SUPREME COURT OF QUEENSLAND

CITATION:	*R v M* [2003] QCA 556
PARTIES:	**R** **v** **M** (applicant)
FILE NO:	CA No 359 of 2003 DC No 345 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	11 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	11 December 2003
JUDGES:	Williams JA, Chesterman and McMurdo JJ Separate reasons for judgment of each member of the court, each concurring as to the order made
ORDER:	**Application refused**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - APPLICATION TO REDUCE SENTENCE - WHEN REFUSED - PARTICULAR OFFENCES - OFFENCES AGAINST THE PERSON - SEX OFFENCES - indecently treating a child with a circumstance of aggravation - whether sentence was manifestly excessive - whether sentence should have been wholly suspended - whether mitigating factors given adequate consideration *R v L, exparte AG* [1998] QCA 468; CA No 373 of 1998, 3 December 1998, considered *R v M; ex parte AG* [2002] 2 Qd R 543, considered *R v N* [2001] QCA 70; CA No 215 of 2000, 6 March 2001 *R v Phuc Minh Pham* [1996] QCA 3, CA No 435 of 1995, cited *R v Moffat* [2003] QCA 95; CA No 439 of 2002, 11 March 2003, considered *R v W* [2002] QCA 304; CA No 22 of 2002, 16 August 2002, distinguished

COUNSEL:	M J Griffin SC for the applicant B G Campbell for the respondent
SOLICITORS:	Price & Roobottom for the applicant Director of Public Prosecutions (Queensland) for the respondent

CHESTERMAN J: On 19 August 2003, the applicant pleaded guilty in the District Court to three counts of indecently treating a child with a circumstance of aggravation: namely, that in each case the child was under the age of 12. The applicant is 31 years of age. The three charges involve two children: a brother and sister whose mother is the applicant's first cousin. He lives in Sydney, but each summer he visited his cousin's household on the Gold Coast.

The first offence occurred on a visit in November 2000. The applicant shared a sofa bed with his second cousin, a boy then 10 years old. They both went to bed at the same time and began talking about sex. This led to the applicant fondling the boy's genitals by consent and then committing an act of fellatio. He stopped as soon as the boy told him to.

The second offence occurred very late in December of 2001. It involved the female child who was then eight years of age. The applicant was again a guest in his cousin's house. The offence occurred when the family including the applicant were driving in the family car. The applicant was sitting in the back between the complainant girl and her younger sister. He rubbed the girl's labia using his own saliva for lubrication.

His finger did not penetrate into the vagina but the contact was with her skin and not her clothing.

The applicant claimed when interviewed by the police that he had begun to rub the girl's leg when she opened her legs and he then moved his hand to her pubis.

The third offence also involved the girl. It occurred on 1 January 2003 when she was nine. The applicant went into the complainant's bedroom where she lay on her bed curled up on her side. The applicant sat on the bed and placed his hand on her bottom on the outside of her clothing. He left his hand in that position for a few moment until the complainant asked the applicant to stop.

The applicant was sentenced on 5 November 2003 to 18 months imprisonment for the first offence and 12 months imprisonment for the second offence. Each of those terms of imprisonment is to be suspended after the applicant serves four months. The operational period is three years. For the third offence the applicant was sentenced to one month's imprisonment.

The applicant complains that the sentences imposed were manifestly excessive. He submits that the sentences should have been wholly suspended. The applicant has no previous convictions and has a history of steady employment. He pleaded guilty very early and co-operated fully with the prosecuting authorities. Although a resident of New South Wales, he returned voluntarily to Queensland and did not

insist upon extradition. Neither child was required to give evidence at the committal. There were no victim impact statements tendered and in that regard no evidence that the offences have had any lasting adverse effects on the children although experience suggests that there may be some such effect in later years.

The complainants' parents urged the Court not to send the applicant to prison. In separate letters, they both advanced personal and family reasons to support their plea that the applicant not be gaoled.

