SUPREME COURT OF QUEENSLAND

CITATION:	*R v BAY* [2005] QCA 427
PARTIES:	**R** **v** **BAY** (applicant/appellant)
FILE NO/S:	CA No 110 of 2005 DC No 110 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	18 November 2005
DELIVERED AT:	Brisbane
HEARING DATE:	31 October 2005
JUDGES:	McMurdo P, Jerrard JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal against sentence granted** **2. Appeal allowed to the extent of setting aside the sentence of 12 years and substituting in lieu thereof imprisonment for a period of 10 years on count one and setting aside the sentence of 10 years and substituting in lieu thereof imprisonment for a period of 8 years on counts 2-37**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – MISCELLANEOUS MATTERS – MAXIMUM SENTENCE – GENERALLY – where applicant convicted of one count of maintaining a relationship with a child under the age of 16 years with circumstances of aggravation, three counts of incest, four counts of sexual assault and 29 counts of indecent treatment of a child under 16 years – where the penalty for maintaining a sexual relationship with a child was increased twice during the period of the offending – whether the sentence was manifestly excessive CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO

ACCOUNT – MISCELLANEOUS MATTERS – PLEA OF GUILTY, CONTRITION AND CO-OPERATION – where the applicant pleaded guilty after the trial had commenced but meant that the complainant and her family were not required to give evidence – where the means of mitigating the sentence are limited as the applicant is convicted of a serious violent offence and must serve 80 per cent of the sentence – amelioration of the sentence requires a reduction to the head sentence

Criminal Code 1899 (Qld), s 222, s 229B
Penalties and Sentences Act 1992 (Qld), s 13

Cameron v The Queen (2002) 209 CLR 339, considered
R v AP [2003] QCA 445; CA No 435 of 2002 and 133 of 2003, 17 October 2003, considered
R v B [1999] QCA 372; CA No 394 of 1998, 10 September 1999, considered
R v BAW [2005] QCA 334; CA No 116 of 2005, 9 September 2005, considered
R v D [2003] QCA 426; CA No 211 of 2003, 25 September 2003, considered
R v DAF [2004] QCA 368; CA No 237 of 2004, 8 October 2004, considered
R v F [1996] QCA 490; CA No 418 of 1996, 6 December 1996, considered
R v GQ [2005] QCA 53; CA No 430 of 2004, 4 March 2005, considered
R v Hoban [2000] QCA 384; CA No 173 of 2000, 22 September 2000, considered
R v KAI [2002] QCA 378; CA No 201 of 2002, 24 September 2002, considered
R v Krieger [1991] CCA 53; CA No 13 of 1991, 28 March 1991, considered
R v S [1993] QCA 367; CA No 316 of 1993, 7 October 1993, considered
R v SAG [2004] QCA 286; (2004) 147 A Crim R 301
Siganto v The Queen (1998) 194 CLR 656, considered
York v The Queen [2005] HCA 60, considered

COUNSEL: A Boe (sol) for the applicant/appellant
P F Rutledge for the respondent

SOLICITORS: Boe Lawyers for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with the reasons for judgment of Atkinson J and with the orders she proposes.

[2] **JERRARD JA:** In this appeal I have read the reasons for judgment of Atkinson J and the orders proposed by Her Honour, and respectfully agree with those. Two things save this appellant from falling within that class of offenders for whom a

sentence in the range of 12 years imprisonment is appropriate after a plea (following the offender having made admission of guilt to police officers and where the complainant was not required to give any evidence). One is the fact that he was not convicted of any offences of rape, and the other is that he committed only one offence of unlawful carnal knowledge of the complainant during the slightly over seven years in which he maintained an unlawful sexual relationship with her. The length of that relationship, her age (7) when it first began, the acts which she was forced to do, and the emotional abuse to which the complainant was subjected to ensure that she continued to submit, are matters which in combination show that the appellant denied the complainant a childhood. That, and the offences he committed after the date on which the charged relationship ended, amply justifies a sentence in which he must serve a minimum term of eight years before being eligible for post-prison community based release.

[3] **ATKINSON J:** On 8 April 2005, the applicant for leave to appeal against sentence pleaded guilty on an indictment containing 37 counts. He was sentenced to 12 years imprisonment on count 1 and 10 years imprisonment on each of counts 2 to 37; each sentence to be served concurrently. He argued the sentences imposed were manifestly excessive.

