SUPREME COURT OF QUEENSLAND

CITATION:	*R v CCK* [2019] QCA 237
PARTIES:	**R** **v** **CCK** (applicant)
FILE NO/S:	CA No 135 of 2019 DC No 2881 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 26 April 2019 (Loury QC DCJ)
DELIVERED ON:	1 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	22 October 2019
JUDGES:	Fraser JA, Mullins AJA and Henry J
ORDER:	**The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of maintaining a sexual relationship with a child, nine counts of indecent treatment of a child under 12, three counts of rape, one count maintaining a sexual relationship with a child (domestic violence offence), three counts indecent treatment of a child under 12, lineal descendant (domestic violence offence), three counts of rape (domestic violence offence), and one count of indecent treatment of a child under 16, lineal descendant (domestic violence offence) – where the applicant was sentenced to 10 years' imprisonment for the count of maintaining a sexual relationship with a child (domestic violence offence) and a concurrent term of seven years' imprisonment for the count of maintaining a sexual relationship with a child – where the head sentences were intended to reflect all the offending – where the applicant is the biological father of the complainants – whether the sentence was manifestly excessive *R v B* [2003] QCA 68, considered *R v EK* [2013] QCA 278, considered *R v GQ* [2005] QCA 53, considered

R v HAA [2006] QCA 55, considered
R v Pham (2015) 256 CLR 550; [2015] HCA 39, cited
R v S [1998] QCA 318, considered
R v SAG (2004) 147 A Crim R 301; [2004] QCA 286, considered
R v WBG [2018] QCA 284, considered

COUNSEL: C C Minnery for the applicant
S J Hedge for the respondent

SOLICITORS: Fuller & White Solicitors for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Mullins AJA and the order proposed by her Honour.

[2] **MULLINS AJA:** On 22 March 2019, the applicant pleaded guilty in the District Court to one count of maintaining a sexual relationship with a child (count 1), nine counts of indecent treatment of a child under 12 (counts 2 to 4, 6 to 8, 10, 11 and 13), three counts of rape (counts 5, 9 and 12), one count maintaining a sexual relationship with a child (domestic violence offence) (count 14), three counts indecent treatment of a child under 12, lineal descendant (domestic violence offence) (counts 15, 16 and 18), three counts of rape (domestic violence offence) (counts 17, 19 and 20), and one count of indecent treatment of a child under 16, lineal descendant (domestic violence offence) (count 21). The applicant is the biological father of the complainants.

[3] The applicant was sentenced on 26 April 2019 to 10 years' imprisonment for count 14 and a concurrent term of seven years' imprisonment on count 1. He was convicted and not further punished in relation to the remainder of the offences. Counts 14 to 21 were declared domestic violence offences.

[4] The applicant applies for leave to appeal against the sentence on the ground that it is manifestly excessive.

Circumstances of the offending

[5] The complainants for counts 1 and 14 were respectively the elder daughter and the younger daughter of the applicant. The elder daughter was also the complainant for counts 2 to 13 and the younger daughter for counts 15 to 21. The offending against the elder daughter was committed during 2009 and 2010 when she was aged 9 to 11 years. The offending against the younger daughter commenced in 2013 and ended on 19 September 2017 when she was aged between 11 and 15 years.

[6] The first offence against the elder daughter began in the shower when the applicant asked her to masturbate his penis (count 2). Similar conduct occurred a week later (count 3). On each occasion the applicant told the complainant not to tell her mother. When the complainant was having a shower, he grabbed her buttock and then her breast (count 4). Thereafter the offending in the shower occurred on average two days each week for over a year. The sexual offending escalated when it moved from the shower to the bedroom. From mid-2009, the applicant procured

the complainant to suck his penis, he digitally penetrated her, he performed oral sex on her, and he engaged in simulated intercourse, ejaculating on her leg (counts 5 to 10). That type of conduct continued until about mid-2010, when in the shower the applicant procured the complainant to touch his penis and perform oral sex and the applicant touched the complainant's body (counts 11 to 13). The complainant said she did not like it. The applicant told her not to mention it to her mother or "it will be your fault". The applicant did not offend against the elder daughter after this last shower incident.

