SUPREME COURT OF QUEENSLAND

CITATION:	*R v BAW* [2005] QCA 334
PARTIES:	**R** **v** **BAW** (applicant)
FILE NO/S:	CA No 116 of 2005 DC No 50 of 2005 DC No 525 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	9 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	15 August 2005
JUDGES:	McMurdo P, Jerrard JA and Wilson J 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 – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – SEXUAL OFFENCES – applicant pleaded guilty to three counts of maintaining a sexual relationship with a child and 21 counts of indecent dealing involving eight children – sentences of eight years imprisonment imposed concurrently on each maintaining count with lesser concurrent terms imposed on indecent dealing counts – discretionary serious violent offence declarations made on each maintaining count due to the aggravating circumstances that those children were lineal descendants, under 12 and in the applicant's care at the time of the offences – offences occurred over a 40 year period – whether the eight year head sentence was manifestly excessive – whether the serious violent offence declarations were justifiable *Corrective Services Act* 2000 (Qld), s 135(2) *Penalties and Sentences Act* 1992 (Qld), s 161B(3)(b)

Griffiths v R (1989) 167 CLR 372, cited
Kellerman v Pecko [1996] QCA 366; [1998] 1 Qd R 419, cited
R v Bojovic [1999] QCA 206 [2000] 2 Qd R 183, cited
R v Collins [1998] QCA 280; [2000] 1 Qd R 45, cited
R v Daswani [2005] QCA 167; (2005) 53 ACSR 675, cited
R v Eveleigh [2002] QCA 219; [2003] 1 Qd R 398, cited
R v Ianculescu [1999] QCA 439; [2000] 2 Qd R 521, considered
R v Nagy [2003] QCA 175; [2004] 1 Qd R 63, distinguished
R v Orchard [2005] QCA 141; CA No 11 of 2005, 6 May 2005, cited
R v SAG [2004] QCA 286; (2004) 147 A Crim R 301, cited

COUNSEL: A J Kimmins for the applicant
R G Martin SC for the respondent

SOLICITORS: Walker Pender Solicitors for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with Jerrard JA that the application for leave to appeal against sentence should be dismissed. The appalling facts of the offences and the issues in this application are fully set out in Jerrard JA's reasons so that I need repeat only those necessary to briefly explain my reasons for agreeing in the order proposed.

[2] The applicant had a prior conviction in 1960 when he was 19 years old for unlawful carnal knowledge of a girl under the age of 17 for which he was admitted to probation.

[3] The child sex offences the subject of this application spanned approximately 40 years. The first in time was a count of unlawful and indecent treatment of a boy under 14, the applicant's young brother-in-law, committed in 1964. The next group of offences were committed between 1980 and 1983 on the applicant's god-daughter. The next offences were committed in 1984 and 1985 on two complainants who were the young daughters of a friend of the applicant's. The maximum penalty for all these offences was seven years imprisonment.

[4] In 1993 the applicant committed further sexual offences on a nine year old girl that he met at a party. This offence was punishable by a maximum of 10 years imprisonment.

[5] In addition to these offences the applicant committed three offences of maintaining a sexual relationship with three different children, all under 12 years, his lineal descendents and in his care. The relationship spanned, in the first of these offences, six and a half years (from April 1994 to January 2001) and in the other two offences about nine years (from April 1994 until 2003). The maximum penalty for each of these three offences was, as Jerrard JA explains, life imprisonment.

[6] The learned sentencing judge imposed a sentence of eight years imprisonment on each of those counts. Since 1 July 1997 the offence of maintaining a sexual relationship with a child has been included in the Schedule - Serious Violent

Offences in the *Penalties and Sentences Act* 1992 (Qld) ("the Act") so that under s 161B(3)(b) of the Act the judge had the power to declare the applicant to be convicted of a serious violent offence as part of the sentence. Such a declaration results in the applicant having to serve 80 per cent of that eight year sentence before becoming eligible to apply for post-prison community based release: *Corrective Services Act* 2000 s 135(2)(c).