[4] The first count concerned the offence of maintaining an unlawful sexual relationship with a child under the age of 16 years with circumstances of aggravation. The circumstances of aggravation were that during the course of the relationship, the application had unlawful carnal knowledge of the complainant, who was his daughter, knowing that she bore that relationship to him and that during the course of the relationship, he indecently dealt with the complainant and that she was under his care. The period involved was seven years from 31 May 1993 to 8 July 2000.

[5] Counts 2 to 25 and 27 to 31 were offences of indecent treatment of a child under 16 with a circumstance of aggravation. Count 2 concerned an offence that occurred on a date unknown between 1 June 1993 and 23 October 1993; the dates on the other counts of indecent treatment of a child under 16 with a circumstance of aggravation were progressive until count 31 which occurred on 7 July 2000. The incest offences occurred on a date unknown between 5 and 11 September 1999 (count 26), on a date unknown between 31 January and 1 March 2002 (count 32) and on a date unknown between 1 June 2002 and 1 January 2003 (count 33). The counts of sexual assault occurred between 1 January and 10 February 2003 (counts 34, 35 and 36) and on a date unknown between 31 March 2003 and 1 May 2003 (count 37).

[6] The applicant initially pleaded not guilty before a jury. After a *voir dire* was held which determined that his interviews with the police were admissible he changed his plea on each charge to guilty.

[7] The offences occurred over a 10 year period between 31 May 1993 and 1 May 2003 and commenced when the complainant was seven years old. The offences came to light when the complainant and her mother made a complaint to the police on 24 May 2003. The police were called to the applicant's residence that night and he made admissions which were recorded on a field tape and also in a formal interview conducted at the police station on 25 May 2003. Later that day the complainant gave a statement to the police setting out in detail the offences that occurred.

[8] During his interviews with the police, the applicant admitted to molesting the complainant, his eldest daughter, over a period of twelve years. He said that the last occasion prior to the interview had been four months ago. It was clear during the police record of interview that the applicant was ashamed and embarrassed about what he had done and was reluctant to go into the details. His admissions were in the form of general admissions such as that he would plead guilty to everything as well as some specific admissions. Some of his admissions accepted the enormity of what he had done whereas in others he endeavoured to minimise his offending behaviour. However he did appear to be genuinely contrite and remorseful.

[9] The complainant is the second eldest of 10 children and the oldest girl. The applicant is not her biological father but was married to her mother for 13 years and acted as the complainant's father.

[10] The first offence occurred when she was seven years old. Counts two to four concern an incident that occurred sometime between 1 June 1993 and 23 October 1993. The applicant took the complainant child for a drive around the country town where they were living one night. The front seat was a bench seat and as the applicant was driving he told her to move over closer to him. He reached across and touched her on the vagina. He rubbed her vagina for a few minutes and after a while he brought out his erect penis and put her hand around his penis. He caused her to masturbate him for about five minutes and then told her to lie down on her side of the seat with her head facing towards his penis. The applicant put his penis into her mouth. After a while he stopped and told her to get up and they went home. She was feeling scared and didn't know what was going on. Not long after that, that night or the following day, the complainant's mother asked her if the applicant was doing rude things to her and the complainant told her what had happened. Her parents had an argument as a result.

[11] Count five concerned an incident which occurred in 1993, a few days before the first birthday of one of the complainant's younger sisters, when the complainant's mother and sister went to the hospital when her sister was ill. The complainant was asleep in her room when the applicant woke her and told her to go into his room. He sat her on the bed, pulled her pants down and rubbed her vagina for about three minutes or so, he then made her suck his penis and then required her to sit on his face while he licked her vagina. Those events constituted counts five, six and seven on the indictment. While this occurred she was still only seven years old.

[12] Three more counts of indecent treatment occurred at different times during 1993 which involved the applicant performing oral sex on the complainant, including on one occasion where he was interrupted by the complainant's brother coming into the room.

[13] To avoid his advances, the complainant would pretend to be asleep or stay over at friends' houses or invite friends to stay with her. She was indecently dealt with two or three times per fortnight over the following two years.

[14] Counts 11 and 12 occurred sometime during 1994 when he required her to perform oral sex on him and showed her him ejaculating into his hand. The complainant was visibly upset and the applicant told her he was sorry and wouldn't do it again. After that she lived with her grandmother for a period of time.