[7] There was then a gap in time before the sexual offending against the younger daughter started when they were alone at home with the applicant touching her buttocks and procuring her to masturbate him and to perform oral sex on him, after which he ejaculated into her mouth (counts 15 to 17). From the start of 2015, the applicant regularly raped the complainant by penile/vaginal intercourse and she said it happened "a lot" in 2016 and, at some points, the applicant engaged in sexual conduct with the complainant nearly every day. He told the complainant contraception was not an issue, because he had a vasectomy. He also told the complainant not to tell her mother. During the Easter holidays of either 2014 or 2015, the applicant procured the complainant to masturbate his penis and perform oral sex on him, during which he ejaculated in her mouth and on her face, and he then had sexual intercourse with her (counts 18 to 20). The last occasion of sexual offending that was specifically charged occurred in the shower in late 2016 when the applicant touched the complainant's breasts (count 21) and the complainant pushed him away and told him to leave her alone. When the complainant was in year 11and the applicant tried to touch her sexually, she told him she could not deal with his conduct anymore, because it was hurting her and she could not take the mental strain.

[8] The elder daughter provided a victim impact statement that dealt eloquently with the significant impact the offending had on her. The younger daughter did not provide a victim impact statement, but the schedule of facts referred to the sexual offending caused her to suffer from depression and she started self-harming. During the sentencing, the appellant accepted that was the case in respect of the younger daughter.

The applicant's antecedents

[9] The applicant was aged between 43 to 51 years during the period of offending and was 54 years old when sentenced. His pleas of guilty were early. He had no prior criminal history. Until the sentence, the applicant had worked for over 30 years as an automotive technician and was the workshop foreman. His brother provided a reference and signified his willingness to provide the support the applicant required when released from prison. The applicant's wife left the family home in August 2017.

[10] Forensic psychologist Mr Alec Jones prepared a psychological assessment of the applicant and the report dated 22 April 2019 was tendered in evidence. Mr Jones noted the applicant did not deny responsibility for his actions, but repeatedly professed an inability to understand his motivation and expressed a genuine grief, noting his regret and shame and marked victim empathy.

[11] Mr Jones made a principal diagnosis of mixed personality disorder – personality disorder not otherwise specified with some borderline, obsessive compulsive and anti-social features. Mr Jones identified as conditions underlying the principal diagnosis as a pervasive generalised anxiety disorder and a complex post-traumatic stress disorder. The report noted that the applicant "is indicated as suffering a Major Depressive Disorder", but when the sentencing judge expressed difficulty in accepting that diagnosis, the applicant's counsel did not rely on the diagnosis of major depressive disorder. The applicant had informed Mr Jones of the traumatic experiences he suffered when he was sent to a boarding school for years 9 and 10. Mr Jones expressed the opinion that the applicant's offending "is consequent upon his suffering negative adolescent development, inducing marked anxiety, by separation from his conservatively Christian home environment and being placed in [boarding school]". Mr Jones summarised the applicant's version of his relationship with his wife who was the mother of his children. The applicant asserted that she suffered from depression and there had been a lack of intimacy between them for many years. Mr Jones considered the applicant's marriage experiences further impacted on the applicant's damaged mental health profile with resultant increased suicidal ideation. There was a failed suicide attempt 10 days before the applicant pleaded guilty to the offences.

Cases referred to before the sentencing judge

[12] The prosecutor referred to *R v SAG* [2004] QCA 286 for the relevant factors to be considered in sentencing for the offence of maintaining a sexual relationship for a child under 16 years. The prosecution relied on the comparable authorities of *R v HAA* [2006] QCA 55, *R v EK* [2013] QCA 278 and *R v WBG* [2018] QCA 284. The prosecutor's submission was that the applicant should be sentenced on count 14 to no less than 10 years' imprisonment.

[13] The applicant's counsel relied on *R v S* [1998] QCA 318, *R v TWB* [2001] QCA 111, *R v B* [2003] QCA 68 and *R v SAR* [2005] QCA 426 as comparable authorities. The applicant's counsel had submitted for an effective sentence of imprisonment between seven and eight years with parole eligibility at about one-third of the sentence.

