SUPREME COURT OF QUEENSLAND

CITATION:	*R v WBM* [2020] QCA 107
PARTIES:	**R** **v** **WBM** (applicant)
FILE NO/S:	CA No 48 of 2019 DC No 7 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maryborough – Date of Sentence: 7 February 2019 (Reid DCJ)
DELIVERED ON:	22 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	16 April 2020
JUDGES:	Fraser and Mullins JJA and Applegarth 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 – OTHER MATTERS – where the applicant was convicted of two counts of rape, one count of attempted rape and two counts of aggravated indecent treatment of a child – where the sentencing judge concluded that the offending occurred on more than one occasion – where the applicant submits that the sentencing judge should have found that the offending occurred on only one occasion – whether the sentencing judge erred in finding that the offending occurred on more than one occasion CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the applicant submits that the absence of maintaining, overt violence, previous sexual offending and multiple victims in the circumstances were not taken into account – whether the sentencing judge failed to take account of the matters alleged CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was given a head sentence of nine years' imprisonment with parole eligibility after five years to reflect his overall offending – whether the

head sentence was manifestly excessive in all the circumstances

R v BBP [2009] QCA 114, considered
R v Bouttell (2018) 272 A Crim R 41; [2018] QCA 52, cited
R v KAJ; Ex parte Attorney-General (Qld) [2013] QCA 118, cited
R v P [2001] QCA 25, cited
R v WBK [2020] QCA 60, considered

COUNSEL: The applicant appeared on his own behalf
D Balic 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 Applegarth J and the order proposed by his Honour.

[2] **MULLINS JA:** I agree with Applegarth J.

[3] **APPLEGARTH J:** On 6 February 2019 the applicant was convicted after a three day trial on two counts of rape, one count of attempted rape and two counts of aggravated indecent treatment of a child. The victim was his daughter, who was aged seven at the time of the offences.

[4] On 7 February 2019 the applicant was sentenced to concurrent terms of imprisonment of nine years for the rape counts, six years for the attempted rape count and four years for the indecent treatment of a child counts. Each offence was a domestic violence offence. Parole eligibility was fixed after five years' imprisonment, and 212 days of pre-sentence custody were declared as time served. The applicant seeks leave to appeal against his sentence.

The offending

[5] The offending occurred in the family home. The complainant's evidence established that it occurred on more than one occasion. The offences consisted of:

(a) penetration of her vagina with his penis;

(b) an attempt to penetrate her anus with his penis;

(c) licking her anus with his tongue;

(d) licking her vagina with his tongue, penetrating her vagina; and

(e) procuring her to touch his penis and to masturbate him until he ejaculated.

[6] The complainant reported the applicant's offending to her mother. Her mother told her not to tell anyone. Later, and with reluctance due to the "pinkie promise" obtained by the applicant to not tell anyone and her mother's advice that if she told anyone her father would get into trouble, the complainant disclosed the offending. She was interviewed by police on 17 June 2016, by a child safety officer on 8 July 2016 and again by police on 16 July 2016.

[7] The sentencing judge who assessed this evidence and the complainant's pre-recorded evidence at the trial thought there was no doubt that the offending occurred on more than one occasion. This conclusion was supported by the evidence, including:

(a) the complainant's description of the applicant wearing different clothes on different occasions when she was sexually assaulted;

(b) her description of one occasion when her mother was driving an older son to the station for a long-distance journey, and she was left alone at home with her father, save for infant twins who were asleep;

(c) her description of another occasion when her mother was in the kitchen cooking; and

(d) her references to a third time.

The applicant's antecedents

[8] The applicant was aged either 32 or 33 at the time of the offences and was 36 at the date of sentence. He had a minor and dated criminal history, and no previous offending for sexual offences.

[9] He was educated to Grade 7 and left school at 14. Thereafter, he worked in various labouring jobs. When he and his wife had twins in mid-2014, he ceased work and supported his wife by driving children to school and undertaking some domestic tasks. The family moved to a small town in 2015.

