SUPREME COURT OF QUEENSLAND

CITATION:	*R v MAN* [2005] QCA 413
PARTIES:	**R** **v** **MAN** (applicant/appellant)
FILE NO/S:	CA No 109 of 2005 DC No 496 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	11 November 2005
DELIVERED AT:	Brisbane
HEARING DATE:	2 November 2005
JUDGES:	McMurdo P, Keane JA and Atkinson J Judgment of the Court
ORDER:	**1. Application for leave to appeal against sentence granted** **2. Appeal allowed** **3. Set aside the sentence imposed at first instance and instead impose a sentence of five years imprisonment with a recommendation for post-prison community based release after 18 months**
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 GRANTED – PARTICULAR OFFENCES – SEXUAL OFFENCES – applicant pleaded guilty to ex officio indictment containing two counts of aggravated maintaining a sexual relationship with a child under 16 years – sentenced to nine years imprisonment – complainants twin girls aged between 12 and 15 at time of offending – applicant aged between 19 and 22 at time of offending and 29 at sentence – applicant had been homeless and moved into the house the complainants lived in with their mother, older brothers and sisters and some young adults when aged 18 – complainants willing participants in offending – each complainant considered herself the applicant's girlfriend and competed for the applicant's

attention – relationships carried out openly and with the apparent consent of adults who had care of the complainants – no violence or intimidation used by applicant to further relationships – applicant fathered two children to each complainant – three of the children born while complainants aged under 16 – one child born outside offending period when complainant aged 18 – applicant has maintained a healthy and responsible father-child relationship with all the children whom he has also financially supported – applicant given legal custody of two of the children in 2003 – applicant at sentence had full-time custody of one of the children – co-operation with police and full admissions made – applicant contends the relationships just developed and stated in his police interview "we were all just kids and we didn't really think about it" – good work history – no like criminal history – evidence of rehabilitation – circumstances suggesting applicant unlikely to reoffend – whether sentencing process affected by errors of fact – whether sentence manifestly excessive

R v BAX [2005] QCA 365; CA No 162 of 2005, 30 September 2005, cited
R v KAI [2002] QCA 378; CA No 201 of 2002, 24 September 2002, distinguished
R v Le [1995] QCA 479; [1996] 2 Qd R 516, cited
R v SAG [2004] QCA 286; (2004) 147 A Crim R 301, distinguished

COUNSEL: S T Courtney for applicant/appellant
R G Martin SC for respondent

SOLICITORS: Butler McDermott & Egan (Nambour) for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **THE COURT:** The applicant pleaded guilty on 14 March 2005 to two counts of aggravated maintaining a sexual relationship with a child under the age of 16 years. The first count occurred between October 1995 and February 1998 and the second between November 1995 and December 1998. The complainants were twin girls aged between 12 and 15 years at the time of the offending. The applicant was sentenced to nine years imprisonment. He contends that the sentence was manifestly excessive. He was granted an application for an extension of time within which to apply for leave to appeal against sentence on 2 August 2005.

[2] This Court deals with a great number of sexual offences, many involving the exploitation of young people. The facts of this offence are, however, unique. The applicant was 29 years old at sentence and aged between 19 and 22 years at the time of the offences. The complainants lived in a household with their mother, older brothers and sisters and some young adults in a Queensland country town. The applicant was homeless. He had a friend who introduced him to the complainants' older sister. The applicant was invited to move into the household in early 1995

when he was 18 years old. His sexual relationship with the complainants began in mid to late 1995 and by the Christmas holidays had progressed to him having sexual intercourse with both girls. The complainants were sexually active before their relationship with the applicant and were willing participants, competing for his affection. Each considered herself to be his girlfriend. The applicant has fathered two children to each of the complainants. M had his first child when she had just turned 14 and his second when she was 15. K had her first child to the applicant when she was 14 and her second, outside the time period of the offences, when she was 18. M moved to the Sunshine Coast hinterland where she lived with the applicant and their child when she was 15 but returned to her family to find she was pregnant with her second child. She then commenced a relationship with another young man. K moved to a beachside town to live with the applicant when she was 14. When she realized she was pregnant the applicant urged her to have an abortion but she returned to the family home and gave birth to a daughter, E. When E was 11 months old the applicant asked K to move with him to Toowoomba. The applicant and K then lived together "as a family" with periodic separations until their second child, T, was born in June 2001. He and K remained in a relationship until the middle of 2003 when they separated permanently. It appears that, after proceedings in the Family Court in which custody of both children was awarded to the applicant in October 2003, E has lived primarily with K while her son, T, has lived with the applicant. The applicant has provided financial support for all his children.