[15] Counts 13 to 21 refer to indecent treatment of the complainant when she was 10 years old. The first occasion occurred when the complainant's mother went into hospital two weeks before the birth of the complainant's brother. The applicant put on a pornographic video and made the complainant watch it before standing her up against the wall and then putting his finger into her vagina which hurt her. The applicant then inserted a finger into the complainant's anus and then pushed her head down and placed his penis into her mouth and made her perform oral sex on him. She was then forced to masturbate the applicant. He then again put his fingers into her vagina. On another occasion, a few days later, the applicant required the complainant to perform oral sex on him, got her to masturbate him, inserted a finger into her vagina and then into her anus.

[16] Counts 22 to 26 involve offences that occurred with the complainant was 12 or 13 years old. The dates of various offences were able to be identified by occasions where her mother was away from home because of child-birth or illness. The offences included touching the complainant on the vagina or inserting his fingers into her vagina, requesting her to perform oral sex on him or performing oral sex on her and then, in September 1999, the applicant had sexual intercourse with the complainant. When she started to cry he stopped and masturbated.

[17] The complainant did not consent to any of this sexual activity but didn't tell anyone. The applicant asked her if she liked it. When she told him that she did not, he got angry and upset and took it out on the complainant, her brothers and sisters and her mother by hitting them. Once when she got into trouble, the complainant walked towards a friend's place before returning home. When she returned home, the applicant punched her in the face and threatened her that if she left, he would turn his sexual attention to her two younger sisters.

[18] The applicant did not offend for some time after that. When the complainant was in grades nine and 10, there were only two occasions when her father required her to perform oral sex on him. The offences charged in respect of this were counts 28 and 29.

[19] Count 30 occurred when the complainant was home during the day because her mother was pregnant and needed help at home. She went to pick up her youngest sister who was crying. When her father handed her the baby he grabbed the complainant's vagina and inserted a finger of his other hand into her vagina. Count 31 occurred when the complainant and the applicant went to the hospital to visit her mother who had just given birth. On the way to the hospital, he lifted the complainant's dress, put his hand down the front of her underpants, touched her vagina and tried to insert his finger. He did not molest her for the rest of the year.

[20] The next offence of incest, the subject of count 32, occurred in February 2002 when she was 16 years old. Late at night when everyone else was at home asleep, the applicant woke her up and took her into a room where there was a pool table. He told her to suck his penis, told her he was sorry and then had sexual intercourse with her before ejaculating on her leg. She said she thought she couldn't tell him to stop as she was worried that he would do the same thing to her sisters if she didn't do what he wanted.

[21] Another offence of incest occurred in June 2002 after the complainant had been made to perform oral sex on the applicant. That constituted count 33. The four

counts of sexual assault occurred when the complainant was 17 years old. Between the count of incest and the counts of sexual assault, there were other occasions on which the applicant inserted his fingers in the complainant's vagina or anus and when he performed oral sex on her or got her to perform oral sex on him.

[22] On one occasion they had been arguing and she had wanted to leave home and he told her that she could leave but said that he would do it to her three younger sisters. On one occasion the complainant was with the applicant in a relatively public place. He rubbed her vagina outside and inside her jeans and then drove her to another place where he made her masturbate him and then performed oral sex on her.

[23] In April 2003, her mother and father had an argument and he said he was going to kill himself. He left the house and came back in the afternoon and ordered the complainant into the car. He drove her to an isolated spot and told her that he and her mother were fighting because the complainant wouldn't let the applicant do what he wanted to do to her. On the way home he threatened to kill himself.

[24] When they got home she went to her auntie's place to hide. Her father arrived and she hid. She could hear him swearing that he had seen her in the house. He then drove off but came back and saw her through a window. He said to her "you lying dog cunt. Get in the car." He was also abusing her friend so she got in the car. He ripped off the rear vision mirror and punched the roof of the car and the dashboard. He put his fist up towards her and yelled out "I should punch your fucking head in." He asked her why she had told "her" and the complainant told him that she hadn't told her. He then said "I need to touch you once more so that I can satisfy this urge. Then I can get over it." She refused so he said he was going to kill himself.

[25] The applicant drove to a more isolated spot and told the complainant that if she wouldn't let him touch her, he would have to rape her. He was yelling abuse at her and speeding and said that he wasn't going to drive her home because she would tell her mother and that he was going to rape her. She was frightened when he stopped the car and grabbed her breasts and squeezed them and then said he would change and that he would give her a fatherly kiss. She was frightened and he accused her of not trusting him and persuaded her to kiss him. When she did, he grabbed the back of her head and pushed his tongue into her mouth. He then said he wouldn't do that again but asked if he could touch her. She was crying and he touched her breasts on the outside of her clothes and then touched her vagina on the outside of her clothes. He then said he was sorry and drove her home.