Sentencing hearing

[10] In the course of the sentencing hearing, the learned sentencing judge discussed with counsel the sequence of the five offences. He accepted the prosecution's submission that the offences occurred on more than one occasion. Among other things, the sentencing judge referred to the complainant's report of an occasion when the applicant called her back in the room, took his and her clothes off and she "knew what was coming".

[11] The prosecution's submissions relied upon a number of matters, including:

(a) the gross breach of trust by a father;

(b) the acts involved actual penetration, both with his penis and with his tongue, and attempted penetration of the anus;

(c) the complainant asked him to stop but he persisted, although he eventually stopped; and

(d) the emotional damage caused to the complainant.

As to the last matter, the complainant's age and the fact that the perpetrator was her father must have proved traumatic. The sentencing judge referred to a passage in her evidence when she spoke about crying when she was on her own. By the time of the second police interview she was in foster care and felt safe.

[12] The prosecutor noted the limited number of comparable cases of multiple sexual offences perpetrated against an offender's child that do not involve the offence of

maintaining. Reliance was particularly placed upon *R v BBP*[1] and *R v KAJ; Ex parte Attorney-General (Qld)*.[2] This case was submitted to be a much more serious case than *BBP*, who was sentenced to eight years for the rape of his niece aged nine or ten at the time of the offending. The prosecutor submitted that the top of the range probably did not extend to 10 years or more with an automatic SVO declaration. According to the prosecution, absent the 80 per cent parole requirement of an SVO declaration, a sentence of 10 years' imprisonment would have been appropriate. The prosecutor submitted that the sentence might extend very close to 10 years, and it was a question of how to structure the sentence.

[13] Reliance was placed upon the fact that the applicant's actions had certainly destroyed the family unit as it had existed. It almost certainly negated any relationship between the complainant and the applicant in the future. The complainant had been placed in the care of the department for two years following the disclosures to her mother, but had been returned to her mother by the date of sentencing. With whom she would live in the long term was uncertain.

[14] Defence counsel addressed the sentencing judge as to whether the sentence should be "on the basis of multiple occasions". The sentencing judge clarified that he had no doubt that there was more than one occasion, did not know exactly what the combination of the five offences was and that defence counsel might be right in the sense that it could be two and not three occasions. It was possible that Counts 1, 2, 3 and 4 happened on one occasion and Count 5 happened on another. The sentencing judge indicated to defence counsel that he was confining himself to the five offences and concluded that they were spread over more than one day.

[15] Defence counsel asked the judge to have regard to the fact that there was no "extended violence", and that the offence was not in company. He accepted that eight years was "within range" and that the sentencing judge "might consider nine, but that would be a heavy sentence".

[16] Defence counsel referred to various authorities. The sentencing judge stated that he intended to consider whether the applicant "ought serve more than the statutory half". Defence counsel reiterated his submission that the maximum sentence ought to be nine years' imprisonment to serve four and a half.

Sentencing remarks

[17] The sentencing judge noted the applicant's entire lack of remorse in respect of the serious charges involving his child and that, even after the verdict, no statement, personally or through counsel, was made showing contrition or sorrow for the hurt, pain and distress that he had caused his own daughter.

[18] The sentencing judge indicated that he found that the offending occurred on more than one occasion. It involved "two and probably three occasions". The complainant's statement that when the applicant took off his and also her clothes, she knew what was coming was said to be an indication of the applicant's "appalling predatory conduct".

[19] Regard was had to the variety of offending, involving penile-vaginal rape, oral-vaginal rape, attempted anal rape, indecently licking the anus and having her masturbate him until he ejaculated. On at least one of the occasions the

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1 [2009] QCA 114.
2 [2013] QCA 118.

complainant was alone in the house with the applicant, save for her very young twin siblings, who apparently were asleep. The applicant locked doors and perhaps windows so as to prevent the complainant from escaping. He told her not to tell anyone and bound her with a "pinkie promise" relying, as the sentencing judge said, on "the innate trust that your daughter had in you".