[7] In sentencing the applicant for this assortment of serious criminal sexual offences committed on eight different complainants over a 40 year period, his Honour could have imposed either a series of cumulative sentences or one penalty on the most serious offence or offences to reflect all the criminality involved in the offences to which the applicant had pleaded guilty with lesser concurrent sentences on the remaining offences. Both approaches to sentencing are acceptable, provided the overall practical effect of the sentence imposed is neither manifestly inadequate nor manifestly excessive: see *R v Dube & Knowles;*[1] *R v Gage;*[2] *Griffiths v R;*[3] *Kellerman v Pecko;*[4] *R v Pollock.*[5]

[8] The learned primary judge adopted the latter, concurrent, approach. It followed that in sentencing the applicant for the three most serious and most recent offences, (maintaining a sexual relationship with a child with circumstances of aggravation) his Honour was also taking into account the applicant's offences committed from 1964 to 1993 on which his Honour was also sentencing the applicant. This is because it is not the law that if one crime is committed another crime of the same sort can be committed with little or no increase in punishment: *R v Daswani.*[6]

[9] Had his Honour adopted the former cumulative approach, the diversity and seriousness of the applicant's offending was such that his Honour would have been entitled to impose a series of cumulative sentences giving a practical effect of 12 or 13 years imprisonment. Because the offences other than those of maintaining were committed before l July 1997, such a sentence would not mean that the offences of maintaining were subject to an automatic declaration that the applicant was convicted of a serious violent offence under s 161C of the Act. It follows that had a sentence been structured by the imposition of cumulative sentences effectively giving a sentence of about 13 years imprisonment, the applicant would have been eligible for post-prison community based release after serving six and a half years imprisonment: *Corrective Services Act* 2000 (Qld) s 135(2)(e).

[10] Instead, his Honour imposed sentences of eight years imprisonment on the most serious and recent offences (maintaining a sexual relationship with a child with circumstances of aggravation) to reflect the overall criminality of all the applicant's offences before the sentencing court with lesser concurrent sentences on the other offences. In fixing the appropriate term of imprisonment his Honour was entitled to consider whether he should exercise his discretion under s 161B(3)(b) of the Act to declare the applicant to be convicted of serious violent offences in respect of the three maintaining offences. In imposing the sentences of eight years imprisonment on those offences and making that declaration in respect of them his Honour was

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1 (1987) 46 SASR 118, King CJ, 124.
2 (1992) 62 A Crim R 134, 139.
3 (1989) 167 CLR 372.
4 [1998] 1 Qd R 419, 420-21.
5 (1993) 67 A Crim R 166.
6 [2005] QCA 167; CA No 107 of 2004, 20 May 2005, [12].

correctly adopting the approach to sentencing endorsed by this Court in *R v Bojovic*.[7] The practical effect of the sentence imposed was appropriate to the seriousness of the applicant's overall offending.

[11] The learned sentencing judge did not act on any wrong principle of law in sentencing the applicant and nor was the sentence imposed outside the sound exercise of the sentencing discretion.

[12] **JERRARD JA:** On 26 April 2005 BAW pleaded guilty in the District Court to counts of having maintained an unlawful relationship of a sexual nature with three different children, A, B, and C, three of his grandchildren; to one count of indecent dealing with a boy under 14, D, his much younger brother-in-law; to 12 counts of indecent dealing with a girl under the age of 14 years, E, D's daughter; to four counts of indecent dealing with a girl under the age of 14, F; to two counts of indecent dealing with a girl under the age of 14, G; and to two counts of indecent dealing with a child under the age of 12, H. He was sentenced to eight years imprisonment on each of the three counts of maintaining, to be served concurrently; and to concurrent terms of two years imprisonment for the offence committed against D, four years imprisonment for the offences committed against E, three years imprisonment for the offences committed against F and H, and two years imprisonment for the offences committed against G. The learned sentencing judge declared in respect of the three counts of maintaining a sexual relationship, each of which had circumstances of aggravation, that BAW be deemed a serious violent offender. That declaration should be understood as being that those were serious violent offences. BAW asks leave to appeal against those sentences, arguing both that the resulting head sentence of eight years was manifestly excessive, and that in any event there ought not to have been a declaration that he had committed three serious violent offences.