[26] The following month the complainant and her mother went to the police and spoke to them about what had happened. When he came home, the complainant's mother would not let him in and told him that they had been to the police station. When he said he was going to kill himself the complainant's mother rang the police and that is when they conducted the first field interview with him, to which I have referred earlier in these reasons.

[27] The applicant was sentenced to 12 years imprisonment on count 1 and 10 years imprisonment on each of the other counts.

[28] The sentencing judge took into account the regular continuing sexual molestation and the nature of the offences including that sexual intercourse occurred for the first when the complainant was aged 13. The judge took into account the applicant's remorse and frank admissions which also show that the applicant was aware of what

he was doing and what effect it was having on the complainant. The learned sentencing judge referred to the effect of the profound and lasting impact of the offences on the complainant and her family. He also took account of the applicant's co-operation and that he did not cross-examine the complainant or any family members at the committal and his shame at what he had done and also the loss of his marriage and family. However this offending was prolonged, persistent and on occasions accompanied by threats.

[29] There are many cases in which, as Jerrard JA observed in *R v SAG* [2004] QCA 286 at [18], a lengthy sentence has been upheld or imposed on appeal where an offender has been convicted in respect of one child victim only. These include cases where a sexual relationship has been maintained, as it was in this case, for a very long time. His Honour observed:

> "Those matters including an offender convicted in respect of one child victim only, and on whom lengthy sentences were upheld or imposed on appeal, included the matters of *R v S* [1993] QCA 367 (15 years); *R v L* [1999] QCA 423 (11 years); *R v R* [2000] QCA 279 (11 years); *R v Myers* [2002] QCA 143 (11 years); *R v Young; ex parte A-G (Qld)* (2002) 135 A Crim R 253 (10 years); *R v C; ex parte A-G* (Qld) [2003] QCA 134 (10 years); *R v H* [2003] QCA 392 (8 years); *R v D* [2003] QCA 426 (10 years); *R v AP* [2003] QCA 445 (14 years); and *R v LJ* [2004] QCA 114 (14 years). … The outcome of *R v A* and *R v LJ* shows that similar sentences can be expected for protracted, extremely abusive and incestuous relationships (it lasted 11 years in *R v LJ*) in which incest is the offence charged, as can be expected in cases of prolonged and abusive relationships in which children are in other varieties of care, and in which maintaining a sexual relationship is the most serious offence charged."

[30] At [19] Jerrard JA referred to the matters which substantially increase a sentence for an offence of maintaining a sexual relationship which include, as are relevant here:

- the young age of the child when the relationship thereafter maintained first began;
- the lengthy period for which that relationship continued;
- that there was unlawful carnal knowledge of the victim on three occasions and many other offences of a sexual nature;
- there had been a parental relationship between the applicant and the complainant;
- there was evidence of emotional blackmail and other manipulation of the victim.

[31] The complainant in this case was aged only seven when the abuse thereafter maintained began and the relationship continued for seven years and thereafter there were offences of incest and sexual assault committed for the following three years until she reported it to police. The abuse was of many different kinds including digital penetration of the vagina and the anus, performing oral sex on the victim and

requiring her to perform oral sex on the applicant, requiring her to masturbate him and occasions of non-consensual sexual intercourse.

[32] During the whole of the time, the applicant was living in a parental relationship with the complainant. There was physical assault and threats of further physical violence and also, perhaps even more damaging, threats that if she did not comply with his demands then he would sexually abuse her younger sisters. He blamed her for his argument with her mother.

[33] The factors which mitigate the penalty include the remorse the applicant showed as well as his admissions to the police and co-operation with the administration of justice both by sparing the victim from any contested hearing and by his plea of guilty after the voir dire.

[34] Whether or not the sentence imposed was manifestly excessive depends on a close examination of the sentences imposed in similar cases, taking into account the maximum penalty for the offences.

Maximum penalties

[35] The offence of maintaining a sexual relationship with a child is found is s 229B of the *Criminal Code*. It was first included in the *Criminal Code* on 3 July 1989.[1] It now carries a maximum penalty of life imprisonment. That has been the penalty since 1 May 2003 by reason of s 18 of the *Sexual Offences (Protection of Children) Amendment Act* 2003 (Qld).