[20] The judge referred to the applicant's persistence in committing offences on more than one occasion, and also in continuing, at least for some time, his attempts to achieve further penetration of the complainant's vagina, despite her asking him to stop because it was hurting. The sexual abuse was unprotected, exposing the girl to the risk of disease.

[21] In comparison to some rape cases, there was "an absence of overt violence or of blackmail other than the making of the pinkie promise … and having her say she would tell no-one". Account was taken of the fact that the intercourse appeared to have been "fleeting and shallow" and penetration was not "fully achieved". The sentencing judge referred to the applicant's misconduct having ruined much of the complainant's life and torn apart the family fabric.

[22] The sentencing judge proceeded to analyse the authorities which had been cited to him, identifying relevant points of distinction.

[23] The authorities were said to make it appropriate for the applicant to be sentenced in the more serious circumstances of this case to at least nine years' imprisonment. A sentence of 10 years or more would not have been appropriate because of the fact that the applicant would have been required to serve 80 per cent of any sentence of 10 years or more. In the circumstances a head sentence of nine years' imprisonment was imposed to reflect the applicant's overall offending with parole eligibility after five years.

Grounds of application for leave to appeal

[24] The applicant initially filed a notice of appeal against conviction and an application for leave to appeal against sentence. As to the latter, the document simply said "Compared to similar cases my sentence seems harsh". The appeal against conviction was abandoned on 20 January 2020. In his written submissions, the applicant, who is self-represented, said his application was based on two grounds. The first was "Not taking into account that this happend (*sic*) on one occasion instead of multiable (*sic*) occasions". The second was:

> "There was no maintaing (*sic*) or violence or any previous history of this nature or multable (*sic*) victims. I believe this was not taken into account."

[25] In his written and oral submissions the applicant added that he discontinued his appeal against conviction because he did not want to put his family through the trauma of a retrial, but believed that the two counts of rape would have been downgraded to attempted rape and this would have made a "dramatic difference to my sentence". He said he was "very remorseful" for his actions and was on the way to rehabilitation. He said that he and his family wanted this over as soon as possible "so I can return home and rebuild our family unit". He referred to missing his children, who he had not seen since 2016, but seeing his wife in prison on a weekly basis. In oral submissions the applicant referred to his "very disgraceful and appalling act…" and said he was on his way to rehabilitation and to rebuilding his family unit. The applicant's sentiments may be noted. However, there is no

evidence about how precisely he can rebuild the family unit and what kind of life his victim will lead in a family that is headed by him and his wife.

[26] The applicant's submissions should be understood as raising the two alleged specific errors as well as the complaint that the sentence was manifestly excessive in the circumstances.

Did the sentencing judge err in concluding that the offending occurred on more than one occasion?

[27] The applicant was sentenced for five offences which the sentencing judge concluded occurred on more than one occasion. The applicant's contention that the judge should have found that all the offences occurred on one occasion is unsustainable. The complainant's s 93A statements, her disclosures to the child safety officer and her sworn evidence supported the conclusion that there were at least two occasions. The evidence in this regard has been summarised.

Did the sentencing judge fail to take account of the matters alleged?

[28] The sentencing remarks noted that the applicant was to be sentenced "on the basis of the five individual offences". No offence of maintaining was charged and the judge was clearly aware of this. The judge also noted the "absence of overt violence". Regard was had to the absence of any relevant criminal history of violence or of sexual offending. The sentence also proceeded on the basis that there was one, not multiple victims. The applicant cannot sustain the contention that the matters raised by him were not taken into account.

Was the head sentence manifestly excessive in all the circumstances?

[29] The head sentence of nine years' imprisonment expressly reflected the applicant's overall offending, not just the most serious offence. It reflected the diversity of sexual offending. This was not a case of a single rape of a seven year old, as appalling as that is.