[3] In August 2004, after their relationships with the applicant had broken down and he had been awarded custody of E and T, the complainants finally gave effect to the threats they had made to the applicant from time to time and gave statements to police about the applicant's unlawful conduct.

[4] The applicant co-operated with police and made full admissions. His description of the complainants' household was one of dysfunctionality. Their mother drank alcohol heavily and was often away from home. She wanted either him or another of the young adults living in the household to be at home when she was away in case the police came because she did not want to lose custody of her children. He told police that he became fond of the complainants and the relationship developed from this friendship.

[5] M provided a victim impact statement in which she expressed her anger at the applicant for his conduct which she said has left her with a lifelong scar and took her childhood away. She feels embarrassed in public when her children call her "mum". K did not provide a victim impact statement.

[6] The applicant has a relatively minor criminal history for street, drug and minor property offences for which he was sentenced to community based orders. He has no convictions for like offences. The learned sentencing judge clearly, and with respect correctly, regarded that history as of no significance in relation to the offences of present concern.

[7] The applicant's counsel at sentence provided the following additional information. The applicant grew up with his parents and two sisters on the Sunshine Coast. When he was 15 years old his family moved to Western Queensland where he was told he was to work on the property and shoot kangaroos with his father. He rejected this option and moved away from home at 15, existing on a young

homeless person's payment. He moved to Roma where he unsuccessfully attempted to complete his secondary education. He lived in a caravan with his grandfather for a period and then with an uncle in a rural region near the complainants. He returned to high school in country Queensland for a time. Immediately prior to moving into the complainants' home when he was 18, he was sleeping on football fields and showgrounds and attempting to complete his education. The household consisted of the mother, the complainants, four other siblings and a group of older adults aged between 20 and 25 who looked after the children when the mother was away. His position in the household was that he was a teenage friend to both the mother and the older children. His relationship with the complainants simply developed. His counsel repeated his words in the police interview: "We were all just kids and we didn't really think about it". The applicant acknowledged that he knew the girls were under age and that as an older teenager and young adult he should have ensured that their interest in him did not develop into sexual contact. The applicant has maintained a healthy and responsible father-child relationship with all his children whom he has also financially supported. At sentence he had full-time custody of his three year old son, T.

[8] The applicant was in regular employment prior to his sentence. References tendered on his behalf indicated that he was a good worker, well regarded by his employers, at least one of whom is prepared to re-employ him once these matters are finalized.

[9] A letter from the applicant's mother explained that he had faced up to his responsibilities as a father and was "a much better father with his children than his own father has been with him"; although she did not condone what her son had done, she described him as "the best father to all the children". She observed that the complainants' father, who had been sent to prison for sexually molesting their older sister, had come back into their lives shortly before they complained to police about the applicant's conduct.

[10] Another reference from a family friend described the move by the applicant's family to Western Queensland when the applicant was about 16 as having a catastrophic effect on him.

[11] Most unusually, a letter from the complainants' mother was also tendered on behalf of the applicant. Whilst she may not be blameless in this disastrous series of events which have detrimentally affected so many young lives, her observations are of some use in better understanding the full background to these offences. She emphasized that at the time the applicant was living in her household with the complainants, whom she described as "uncontrollable", "he was still just a kid. Even though he was older than my girls, mentally he wasn't and even though I don't condone what happened I know if it had been any of the other guys they were running around with they would not of [sic] stuck around to take responsibility". She said that both complainants "chased him with great intensity". She emphasized that the applicant had been "a fantastic father" to the complainants' children. Both K and M have left their children with the applicant to suit "their party schedule". She opined that "being a responsible parent already has" rehabilitated the applicant.

[12] The prosecutor at sentence submitted that the applicant entered the household taking on a quasi-carer role; he would sign the girls' report cards from time to time. She urged the judge to impose a sentence of between 10 - 12 years imprisonment, perhaps at the lower end of that range to reflect his plea of guilty. Defence counsel

submitted a sentence of between seven to nine years imprisonment should be imposed. Both counsel at sentence referred his Honour to cases which were said to be comparable. They were not. For reasons developed later in this judgment they were much more serious examples of maintaining a sexual relationship with a child than this.