[36] Prior to this time the maximum penalty for the offence varied depending on whether or not there were circumstances of aggravation. On 1 July 1997, the maximum penalty for maintaining a sexual relationship with a child, without any relevant circumstances of aggravation, was increased from seven years to 14 years imprisonment.[2]

[37] Prior to 2003, the maximum sentence increased if there were circumstances of aggravation. The increase in the sentence depended on the maximum sentence that could be imposed for the offence that represented the circumstance of aggravation. Prior to the amendments in 1997, s 229B(1B) provided that the maximum penalty was 14 years if, in the course of the relationship, the offender committed a sexual offence for which the liability for imprisonment was more than five years and less than 14 years. If the offender, in the course of the relationship, committed a sexual offence for which he or she was liable to 14 years or more imprisonment, the offender was liable to imprisonment for life. After the 1997 amendments when the maximum penalty for maintaining a sexual relationship with a child without any circumstances of aggravation was increased to 14 years, the commission of an offence of a sexual nature committed during the course of that relationship punishable by imprisonment of 14 years, was a circumstance of aggravation which increased the maximum period of imprisonment which could be imposed to life imprisonment.

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1 *Criminal Code, Evidence Act and other Acts Amendment Act* 1989 (Qld) (No 17 of 1989), effective 3 July 1989.

2 *Criminal Law Amendment Act* 1997 (Qld) (No 3 of 1997) s 33.

[38] Prior to 2003, therefore, the maximum penalty for maintaining a relationship with a circumstance of aggravation required the court to consider the maximum penalty for the offence or offences that represented any such circumstance of aggravation. The penalties for many of those offences also increased in the decade from the mid nineties. For example, one of the circumstances of aggravation in this case is that during the course of the relationship, the applicant had unlawful carnal knowledge of the complainant, who was his daughter, knowing that she bore him that relationship. That is the offence of incest under s 222 of the *Criminal Code*. The maximum period of imprisonment that could be imposed for incest is life imprisonment. Since 1 July 1997, the offence of incest by a man has been widened so that, *inter alia*, it includes offspring who are in a half, adoptive or step relationship with the offender. The maximum penalty faced by the applicant on count 1 was therefore life imprisonment.

[39] The maximum penalties applicable to the other 36 counts on the indictment were 10 years imprisonment on counts 2 to 21 and 34 to 37; 14 years imprisonment on counts 22 to 25 and 27 to 31; and life imprisonment for counts 26, 32 and 33.

[40] The earliest relevant case referred to by the parties was *R v Krieger* [1991] CCA 53; CA No 13 of 1991, 28 March 1991 where the Court of Criminal Appeal upheld the sentence of 15 years imprisonment on an applicant who was convicted of a wide variety of sexual acts involving the corruption of a seven year old child. It is an example of an even more serious case than the present. The sexual relationship was maintained for a period of slightly over four years. The applicant was her uncle who was living in the same family home. Those sexual acts included hundreds of occasions of carnal knowledge as well as oral sex, digital activity, exposure to pornographic material and sodomy. Many of the offences carried a maximum of life imprisonment. The number of offences of carnal knowledge would appear to make that case worse than this case.

[41] In *R v S* [1993] QCA 367 the Court allowed an appeal against sentence and reduced a sentence of 20 years to that of 15 years. In that case the applicant had pleaded guilty to maintaining an unlawful sexual relationship with his natural daughter over a four year period commencing when she was four years old. The applicant had subjected the child to numerous and repeated acts of indecency including procuring her to masturbate him, the performance of oral sex by each of them on each other, penetration of her anus and vagina with his finger, attempted penetration of her vagina and anus with his penis and at least one act of sodomy and one act of rape.

[42] A more recent case which appears to be worse than the present case is *R v AP* [2003] QCA 445. The applicant was convicted after trial of one count of maintaining an unlawful sexual relationship with a child under 16 with a circumstance of aggravation; one count of indecent dealing with a child under 12 under his care; one count of attempted rape; and one count of rape. The offender was the complainant's foster father and was the only father figure she knew. He seriously and persistently sexually interfered with her at increasingly serious levels of offending from when she was three years old; however because s 229B was not an offence prior to 1989, he could only be sentenced from the period of nine years from when she was seven to 16 years old. He attempted to have sexual intercourse with her when she was just 10 years old, serially raped her and impregnated her, continuing the sexual relationship after she gave birth to his child. He showed no

remorse. The Court of Appeal reduced his sentence from fifteen years to 14 years imprisonment.[3]

[43] In *R v DAF* [2004] QCA 368, the Court of Appeal held that a sentence of 12 years imprisonment was not manifestly excessive for sexual offences which took place over a period of ten and a half years involving six children. He pleaded guilty to the offences. That case was more serious than the present case because of the number of children involved.