The applicant had been examined by Dr Westmore, a forensic psychiatrist, for the purposes of providing a report for use in sentencing. He gave Dr Westmore a history of having been sexually exploited by his cousin three years older commencing when the applicant was about 12. The activity progressed to the stage of anal intercourse which occurred frequently and until the applicant was about 20. That was his only sexual experience. Dr Westmore wrote:

> "This man does not have a personality disorder. In particular, he does not have any anti social personality disorder. Alcohol and drugs play no role in his current difficulties. The history he provides about the sexual behaviour of his older cousin if correct is likely to have had a significant impact on his psycho-sexual development. The absence of an anti-social disorder and substance abuse along with the positive support he continues to receive from his parents are all positive prognostic signs. He has personality qualities of shyness, probably a lack of confidence in sexual matters, and possibly some issues to do with self-esteem. These are also issues which if worked on in therapy may assist him in the longer term."

Dr Goldman, a psychologist, who was providing psychotherapy for the applicant reported:

> "The applicant appears to be of the view that his sexual offending was wrong and he appears to be demonstrating genuine remorse. Despite his probably average intelligence, his understanding as to the reasons for and implications of his behaviour is unsophisticated. He believes therapy has helped him gain a deeper understanding of himself and will agree to continue. I do not believe he is at significant risk of further offending against children. However, it is unclear how his introverted and self-conscious personality type correlated with traumatic psycho-sexual development, shyness and low self-esteem will allow for the kinds of inter-personal relationships he strives for."

The applicant complains that the trial Judge rejected this evidence and took a contrary view without any proper basis. This, it is submitted, amounts to an error in the sentencing process. What his Honour said was:

> "I would make the comment that offences of this kind committed in respect of very young children over a period of a little over two years would suggest an aberration on your part that may not be as easy to deal with as it might be suggested. It is a common experience in matters of this kind that such personal problems that lie behind these sorts of offences are quite intractable and that there is a great amount of difficulty in arriving at any strong conviction that there is no danger of reoffending. I will take some persuasion that that is the case."

These remarks, in my opinion, cannot be fairly criticised. They are not an unjustified rejection of cogent evidence. His

Honour's remarks would seem to reflect the caveat expressed by Dr Goldman and Dr Westmore.

It is also complained that the sentencing Judge failed to give sufficient weight to the fact the applicant himself had been subjected to sexual misconduct by an older cousin, dismissing that point on the ground that it is not suggested that the abuse was other than consensual. It may be that his Honour was unsympathetic but it must also be pointed out that the applicant continued to engage in homosexual activity with his cousin well beyond childhood and even adolescence. It should also be pointed out that the cousin who was contacted with respect to the allegations strongly denied that the activity had ever occurred.

The applicant also criticises the learned Judge for describing his conduct as occurring over an extended period. He said that this is wrong, that there were three isolated episodes each of which was opportunistic in nature and lacking any suggestion of pre-meditation or predation. The criticism is, I think, a little severe. Whatever adjective one chooses, the fact is that the applicant on three occasions in a two year period instigated and continued sexual activity with his very young cousins while a guest in their house. This is all the learned Judge was expressing.

The question for this Court is whether by reference to comparable cases it can be seen that the sentence imposed was manifestly excessive. Unless it was, the application must be

refused. R v. M ex parte Attorney-General 2000 Volume 2 Queensland Report 543 was a case in which the complainant was a seven year old boy, the offender's nephew. The offender was part of the household. On two occasions, he went into the complainant's bedroom where he fondled and sucked the boy's penis. The Court of Appeal revising the sentence imposed in the District Court ordered that he be imprisoned on each count for 18 months with the recommendation that he be released on parole after serving six months. Mr Justice McPherson said:

> "In R v. Pham it was said that other than in exceptional circumstances those who indecently assault or otherwise deal with children should be sent to gaol. That proposition though not to be taken as an absolute rule has been applied in so many subsequent cases that it should not now be departed from without compelling reason."

In R v. L and The Attorney-General, Court of Appeal 373 of 1998, the offender pleaded guilty to two counts of indecent dealing with a boy under 12. He was a friend of the boy's family and sometimes stayed with them. One night when the boy's mattress had become wet, the offender took him in his own bed where he placed the child on to his stomach, put his hand down the front of the boy's shorts and rubbed the boy's penis on the outside of his underpants. The second offence occurred a few months later while they were fishing at a local dam. He fondled the boy's penis on the outside of his pants causing him to become erect.

There were many circumstances in favour of the offender. He pleaded guilty and was clearly remorseful. He had a good record of involvement in local community activity and was

experiencing personal difficulties from a divorce at the time. He had been rejected by his own local community as a consequence of his offending. He had no criminal history. There was evidence that the boy had been badly effected by the experience. He was sentenced to 15 months imprisonment wholly suspended on the first offence and three years probation on the second. On appeal, both sentences were set aside and instead he was imprisoned for 12 months on each offence, the term to be suspended after three months.

