SUPREME COURT OF QUEENSLAND

CITATION:	*R v SAK* [2004] QCA 379
PARTIES:	**R** **v** **SAK** (appellant/applicant)
FILE NO/S:	CA No 29 of 2004 CA No 34 of 2004 DC No 23 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Bundaberg
DELIVERED ON:	15 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	1 October 2004
JUDGES:	Williams and Jerrard JJA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Each of the appeals against convictions incurred on 27 June 2002, the application for leave to change the pleas entered on 14 October 2002, and the application for leave to appeal the sentences, is dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL - APPEAL AGAINST CONVICTION RECORDED ON PLEA OF GUILTY – PARTICULAR CASES — where appellant pleaded guilty to four counts charging sexual offences committed against his step-daughter – where appellant sought to withdraw pleas of guilty on appeal on the basis that his pleas were based on false evidence – where the appellant filed affidavit in which the complainant step-daughter deposed that the appellant had not committed any sexual offences against her but at the hearing of the appeal repudiated the contents of her affidavit – whether pleas of guilty should be set aside CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – FRESH EVIDENCE – where appellant convicted after a trial of four counts charging sexual offences against his eldest step-daughter –

where appellant claimed his convictions were based on false evidence – whether any basis for the appellant's claim

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where applicant convicted of four counts charging sexual offences against one step-daughter after a trial and four counts charging sexual offences against his other step-daughter on pleas of guilty – where both complainants children at time of offences - where applicant received head sentence of 11 years imprisonment with a declaration that he had been convicted of a serious violent offence – where no remorse - whether sentence manifestly excessive

R v Myers [2002] QCA 143; CA No 353 of 2001, 19 April 2002, cited
R v R [2000] QCA 279; CA No 126 of 2000, 14 July 2000, cited
R v SAG [2004] QCA 286; CA No 55 of 2004, 6 August 2004, cited

COUNSEL: The appellant/applicant appeared on his own behalf
M J Copley for the respondent

SOLICITORS: The appellant/applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA:** Given the evidence of P in this court there is no basis for the appellant's claim that his convictions were based on false evidence.

[2] I agree with all that is said in the reasons for judgment of Jerrard JA which I have had the advantage of reading. I agree with the orders proposed therein.

JERRARD JA:

The Convictions

[3] On 27 June 2002 the appellant SAK was convicted by a jury of four counts charging sexual offences involving his step-daughter M. Those were a charge of having maintained a sexual relationship with her from 1 January 1990 until 31 December 1999, while she was a child under the age of 16 years, with the circumstance of aggravation that he raped the child in the course of that relationship; a charge of unlawfully and indecently dealing with her when she was under 12 years of age, on a date between 1 January 1990 and 31 December 1990; and two charges of rape, one act occurring between 1 September 1996 and 31 October 1996 and the other between 1 March 1997 and 31 December 1997. On the count of maintaining, which covered a period from when M was five until when she was 15, he was sentenced to 11 years imprisonment and a declaration was made that he had been convicted of a serious violent offence. He was sentenced to concurrent terms of imprisonment of two years, in respect of the offence of indecent dealing, and nine years in respect of

each of the two counts of rape. All those sentences are to be served concurrently. 193 days spent in pre-sentence custody from 25 May 2001 until 3 December 2001 was deemed time already served.

[4] SAK later pleaded guilty on 14 October 2002 to other charges of sexual offences, relating to his step-daughter P. These were a count of having maintained an unlawful sexual relationship with her between 1 January 1996 and 12 February 2000, while she was a female under 16 years whom he had raped in the course of the relationship and while she was under his care; and three counts of rape, two of which were alleged to have occurred on dates unknown between 1 January 1997 and 31 December 1998, at a rural town, and the third on a date unknown between 1 January 2000 and 12 February 2000, at another rural town. He was sentenced to 11 years and three months imprisonment on the offence of maintaining, and nine years imprisonment (to be served concurrently) on each rape count, with all counts to be served concurrently with each other and with the sentences previously imposed on 27 June 2002.

The applications

[5] The applicant successfully applied by notices filed 9 February 2004 and 12 February 2004 for an extension of time within which to give a notice of appeal in respect of the convictions recorded on 27 June 2002, a notice of an application to set aside the pleas of guilty and convictions entered on 14 October 2002, and to apply for leave to appeal against the sentences.

The grounds of SAK's application filed 9 February 2004 are:

- the evidence given by P for the prosecution in the trial concerning the complainant M was fabricated and untrue;
- P has now stated that SAK had not committed any sexual offences against her, and that accordingly the evidence P gave at that trial was not true. P, who was still 15 at that trial, gave evidence of an occasion when the appellant had sexual intercourse with her;
- this evidence from P is fresh evidence.

