SUPREME COURT OF QUEENSLAND

CITATION:	*R v Friend* [2002] QCA 471
PARTIES:	**R** **v** **FRIEND, Gareth Llewellyn** (applicant)
FILE NO/S:	CA No 233 of 2002 DC No 1838 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EXTEMPORE ON:	6 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	6 November 2002
JUDGES:	McMurdo P, McPherson JA, Mullins J Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDER:	**Allow the application and appeal to the extent of varying the sentence by reducing it from five years to four years.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AFTER INQUIRY AND CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – whether sentence manifestly excessive
COUNSEL:	R East for the applicant BG Campbell for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: Mr Justice McPherson will deliver his reasons first.

McPHERSON JA: The applicant was sentenced in the District Court to imprisonment for five years on one count of

maintaining a sexual relationship with a child under 16, with the aggravating circumstance that he had indecently dealt with her.

The sentence followed a trial at which he was found guilty and convicted of five counts of indecent dealing, Counts 2, 3, 5, 7 and 10, as to which, individually, no further penalty was imposed.

He was not found guilty of Count 4, rape, and Count 6 and 8, indecent dealing, on which the jury were unable to agree. The Crown did not proceed at the trial with another count of rape, Count 9, which it was unable to particularise. Nolle prosequi was entered with respect to those counts.

The opportunity to commit the offences arose through the applicant's association with the complainant's family. He was the boyfriend of the complainant's older sister, whom he later married and with whom he then had two children before the marriage came to an end.

From a sentencing standpoint, the most significant feature of the offending behaviour is that the complainant was only five years old when the first of the indecent acts, Count 2, took place, in May in 1991. She was five when the second, Count 3, occurred, between five and seven for Counts 5 and 7, and between six and nine years old for Count 10, which was

committed, evidently, some short time before January 1996, when the offending ceased.

The acts involved were as follows; Count 2, going into the complainant's bedroom and touching her outside the vagina, as if tickling her there; Count 3, applying Vaseline to the complainant's vagina while they were both in the bathroom. The rape was alleged to have followed this incident. Count 5, touching her under her underwear, and moving his finger on the outside of her vagina; Count 7, putting his finger inside her vagina, which "really hurt" the complainant; Count 10, putting his hand, either over or under her underclothing, on or in the opening of her vagina and moving it around.

The applicant was 18 or possibly 19 years old when the series of offences commenced, and he was 22 when it ceased. He was 28 at sentencing, and had some prior convictions for drug related offences. He had a consistent work record, and some favourable references, one of which, particularly, commended him for considerate deeds done to or for others.

On the other hand, the offending behaviour was persistent and spanned a lengthy period, and in committing these offences, he took advantage of the hospitality and trust extended to him by the complainant's family.

The complainant herself was very young, and obviously in a vulnerable position, having regard to the applicant's relationship with her sister, who was some 12 years older than

she. She has suffered and still suffers deep-seated feelings of guilt as a result, and her relationships with men or boys and other girls of her age have been impaired.

It goes slightly in favour of the applicant that, according to the jury verdict, he did not use violence or commit any of the array of other acts that are often a feature of such offending behaviour, although there is some evidence of threats being made against the complainant if she were to disclose what was happening.

The learned sentencing Judge found no remorse on his part. He did not plead guilty to the charges in respect of which verdicts of guilty returned against him, and so is not entitled to clemency on that account.

As is often the case, there is no comparable case exactly like this. In R v. Rea, CA 152 of 98, a sentence of five and a-half years' imprisonment was imposed for somewhat similar conduct. The complainant was, however, slightly older, eight to 13 years, and vaginal intercourse took place in that instance. But at that time, the maximum penalty for maintaining a sexual relationship without circumstances of aggravation was only seven years, and that may explain, in part, the level of sentencing in that case.

Here, the applicant's conduct carried a maximum of 14 years. In R v. Clark [2000] QCA 145, the complainant was aged six to

11 years. She was the step-granddaughter of the accused, who was 68 years old at sentencing, but the offending behaviour was, in some respects, a good deal more serious. The sentence there was five years with a parole recommendation after two years.

In R v. R, CA 93 of 2001, a four year term of imprisonment was affirmed on appeal, but ameliorated as Justice Ambrose described it in giving judgment on the appeal, by recommending eligibility for parole after 15 months. Although I was a member of the Court in that case, I confess it is not entirely clear to me now why eligibility for parole was recommended on appeal. The conduct in that case was, in some respects, more serious, including as it did simulated intercourse to the stage of ejaculation. In that case, like this, the applicant had not pleaded guilty.

In R v. Snow, CA 238 of 2000, a 33 year old step-father committed sexual offences against his seven to 15 year old step-daughter. The sentence imposed there was one of six years' imprisonment, with a recommendation for parole after two years; but in that instance, the applicant volunteered his guilt by going to the police and reporting it. On appeal, his sentence was varied to the extent of reducing the recommendation for parole after two years down to 18 months. The offending conduct in that case was somewhat similar, but more serious than that with which we are confronted here. Much, in that case, plainly turned on the fact that the

applicant had admitted his own guilt in circumstances in which it would not otherwise have been discovered.

This brief review of some of the cases demonstrates, once again, that the process of sentencing is not a scientific art, and involves, to my mind, something similar to what Justice Cardozo once condemned as attempting to match colours. The best we can do in most of these cases is to ask whether the sentence appears, on appeal, to be within an appropriate range or pattern of penalties that is discernible from other reported cases.

In a sense, that might be true of the present case, except that it is right to say that the offending behaviour in the present instance was certainly not as serious as some of that in the decisions I have referred to. The most serious instance here is Count 7, that is to say, involving the applicant's putting his finger inside the complainant's vagina and hurting her in doing so.

One does not wish to detract from the seriousness of offending behaviour of this general kind, but it seems to me that this is a case in which the conduct of the applicant is on a slightly lower plane that that of some of the other applicants with whom the cases referred to have been concerned.

In addition, he was a younger man, and despite the fact that his victim was only five years old when the conduct started,

on the verdicts found by the jury, I think that this sentence is probably on the high side, and sufficiently so to justify the intervention of this Court in the present case.

I would therefore allow the application and appeal to the extent of varying the sentence by reducing it from five years to four years.

THE PRESIDENT: I agree.

MULLINS J: I agree.

THE PRESIDENT: That is the order of the Court.