[44] The cases relied upon by the applicant included *R v F* [1996] QCA 490 where a sentence of eight and a half years for rape was upheld. In that case the complainant was 13 years old and the relationship continued for only eight months. It is not therefore in any real sense comparable. Other cases referred to by the parties included much shorter periods of offending that were therefore not comparable to the present case: *R v L*;[4] *R v R*;[5] *R v Young; ex-parte A-G (Qld)*;[6] *R v B*;[7] *R v C; ex parte A-G (Qld)*;[8] *R v H*;[9] *R v BAO*.[10] Each of these cases is very serious but the gravamen of the length of time over which the offending occurred in this case is that it essentially robbed the complainant of the whole of her childhood.

[45] Nor did this case have the feature which mitigates the sentence that would otherwise be imposed of voluntarily confessing where the offending would not otherwise have been exposed: *R v S*;[11] *AB v The Queen*.[12]

[46] A sentence of eight and a half years imprisonment was held not to be manifestly excessive in *R v Hoban* [2000] QCA 384. That case involved serious sexual offending against the offender's step-daughter over nine years but he had not been convicted with the offence here under consideration, maintaining with circumstances of aggravation.[13]

Comparable cases

[47] A comparable case referred to by the parties was *R v B* [1999] QCA 372. This Court upheld a sentence of 12 years imprisonment for the offence of maintaining and reduced sentences in respect of individual counts of unlawful carnal knowledge to nine years imprisonment. The offending took place over nine years by a man who showed remorse during his interview with police, making significant admissions, and who pleaded guilty in a timely way and did not require the complainant for cross-examination. The offences commenced when the complainant, who was the offender's step-daughter, was only seven years old and spanned nine years with penetration first occurring at puberty. There were 20 or 25 acts of unlawful carnal knowledge. There were threats to kill the victim and her family if she told anyone. The applicant was given a recommendation for release on

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3 See also *R v LJ* [2004] QCA 114.
4 [1999] QCA 423.
5 [2000] QCA 279.
6 [2002] QCA 474; (2002) 135 A Crim R 253
7 [2003] QCA 68.
8 [2003] QCA 134.
9 [2003] QCA 392.
10 [2004] QCA 445.
11 [2001] QCA 54.
12 (1999) 198 CLR 111 at 147-148.
13 See also *R v R* [2003] QCA 285.

parole after serving four years in recognition of his guilty plea. However, such a recommendation is no longer able to be made because the *Penalties and Sentences Act* 1992 (Qld) has subsequently been amended by the addition of Part 9A.

[48] Another comparable case is *R v D* [2003] QCA 426. In that case a sentence of 10 years imprisonment, after a plea of guilty on an ex officio indictment, on one count of maintaining an unlawful relationship of a sexual nature with a child under 16 years with circumstances of aggravation was held not to be manifestly excessive. D was also convicted on his own plea of guilty on three counts of indecent dealing with a child under 16 with circumstances of aggravation and eight counts of incest. The complainant was the offender's step-daughter and the sexual offending occurred from when she was six years old to when she was fifteen years old. He had sexual intercourse with her many times after she turned 13 and as a result she became pregnant and gave birth to his child. The learned sentencing judge reduced the sentence of imprisonment that would have been imposed from 12 years to 10 years to take account of the guilty plea.

[49] In *R v D*, Holmes J referred to *R v B* and *R v KAI* [2002] QCA 378, where the complainant's step-daughter was impregnated but the offences occurred over a somewhat shorter period. In *R v KAI*, Williams JA held:[14]

> "… there is a broad range for offences of this type from seven to 13 years with some exceptional cases justifying sentences in excess of 13 years. That, to my mind, demonstrates that the sentence of 10 years' imprisonment imposed in this case is within the range. The comparable cases would certainly support a head sentence of 12 years if there was no plea of guilty and a discounting to 10 years for the plea of guilty in my view is appropriate."