His application filed 12 February 2004 contained similar grounds, and additional ones asserting a witness has come forward to depose to what the witness said happened between P and a male person, and that P was having this male charged with the very offences as those to which SAK had pleaded guilty.

[6] SAK filed four affidavits altogether, of which two were read at the hearing. One was from P, sworn 21 January 2004. P swore in it that at no time did SAK have sexual intercourse with her, and that she was forced to tell a Juvenile Aid Bureau Officer that SAK committed offences with her, by her older sister M and her father W. The affidavit alleges that a "Janett Cook" of Family Services was "also" involved in forcing P to tell the Juvenile Aid Bureau officer that SAK had offended against P.

[7] The affidavit from P also alleges that the evidence P gave at the trial relating to M was twisted "around to make it look like that" SAK was at fault by having sexual intercourse with M, whereas it appeared to the deponent that "in actual fact it looked

like M was forcing herself onto SAK. At no time did I see SAK wanting to have sexual intercourse with M." P then describes in that affidavit an occasion at an address at which they lived, when she had seen M behave in a sexually provocative way to SAK, who had asked M to leave him alone.

[8] The affidavit also deposes that P felt that SAK's convictions for offences (apparently those committed on M) were incorrect, and he had been falsely accused; and that the offences which he was convicted of committing on P were really committed by a B, those being the charges to which SAK had pleaded guilty. P described in that affidavit a present intention to cause B to be charged with committing those same offences.

[9] However, at the appeal hearing, P, now a 17 year old mother, convincingly repudiated the contents of her affidavit sworn 21 January. She swore in this court that the evidence she gave in SAK's trial in June 2002 was the truth; and that her mother and SAK had each placed different pressures on her to recant from what she had said then. I thought her evidence to this court was unquestionably honest; and she showed a good deal of both courage and spirit. Once P recanted her earlier "withdrawal" of the evidence she gave at the trial, SAK was left with very little on which to attack the convictions involving M, and no grounds of complaint about his pleas regarding P.

[10] SAK had also filed an affidavit by HJ, wife of SAK and the mother of M and P, deposing to a conversation in February 2003 with P, in which P had said that B had actually committed the offences to which SAK had pleaded guilty, and that a named officer of the Juvenile Aid Bureau and an officer of the Department of Children and Family Services had changed the wording of P's original statement presumably to inculpate SAK and exculpate B. P swore on the appeal to the contrary of these alleged conversations and HJ was not required for cross-examination by counsel for the Director.

[11] There was also an affidavit from SAK himself, deposing to the advice by his solicitor of the limited cumulative term of imprisonment he would face if he pleaded guilty to the charges against P, to his innocence of those charges, and to his pleas of guilty being made because he did not want "my family to suffer anymore hardship than necessary". He also declared in the affidavit "I now reaffirm my original plea of not guilty to the charges against M". However, at the hearing, he elected not to subject himself to cross-examination, and that affidavit was not read.

The convictions regarding M

[12] The evidence from M in that trial described the offences involving her. The indecent dealing offence occurred in a motel in the Cairns area in the first part of 1990, when M was nearly six. The conduct reflected in the first count of rape occurred on a school holiday camping trip in September or October 1996, when that complainant shared a tent with her mother, SAK, and her then small baby brother N. That was the first of many occasions on which SAK had sexual intercourse with her. The conduct involved in the second count of rape, in 1997, occurred at a motel, after an argument between SAK and the complainant's mother, which had resulted in SAK breaking a louvre window and hurting his arm.

[13] For the charge of maintaining the prosecution particularised five separate occasions on which specific sexual offences had occurred. One was the occasion of the

indecent dealing which was charged, and two more were the two offences of rape with which SAK was charged. The fourth was an uncharged further incident of rape, committed in a motel, after the complainant had had a shower; and the fifth was an occasion on which P swore she had seen SAK and her sister M having intercourse at one of the addresses at which they lived. This was on an occasion when P walked into a bedroom in that home, and saw SAK naked in the bed on top of M. He asked her to "knock next time", while M tried hiding beneath the covers. P said both were naked, and the date was 28 July 1996, which date she remembered because it was just after her brother's birthday and just before her mother's. Other evidence indicated that the family was not living at that address in 1996, but was living there in 1999. P would have been nine in July 1996.

