SUPREME COURT OF QUEENSLAND

CITATION:	*R v WBL* [2020] QCA 88
PARTIES:	**R** **v** **WBL** (applicant)
FILE NO/S:	CA No 168 of 2019 DC No 118 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh – Date of Sentence: 24 May 2019 (Chowdhury DCJ)
DELIVERED ON:	1 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	7 February 2020
JUDGES:	Fraser and Morrison and McMurdo JJA
ORDER:	**Application for leave to appeal refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted, on his own pleas of guilty, to 18 sexual offences – where the applicant was sentenced on one of those offences, which was that he maintained a sexual relationship with a child, to a term of nine and a half years' imprisonment – where the applicant was sentenced to concurrent and lesser terms for the other offences – whether the sentence was manifestly excessive *R v CCK* [2019] QCA 237, cited *R v Nagy* [2004] 1 Qd R 63; [2003] QCA 175, cited
COUNSEL:	The applicant appeared on his own behalf J A Wooldridge for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

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

[2] **MORRISON JA:** I have read the reasons of McMurdo JA and agree with those reasons and the order his Honour proposes.

[3] **McMURDO JA:** This is an application for leave to appeal against sentences imposed for 18 sexual offences. The applicant was sentenced on one of those offences, which was that he maintained a sexual relationship with a child, to a term of nine and a half years' imprisonment. He was sentenced to concurrent and lesser terms for the other offences, the highest being one of four years' imprisonment for an offence of the rape of another girl. His sentence on the maintaining charge was intended to reflect the overall criminality of all of his offending, in the way which was approved by this Court in *R v Nagy*.[1] The applicant's challenge, therefore, is to the sentence of nine and a half years' imprisonment.

The offences

[4] The most serious of the applicant's offences were committed against two sisters, whom I will call R and J, when the applicant was in a de facto relationship with their mother, whom I will call D, from 2011 to 2015.

[5] The offence of maintaining a sexual relationship was committed against R, over a period of approximately three years, who was approximately seven or eight years of age when it commenced. The offence ended only when R came to understand that what the applicant was doing was wrong. The offending against R included:

- anal penetration with his penis;
- licking the complainant's genital area;
- ejaculating on the complainant;
- putting his penis between the complainant's thighs;
- having the complainant play with his penis;
- handing a vibrator to the complainant and showing her how to use it;
- standing naked in front of the complainant, asking her to suck his penis;
- exposing her to pornography; and
- using a camera to covertly take a video of R while she was showering, which the applicant then kept on a USB stick which was found in his possession.

[6] As I have said, on the maintaining charge he received a sentence of nine and a half years' imprisonment. For the other offences against R, he received concurrent terms of 18 months' imprisonment.

[7] The physical offending against J occurred on two occasions. On the first occasion, he touched her on the area of her vagina on the outside of her pyjamas. On the second occasion, when J was about nine years of age, he penetrated her vulva with his penis, by positioning her over him while he lay naked on the bed. He told her not to tell her mother. For those offences, he was sentenced to terms of 18 months' and four years' imprisonment respectively.

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1 [2004] 1 Qd R 63; [2003] QCA 175.

[8] He also offended against J by filming her in the shower, and again, the video was located on a USB stick which police found in his possession. J was two and a half years younger than her sister.

[9] There were other offences which involved the applicant covertly recording children and adults in the shower. The applicant filmed D, D's sister and a number of school friends of R and J. There was also a video recording of an unknown pre-pubescent girl. The recordings of D and her sister resulted in terms of six months' imprisonment, and the recordings of the other children resulted in terms of 12 months' imprisonment in each case. Lastly, there were further concurrent terms, each of 12 months' imprisonment, for offences involving the applicant showing, to a friend of his, two of the videos, and the applicant possessing the videos. All of the offending came to light when the applicant told this friend that he had been touching R and J, and showed the friend two of the videos.

