SUPREME COURT OF QUEENSLAND

CITATION:	*R v GQ* [2005] QCA 53
PARTIES:	**R** **v** **GQ** (applicant)
FILE NO/S:	CA No 430 of 2004 DC No 1073 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	4 March 2005
DELIVERED AT:	Brisbane
HEARING DATE:	4 March 2005
JUDGES:	McPherson JA, White and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal dismissed**
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 – SEXUAL OFFENCES – maintaining relationship with child under 16 for 6 years – protracted unprotected intercourse – provision of alcohol to victim – where voluntary confession in circumstances where no official complaint made – where reason to believe complaint might have been made or might be made in the future – whether confession sufficient mitigating feature *AB v R* (1999) 198 CLR 111, cited *R v C; ex parte A-G* [2003] QCA 134; CA No 400 of 2002, 24 March 2003, cited *R v S* [2001] QCA 54; CA No 238 of 2000, 21 February 2001, distinguished
COUNSEL:	D Shepherd for the applicant

D L Meredith for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

WHITE J: The applicant pleaded guilty on the 19th of October 2004 to maintaining a sexual relationship with circumstances of aggravation, those aggravating features being rape and unlawful carnal knowledge in the period of the relationship, between the 1st of January 1994 and the 6th of April 2000. He also pleaded guilty to two counts of indecent dealing with a child under the age of 12, two counts of rape, the second of which occurred when the girl was then 16, and one count of indecent assault when she was also 16.

He was sentenced on the 3rd of December 2004 in the District Court. A head sentence of 10 years' imprisonment was imposed in respect of the maintaining charge. He was also sentenced to three years' imprisonment for the indecent dealing charges, eight years' imprisonment for the rapes and three years' imprisonment for the indecent assault, all of those terms of imprisonment to be served concurrently.

As a consequence of the 10 year sentence imposed for the maintaining offence an automatic serious violent offence declaration was made.

The applicant was born on the 26th of January 1970. He was therefore 34 at the time of sentence and aged between 23 and 30 years over the period of the offending conduct. The child

was aged between 10 and 16 years when the offences occurred. She was the applicant's wife's sister's daughter, that is his wife's niece.

The complaint is that the head sentence of 10 years is manifestly excessive when all mitigating factors are considered but particularly the applicant's voluntary confession before the complainant went to the police.

Mr Shepherd, who appears on behalf of the applicant, in his written outline contended for a sentence of nine years with no serious violent offence declaration being made.

The complainant was born on the 6th of April 1984. The applicant started to go out with her aunt when the child was about seven.

The second half of her Year 5 at school, that is 1994, was the first time that the applicant, according to the complainant, touched her in a sexual manner. She was sleeping at her aunt's and the applicant's house. She woke up, went into the lounge room, watched television and was sitting on a couch when the applicant came into the room. He placed his hand up near her genitals for a couple of minutes. That constituted Count 2 on the indictment.

At the end of that year the aunt and the applicant moved house in which endeavour the complainant helped. The applicant asked her to come back upstairs to help with some boxes and

her female cousin was told to wait in the car. She went into her cousin's room with the applicant, was told to lie on the floor, and he lay down with her. The door to the bedroom was still open and her cousin came into the room. The complainant could not recall if anything further happened on that occasion.

The complainant went to live with her grandmother as did the applicant, the aunt and cousin in separate accommodation. When they first moved in the complainant was in a room helping the applicant to set up the bed. She was sitting against a wall. The applicant sat next to her, reached over and started to touch her vagina although whether it was inside or outside her underwear is not made clear. That conduct constituted Count 3, an indecent dealing charge.

Thereafter it appears that the applicant engaged in more regular and more intimate sexual contact with the complainant. For example, when she woke up the applicant's hand was between her legs touching her vagina and this occurred regularly. On another occasion he pulled back her shorts and underpants. She lay back on the bed and the applicant placed his mouth against her vagina performing oral sex upon her. The complainant's recollection was that he would do this whenever he could including coming into her bedroom at night. This was uncharged conduct.

The complainant's recollection of the first sexual intercourse, the subject of Count 4, occurred when she was 11.

She had by then become physically mature. It occurred in the early or middle part of 1996 when she was sleeping at the applicant's house. The complainant's cousin was in the shower and she was watching television. She was in her cousin's bedroom with the door shut. Her aunt was at work. The applicant came into the room, stood in front of her, exposed his penis and said words to the effect, "I'm going to put this inside of you." The complainant said she lay back on the bed and he had sexual intercourse with her and her recollection was that it hurt a lot.

Sexual intercourse occurred on a regular basis from that time until she was 16 in the year 2000. The complainant estimated the frequency at about three or four times a week. Intercourse was unprotected. On occasions he made her perform oral sex on him.

