SUPREME COURT OF QUEENSLAND

CITATION:	*R v Q* [2003] QCA 114
PARTIES:	**R** **v** **Q** (applicant)
FILE NO/S:	CA No 397 of 2002 DC No 71 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maryborough
DELIVERED EX TEMPORE ON:	17 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	17 March 2003
JUDGES:	Williams and Jerrard JJA and White J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where applicant convicted of incest – where applicant in ill health – where sentenced to six years' imprisonment with a recommendation that he be eligible for post prison community based release after two years – whether a suspended sentence should have been imposed in order to gain greater certainty of release *R v BG* (2000) 111 A Crim R 302; [2000] QCA 42, followed
COUNSEL:	K M McGinness for the applicant M J Copley for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

WILLIAMS JA: The applicant pleaded guilty on 22 October 2002 in the District Court to 12 counts of incest and eight counts of indecent dealing with a girl under 16 years.

The offences occurred between January 1977 and April 1982. On his plea of guilty, he was sentenced to imprisonment for a period of six years and a recommendation was made that he be eligible for post prison community based release after serving two years. The applicant now seeks leave to appeal against that sentence.

The complainant girl, the applicant's daughter, was 10 years old when the first act of incest occurred. On that occasion, there was a degree of overbearing or force to the extent that the applicant placed his hand over the girl's mouth and told her not to tell anyone.

It seems as though the conduct occurred on a regular basis over the period in question. On a number of occasions the girl indicated in quite clear terms that she did not wish him to have intercourse with her. Notwithstanding that, the applicant persisted in his course of conduct.

In 1982, the girl complained to her mother, and that resulted in the matter being investigated by the police. It seems that at that stage the applicant did make a full admission to the police of the offences in question. But the family decided not to make any formal complaint but agreed to undertake counselling. It appears that all members of the family took part in that counselling.

It is clear, however, that the complainant has suffered quite considerable distress as a result of the applicant's conduct over the four year period in question. Against that background, it is not surprising that later, when she was aged 34, she made a statement to the police which resulted in these charges being laid.

The learned sentencing Judge considered that, disregarding the plea of guilty, a sentence of eight years' imprisonment would be called for given the circumstances of the case. In my view that could be regarded as even a modest sentence given the particular circumstances of this case. He then discounted the eight years to six years because of the plea of guilty.

The other matter which was raised at sentence and which has been heavily emphasised in the submissions on behalf of the appellant before this Court is that the appellant is now in poor health. He was aged 36 and in good health at the time he originally admitted to the

offences in 1982. At the date of sentence he was aged 56 and in poor health. It appears he suffered a stroke in May 2002. His health is impaired by lung disease and apparently alcoholism over a period of time. He is currently on medication for depression, insomnia and peptic ulcers.

The learned sentencing Judge took those factors into account in determining that a recommendation as to eligibility for parole should be made after two years.

Counsel for the applicant did submit that, because of the uncertainty with respect to the applicant getting parole, the Court should consider imposing a suspended sentence. That could only be done if the head sentence was no more than five years' imprisonment. In my view, a sentence of five years' imprisonment would not reflect the seriousness of the offending behaviour.

The applicant may well be able to get parole either at the end of the two year period or even earlier because of exceptional circumstances, but in my view his state of health does not justify this Court concluding that the sentence in fact imposed was manifestly excessive.

The Crown has referred to the decision of this Court in *R v. BG* (2000) 111 A.Crim.R. 302. There is quite a similarity between the facts of *BG* and the facts of this case. In *BG*, there were only two acts of incest though there were some other acts of indecent treatment. The complainant girl in that case was aged 14 when the first incident occurred.

In that case, the applicant was suffering from emphysema and had a life expectancy of about two years. This Court upheld a sentence of six years' imprisonment with a recommendation for parole after two years.

That is identical with the sentence imposed in this case and in my view the facts of this case, if only because there were 12 acts of intercourse and the girl was aged 10 at the time of the first, are far more serious and call if anything for a higher penalty.

In all of the circumstances I would refuse leave to appeal against the sentence imposed.

JERRARD JA: I agree.

WHITE J: I agree.

WILLIAMS JA: That will be the order of the Court. The application is refused.