In R v. W, Court of Appeal 22 of 2002, the offender pleaded guilty to two counts of unlawfully and indecently dealing with a girl under 12. He was sentenced to six months imprisonment together with probation for two years. He had no relevant prior convictions. The complainant was nine years of age and the daughter of his de facto wife. The offences were similar in nature. The first occurred when the offender was lounging in an easy chair. The child approached him and pressed her vaginal area against his hand. She remained in contact for a number of minutes until he moved his hand away. The second offence occurred some time later when the child approached the offender and asked him to rub her vagina in the same way as he had the first time. He did so, rubbing on the outside of her clothing for about a minute during which she pushed against his hand. The offences only came to light when the offender told the child's mother of her approaches. He co-operated fully with the police and pleaded guilty at committal.

The case has features which suggest it may be less serious than the present one. Mr Justice Mackenzie, who gave the judgment of the Court, reviewed a number of similar cases and noted that examples of custodial and non-custodial outcomes can be found. He noted the remarks in Pham that save for exceptional cases those who indecently deal with children should be sent to gaol. The sentences were not disturbed.

In R v. N 2001 QCA 70, the applicant was convicted after trial of one count of indecently dealing with a girl under the age of 12. The complainant was the neighbour of the offender. The families knew each other. On the occasion in question, the offender took the girl into a spare bedroom to show her his shell collection. When they were alone, he took off his shorts, he was wearing underpants, pushed the girl on to the bed where he lay on top of her and rubbed his penis against her pubis. She was fully clothed. The offender was 38 at the time, married, with a nine year old daughter. He had no previous convictions. The Court noted there was no touching either with fingers or penis of an exposed vagina, no exposing of the penis, no penetration, no attempt to have the girl touch the penis, there was no ejaculation, the incident was isolated. The Court substituted a sentence of six months imprisonment for one of 15.

Reference should also be made to R. v. Moffatt, Court of Appeal 439 of 2002 in which the offender was 53 years old and was convicted of indecent dealing with a girl of 10. He was the groundsman of a caravan park where the complainant and her

sister would go swimming. He enticed the child into his caravan by offering her a drink. She appeared to have been uncomfortable in his presence but he pulled her by the waist and sat her on his knee. He then rubbed her stomach and upper thigh before moving his hand to rub on top of her vagina. The child got off his knee but the offender approached her again from behind and rubbed her with his hand between her legs. He lifted her skirt and tried to interfere with her underpants, but the child was able to evade him and leave the caravan.

He had no previous convictions and a good work record. He had been sentenced to 12 months imprisonment. On appeal, the Court ordered that it be suspended after six months.

The applicant's submissions identify some instances in which non-custodial sentences have been imposed for similar offences. That is, it seems to me, really beside the point. Such outcomes must be now regarded as exceptional. What cannot be said from a review of the authorities is that the sentences imposed on the applicant were manifestly excessive. They are conformable to sentences imposed for similar offences in roughly similar circumstances. It is not enough for the applicant to demonstrate that this case was exceptional. For the application to succeed, it must be shown that the only appropriate penalty to impose in the circumstances was a non-custodial one.

The cases I referred to show that that is not the case. In my opinion, the applicant has not demonstrated any error in the

exercise of the sentencing discretion. I would refuse the application.

WILLIAMS JA: I agree with what has been said by Mr Justice Chesterman but would add this. Senior Counsel for the applicant submitted that the learned sentencing Judge did not address the issue whether there were exceptional circumstances calling for the imposition of a non-custodial sentence. The expression "exceptional circumstances" is to be found in some of the judgments of this Court as indicating when a non-custodial sentence may be imposed for offences of this type.

When the sentencing remarks in the present case are carefully analysed, all the particulars of exceptional circumstances relied on by the appellant were addressed by the sentencing Judge. Though he did not use the expression "exceptional circumstances" he inferentially concluded that the matters that he did address in the course of his remarks did not amount to exceptional circumstances in the circumstances of this case. I agree the application should be dismissed.

McMURDO J: I agree with each of the reasons for judgment which have been given.

WILLIAMS JA: The order of the Court is that the application is dismissed.