The sentence

[13] In sentencing the applicant the learned sentencing judge said the closest case to which he had been referred was *R v KAI*.[1] His Honour declined to hold that the applicant stood in loco parentis towards the complainants at the time of the offences. He also noted that there was no element of violence or intimidation used by him to further his relationships with the complainants. He took into account as well the applicant's co-operation with the police and his plea of guilty upon the presentation of an ex officio indictment.

[14] In imposing a sentence of nine years imprisonment, the learned sentencing judge was influenced by the consideration that a heavy sentence was required by reason of the seriousness of the offences and the need for general deterrence.

[15] The learned sentencing judge also referred to the fact that the applicant has "maintained financial responsibility for the infant children" as a matter in the applicant's favour and that "as much as possible, it seems, [the applicant has] tried to have emotional contact with them too".

The arguments for the applicant

[16] The applicant asserts that these last mentioned observations by the learned sentencing judge reveal an error in that they erroneously minimize his active role as the father of all his children, especially T. His Honour's failure explicitly to recognize the applicant's role as custodial parent of T is of some importance in the very special circumstances of this extraordinary case.

[17] Further, the ongoing relationships between the applicant and the complainants seem to have proceeded with the consent of adults who had the care of the complainants and who should have exercised greater oversight and control in relation to the activities of these three immature young people. The learned sentencing judge seems to have accorded no significance to the circumstances that those adults responsible for the care of the complainants, and who also had some ability to control the applicant's behaviour, evidently allowed the sexual relationships to continue, and that no complaint against the applicant was made to the police until August 2004, that is, more than five years after the offences had been committed.

[18] Further, by the time the applicant came to be sentenced, the applicant had a history of providing financial support for his children; and he had become the custodial parent of his son T. He had thus shouldered responsibility for his earlier misconduct in a way which called for recognition of the strong claims of rehabilitation as a consideration bearing upon an appropriate sentence.

Discussion

[19] Previous decisions of this Court suggest a wide range of terms of imprisonment, from seven to 13 years, for this kind of offence.[2] A cursory review of the cases

---

1 [2002] QCA 378; CA No 201 of 2002, 24 September 2002.

2 See, eg, *R v KAI* [2002] QCA 378; CA No 201 of 2002, 24 September 2002; *R v D* [2003] QCA 426; CA No 211 of 2003, 25 September 2003.

suggests therefore, that the applicant received a sentence at the middle to lower end of the applicable range, but the applicant's contention is that the sentencing process was affected by the errors of fact referred to above and was in any case manifestly excessive in the unique circumstances here.

[20] The respondent emphasizes the following disturbing features of the applicant's offending. Both complainants were very young and the applicant's relationship with each of them persisted for a long period. The applicant took no precautions to prevent pregnancy or disease. He persisted in the relationships undeterred by pregnancy. He took advantage of their immature and competitive infatuation with him. His actions resulted in the complainants having babies while they were still children themselves. These features of the case are, however, also consistent with the view that the applicant was himself grossly immature and lacking guidance and direction rather than a calculating predator or a paedophile.

[21] It is clear that, in this case, the degree of sexual exploitation of young girls by an older man is by no means as serious as it is in cases where a mature adult male acts in a predatory and clandestine way.[3] *KAI*, for example, which particularly influenced the primary judge, involved the predatory acts of a stepfather who was 30 years older than the nine year old complainant. KAI preyed on his stepchild for a six year period and a child was born. A sentence of 10 years imprisonment was imposed. Unsurprisingly this Court considered KAI's sentence was not manifestly excessive. In *R v SAG*[4] Jerrard JA, with whom the other members of the Court agreed, set out factors which may increase a sentence for an offence of maintaining a sexual relationship with a child.[5] Those observations were made in the context of offences committed in secret by SAG, a mature man, on his three stepdaughters. This case is in a quite different category of maintaining offences. To compare this case to cases like *KAI* and *SAG* is to misconceive the seriousness of conduct like KAI's and SAG's which amounts to a breach of trust in a grossly unequal relationship, usually perpetrated in secret. That is not to excuse or condone the applicant's unlawful conduct but the greater closeness in maturity, age and balance of power between him and the complainants places this offence in a different and less serious category than cases like *KAI* and *SAG*.

[22] Further, the continuance in an open way of the relationships between the complainants and the applicant with the evident consent of those who were responsible for the care of the complainants and who could have exercised control over the applicant must be recognized as somewhat lessening the criminality of the applicant's offending.