Sentencing remarks

[14] After summarising the circumstances of the offending, the sentencing judge's remarks included the following. The complainants told their mother of the abuse in February 2017 and in March 2018 they made a formal complaint to the police. There was then a pretext telephone call in which the younger daughter asked the applicant why he had played with her breasts and buttocks and he responded "Probably because I liked it" and said that he thought it was "a mutual thing". When the applicant was arrested the next day and interviewed by the police, he denied the offending, although admitted to touching the younger daughter on the breasts and buttocks and that it was not consensual. The pleas of guilty were indicated at an early time. The contents of the psychological report did not in any way reduce the applicant's moral culpability for the offending and did not provide any palatable reason for why the applicant would have used and manipulate his daughters in such an appalling way. There were problems with the applicant's relationship with his wife. Even though there was a diagnosis the applicant was suffering from depression, that had not affected his functioning in the community,

as the applicant had been employed and held down a job for all his adult years. The applicant had self-harmed in recent times and remained at risk of self-harming, because of his current mental health state. The applicant's mental health and self-harming did not excuse the offending which had caused irreparable harm to the complainants. The applicant expressed deep remorse for what he had done to the psychologist. The applicant's conduct had "a very significant effect upon [his] daughters". The younger daughter was described as suffering from depression and was self-harming and the elder daughter had "poignantly written of the effects of what [he] did in her victim impact statement", writing of "a heavy feeling of sadness that invaded every part of her life" which had become a hatred for the applicant. The applicant's conduct was a grave breach of trust of his daughters. The threats the applicant made to his daughters and emotional blackmail were aggravating features of his offending, as was the length of the sexual relationships he maintained which was two years for the elder daughter and almost five years for the younger daughter.

[15] In describing the purposes of sentencing the applicant, the sentencing judge stated:

> "Deterrence, both general and personal, are important considerations to the exercise of my discretion. Community denunciation is particularly important. The sentence I impose must condemn what you did. I must pay particular regard to the effects of your offending on your daughters, and those effects are, in truth, immeasurable.
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> I have had regard to the many comparable decisions that have been provided to me, and particularly to the principles that are contained within those decisions and, also, the principles that are contained within section 9 subsections (4) and (6) of the Penalties and Sentences Act. It is consistency in the application of principles that inform the sentence that I must impose."

[16] The sentencing judge had regard to the fact that the applicant would be required to serve 80 per cent of the term, if 10 years' imprisonment was imposed, but intended to reflect all the offending in the head sentences imposed for the two counts of maintaining a sexual relationship with a child and that a sentence of 10 years' imprisonment was appropriate in all the circumstances.

The applicant's submissions

[17] There were significant mitigating features in the applicant's favour: his early plea of guilty demonstrating remorse and cooperation and saving the complainants from giving evidence, his lack of prior convictions, the support of his brother, his genuine remorse and insight into the seriousness of his offending, his mental health issues and his good work history. It is difficult to see any allowance in the sentence for these features. The approach of the sentencing judge was to impose a sentence which recognised the need for significant punishment of the applicant on the principles of denunciation and deterrence, emphasised the effect of the offending upon the complainants, and paid little regard to any mitigating features in terms of actual effect upon his sentence.

[18] *EK* demonstrates offending that is more serious than the applicant's offending with less significant mitigating features than applied to the applicant. The offender in *B* committed offences against his two stepdaughters for a similar period of time to the

applicant's offending, but his sentence of seven years' imprisonment for each offence was not successfully appealed. *WBG* involved the three daughters of the offender who were of significantly lower age than the complainants in this matter and there was no clear indication of significant mitigation or remorse on the part of WBG. The sentence for the offending in *WBG* would therefore ordinarily be higher than that for the applicant's offending, but WBG was sentenced to 10 years' imprisonment that was not disturbed on appeal.

[19] It was therefore submitted the sentence ought to be reduced to a sentence of imprisonment of eight or nine years with parole eligibility after one-third.

The respondent's submissions

[20] The applicant's insight and remorse that was displayed by the time he was interviewed by his psychologist had a reduced mitigating effect where the offending involved a persistent, gross breach of trust of the parental relationship and emotional manipulation of the victims over many years.

[21] The sentence imposed on the applicant fits comfortably within the yardsticks provided by the comparable cases, particularly *EK* which is the most comparable case to the applicant's case and *HAA*, where a sentence of 12 years' imprisonment was imposed after trial that demonstrates the applicant's sentence could have been substantially in excess of ten years' imprisonment had the applicant not pleaded guilty. The conduct in *EK* was arguably less serious than the applicant's offending. The applicant's case is more serious than *WBG* and *R v GQ* [2005] QCA 53 in which cases 10 years' imprisonment was imposed after guilty pleas. The cases relied on by the applicant, both at sentence and on this application, are not comparable to the applicant's offending, because in none of them did the offender subject the complainant or complainants to regular penile intercourse. The sentence imposed on the applicant was proportionate to the gravity of the offending and not manifestly excessive.