[10] The friend contacted the police. R was interviewed in May 2016 and the recording became admissible under s 93A of the *Evidence Act* 1977 (Qld). A few weeks later, police executed a search warrant at the house where the offences had been committed, and where the applicant was still living. He initially denied that he was in possession of any child exploitation material, until police located the USB stick. The applicant then admitted to recording persons, on different occasions over a two year period, as they showered at the house. But he declined to participate in an interview. A few weeks later, J provided her initial statement under s 93A. In the following months, police went back to the house, where the applicant declined to say where he had positioned the camera. During that search, he told police that he had recorded the children in the shower because he was concerned with water wastage. At the conclusion of that search, he expressed remorse for having made the recordings, but declined to discuss his partner or her children.

[11] In February 2017, D conducted a pre-text telephone call with the applicant, who told her that he had never hurt J or R, but accepted that he had recorded them on the videos.

History of the proceeding

[12] The indictment was presented in March 2018, and the matter, on counts 1 to 6 only, was listed to proceed to trial in March 2019. In a pre-trial hearing listed on 5 December 2018, the applicant indicated that he was prepared to plead guilty on the counts involving the videos, but would contest the charges of physical sexual conduct. Subsequently, after some amendment to the facts charged in relation to those counts, he pleaded guilty to all counts.[2] He was granted bail pending his sentence hearing, which occurred in the District Court on 23 May 2019. The sentencing judge (Chowdhury DCJ) said that the applicant had entered a timely plea of guilty, for which he was to be given credit.

The applicant's antecedents and psychological assessment

[13] The applicant was born on 3 February 1981, so that he was aged 29 to 35 years at the time of the offences and 38 years at the time of the sentence. He had no significant criminal history.

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2 Save for one count on which the Crown entered a *nolle prosequi*.

[14] The applicant relied upon a report of Dr Andrews, a clinical psychologist and neuropsychologist. Dr Andrews wrote that she was "somewhat puzzled" by the applicant's account to her of the alleged offences, for which he said that he had memory difficulties around that period. He told her that he did not believe that the physical offences had occurred in the way in which they had been reported by the children, but that he did not want them to be repeatedly interviewed or examined, and therefore he had pleaded guilty. The applicant gave a version to Dr Andrews which was inconsistent with what became the agreed statement of facts at the sentencing hearing, and which I have summarised. He denied any recollection of the indecent dealing offence against J, saying that he might have been intoxicated at the time and he could have believed that J was, in fact, her mother (D). As to the offence of rape against J, the applicant told Dr Andrews that he did not accept that penetration had occurred, and added that J was the instigator of the contact. He denied having a sexual interest in children or adolescents, and he continued to claim that he had been filming girls and women in the shower because of his concern about the cost of water.

[15] To Dr Andrews, the applicant appeared to be of average intelligence and he had described a functional and unremarkable childhood. He had been involved in a serious motorcycle accident in 2012, and he had told her that he had been medicating with alcohol to manage his pain. He had suffered from some adjustment difficulties following his accident. In her view, he was showing symptoms consistent with generalised stress and worry about his forthcoming sentence hearing. She noted that he had not been treated for or diagnosed with any mental illness. In her opinion, the applicant was someone with a propensity to abuse alcohol and engage in disinhibited and inappropriate behaviours. She concluded that the applicant lacked a level of insight into his actions.

The reasons of the sentencing judge

[16] His Honour said that this was a timely plea which spared the children the requirement to give evidence, which was "a significant feature", although the girls did have to prepare to give evidence by watching their police interviews and undertaking a conference with the prosecutor.

[17] The judge said that the applicant had an excellent work history and that, although the applicant obviously drank too much, there was little in the applicant's background to indicate why he would engage in this offending. His Honour noted that there were character references in favour of the applicant, including one from his employer.

[18] The judge said that he had considered a number of comparable cases which had been referred to him in the submissions, of which he made specific reference to *R v BCW*[3] and *R v BBY*.[4] From the former, his Honour quoted the judgment of Holmes JA (as she then was) who said[5] that in cases of this kind, a factual comparison between cases in order to establish a "hierarchy of heinousness" was "not necessarily fruitful". From the latter, he referred to the statements by Atkinson J about the considerations which will be relevant in sentencing for the offence of maintaining a sexual relationship with a child.

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3 [2014] QCA 340.
4 [2011] QCA 69.
5 [2014] QCA 340 at [22].

[19] His Honour made particular reference to the victim impact statements, including that by the children's mother.