[13] The circumstances of aggravation in the counts of maintaining were that each of the three complainants was under the age of 12 years and under the care of BAW during the period in which he maintained that relationship and each was, to his knowledge, his lineal descendant. BAW admitted by his plea maintaining a sexual relationship with A from 6 April 1994 until 15 January 2001, beginning when A was four and ending when she was 11. His plea regarding B admitted maintaining a sexual relationship from 6 April 1994 until 15 January 2003, a nine year period which began when B was aged two and a half and ending when she was aged 10. However, the schedule of uncharged acts on which the prosecution relied to establish those charges listed the last incident involving her as happening on 15 January 2001, when B was aged eight. Regarding C, BAW admitted by his plea maintaining a sexual relationship with her from 6 April 1994 until 3 May 2003, also beginning when she was two and a half and ending when she was 11. The length of time over which those three relationships were maintained, and the very young age of each child when the relationships began, are matters which this Court identified in *R v SAG* (2004) 147 A Crim R 301 as significant matters substantially increasing the appropriate sentence for BAW.

[14] The conduct involving A included exposing her to witnessing BAW abusing C, persuading her to place her hand on BAW's penis, rubbing a vibrator against A's vulva, inducing A to perform fellatio upon him, performing cunnilingus on A,

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7 [2000] 2 Qd R 183, 190-92.

exposing her to watching him perform cunnilingus upon C, and offering A $10 to touch him on the penis or allow him to touch her on the vulva. The acts relied on involving B included rubbing her vulva with his finger, inducing both her and A to place their hands on his penis when in each other's company, rubbing a vibrator against her vulva and when in A's company, performing cunnilingus upon her, exposing her to watching him perform cunnilingus on C and offering her $10 to touch him on the penis or allow him to touch her vagina. The conduct involving C included all of the same depravity, and rubbing his penis against that child's vulva. There appears to have been more acts involving C than either A or B.

[15] Then there are BAW's other victims. The offence committed against his brother-in-law D, then aged between eight and nine, happened between late December 1963 and late December 1964, and consisted in BAW performing fellatio upon D, and D then doing likewise to BAW. After that offence, close to 20 years passed before BAW committed the next series of offences to which he pleaded guilty, the 12 counts of indecent dealing with E, D's daughter, committed between 10 March 1980 and 2 July 1983. The offences committed against E happened when she was aged between two and five years and four months old. They involved rubbing her vulva, placing her hand on his penis and inducing her to masturbate him, inducing her to suck his penis, attempting to place his finger inside her vagina, ejaculating into her mouth after persuading her to perform fellatio, causing his dog to lick the child's vulva while BAW masturbated, persuading her to masturbate him in the presence of another unidentified small girl, and performing cunnilingus upon her.

[16] The offences committed on the child F were committed between January 1984 and 1 March 1985. That child was the daughter of friends of his with whom he went ten pin bowling. She was aged between eight and nine years when offended against. BAW admitted to four offences committed against her, one of which included persuading that child and the child G to take off their clothes and to perform fellatio on him. Each naked child in turn was then persuaded to sit on BAW's face; eventually he ejaculated. On another occasion the same conduct occurred with F and G, with each being induced to perform fellatio on him while he performed cunnilingus on each of them, and the other sexual offences committed on F also involved cunnilingus and fellatio on one occasion, and inducing that child to masturbate BAW on another.

[17] The offences committed against G were likewise committed between 1 January 1984 and 1 March 1985. G's family were friendly with BAW. Two offences were admitted which involved her, both committed when she was between six and seven. Only one of those offences admitted by BAW was alleged to have occurred in the presence of F; the other was alleged to have happened when G was alone with BAW. The first – in the presence of F and BAW – involved, on G's recollection, both children performing fellatio on BAW. G had also been induced to masturbate BAW, while he touched F's vulva. The incident admitted by his plea as having happened when G was alone with him involved her masturbating him, performing fellatio upon him, and his touching her vulva.