The comparable authorities

[22] In *SAG*, Jerrard JA (with whom Atkinson and Philippides JJ agreed) listed at [19] significant matters that substantially increased a sentence for an offence of maintaining a sexual relationship, as including:

> "• a young age of the child when the relationship thereafter maintained first began;
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> • a lengthy period for which that relationship continued;
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> • if penile rape occurred during the course of that relationship;
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> • if there was unlawful carnal knowledge of the victim;
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> • if so, whether that was over a prolonged period;
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> • if the victim bore a child to the offender;
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> • if there had been a parental or protective relationship;
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> • if the offender was being dealt with for offences against more than one child victim;

- if there had been actual physical violence used by the offender; and if not whether there was evidence of emotional blackmail or other manipulation of the victims."

[23] In the same case, Jerrard JA noted at [20]:

> "Matters which mitigate the penalty include conduct showing remorse, such as the offender voluntarily approaching the authorities, or seeking help for all the family; co-operation with investigating bodies, admissions of offending, co-operating with the administration of justice, and sparing the victims from any contested hearing."

[24] The offender in *S* pleaded guilty to one count of maintaining a sexual relationship with a circumstance of aggravation (making the maximum penalty life imprisonment) in respect of his stepdaughter and related offending that included an attempted rape. The offences were committed over a period of two years. S also pleaded guilty to an indecent assault with circumstances of aggravation and indecent treatment of a child under 16 years with circumstances of aggravation in respect of his daughter. The stepdaughter was 12 or 13 years old when the first offence was committed against her and the daughter was 11 years old. The pleas of guilty were entered after the jury had been empanelled. S was sentenced to seven years' imprisonment for the maintaining offence with concurrent sentences for the related offending against his stepdaughter and a cumulative sentence of 18 months' imprisonment for the two offences against his daughter. S was 34 years old when sentenced and was on a disability pension as a result of alcohol abuse. He had prior criminal convictions including relevantly for the offence of permitting himself to be indecently dealt with by a child under 12 years. An aggravated aspect of his offending was that he had on one or two occasions given alcohol to his stepdaughter to make her less resistant to his advances. The only factor in his favour was the late guilty plea. It was explained by McPherson JA (with whom Ambrose and Byrne JJ agreed) at p 5 that, as the offending would have justified a sentence of as much as 10 years' imprisonment after trial, the sentence of eight and one-half years was not manifestly excessive.

[25] There were two complainants in *B* who were the offender's stepdaughters. He was unsuccessful in applying for leave to appeal against his sentence of seven years' imprisonment on two counts of maintaining an unlawful relationship with circumstances of aggravation. The first complainant was aged between 10 and 12 years over the period of 18 months during which the offences were committed. The offending included masturbating in front of the complainant, performing oral sex on her and having the complainant masturbate. B attempted to have intercourse with the complainant on three occasions. The second complainant was four years old when the offending commenced against her and it lasted for almost four and one-half years. The pattern of offending was similar to that committed against the first complainant and on one occasion included an attempt to have intercourse with the second complainant. B was 28 years old when sentenced. He had prior criminal convictions mainly for drug offences.

[26] The offender in *GQ* pleaded guilty to maintaining a sexual relationship with circumstances of aggravation where the period of the relationship was about six years. The head sentence of 10 years' imprisonment in respect of the maintaining

charge was not disturbed on appeal. GQ was aged between 23 and 30 years over the period during which he offended. The complainant was his wife's niece. The first sexual intercourse occurred about two years into the period of offending and then occurred on a regular basis from that time until she was 16 years old at the end of the period of offending. The complainant estimated the frequency of sexual intercourse was about three or four times per week and on occasions the offender made her perform oral sex on him. The offending came to an end when the complainant started to tell adults what had been happening and the offender's marriage broke up. He voluntarily informed the police about his offending. Too much was not made of his confession, as by then his unlawful conduct was out in the open. Aggravated aspects of his conduct were that unprotected intercourse occurred frequently over the period and on some occasions he had provided the complainant with alcohol.

[27] The offender in *HAA* was found guilty after trial of maintaining an unlawful sexual relationship, one count of rape and 15 counts of unlawful carnal knowledge. He unsuccessfully appealed against the sentence of 12 years' imprisonment that was imposed for the maintaining offence. The complainant was the granddaughter of the offender's defacto partner. She was nine years old when the unlawful sexual relationship which lasted four years began. The offender had been entrusted the after school care of the complainant. Sexual intercourse occurred between them at various places. There was also one offence of oral rape. The complainant's grandmother was very ill and the offender threatened that, if the complainant told anyone about their sexual activity, he would leave her grandmother. The offender was aged between 50 to 55 years during the offending and had one prior conviction for indecent dealing with another child under the age of 16 years. He showed no remorse.

