SUPREME COURT OF QUEENSLAND

CITATION:	*R v DAF* [2004] QCA 368
PARTIES:	**R** **v** **DAF** (applicant)
FILE NO/S:	CA No 237 of 2004 DC No 3269 of 2003 DC No 1460 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	8 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	22 September 2004
JUDGES:	Jerrard JA, White and Jones JJ 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 dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – OFFENCES AGAINST THE PERSON - SEXUAL OFFENCES – where applicant convicted on pleas of guilty to a substantial number of sexual offences committed against six different children over a period of 10 and a half years – where significant aggravating features - whether sentence manifestly excessive *R v SAG* [2004] QCA 286; CA No 55 of 2004, 6 August 2004, followed *R v Dugdale* [1991] CCA 251; CA No 272 of 1991, 13 December 1991, followed
COUNSEL:	A J Rafter SC for the applicant R G Martin for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the

respondent

[1] **JERRARD JA:** DAF has applied for leave to appeal against concurrent terms of imprisonment, the longest being 12 years, imposed on him on 25 June 2004 in the District Court upon his pleas of guilty to a variety of charges alleging the commission of sexual offences against six different children over a period of 10 and a half years. One child was his step-daughter, one was his son, one was his step-daughter's friend, one was his niece, one was his then de-facto partner's younger sister, and one was a friend of that younger sister.

[2] There were two discrete groups of offences, and those in the first group were committed while he lived with a Ms T. She is the mother of A, DAF's step-daughter, who was the complainant child in counts 1 – 3 and count 8 of a 15 count indictment presented against DAF. The offences DAF admitted committing against A by his pleas were one count of maintaining an unlawful sexual relationship with that child between 24 May 1992 and 27 November 1994, when A was under the age of 12 and in his care; he also admitted by that plea having committed rape upon A during that relationship. A could recall at least 10 acts of penile intercourse during the period covered in the indictment. DAF entered separate pleas to two counts of having raped A in that same period. A was aged about four and a half years old when first raped by him, and was between four and six years of age during the period in which that relationship was maintained and when the second offence of rape was committed. Both rapes DAF admitted to by pleading guilty consisted of penile penetration of A's vagina; DAF then threatened A at that time that he would kill her mother Ms T if A revealed what he had done. He also threatened A that he would kill his own sister, to whom A was particularly attached.

[3] Against his own son, the complainant B, who was the victim of sexual offences committed while DAF lived with Ms T, DAF admitted by his pleas the commission of the offence of anal intercourse, committed when B was under 12 years of age and in DAF's care, and aggravated by B being DAF's lineal descendant. He also admitted offences of unlawfully and indecently dealing with B whilst that child was under 12 years of age, and an offence of unlawful assault of B, which assault occasioned the child bodily harm. The assault was constituted by striking the boy on the head with the butt of a shot gun. One of the offences of indecent dealing consisted of DAF asking the child to suck DAF's penis, but the child bit it instead. The second consisted of DAF rubbing his own penis against his son's leg, on a separate, subsequent, occasion. B's age when hit with the shot gun and when those two offences of indecently dealing were committed was not described to the learned sentencing judge, but he was under 12; the offence of anal intercourse occurred when he was still attending kindergarten. A medical examination of him, made when those complainants went to the police in 2002, showed that his anus had a scar consistent with blunt penetration occurring that long ago.

[4] DAF was convicted of one further offence involving the child A, that being an offence of indecent dealing when she was still under 12, committed by his inducing A to play with his penis. The offence against complainant C, a close friend of A, occurred when that child was visiting Ms T's home, and when C was aged about 10. DAF digitally penetrated her vagina and fondled her anal area while he masturbated himself. The child was, unsurprisingly, very frightened; and DAF told her not to tell A. C was so disturbed she wet the bed.

[5] The offences committed while DAF lived with Ms T included those which drew the heaviest of the sentences imposed. These were the 12 year sentences imposed on DAF for each the offences of maintaining the sexual relationship with A, the two offences of rape of A, and the offence of unlawful anal intercourse with B. Those four offences all carried a maximum of life imprisonment. Concurrent sentences of five years imprisonment were imposed in respect of all the other offences, with the exception of the count for assault occasioning bodily harm of B, for which a sentence of three years was imposed

[6] During that same period of co-habitation with Ms T DAF committed the offences against child F, his niece, the subject of a separate three count indictment. The first offence was of attempted rape of her, consisting of attempted penile penetration of her vagina, and it occurred when she was aged between five and six years. A second offence of unlawfully and indecently exposing that child to an indecent act while she was in his care was committed in the same general period, and consisted of his asking the child to touch his exposed penis. His third offence against that child was committed when she was aged around seven or eight years, that being an offence of unlawful and indecently dealing with her whilst she was under the age of 12 and in his care. This consisted of his touching the child on her vulva.