[14] Evidence was also led from P at that trial, and described by the learned judge as independent evidence that might provide some support for M's evidence, that:

- SAK said to P that she had "bigger flaps" than M did. The Crown was allowed to lead evidence from P that that statement was made when SAK was having sexual intercourse with P; although P did not describe the year in which that intercourse occurred or the location, it necessarily followed that P would have been well under the age of 16 years;

- on a number of occasions, which P estimated were possibly 15 but less than 20, P had heard noises, which P associated with sexual intercourse, coming from a caravan that SAK and M were in. This happened at a caravan park the family lived in. P did not give a date. The evidence of M implied that the family stayed there in late 1998. M said only one act of intercourse happened in the caravan, and that the other children were outside the caravan when it happened;

- (as already described) P had seen SAK and M in bed naked, when walking in on them, and when his penis was inside M's vagina. M could not recall P "walking in" on her and SAK at that house, while she could remember her younger sister E doing that. M gave evidence that sexual intercourse happened with SAK at that residence.

[15] The learned judge's summing up described the evidence given by P, of SAK's having sexual intercourse with her when the comment was made comparing her physical characteristics as asserted by SAK with those of M, as evidence which had been led to place the comment in context. The jury were told that they were not hearing any charges in relation to P. They were reminded that M had no recollection of the incident occurring in which P described walking in on intercourse occurring. They were also reminded that the evidence was that P had no great love for M; and that accordingly that the prosecution were suggesting that it would be unlikely she would give false evidence on oath for M's benefit.

[16] The summing up reminds that evidence from P supplied the great bulk of the potentially corroborative evidence relied on by the prosecution for the count against SAK of maintaining a sexual relationship with M. P's affidavit (repudiated at the appeal) said about that evidence only that it had been twisted to make it appear SAK was the sexual predator rather than M, and P expressed the same opinion at the appeal. P's affidavit did not declare that any of the evidence P gave at that trial was untrue, and P confirmed its truth on the appeal.

[17] The trial in June 2002 was the third trial of SAK on the complaint involving M. There had been an earlier trial in which he was charged both with the offences against M and offences against P, and convicted by a jury. Those convictions were set aside on 19 October 2001,[1] when this court held that separate trials should have been ordered in respect of each complainant. The judgment given on that appeal describes the evidence then given, and it is apparent from that judgment that the evidence of both M and P in that joint trial was consistent with the evidence each gave later on the June 2002 trial of SAK. That evidence in the joint trial included P's evidence of her having sexual intercourse with SAK on the occasion the vulgar comparison was made. There had also been an earlier re-trial of the offences alleged in respect of M, at which the jury were unable to agree; neither the appeal record or the affidavits revealed whether P had given evidence at that earlier re-trial. If she did, there was no suggestion she gave any inconsistent evidence there.

[18] The only argument SAK had left was that P's evidence of interrupting intercourse in July 1996 conflicted with M's evidence, both as to when the family lived in that residence, and as to when intercourse began between M and SAK. The jury were undoubtedly alive to those points, and to the inconsistency between M and P as to the number of times SAK had intercourse with M in the caravan. Those inconsistencies do not provide sufficient reason to overturn the verdicts of the jury. The result of all this is that there is no reason for this court to doubt the guilt of SAK on any of the charges involving M or P of which he was convicted by the jury or on his plea, and no basis for any finding that a miscarriage of justice has resulted from those convictions.

The sentence applications

[19] The sentence imposed in respect of M does not appear manifestly excessive in comparison with the 11 year sentences upheld by this court in *R v Myers* [2002] QCA 143 (following a trial), or *R v R* [2000] QCA 279, after a plea. Those decisions hold that an 11 year sentence is within the appropriate range in cases of this nature, before matters in mitigation - such as a plea of guilty - are considered. It is not manifestly excessive when compared with the sentences examined in *R v SAG* [2004] QCA 286, and evaluated against the matters described therein which lead to heavy sentences for serial sexual offending of a very serious nature.

[20] Regarding M, there were three trials, no remorse, and a very long period in which a sexual relationship was maintained, which progressed from indecent dealing with a five or six year old to rape of her as a 12 year old, and to her submission to other sexual intercourse until she was about 15. It involved very many occasions of sexual exploitation. These took place in a household in which she was subjected to physical violence from him, both in the apparent exercise of discipline and more generally, and that violence was described by her as the principal reason for her submitting without much complaint to his abuse. That sentence should remain.

[21] The sentence imposed regarding P was also appropriate. SAK's pleas admitted raping P during the same period in which he was sexually abusing and raping M. P described at least 10 occasions of rape of her during the period SAK maintained the sexual relationship. He clearly has no remorse for any of his conduct, as shown by his endeavours to procure perjury from P.

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1 *R v S* [2001] QCA 501

[22] I would order that each of the appeals against the convictions incurred on 27 June 2002, the application for leave to change the pleas entered on 14 October 2002, and the application for leave to appeal the sentences, be dismissed.

[23] **JONES J:** I have read the reasons for judgment of Jerrard JA and I agree with those reasons and the orders proposed.