[18] The final victim, H, was the daughter of a friend who was in the same motorcycle club as BAW. Those offences were committed between 1 March 1993 and 1 May 1993, when that child was aged nine. The offences consisted of his rubbing her vulva when purporting to give her a piggyback, and his deliberately touching her vulva on another occasion, on which he asked "Do you like that?"; she said "No".

[19] The aggravating circumstances in BAW's conduct include committing offences against child relatives and other children over a period of 40 years; the fact that all victims were truly children when offended against, and not even young adolescents; causing E to submit to molestation in which BAW used a dog as a instrument of abuse; the very long period – nine years in the case of two grandchildren – over which BAW maintained a sexual relationship with three of his granddaughters; the very young age of each granddaughter victim when BAW began the relationship – B and C were only two and a half; E's age when BAW began offending against her, she being little more than a baby; and the feature that the abuse of each of A, B, C, F and G involved exposing those children to abuse of other children, either as witnesses or victims.

[20] In his favour are his pleas of guilty and service in the 3RAR between 1962 and 1968, which included active service in both Malaya and Vietnam. In Vietnam he suffered a serious injury to his shoulder and was evacuated in 1966. He was ultimately granted a TPI pension in approximately 1994, and has been treated for post traumatic stress disorder and other conditions. His counsel informed the learned trial judge that BAW had stopped his abuse of his three granddaughters prior to their coming forward to reveal it, and that he had earlier sought psychiatric help from around 1990 onwards in respect of mood swings, anger, flashbacks and blackouts, which he attributed to his service in Vietnam. Further, none of the complainants were required for cross-examination in the proceedings, and there were full hand-up committal proceedings. However the offences first came to light, a matter not made clear to the learned sentencing judge, BAW did make admissions when first interviewed and released on bail; he was subsequently returned to custody when the complaints were made by D and E. He admitted the offending against D.

[21] The length of time over which the unlawful sexual relationships were maintained with each granddaughter, their shockingly young ages when it began, the fact that his conduct involved having two of the granddaughters watch him abuse a third, and that it involved offering two of them money to participate in sexual abuse, makes the head sentence of eight years on those charges a light sentence rather than a heavy one. Mr Kimmins, for BAW on the appeal, did not really argue otherwise.

[22] One argument he did advance suggested that there might be uncertainty as to the maximum sentence appropriate on the maintaining counts, since they covered a period before and after 1 July 1997. That was the date on which the maximum penalty for acts of indecent dealing with children under 12 years of age, or lineal descendants, or who were in the care of the offender (and the granddaughters met all three criteria) increased from 10 years to 14 years. That increase in turn meant that the maximum penalty available for the count of maintaining increased from 14 years to life, for indecent dealing offences committed on children answering any of those three descriptions in the course of maintaining a sexual relationship with one of those children after 1 July 1997. Mr Kimmins referred to the decision of this Court in *R v Ianculescu* [2000] 2 Qd R 521, but did not suggest that that judgment actually helped his argument.

[23] It does not; the particulars – exhibited by agreement between counsel to the learned sentencing judge – of the uncharged acts on which the prosecution relied to sustain the count of maintaining in respect of each granddaughter included eight incidents all occurring after 1 July 1997, and admitted by the plea. Mr Kimmins accepted

that, had it not been for the agreement between counsel appearing before the learned sentencing judge about the use of that schedule, it would have been appropriate to charge BAW with two counts of maintaining an unlawful sexual relationship in respect of each granddaughter. One would have carried a maximum of 14 years, and each second count, that running from 1 July 1997 until the end of the period in which the relationship was maintained would carry a maximum period of life. It follows BAW was not at all disadvantaged by the manner in which the prosecution proceeded, by agreement. He committed a continuing offence as described in *R v Ianculescu*, which offence had a maximum penalty of life imprisonment. That point really went nowhere.