[7] His second spate of offences were committed when he was living with a Ms B, and was committed against her younger sister D, and a friend of D's, E. Those offences were all committed in the period 28 May 1997 to 24 November 2002. DAF's offences against those children came to light when E made a fresh complaint.

[8] The offences against D were ones of unlawful and indecent dealing with that child whilst she was aged under 12 and in his care, together with one offence of attempted sodomy of her while she was aged under 12, and one of unlawful and indecent dealing when she was aged under 16 and in his care. The opportunity to commit those offences occurred when D visited her sister Ms B each second weekend at her sister's home. The indecent dealing offences consisted of DAF attempting or succeeding in fondling D's vulva, sometimes through her clothing and sometimes on her bare skin, and his attempting to force that child to suck his penis. The attempted anal intercourse needs no explanation.

[9] The offence against E was one of unlawful and indecent dealing with that child whilst she was in his care and aged under 16; it consisted of his having touched the child on her vulva on the outside of her clothes. She made a complaint and police became involved. That police involvement resulted in DAF denying the commission of any sexual offences, and that denial persisted past the committal proceedings, in which five of the complainants were required to give their evidence in full and be cross-examined.

[10] There were actually two committal hearings, because the applicant successfully applied to sever the two groups of complainants. The result was that A's evidence of having been subjected to penile intercourse a minimum of 10 times when aged between four and six was given on oath, and while subject to cross-examination. Although the information placed before the learned sentencing judge did not include any description of any injuries observed to the child around the time those acts occurred, or information as to whether there was any examination in 2002, the only sensible conclusion is that the applicant must have subjected that child to at least extreme discomfort and considerable pain on those occasions, just as he must have

when anally penetrating B. DAF's pleas of guilty to the maintaining charge, after that evidence given of at least 10 acts of intercourse with a very little girl, means he admitted to a very serious offence.

[11] He ultimately pleaded guilty to one count of maintaining a relationship with a child under 12, two of rape of that child under 12, one of anal intercourse with a separate child, nine counts of indecently dealing with children, mostly when under 12, one of attempted rape of yet another child, one of attempted sodomy of a quite different child, and one of assault occasioning bodily harm. The offences he committed against four children while living with Ms T were committed at times when she was away from the home and they were in his care, with the exception of the offence committed against C. The first offence of rape of A was committed when Ms T was in hospital giving birth to B. DAF's offending behaviour can therefore be described as that of an opportunistic, predatory, sexually indiscriminate and aggressive paedophile.

[12] His offending behaviour contained a number of the significant matters which substantially increase the appropriate sentence where a child or children have been sexually abused, of which some were described by this court in *R v SAG* [2004] QCA 286 at [19] and which in this case include:

- the very young age of his victims;
- the lengthy period for which his offending behaviour continued;
- the penile rape of two very young children (one anally) and the attempted penile rape of two other young children (one anally);
- the fact that unlawful carnal knowledge of at least one very young child occurred at least 10 times;
- the fact of his being in a parental or protective relationship to most of the victims;
- the fact that there was more than one child victim;
- his use of emotional blackmail and manipulation of at least two victims, and actual violence to a third;

together with the aggravating features identified by Williams J (as His Honour then was) in *R v Dugdale* [1991] CCA 251 at pages 3 and 4 thereof namely:

- the refusal to desist when B indicated his objection by biting the applicant's penis, and when F indicated hers by not touching his penis as requested;
- the apparent and significant risk of re-offending behaviour if the opportunity arises;
- the serious nature of some the individual offences committed on a number of the children.

[13] DAF had previous convictions for offences of dishonesty, offences relating to drugs, and one for possessing a weapon, all committed between 1991 and 2002, in Queensland and New South Wales. The dates of the most serious offences admitted

by him were before 1 July 1997, and before the introduction of Part 9A of the *Penalties and Sentences Act*. It is not applicable to him and he has therefore avoided a sentence of 10 years or more for a serious violent offence (*R v Mason and Saunders* [1998] 2 Qd R 186 at 190). He will accordingly be eligible to apply for parole after he has served half his sentence.

[14] In *R v SAG* this court had occasion to consider the appropriate penalty where there had been serial sexual offending of a very serious nature against one or more than one child, and to review sentences relevantly recently imposed or upheld by the court. It is unnecessary to repeat the exercise here, and for my part it is sufficient to say that the significant aggravating features identified demonstrate that the head sentences of 12 years imprisonment were not manifestly excessive and were appropriate. I would dismiss the application.

[15] **WHITE J:** I agree with the reasons for judgment of Jerrard JA and the order which he has proposed.

[16] **JONES J:** I agree with the reasons of Jerrard JA and the order proposed.