[28] The offender in *EK* pleaded guilty at an early stage to two counts of maintaining a sexual relationship and related offending with his stepdaughter A and a further offence of maintaining a sexual relationship and three offences of indecent treatment of a child under his care in respect of another stepdaughter B. The offender was aged between 52 and 58 years during the period of his offending and was 65 years when sentenced. He had served in the RAAF for 20 years and had seen active service in Vietnam, as a result of which he suffered from a variety of significant physical and psychological problems, including posttraumatic stress disorder. The maintaining relationship with A commenced when she was 11 years and concluded when she was 19 years, although the applicant was not charged with offending occurring after A turned 16 years. The sexual conduct comprised touching and oral sex until A's 13th birthday when he had sexual intercourse with her which was repeated about once per month, but more frequently during holiday periods. The sexual relationship with B commenced when she was 13 years and stopped when she was 16 years. It commenced with kissing, then touching of B's breasts and concluded with licking and rubbing of B's vaginal area. The offender appealed on the ground that the sentences of 10 years' imprisonment imposed for the maintaining offences in respect of A were manifestly excessive. Muir JA (with whom Philippides and Henry JJ agreed) found at [41] the sentencing judge failed to have due regard to the considerations arising from the offender's many ailments that would render his imprisonment unusually onerous and create continuing health management difficulties. Sentences of nine years' imprisonment were substituted for the two maintaining offences.

[29] There were three complainants who were the daughters of the offender in *WBG*. There were two counts of maintaining a sexual relationship with a child in respect of the two older daughters who were respectively nine years old and six to seven years old when the offending was committed. The third daughter was six years old and was the complainant for the offence of indecent treatment of a child under 16 years, under 12 years, who was a lineal descendant, under care. WBG was sentenced to 10 years' imprisonment for each of the maintaining offences. The period of offending was three months. Apart from one offence involving anal penetration of child one, and two occasions on which child two performed oral sex on the offender, the conduct involved touching the complainants, the offender rubbing his penis against the complainants, and causing the two older daughters to watch pornographic videos. There were timely pleas of guilty and a lack of any relevant prior criminal history, but the offender was unsuccessful in his application for leave to appeal against the sentence.

Was the sentence manifestly excessive?

[30] As was observed by French CJ, Keane and Nettle JJ in *R v Pham* (2015) 256 CLR 550 at [28]:

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

[31] Most of the aggravating features identified in *SAG* at [19] were present in the applicant's offending, particularly in relation to the younger daughter. Although Mr Minnery of counsel for the applicant emphasised the applicant's remorse and the development of insight into his offending, as outlined in the psychologist's report, the practical manifestation of that remorse and insight was in the early pleas of guilty and the cooperation with the administration of justice. The sentence imposed on the applicant is not out of step with any of the comparable authorities relied on by both the applicant and the respondent. Neither *S* nor *B* involved actual penile intercourse. There was only one complainant in *GQ* and in *HAA*. The sentence that was imposed in *EK* at first instance was 10 years' imprisonment before the sentence was reduced on appeal to take into account the exceptional circumstances that applied as a result of the offender's many physical and mental ailments which far exceeded the applicant's mitigating factors. Although the complainants were younger in *WBG*, the period of offending was a relatively short period of three months and therefore *WBG* should not be treated as a worse example of offending than the applicant's case.

[32] The applicant's offending was a serious example of the offence of maintaining. The two complainants were the applicant's biological daughters and the offending against them (which included regular penile rape committed against the younger daughter) continued for significant periods during which he used emotional blackmail and threats to avoid the complainants' reporting the offending. The significant mitigating factor of the early guilty pleas has been reflected in the effective sentence of 10 years' imprisonment. Even allowing for the consequence that the applicant will serve a minimum of eight years in custody before being

eligible for parole, the sentence is not inexplicably or markedly different from the comparable cases and is neither unreasonable nor unjust in all the circumstances. It is therefore not manifestly excessive.

Order

[33] The application for leave to appeal against sentence is refused.

[34] **HENRY J:** I have read the reasons of Mullins AJA. I agree with those reasons and the order proposed.