SUPREME COURT OF QUEENSLAND

CITATION:	*R v B* [2003] QCA 68
PARTIES:	**R** v **B** (applicant/appellant)
FILE NO/S:	CA No 374 of 2002 DC No 129 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED EX TEMPORE ON:	21 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	21 February 2003
JUDGES:	McPherson and Davies JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring with the orders made
ORDER:	**1. Application for leave to appeal against sentence granted** **2. Appeal allowed only to the extent of setting aside the order made pursuant to s 19 of the *Criminal Law Amendment Act* 1945 (Qld)**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT - CIRCUMSTANCES OF OFFENCE - where applicant pleaded guilty to two counts of maintaining an unlawful relationship with circumstances of aggravation - where victims were applicant's stepdaughters - where applicant's conduct was prolonged and persistent - whether sentence manifestly excessive CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT - CIRCUMSTANCES OF OFFENCE - where sentencing judge made an order pursuant to s 19(2) of the *Criminal Law Amendment Act* 1945 (Qld) - where evidence suggested that the applicant was unlikely to re-offend - whether order was appropriate

	Criminal Law Amendment Act 1945, Qld s 19(2)
	R v S [1998] QCA 318; CA No 234 of 1998, 27 August 1998, considered
COUNSEL:	P J Callaghan for applicant/appellant D L Meredith for respondent
SOLICITORS:	Legal Aid Queensland for applicant/appellant Director of Public Prosecutions (Queensland) for respondent

DAVIES JA: The applicant pleaded guilty in the District Court at Townsville on 6 November 2002 to two counts of maintaining an unlawful relationship with circumstances of aggravation. On the same date he was sentenced to seven years imprisonment on each offence to be served concurrently.

An order was also made pursuant to s 19 of the *Criminal Law Amendment Act* 1945 that the applicant report his current name and address to the officer in charge at the Townsville Police Station within 48 hours of being released from custody and thereafter for a period of 15 years, report any change of name and or address within 48 hours of the change taking place to the officer in charge of the nearest police station to the new address. Forty-one days of pre-sentence custody were deemed to be time served under the sentences. He seeks leave to appeal against those sentences.

Each of the offences of maintaining was a serious offence committed over a long period of time. The complainant was, in each case, a step daughter.

The complainant in the first count was, at the time of the offences comprising the maintaining were committed, between 10 and 12 years of age. The offences were committed over a period of about 18 months. Eleven events were specifically particularised. These included masturbating in front of her, performing oral sex on her and having the complainant masturbate. Worst of all he attempted to have intercourse with her on three occasions over this period.

The other complainant, a sister of the first, was much younger when the offences against her were committed and they extended over a much longer period, in all nearly four and a half years. She was four when it commenced and about nine when it ceased. The pattern of offending behaviour was similar and also on one occasion included an attempt to have intercourse with her. A number of the offences committed on one complainant were committed in front of the other.

The applicant's appalling behaviour, unsurprisingly, has had a substantial psychological effect on the complainants and their mother who, it seems, had married the applicant during this period. All appeared to have been shattered by his gross breach of trust.

The applicant is 28 years of age, having been born on 30 January 1975. He has a small number of criminal offences, mostly drug related, his only other offence being a breaking, entering and stealing as a child. He is, or at least was at

the time of his offending conduct, apparently a heavy consumer of marijuana.

He was examined by a psychiatrist for the purpose of his sentence hearing. This revealed no psychiatric or psychological disorder. No satisfactory explanation for his offending conduct was given. To the psychiatrist he expressed remorse and during the course of his plea of guilty his counsel said that he was remorseful. However, the applicant's conduct was both prolonged and persistent. He threatened the complainants that they would be in trouble if they told their mother of what occurred and there were four acts of what amounted, in effect, to attempted rape. He abandoned one of these only when it became clear to him that his wife was returning home.

There is a wide range of sentences for offences of maintaining and there is no one case closely comparable to this. The closest in my opinion is *S* [1998] QCA 318, CA No 234 of 1998, where an effective total sentence of eight and a half years imprisonment was imposed for two maintaining offences, one against a step daughter aged 12 to 13, the other against his natural daughter, aged about 11. I do not think that the totality of the offences in that case were any more serious than those in this. Indeed the contrary seems to me to be the case. The offences in this case continued over a substantially longer period and although there were only 21 specific offences alleged, the applicant conceded that he

performed oral sex on both girls a couple of times a week over this period.

There were, however, two aspects of this case which arguably justified a higher total sentence than this. In the first place, though the offender there pleaded guilty, this was only after the jury had been empanelled. However, there was an explanation for this, namely that there had been some doubt about his ability to understand and give instructions. And the second more serious factor is that the offender there had a previous conviction for permitting himself to be indecently dealt with by a female child under 12, for which he had been sentenced to eight months imprisonment.

Notwithstanding those differences I think that that case demonstrates that the total effective sentence imposed here for both sentences, though high, was not manifestly excessive, even taking into account the applicant's guilty plea. Subject to what I am about to say, therefore, I would dismiss this application.

As mentioned earlier the applicant also seeks leave to appeal against the reporting order made pursuant to s 19 of the *Criminal Law Amendment Act* 1945. Subsection (2) of that section provides that a reporting order shall not be made unless the court is satisfied a substantial risk exists that the offender will thereafter commit any further offences of a sexual nature upon or in relation to a child under the age of 16 years.

The only specific evidence on this question came from the psychiatrist, Professor James, who said in his report:

> "With regard to the likelihood of B re-offending, the absence of intellectual impairment or psychiatric illness can be seen as a protective factor; and the genuineness of his remorse similarly would influence, in a desired way, the danger of repetition. The lack of any clearly relevant developmental experience would also suggest that there is no strong, unconscious, paedophilic tendency. He appears to be normally an engaging young man, and his relational behaviour appears otherwise normal. He is unlikely, therefore, to be inclined to repeat paedophilic conduct because of social isolation."

Mr Callaghan for the applicant points out correctly that the learned sentencing judge did not specifically refer to this evidence and did not make a finding that he was satisfied that a substantial risk existed that the applicant would commit further offences of a similar kind.

It is difficult to see how his Honour could have made the order which he did without rejecting Professor James' opinion, which of course, he was entitled to do. But there is no suggestion that he did or that he adverted to it at all. It is also difficult to see what evidence there was from which his Honour could have been satisfied that there was a substantial risk of the applicant re-offending. In my opinion this order was made in error.

I would accordingly grant the application, and allow the appeal only to the extent of setting aside the order made pursuant to s 19 of the *Criminal Law Amendment Act* 1945.

McPHERSON JA: I agree.

PHILIPPIDES J: I also agree.

McPHERSON JA: The application and appeal are allowed to the extent only of setting aside the order made under s 19 of the *Criminal Law Amendment Act* 1945, otherwise the application is dismissed.