[24] Mr Kimmins' other argument in respect of that eight year head sentence challenged the declaration that each conviction was for a serious violent offence. That submission relied on the absence of any physical injury to any of the victims, or any evidence in the schedule of facts of any threats or coercion to them, and the absence of any digital or penile penetration. He conceded that offering two of the children money demonstrated a degree of manipulation which would be relevant when determining on a declaration, but submitted that that was the only relevant conduct.

[25] That submission had merit, but the Crown's response was that since the eight year sentence was at the lower end of the range, the declaration that these were serious violent offences was quite acceptable, since a "global" sentence was being imposed. Mr R Martin SC for the Crown contended that there was no risk of the double or unlawful punishment identified as a potential risk in the judgment of this Court in *R v Nagy* [2003] QCA 175. The learned judge could well have ordered cumulative sentences for the offences committed on the complainants D to H inclusive, and had the judge fashioned a sentence in which cumulative terms totalling, say, three years were added to the eight year term, then I do not consider BAW could have complained that that 11 year head sentence was manifestly excessive.

[26] It would not have been a sentence of 10 years or more to which s 161A of the *Penalties and Sentences Act* 1992 (Qld) automatically applied, because only the eight year terms for the offences of maintaining would have been sentences for offences described as serious violent offences in the schedule to that Act. Although that schedule does include offences constituted by the indecent treatment of children under 16, Part 9A of that Act only came into force on 1 July 1997, and all of the individual offences against the other child complainants D to H were committed before that date. Hence none of those could be declared to be serious violent offences; and this Court has construed s 161C of the Act, which describes the effect of cumulative sentences totalling 10 years or more, as requiring two or more accumulated serious violent offences to bring it into operation.[8] On such a notional 11 year head sentence BAW would therefore be required to serve only 5.5 years before being eligible for post prison community based release, although the judge could have made a discretionary declaration in respect of the eight years. On the sentence imposed he must serve 6.4 years. BAW was therefore disadvantaged by the declaration when he got concurrent sentences for his other offences, and not cumulative. Unless it can be justified, it should be removed.

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[8] See *R v Powderham* [2002] 2 Qd R 417 at [10]

[27] The analysis of earlier decisions undertaken by Fryberg J in *R v Eveleigh* [2002] QCA 219 resulted in that learned judge summarising the position[9] resulting from earlier decisions of this Court on Part 9A of the *Penalties and Sentences Act* 1992 as including the principle that where the making of a declaration is discretionary, the considerations which potentially may be taken into account in the exercise of the discretion are the same as those which may be taken into account in relation to other aspects of sentencing. That accords with the position the President took in *R v Collins* [2000] 1 Qd R 45 at 49. Matters which a court sentencing BAW must take into account, for his sexual offences committed on children, are set out in s 9(6) of that Act, and include the effect of the offences on the children.

[28] The victim impact statements tendered to the learned sentencing judge described C as very adversely affected by the abuse, as was B; A perhaps less. There were also statements describing very significant adverse effects upon E and F. Significantly, the statement from A describes that BAW had told her that if she told anyone (of the abuse) he would kill her and her family too; and the one from B describes BAW saying that (if she told anyone) he would come after her family and hurt her and them. A statement from C's mother – A and B are sisters, and C is their cousin – also records that C had told her mother that BAW had threatened the children's lives and their families if they told anyone. There was no description of any threats of that sort in the agreed schedule of facts, but the victim impact statements went in without challenge, and the description in them of threats by BAW significantly aggravates the ugliness of what he did to his granddaughters and the effect of it on them. On his sentence, BAW could have contested the claim that he had made those threats, and he did not. Making those threats does take those offences into the range of more serious ones where a declaration is justified. However, it would be appropriate for sentencing judges to keep in mind the proposition established in *R v Collins*, and repeated in *R v Orchard* [2005] QCA 141, that declarations should be reserved for the more serious convictions that, by their nature, warrant them. In these cases using threats of injury to family members to procure nine years of sexual abuse of children who were under 12 throughout that time justifies the serious violent offence declarations which were made for those offences.

[29] I would dismiss the application.

[30] **WILSON J:** I agree with the reasons for judgment of Jerrard JA and with the order His Honour proposes.

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[9] At [111] of that judgment