[30] The applicant's contention that there was no violence is not accurate. His defence counsel submitted that there was "no extended violence", and the sentencing judge noted "an absence of overt violence".

[31] When a father prevails upon a seven year old to have sex with him, a high level of physical violence may not be required. It was not required in this case. The physical violence sometimes required to overcome the physical resistance of an adult victim is not required. Some adult victims of sexual assault are immobilised by fear and a sense of powerlessness. The absence of strong physical resistance from a seven year old daughter is unsurprising. Therefore, the absence of a high level of physical violence by the applicant is also unsurprising. The sentencing judge was entitled to describe the applicant's offending which occurred on more than occasion as "appalling predatory conduct".

[32] I turn to comparable cases. The applicant has not cited any in his submissions. At the sentencing hearing reference was made to *R v P*.[3] The sentencing judge regarded it as less serious. It involved one rape offence. The offender was a step-

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[3] [2001] QCA 25.

father not, as here, the actual father. The complainant was aged 12 rather than seven. A sentence of eight years was not disturbed on appeal.

[33] The sentencing judge also had regard to *R v KAJ; Ex parte Attorney-General (Qld)*[4] which, as the sentencing judge noted, had significant points of distinction. The de facto step-father of the 11 year old complainant pleaded guilty. As a result, the complainant was not required to give evidence. The defendant in that case had attempted to commit suicide and was said to be remorseful and shamed by his misconduct. The sentencing judge found that he was well on the way to rehabilitation. In an Attorney's appeal, he was resentenced to seven years' imprisonment on each of the two rape counts.

[34] Of greater relevance was *R v BBP*.[5] The appellant in that case was convicted of raping his niece and for having indecently dealt with her on the same occasion. She was aged about 10 at the time. There was evidence of other uncharged acts on occasions when the appellant would bring the complainant to his bedroom when her father was asleep in another room and fondle her vagina. The two charges which went to trial arose out of one incident when the appellant went to the complainant's room and pestered her to return to his room. The appellant had her remove her clothes. He obtained a lubricant which he applied to his penis and the complainant's vagina. He then took her to bed, lay on top of her and began to engage in intercourse. The complainant experienced pain and pushed him away. Following that rape, the appellant compelled the complainant to masturbate him, and she could not recall if he ejaculated. That conduct was the subject of the second count. The appellant was sentenced to eight years' imprisonment for the rape on the basis that the act of penetration which constituted the rape was "both shallow and momentary".[6] As soon as the complainant experienced pain and pushed the appellant away, he desisted immediately.

[35] That case, like this, involved "an appalling betrayal of responsible adulthood".[7] The rape occurred in the complainant's own home. She was entitled to expect affection and protection from her uncle.

[36] Chesterman JA (with whom McMurdo P and Keane JA agreed) had regard to other authorities, including cases in which offenders pleaded guilty.[8] Chesterman JA noted that there was no plea and there was a breach of trust. His Honour observed that "[t]he range for offending of this kind will therefore extend beyond eight years".[9] *BBP* is not authority that a sentence of nine years' imprisonment in that case would have been outside the sentencing discretion. Nor does it suggest that the sentence imposed in this case was outside the sentencing discretion for the circumstances of this case.

[37] It was open to the sentencing judge to identify points of distinction which made this case more serious than *BBP*. First, there were two counts in that case, both

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4 [2013] QCA 118.
5 [2009] QCA 114.
6 At [48].
7 At [49].
8 This included *R v KU & Ors; Ex parte Attorney-General (Qld)* [2008] QCA 154 in which a sentencing range of between five and eight years' imprisonment was said to be appropriate where there was an early plea of guilty, no breach of trust and no actual or threatened violence.
9 At [52].

committed on the same occasion. The child in this case was even younger than the victim in *BBP* who was, at the most, 10 years of age at the time of the offences. In *BBP* there was one count of rape, involving penile-vaginal intercourse. In this case there were two counts of rape and one of attempted rape. Both *BBP* and this case involved a betrayal of trust. In this case, however, the complainant was betrayed by her father, and this has had enduring consequences for her and the family unit of which she was once a part.

