SUPREME COURT OF QUEENSLAND

CITATION:	*R v D* [2003] QCA 426
PARTIES:	**R** **v** **D** (applicant)
FILE NO/S:	CA No 211 of 2003 DC No 146 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Ipswich
DELIVERED EX TEMPORE ON:	25 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	25 September 2003
JUDGES:	Davies and Jerrard JJA and Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – GENERALLY – where applicant sentenced to ten years imprisonment for having maintained an unlawful relationship of a sexual nature with a child under the age of 16 – where applicant had pleaded guilty – where applicant claimed on appeal that he had been misled into pleading guilty – where no evidence to support this assertion – whether sentence manifestly excessive *R v B* [1999] QCA 372; CA No 394 of 1998, 10 September 1999, considered *R v KAI* [2002] QCA 378; CA No 201 of 2002, 24 September 2002, considered
COUNSEL:	The applicant appeared on his own behalf P F Rutledge for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

DAVIES JA: I will ask Justice Holmes to deliver her reasons first. You may sit down, D.

HOLMES J: The applicant was sentenced in the District Court on the 16th of June 2003 after pleas of guilty to 10 years' imprisonment on one count of maintaining an unlawful relationship of a sexual nature with a child under 16 years with circumstances of aggravation.

No sentence was imposed in respect of three further counts of indecent dealing with a child under 16 with aggravating circumstances, and eight counts of incest to which he also pleaded guilty, on the basis that they were in respect of acts which were encompassed within the particulars relied on by the Crown for the charge of maintaining a sexual relationship.

This application was one for leave to appeal against sentence only. However, in his submissions the applicant, in effect, raised an appeal against conviction with an assertion that he had been misled into his plea as regards those offences involving the child when she was under the age of 15.

There is no evidence offered by him to support that assertion and it is to be noted that the record shows that he was asked at the commencement of sentencing proceedings whether he had read each of the counts contained in the indictment and said that he had, and was asked whether he had understood fully the contents of each of the charges and said that he had. He also said that he had discussed them with his counsel and received advice from his counsel. It seems most improbable, then, that there is anything at all in that argument.

The applicant was born on the 25th of June 1963 and was 39 years of age at the time of sentencing. He had a criminal history which consisted of a number of convictions for relatively minor offences which did not involve sexual misconduct.

The complainant was the daughter of the applicant's de facto wife. When the complainant was about six years of age the applicant began on a regular basis to touch her vaginal area. On one occasion when she was about six or seven years of age he engaged in cunnilingus with her.

After the complainant turned 13 the applicant said to her on several occasions words to the effect, "You are now not a child, you're a teenager and I'm going to break you in. I can't be called a paedophile because you're over 12. I'm going to be your first."

The complainant thought that if she had sexual intercourse with someone else that might deter the applicant. Putting that plan into action she had intercourse twice with a friend. The applicant overheard her speaking to her mother about it and later came to her room saying, "It's my turn now." He proceeded to have intercourse with her causing her pain. He subsequently had intercourse with her three to four times a week between January 2000 and March 2002 causing her pain and discomfort on each occasion. She became pregnant as a result of the last of these incidents at the age of 15.

A couple of days prior to the birth of her child the complainant was told by a midwife that she was overdue and that the best way to bring on the labour was to have intercourse. On returning home she joked about this to her mother. The applicant overheard the conversation, came to her in her room that night and penetrated her vagina with his penis.

After the birth of her child he sought again to have sex with her but was rebuffed.

The complainant left school in order to have her child and has not been able to return. In a victim impact statement she says that she has trouble trusting anyone including her mother and has had difficulty with friendships and sexual relationships.

The learned sentencing judge observed in her sentencing remarks that the case was an extremely serious one in which the applicant had demonstrated total disregard for the complainant who, as a result of the applicant's conduct, had been made pregnant and left with the consequences.

Her Honour's appraisal of the applicant's conduct was both accurate and mild. Over a lengthy period the applicant used the complainant for his own sexual gratification with complete disregard for her physical and emotional welfare. He even went to the extent of threatening to commit suicide and to kill members of the complainant's family if she exposed him.

He complains that the sentence was manifestly excessive. It was not.

In *R v KAI* [2002] QCA 378, Williams JA, with whose reasons the other members of the Court agreed, observed that the decisions placed before the Court on that appeal indicated a broad sentencing range for offences of the nature of that under consideration from seven to 13 years, with some exceptional cases justifying sentences in excess of 13 years.

In KAI the applicant, who was the complainant's stepfather, pleaded guilty to three counts of indecent dealing with a circumstance of aggravation, two counts of unlawful carnal knowledge with a circumstance of aggravation, eight counts of incest and one count of maintaining a sexual relationship with a child.

The complainant was nine when the first offence occurred and the offences extended over a period of six years. That the complainant had a child by the applicant was regarded by all members of the Court as a serious circumstance of aggravation.

Leave to appeal against a sentence of 10 years was refused. It is to be noted that the serious violent offenders provision would also have applied in that case.

In *R v B*, Court of Appeal number 394 of 1998, a sentence of 12 years' imprisonment was upheld for a count of maintaining a sexual relationship with a girl under 16 years with a circumstance of aggravation, but a recommendation of eligibility for parole after four years was made in recognition of cooperation, an early plea of guilty and the applicant's remorse.

The applicant there was also the complainant's stepfather. He engaged in sexual misconduct with the complainant from when she was seven years of age to her 16th birthday. He commenced having sexual intercourse and oral sex with her when she was in Grade 8.

The applicant's conduct, unlike that of this applicant, did not lead to the complainant's having a child but it was similarly aggravated by the applicant's threat to kill the complainant and all members of her family if this conduct was exposed.

This was, it is true, a plea of guilty on an ex officio indictment but it was in circumstances where DNA tests had established the paternity of the applicant. The plea of guilty was taken into account by her Honour, as is clear. She said that she would have imposed a sentence of 12 years which, plainly enough, is in the range of appropriate sentences for cases of this type, but she recognised the plea of guilty by instead imposing a head sentence of 10 years.

As the sentence imposed on the applicant was 10 years' imprisonment he was deemed to be convicted of a serious violent offence by operation of section 161A of the *Penalties and Sentences Act* with the consequence that he will serve a minimum of 80 per cent of his sentence.

The sentencing judge was alive to the consequences of a 10 year sentence, but having regard to the facts narrated it can hardly be said that the sentence imposed was manifestly excessive.

I would dismiss the application for leave to appeal.

DAVIES JA: I agree.

JERRARD JA: I agree.

DAVIES JA: The application is dismissed.