[23] We emphasize that all this in no way excuses the applicant's conduct: it is simply to recognize that this is far from the worst case of this kind of offence, and is not fairly comparable with cases in which a sentence of 13 years imprisonment has been regarded as necessary to recognize the seriousness of the offence and to give effect to the need for general deterrence. The range submitted by the Crown prosecutor at first instance of between 10 and 12 years imprisonment was grossly excessive in the unique circumstances here. Even the sentence imposed of nine years imprisonment in the unusual circumstances of this case immediately appears unjust and manifestly

---

3 Cf eg, *R v R* [1998] QCA 360; CA No 231 and CA No 232 of 1998, 25 August 2005; *R v Ruhland* [1999] QCA 430; CA No 147 of 1999, 15 October 1999.

4 [2004] QCA 286; (2004) 147 A Crim R 301.

5 Above at [19].

excessive. That observation makes it a matter of some concern that the applicant was refused legal aid, apparently on a merit-based test, on 23 August 2005.

[24] In this most difficult case, the very special considerations to which we have referred in relation to the circumstances of the offending and its aftermath are matters relevant to the sentencing of the applicant that were not taken into account by the learned sentencing judge.

[25] The applicant's unlawful and irresponsible conduct as a young man taking advantage of the unfortunate young complainants' interest in him was serious criminal behaviour. It resulted in the birth of four innocent children, three during the periods of the offending when the complainants were 14 or 15 years old, still children themselves. Because of the need for general deterrence and to protect foolish and sexually precocious young people, the applicant's grossly inappropriate conduct warranted a substantial term of actual imprisonment, although it was conduct at the lower end of the range of seriousness for offences of this type. That is because there was neither the secrecy nor the great discrepancy in the power relationship, maturity and ages between complainant and offender which is, regrettably, all too often the norm in offences of this type. The protagonists were all young people with unsettled lives. For much, if not all, of the period of the proscribed relationship, it was conducted openly and with the evident consent of those responsible for the care of the complainants. Whilst that may not always amount to a mitigating factor, it was here where the applicant was also a relatively vulnerable young adult living in the same household as the complainants when the relationship commenced and subject to the authority of the complainants' mother. The relationships between the applicant and complainants, while grossly inappropriate, appear to have been the result of affection, sanctioned by those responsible for the care of the complainants, rather than a cold-hearted and calculating quest for sexual gratification pursued callously and in secret.

[26] Since K turned 16 she and the applicant lived from time to time as a young family in an apparently equal relationship in which the applicant has done tolerably well in meeting his fatherly and financial responsibilities towards the children produced from his unlawful unions with both complainants. This is convincing evidence of his rehabilitation. He has no like criminal history. He co-operated with the police and pleaded guilty at an early stage. He is a hard worker and from all reports a very conscientious father to all his children and a responsible carer for, and formed real parental bonds with, his three year old son T. He is not a paedophile who has abused his position of power in a family relationship. These circumstances suggest that the applicant is quite unlikely to reoffend.[6] It is not in the interests of any of those involved in this extraordinary case, or of the community, to impose on the applicant a sentence of imprisonment which is so long as to guarantee the rupture of the parental bond which has formed over the years between the applicant and his children, especially T, and to relieve the applicant of his financial responsibilities for his children. The effect of a sentence on an offender's young children is a factor that may properly be taken into account,[7] particularly in the unique circumstances here which include the fact that the offences for which the applicant is being punished resulted in the birth of these children. The applicant has demonstrated over the years since the offending ceased a willingness to accept responsibility for

---

6 Cf *R v BAX* [2005] QCA 365; CA No 162 of 2005, 30 September 2005 at [3].

7 *R v Le* [1996] 2 Qd R 516 at 518 - 519, 522.

his actions that suggests a lengthy period of incarceration is unnecessary to impress upon him the gravity of what he has done.

[27] Because of the background to his offending, his custodial parental responsibilities and the complex human relationships involved between the protagonists which must be maintained at some level because of the shared children, the applicant, the community and all concerned would benefit from him having a lengthy period of community supervision.

Conclusion and orders

[28] In this unique case, with its many mitigating factors, we would grant the application for leave to appeal against sentence, allow the appeal, set aside the sentence at first instance and instead impose a sentence of five years imprisonment with a recommendation for post-prison community based release after 18 months.