[38] It is appropriate to refer to the recent decision of *R v WBK*.[10] That decision, delivered on 3 April 2020, was not before the sentencing judge. The applicant in it pleaded guilty to two counts of rape and five counts of indecent treatment of a child. The complainant was his daughter. That the matter involved a guilty plea is an immediate point of distinction.

[39] The first count of indecent treatment occurred when the complainant was four years old and living with the applicant when he attempted digital penetration and threatened her if she told anyone. The other offences occurred some five years later when the complainant was nine years old and living with carers. One act of rape involved the applicant putting his penis in the complainant's mouth. The other rape count involved penetration of her vagina with his penis for a short distance. The indecent treatment involved either rubbing or licking her vagina.[11] Charges were not brought until several years after those events. When confronted with what he had done, the applicant stated that he felt guilt and shame. He was arrested in December 2017 and pleaded guilty nine months later when a new indictment was presented. He had a range of previous criminal offences, many of them minor, and no previous convictions for sexual offending.

[40] The sentencing judge in *WBK* adopted a notional head sentence of 10 to 11 years' imprisonment before discounting for mitigating factors. A majority of this Court (Lyons SJA and Boddice J) concluded that the starting point of 10 to 11 years was too high.[12] However, the head sentence of nine years' imprisonment was not disturbed on appeal. Instead, matters of totality justified fixing an earlier parole eligibility date. This was because, at the time of his plea, the applicant had already served more than two years and three months of his total term of imprisonment.[13]

[41] The nine year head sentence which was confirmed in *WBK* had regard to the aggravating features of the offending already noted. These included the fact that the complainant was only four years old when she was subject to indecent treatment and that the other offending, some five years later, occurred over a period and included two counts of rape. In addition, the sentence of nine years' imprisonment allowed for "significant factors in mitigation".[14] They were described by Lyons SJA as follows:

> "Those factors included the applicant's pleas of guilty, which saved the complainant the ordeal of giving evidence; the applicant's remorse, expressed in the covert recording; the considerable delay in prosecuting the offences and no further sexual offending between

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10 [2020] QCA 60.
11 At [29] – [30].
12 At [47].
13 At [55] – [56].
14 At [53].

> 2011 and 2018; the applicant's childhood marred by trauma, a diagnosis of bipolar disorder, against a background of an adjustment disorder, and experiencing depression and anxiety in the community at the time of his release from custody; and the applicant's performance whilst on parole, where he was considered to be well-engaged, performing reasonably well having undertaken courses in an effort to overcome his substance abuse issues, success in respect of which was supported by a number of clear drug screens."[15]

[42] While the offending in *WBK* was more protracted than in this case, there were mitigating factors that are not present here. The head sentence in *WBK* of nine years' imprisonment after a plea of guilty and with those mitigating factors present does not demonstrate that the nine year term of imprisonment in this case is outside the sentencing discretion.

[43] If regard was had by way of comparison with only *WBK* then, having regard to their broadly comparable circumstances, as well as points of difference, I would not regard the sentence of nine years in this case as excessive, particularly when regard is had to the absence of either a guilty plea or an expression of remorse shortly after conviction and the absence of some of the mitigating features in that case. The sentence of nine years' imprisonment imposed in *WBK* would not necessarily make a sentence of nine and a half or close to 10 years' imprisonment manifestly excessive in a closely comparable case, in which there was no plea and the victim was required to give evidence at trial.

[44] In part, this is because a conclusion of manifest excess does not depend upon using one case as a point of comparison.[16]

[45] The sentencing judge was correct to conclude that in this case a sentence of 10 years' imprisonment with a requirement to serve eight years before being eligible for parole would have been excessive.

