# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v S* [2004] QCA 3 |
| PARTIES: | **R**<br>**v**<br>**S**<br>(applicant/appellant) |
| FILE NO/S: | CA No 293 of 2003<br>DC No 260 of 2003 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction & Sentence |
| ORIGINATING COURT: | District Court at Maroochydore |
| DELIVERED EX TEMPORE ON: | 3 February 2004 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 3 February 2004 |
| JUDGES: | McMurdo P and Davies and McPherson JJA<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **1. Appeal against conviction dismissed**<br>**2. Application for leave to appeal against sentence refused** |
| CATCHWORDS: | CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – OTHER OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – RAPE AND SEXUAL ASSAULTS – PRACTICE AND PROCEDURE – where appellant pleaded not guilty to four counts of indecent treatment of a girl under 14 years, two counts of indecent treatment of a boy under 14 years, five counts of rape and one count of an unnatural offence – where child was under the appellant's care – where one complainants' evidence supported by the other – whether verdict unsafe and unsatisfactory<br><br>CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where strong case against the appellant – where statements capable of amounting to admissions by |

appellant

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – CHARACTER OF OFFENCE – where applicant convicted on various sexual offences and sentenced to effective term of ten years imprisonment – where applicant 26 to 32 at time of commission of offences and 48 at time of sentence – where one complainant intellectually disadvantaged – whether sentence manifestly excessive in all circumstances

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| COUNSEL: | The appellant/applicant appeared on his own behalf<br>R G Martin for the respondent |
| SOLICITORS: | The appellant/applicant appeared on his own behalf<br>Director of Public Prosecutions (Queensland) for the respondent |

THE PRESIDENT: The appellant pleaded not guilty in the District Court at Maroochydore to four counts of indecent treatment of a girl under 14 years, counts 1, 6, 8 and 11; two counts of indecent treatment of a boy under 14 years, counts 2 and 9; five counts of rape, counts 3, 5, 7, 10 and 12 and one count of an unnatural offence, count 4. He was acquitted on count 2 but convicted on all other counts. He was sentenced to various periods of imprisonment on the assortment of offences but effectively to a period of 10 years imprisonment.

The appellant, who appears for himself on this appeal, contends that the convictions are "unsafe and unsatisfactory and not according to law", and that the sentences are manifestly excessive in all the circumstances. These contentions are made in the notice of appeal. He has not complied with the practice direction in that he did not file a written outline of argument prior to the hearing of the appeal, and he has not sensibly enlarged upon the grounds

raised in the notice of appeal in his oral submissions. Nevertheless, the grounds raised require a consideration of the whole of the evidence.

The offences occurred between 1981 and 1987. The victims were the children of the appellant's then de facto partner. The girl, A, was aged between 6 and 12 at the time of the offences and the boy, G, was aged between 5 and 11 throughout the offending period and between 7 and 11 during the period of the offending behaviour which concerned him as a victim. A and G had two younger sisters who also resided in the family unit. The prosecution case turned primarily on the two complainants' evidence but, somewhat unusually in cases of this type, each complainant's evidence was to some extent supported by the other's evidence and by statements from the appellant which were capable of being construed as admissions.

A gave evidence that when she was in Grade 1 and living in a southeast Queensland coastal town, Town 1, she was playing with G when the appellant joined them. He touched her on the vagina outside her clothes and then made her touch him on his penis both outside and inside his clothes and then masturbate his penis (count 1). She also gave evidence that the appellant made her touch G's penis both over and under his clothes whilst she was touching the appellant's penis (count 2). Significantly, G did not give evidence of this event and this seems to have been why the jury acquitted the appellant in respect of count 2.

A said that when she was in Grade 1 or 2 she was called into the parental bedroom where the appellant had her sit on the bed and touched her vagina. He then inserted his penis into her vagina whilst she was lying on her back. She described the pain as excruciating. She told him to stop but he continued. When he did eventually stop she went to the bathroom. She was unsure whether or not he ejaculated. He told her not to tell anyone and threatened to hurt and kill her if she did (count 3).

A gave evidence that the remaining counts occurred after the family had moved to a nearby town, Town 2, at the end of her Grade 2 year. When she was in Grade 3 the appellant told her to follow him downstairs late one night. He had her masturbate him then told her to kneel down and sodomised her for a few seconds. This was excruciatingly painful and she asked him to stop. He did so and whilst she remained on her knees he inserted his penis into her vagina. He then moved back and forth, "until he went to ejaculate and then he went to the toilet". He told her not to tell anyone (counts 4 and 5).

When A was in Grade 6 the appellant asked her to go shopping with him. They travelled to a bushland area in his work vehicle. He stopped in the bush on a dirt road. He had her touch his penis outside and later inside his clothes and he touched her on the vagina. He had her suck his penis and he ejaculated in her mouth. This tasted awful and she spat the ejaculate out the car window. On the drive home he told her

not to tell anyone or she would be in a lot of trouble and he would hurt and kill her (count 6).

