from custody."

[71] The primary judge sentenced the applicant to a 15 year head sentence. Muir JA (with whom Holmes and White JJA agreed), having regard to comparable cases exercised the sentencing discretion afresh and imposed a head sentence of 11 years' imprisonment. Once again, this was a plea of guilty and on any evaluation the offending was clearly less serious despite the more serious criminal history.

[72] The applicant in *R v PAM* was refused leave to appeal against his sentence of eight years' imprisonment for maintaining a sexual relationship with his very young step-daughter over a period of three years, and four years' concurrent imprisonment for each of the three counts of rape.[37] The rape offences were violent, including vaginal, anal and with a stick-like object, and left injuries which were evident in medical examinations some four years after the offending. The applicant was a mature man with poor criminal history. The sentencing judge set a parole eligibility date at one-third, taking into account the mitigating factors such as the applicant's timely plea before the complainant was required to give evidence and the applicant's dysfunctional upbringing. McMurdo P rejected the applicant's submissions that the eight-year sentence was manifestly excessive.

[73] In *R v SCQ*, the applicant was convicted after trial of maintaining a sexual relationship with a child over a period of almost three years and the vaginal rape of the child when the child was 10 years of age.[38] The applicant was also dealt with for two other indictments relating to sexual offending against children to which he pleaded guilty. The offender was 49 to 54 years old at the time of offending and had a "protective relationship in respect of all three girls against whom he had offended"[39]. He had a violent criminal history and part of the sexual offending occurred whilst he was on parole. A global sentence for the offending against all three complainants of nine years was imposed. That sentence was not disturbed on appeal as it was considered to be "amply supported by reference to the matters raised in *R v SAG*"[40] where a sentence of 14 years had been imposed. In my view, the decision is authority for the proposition that nine years was not manifestly

---

35 [2010] QCA 236 at [44].
36 [2010] QCA 236 at [43].
37 [2011] QCA 36.
38 [2017] QCA 49.
39 At [61].
40 [2004] QCA 286 at [19]-[20].

excessive but is not as an authority for the sentencing range given that the Court held:[41]

> "The contention that a sentence is manifestly excessive is not established merely if the sentence is markedly different from sentences in other cases. In order to demonstrate manifest excess, the difference must be such that there must have been a misapplication of principle or the sentence is just 'unreasonable or plainly unjust'."

[74] The applicant in *R v Stoian* was refused leave to appeal against a sentence of 12 years' imprisonment for accosting a nine-year-old complainant in the street, taking her to a hotel, threatening her with a knife and forcing her to suck his penis.[42] The applicant was 50 years of age with a criminal history that included a conviction in 1982 for indecent dealing with a young girl. The applicant had mental health difficulties. *Stoian* was one of the two decisions primarily relied upon by the learned sentencing judge. Although the sentence imposed was not disturbed on appeal, the members of the Court observed that the sentence was high.

[75] Counsel for the appellant argues that in contrast to *Stoian*, the appellant in the present case has no criminal history, the offender in *Stoian* took the complainant from the street and used a knife to threaten the nine-year-old. I consider that as Counsel for the Crown argues, it was significant that in *Stoian*, the offending was for a shorter duration than the offending the subject of this appeal, there were no physical injuries and the consequential effects on the complainant were not as severe as in the present case. Furthermore, his criminal history was in fact limited and comprised mainly nuisance offences with a dated offence for indecent dealing which involved touching of a nine-year-old girl on the genitals for which he received probation. At sentence, the Crown had submitted that the range was in between 12 and 14 years. I also note the remarks of McMurdo P in dismissing the application for leave to appeal against the sentence:[43]

> "I also agree with White JA that the application for leave to appeal against sentence should be dismissed. The 12 year sentence was, in all the circumstances, a high one. That is demonstrated by White JA's discussion of the more recent cases relied upon by the parties, namely, *R v Bielefeld*; *R v D and R v Daphney*. But the appellant did not have the benefit of the mitigating features present in those cases of cooperation with the authorities, a timely plea of guilty or remorse. A timely guilty plea is an especially significant mitigating feature in cases of this kind. It saves the complainant the trauma of cross-examination and the uncertainties of a prolonged trial process. Had the appellant entered an early guilty plea, these cases would have supported a sentence in the range of eight to 10 years. The appellant's offending was grave. He took the vulnerable nine year old child to his hotel room from a public street event which she was attending with her father. He then threatened her with a knife and made her suck his penis. It is true the episode was brief and that he did not prevent her early escape, but his offending has

---

41 [2017] QCA 49 at [68].
42 [2012] QCA 41.
43 [2012] QCA 41 at [4].

> caused long lasting trauma to both the complainant and her father. The appellant was a mature man with some mostly minor criminal history. Concerningly, when he was 24 he was placed on probation for 18 months for indecently dealing with another nine year old girl. A heavy penalty was warranted in the hope that it will deter the appellant and others from such predatory conduct and to make clear that the community, acting through the court, denounces such gravely anti-social behaviour." (footnotes omitted)

[76] In my view, the learned sentencing judge was correct in the way he took the complainant's suicide into account particularly given s 9(2) of the *Penalties and Sentences Act* 1992 which provides:

> "(c) the nature of the offence and how serious the offence was, including-
>
> (i) any physical, mental or emotional harm done to a victim, including harm mentioned in information relating to the victim given to the court under section 179K;"

[77] I have carefully considered the decisions relied upon by Counsel for the appellant but I consider that an examination of those cases in fact supports the head sentence of 12 years which was in fact imposed. The appellant has demonstrated no error in the exercise of the sentencing discretion having regard to the relevant factors in aggravation as identified by the sentencing judge.

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

Orders

[79] The orders I propose are:

1. Appeal dismissed.
2. Application for leave to appeal against sentence refused.