[46] The sentencing judge was required to arrive at a sentence which, in weighing many factors, was just in all the circumstances. There was no guilty plea. That is a significant point of distinction compared to the guilty plea in *WBK* which "saved the complainant the ordeal of giving evidence" as well as WBK's evident remorse expressed in the covert recording, his history of mental illness and rehabilitation prior to sentence.

[47] In my view, the sentence imposed was not an inappropriate sentence to balance competing considerations. At the risk of repetition, there was the betrayal of trust by a father towards a vulnerable seven year old. There was the diversity of his offending and its predatory nature which occurred on more than one occasion. There was little by way of mitigation, apart from the absence of previous sexual offending.

[48] This case, like many cases of serious sexual offending against children, involved a betrayal of trust. The reasons of Chesterman JA in *BBP* explain why the betrayal of trust places such a case in a different category, particularly where there is no plea of

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15 At [54].

16 *R v Dwyer* [2008] QCA 117 at [37].

guilt. The betrayal of trust by a person from whom the complainant is expected to receive protection and nurturing is a serious aggravating factor.

[49] In the circumstances of this case, the fact that the betrayal of trust was by a father, rather than an uncle or a step-father whose relationship with the child's family is severed, is no small thing.

[50] When regard is had to the serious and enduring consequences of the crimes committed by the applicant against his daughter, a head sentence of nine years' imprisonment with parole eligibility after five years is not, in my view, manifestly excessive.

[51] This is so even when regard is had to the fact that the parole eligibility period of five years is six months longer than the halfway point provided for by statute in the absence of a parole eligibility date fixed by the Court.

[52] The sentencing judge adverted to the possibility that the parole eligibility date would be fixed beyond the halfway mark.[17]

[53] There should be a "good reason" to postpone the date of parole eligibility.[18] The considerations that lead to that conclusion will usually be concerned with aggravating circumstances which suggest that protection of the public or adequate punishment requires a longer period in actual custody before eligibility for parole.[19]

[54] The aggravating circumstances in this case which made it a "more than usually serious"[20] example of the offence in question persuaded the sentencing judge to conclude that the applicant should be sentenced "to at least a minimum of nine years' imprisonment". The judge then said that he could not ignore the consequences of imposing a sentence of 10 years or more, namely the applicant being required to serve 80 per cent of the sentence before being eligible for parole.

[55] If the applicant had been sentenced to close to 10 years, or if it had been open to sentence him to 10 years without triggering an automatic SVO declaration, his non-parole period would have been five years.

[56] In substance, the sentencing judge concluded that the aggravating circumstances of the offending warranted a period of actual custody of at least five years, that a sentence of 10 years' imprisonment would be excessive and that the appropriate head sentence should be nine years.

[57] In my view, the serious circumstances in this case justify a period of five years before the applicant was eligible for parole.

[58] The sentencing judge structured the sentence to reflect the aggravating features of the offences (each of which was a "domestic violence offence") and the absence of any significant mitigating factors.

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17 *R v Dean; R v Selmes; R v Phillips* [2018] QCA 124 at [90] – [93].
18 At [94].
19 Ibid citing *R v McDougall and Collas* [2007] 2 Qd R 87 at 97 [21].
20 Ibid.

[59] The issue is whether the applicant's sentence is manifestly excessive. I adopt, with respect, the statement of Fraser JA in *R v Bouttell*:[21]

> "This Court's remit to interfere in a sentence does not arise if it concludes only that a sentence seems severe. To establish that a sentence is manifestly excessive an applicant must demonstrate that there must have been a misapplication of principle or that the sentence is unreasonable or plainly unjust: *Hili v The Queen* (2010) 242 CLR 520 at [58], [59]. Sentencing judges are allowed as much flexibility in sentencing as accords with the relevant statutory regime and a consistency of approach: *Markarian v The Queen* (2005) 228 CLR 357 at 371 [27]. A more lenient sentence could have been imposed but I am unable to conclude that the applicant's sentence is **manifestly** excessive." (emphasis in original)

[60] I would refuse the application.

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21 [2018] QCA 52 at [22].