A said that at about the time of her ninth birthday when her mother went to Sydney for about a fortnight she stayed with a friend. The appellant collected her from her friend's home and walked her back to the family residence. She had a shower and he called her into the parental bedroom where he made her lie on the bed. He made her touch his penis whilst he was lying next to her and then made her suck his penis. He touched her vagina and inserted his fingers. He had her remove her underwear and sit on top of him. He inserted his penis into her vagina and had her rock back and forth. He then altered their positions so that she was on all fours and he again entered her vagina. When he was about to ejaculate he ran to the bathroom (count 7).

A gave evidence that the next day the appellant collected G from his friend's place and brought him home. He then called A into the parental bedroom and had A touch and suck G's penis. While she was on all fours sucking G's penis the appellant moved behind her and put his penis in her vagina. She sucked her brother's penis for only a short time because she did not want to do it. G also gave evidence of this incident. He said that he and A both stroked the appellant's penis and that the appellant then had intercourse with A whilst she was kneeling on the bed and the appellant was standing on the floor behind her. The appellant was thrusting his penis in and out. A also sucked on both the appellant's

and G's penis when the appellant told her to do so. These events constituted counts 8 to 10.

A gave evidence that when she was 11 years old the family visited friends who ran a farm in a nearby rural area. When everyone was working in the garden the appellant told A to get something from the house. He followed her. When they were alone he had her touch his penis, he rubbed her developing breasts, she had her hand on his erect penis and the tip of it was close to the entrance to her vagina. He desisted from entering her when he heard voices. She was lying prone on a mattress on the floor and he told her to keep quiet (count 11).

A gave evidence that when she was aged between 10 and 12 the family visited the home of the appellant's mother in an outer Brisbane suburb for a few days when his own mother was away. A was woken up one night when the appellant inserted his penis into her vagina. This occurred the day before the complainant's mother was due to arrive, although her sisters and brother were in the house at the time (count 12).

A gave evidence of many incidents, mainly in the family residence in Town 2, which involved the appellant touching her on the vagina and having her masturbate or suck his penis and sometimes episodes of sexual intercourse. She said this behaviour occurred sometimes as frequently as every second day and sometimes as infrequently as every three months, depending on his opportunities.

As has been noted, G gave evidence specifically corroborating A's account of counts 8 to 10. Further support for the victim's evidence was provided in the police interview with the appellant on 17 July 2002 in which he admitted that he committed acts of a sexual nature with A over 10 years earlier. When referred in general terms to statements from A and her brother G he said, "Yeah, that's what happened." At one point in the interview when asked about A's statement he told police officers, "I did what she said."
The appellant did not give or call evidence.

The defence case as summarised in the summing-up concentrated on inconsistencies in the two complainants' evidence, particularly as to counts 1 and 2. These submissions appear to have been effective because the jury acquitted on count 2. The defence case also emphasised delay and the danger of resulting unreliability of the evidence; the equivocal nature of what the prosecution said were admissions; the real possibility that the appellant may not have understood the questions asked by the police and that generally the quality of the evidence of A and G fell below what was required to establish proof beyond reasonable doubt.

The case against the appellant was a strong one. There was uncontradicted evidence from A that the appellant committed the offences concerning her. Her evidence was directly supported in respect of some counts and indirectly supported in respect of all counts by G's evidence, and by statements

capable of amounting to admissions from the appellant to the police. G's evidence concerning the appellant's convictions on count 9 was also uncontested. After reviewing the evidence called at trial, there is no reason to doubt the soundness of the jury's verdict or to fear that it constitutes a miscarriage of justice.

I turn now to the application for leave to appeal against sentence. The applicant was 48 years old at sentence and committed the offences whilst aged between 26 and 32. He had some minor criminal history for street, property, and drug offences for which he had been sentenced to community based orders and ultimately short periods of imprisonment.

A's victim impact statement sets out the enormous emotional impact the applicant's offending has had and continues to have on her life. She has lost the trusting relationship she should have had between her mother and her brother, G. She has received treatment for many years from counsellors, psychologists, and gynaecologists. Her relationship with her partner has been difficult and she continues to have nightmares and to hold fears for her own children's well being.

G's victim impact statement also demonstrates the great effect the applicant's offending has had on his life. He has suffered from nightmares and has had a mental breakdown, almost certainly attributable to the applicant's offending.

The case against the applicant was compelling. He showed no remorse and cannot have the mitigating benefit of co-operation with the administration of justice. The offences were rightly described by the learned primary Judge as "appalling abuses of trust". They were committed upon two very young children over an extended period of time by their only father figure. The victims have suffered and continue to suffer the expected consequences of such dreadful behaviour. All this is further aggravated by the fact that G was an intellectually disadvantaged boy who attended a special school and was particularly vulnerable. There were no mitigating circumstances other than that the applicant does not seem to have committed further offences of this type since.

On these facts the effective sentence of 10 years imprisonment cannot be said to be manifestly excessive. I would dismiss the appeal against conviction and refuse the application for leave to appeal against sentence.

DAVIES JA: I agree.

McPHERSON JA: I also agree.

THE PRESIDENT: That is the order of the Court.