He seems to have made promises that on each occasion it would be the last time. On other occasions the applicant provided her with alcohol. The Crown did not contend below that this was to be regarded in any way as bribery but the complainant had asked to be supplied with it. There was an allegation by the complainant that on one of these occasions he had inserted a bottle into her vagina which caused pain. That, however, was rejected by the applicant on sentence. His explanation was that he had poured some of the bottle's contents over the outside of her vagina. Though the learned sentencing judge did not make specific reference to that incident he could not

have taken it into account when sentencing given its contested nature.

In the second half of 2000 when she was 16, after the complainant left her grandmother's home she moved with her mother to an address in Townsville. Because her mother worked at a distant hotel she regularly did not return home at night.

In about the middle of that year the applicant telephoned the complainant and asked to be let into the house and she reluctantly permitted him in. He used the toilet and then entered her bedroom. She initially attempted to resist him but since he persisted she gave up her resistance and he had sexual intercourse with her. This constituted the second count of rape, Count 5.

Subsequently that year the applicant sexually molested her while she was seated at the computer. Although she resisted he persisted and performed an act of oral sex upon her. She was able to recall that this took place on the 12th of October 2000. This constituted Count 6, indecent assault.

Shortly afterwards the complainant started to tell adults, including her aunt, what had occurred and this led to the applicant's marriage break up.

About a year later the applicant rang the Townsville Juvenile Aid Bureau in a recorded telephone call. He told police in a general way that he had been having sex with his niece. He

expressed his anxiety about the loss of his family and the fact that a complaint could be made well into the future having learnt that one had not then been made.

The applicant moved away from Townsville from the wider family including his then wife and seven-year old son. He was said to have been sexually assaulted by his blood uncle when he was about 13 or 14 years of age in the Philippines. He undertook counselling from about November 2001 in order to deal with the separation from his family, his feelings of guilt, and what he understood to be his impending incarceration. There would appear to have been genuine remorse.

The complainant wrote of feelings of depression and thoughts of suicide. She felt responsible for the break up of her aunt's family. Her schoolwork suffered. She drank alcohol to excess and engaged in promiscuous relationships with men.

It was not contended that any violence apart from overcoming resistance and in order to carry out the sexual acts was involved.

The worst feature recognised by his Honour was the very long period of the sexual abuse of six years. There was the further factor of the influential position that the applicant had over the child as the niece of his wife and the breach of trust. An aggravating feature was the provision of alcohol to such a young girl. Most reprehensible was the unprotected

nature of the sexual intercourse which left the complainant at risk of pregnancy.

It was conceded below and here that a sentence in the range of 10 to 12 years, taking into account the plea of guilty, is appropriate for this range of offences.

The cases leading to this conclusion were discussed by the Chief Justice in R v C; ex parte A-G [2003] QCA 134.

The complaint here is that there has been insufficient recognition in the sentence of the applicant's confession to police. Mr Shepherd for the applicant submitted that this is a very important matter in the public interest and that interest was not sufficiently recognised in the reduction in what would otherwise have been an appropriate sentence. He referred to R v S [2001] QCA 54. That case has a significantly different feature than here. There it was well understood that no complaint would be made to police because it had been settled within the family and the Church group.

It is true that such voluntary confessions must be accorded recognition. So much can be gleaned from the judgment of AB v The Queen (1999) 198 CLR 111, particularly per Justice Kirby at 147 to 8.

However, the applicant's unlawful conduct was well out in the open by the time he made his voluntary confession. His marriage had broken down as a result and, indeed, he may have initially thought that a complaint had been made. Although commendable, too much can not be made of this confession.

The Chief Justice in C referred to the infinite variations in the circumstances of the offences which requires some flexibility in applying the range. C was a significantly worse case, in my view than this, but it was an Attorney's appeal and the increase to ten years must be considered in that light.

As in all sentencing, a balance needs to be struck between the aspects of it favourable to the offender and those against him. The features suggesting that the sentencing discretion below did not miscarry are the young age of the complainant when the offending began, the duration of the conduct over six years and that unprotected intercourse occurred so frequently over that period. There is the further feature of giving the girl alcohol.

The complainant's life and personality has, it seems, been irreparably damaged by this applicant's conduct.

The learned sentencing Judge below clearly took the voluntary confession into account.

I cannot conclude that the sentence below was manifestly excessive. Accordingly, I think it unnecessary to address the submissions made by Mr Shepherd to us about not making a serious violent offence declaration should the view be taken that a sentence under ten years was more appropriate.

Accordingly, I would refuse the application for leave to appeal.

McPHERSON JA: I agree.

DOUGLAS J: I agree.

McPHERSON JA: The application for leave to appeal is refused.