[20] As to the offence of maintaining a sexual relationship, the judge said it was difficult to gauge the frequency of the offending which was within that charge. He noted that the applicant was in a position of trust and there were "obviously, numerous incidents of sexual abuse".

[21] His Honour explained the process by which he arrived at the sentences as follows. He said that for the offence of maintaining, if considered alone, he would sentence the applicant to a term of eight years' imprisonment. He would then consider imposing concurrent terms for the offences of indecent dealing against the same complainant (R). He said for the offence of rape, he would have sentenced the applicant to four years' imprisonment, to be served cumulatively upon the term of eight years. For the offences of secretly filming the other girls in the shower, he would have ordered terms of 12 months' imprisonment, to be served concurrently with each other but cumulatively upon the terms of eight and four years. There would then have been lesser concurrent terms imposed for the other counts. In that way, his Honour said, he had reached "an overall starting point of 13 years' imprisonment".

[22] But having regard to the totality principle,[6] his Honour said, it was necessary to reduce "the overall sentence" to one of 11 and a half years' imprisonment, and it was then necessary to reduce that for the mitigating factors including his plea of guilty. The result was that his Honour reduced the period of imprisonment to nine and a half years. His Honour said that he wished "to make it clear" he was imposing "the global sentence of nine and a half years' imprisonment on count 1". He explained to the applicant that he would be eligible to apply for parole after serving one half of that sentence.

The applicant's submissions

[23] In this Court, the applicant was without legal representation. The sole ground for his proposed appeal was that the sentence is manifestly excessive. In the course of his oral submissions, he sought to make some specific points, for one of which he applied for leave to adduce evidence, constituted by the s 93A interviews with the complainant R. The point which he sought to make from that evidence was that in the period of maintaining the sexual relationship with R, there were only occasional incidents of offending. According to transcripts of those interviews, provided to this Court by the respondent, R told the police that the offending did not happen "every time", meaning at every opportunity. According to the applicant's understanding of that evidence, R told the police officer that it occurred "around ten times". The applicant's point was that the offending occurred less frequently than in cases which had been submitted by the prosecution as comparable cases.

[24] The applicant also relied upon the assessment by Dr Andrews that he was a low risk of re-offending. He argued that he had shown remorse and that allowance should be made for his willingness to participate in courses, both inside and outside prison, in order to address his behaviour. He submitted that the sentence should be reduced to one of seven years, with parole eligibility after 28 months.

Consideration

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6 *Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70.

[25] The s 93A evidence was not before the sentencing judge. But there is no inconsistency between the evidence to which the applicant refers and the factual basis upon which he was sentenced. The sentencing judge said that he was unable to assess the frequency of the offending within this charge, so it is to be assumed that he was sentenced upon the basis that there was relatively infrequent conduct over the three year period.

[26] This case was complicated by the existence of several offences against different complainants in circumstances where, as the judge said, it would have been appropriate to impose cumulative terms of imprisonment. The judge decided instead to impose concurrent sentences, but to increase the sentence for one offence to result in a period of imprisonment which was commensurate with the applicant's overall criminality. The nine and a half year term for the maintaining offence must be understood in that context.

[27] Under the alternative approach which was open to the judge, one of the accumulated terms would have been for the offence of the rape of the complainant J. The judge said that had he followed that approach, a sentence for that offence would have been a cumulative term of four years. I do not suggest that this would have been an inadequate sentence, but, in the circumstance of the child being under his care, a four year term would not have been a heavy sentence.[7]

[28] On the maintaining charge itself, a number of comparable cases are discussed in the recent judgment of Mullins JA in *R v CCK*,[8] and it is unnecessary for me to repeat that discussion here. A sentence for that offence alone, of eight years' imprisonment, would not have been excessive, if there was some allowance for the mitigating factors by an earlier parole eligibility date.

[29] There were also the offences committed against other children and D and her sister. These were serious offences, especially those involving the children, warranting some further punishment of the applicant.

[30] In these circumstances, it cannot be accepted that the "global" sentence of nine and a half years was manifestly excessive.

Order

[31] I would refuse the application for leave to appeal.

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7 cf *R v BBP* [2009] QCA 114, where a term of eight years from the rape of the applicant's niece, aged 9 or 10, was not disturbed, although that was imposed after a trial.

8 [2019] QCA 237 at [22] to [29].