[50] Another comparable case is *R v GQ* [2005] QCA 53 where the Court of Appeal refused an application for leave to appeal against a sentence of 10 years imposed in respect of a charge of maintaining a sexual relationship with a child with circumstances of aggravation. He was sentenced to lesser periods of imprisonment in respect of other related charges. He pleaded guilty to all of the charges. The offending relationship took place over a six year period when the complainant, who was his wife's niece, was aged between 10 and 16 years. There were many occasions of unprotected sexual intercourse after the complainant had reached physical maturity. The complainant finally told others in her family what had happened which led to the offender's marriage breaking down. About a year later he rang the Juvenile Aid Bureau and told police, in a general way, that he had been having sex with his niece, although he did not know whether a complaint had yet been made.

[51] On the other hand, this Court remarked with ample justification in *R v BAW* [2005] QCA 334, that a sentence of eight years imprisonment was a light sentence. The offender pleaded guilty to sexual offences against various children which took place over 40 years of offending, and included offences against his granddaughters from a "shockingly young" age and involved various degrading conduct but did not include digital or penile penetration. They were declared to be serious violent offences.

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14 (supra) at p 4-5.

Effect of the plea of guilty

[52] The importance of a plea of guilty in a case such as the present must not be underestimated.[15] There are three reasons for this. Firstly, it indicates a willingness to facilitate the course of justice[16] and saves the community the cost of a trial.[17] Secondly, it provides some evidence of remorse[18] and of acceptance of responsibility for the crime[19] and cooperation with the prosecuting authorities. Thirdly, it saves the prosecution witnesses from having to give evidence and be cross-examined.[20]

[53] The value of each of these criteria varies depending on the nature of the crime, the time at which a guilty plea is indicated or entered[21] and the extent of any cooperation with the prosecuting authorities.[22] In the case of a sexual offence against a child, the saving of the ordeal for the child of being cross-examined on such matters is of some real significance.

[54] These principles of sentencing discretion are given statutory effect by s 13 of the *Penalties and Sentences Act* 1992 (Qld) which provides that a sentencing court must take account of the guilty plea[23] and may by reason of that plea reduce the sentence that would otherwise be imposed.[24] There are many ways in which that reduction in sentence to take account of the guilty plea may be achieved. They range from reducing the head sentence to adding a recommendation for early post-prison community based release,[25] suspending all or part of the sentence,[26] ordering the sentence to be served as an intensive correction order,[27] adding a period of probation after a period of imprisonment to be served,[28] or making a community based order.[29] What is appropriate will depend on all of the circumstances.

[55] In this case, the means of mitigating the sentence to take account of the plea of guilty are extremely limited. The appropriate sentence, without the plea of guilty, was about 12 years imprisonment. Such a sentence means that the offender is necessarily convicted of a serious violent offence and must serve at least 80 per cent of any sentence imposed. An amelioration of the sentence to recognise the plea of guilty therefore requires a reduction of the otherwise appropriate head sentence. In this case, the sentence will be manifestly excessive if a reduction in the sentence is not effected to recognise the plea of guilty. It was not an early plea of guilty as it was not entered until after the trial had commenced, however, importantly, neither the complainant nor other members of her family were required to give evidence at any stage.

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15 *R v Woods* [2004] QCA 204 at [8]-[10].
16 *Cameron v The Queen* (2002) 209 CLR 339 at 343 [11]; 350 [39].
17 *Siganto v The Queen* (1998) 194 CLR 656 at 663-664 [22].
18 *Siganto v The Queen* (supra) at [22].
19 *Cameron v The Queen* (supra).
20 *Cameron v The Queen* (supra) at 361 [67].
21 *Cameron v The Queen* (supra) at 357-60 [65].
22 *York v The Queen* [2005] HCA 60.
23 Section 13(1)(a).
24 Section 13(1)(b).
25 Section 157.
26 Section 144.
27 Section 112.
28 Section 91.
29 Sections 101, 109.

[56] In these circumstances this Court should exercise the sentencing discretion afresh by reducing the head sentence imposed to take account of the plea of guilty. The appropriate sentence to be imposed to take account of the guilty plea is 10 years imprisonment on count 1 and eight years imprisonment on each of the other counts.

Orders:

1. Application for leave to appeal against sentence granted;

2. Allow the appeal against sentence only to the extent that the applicant be sentenced to 10 years imprisonment on count 1 and 8 years imprisonment on counts 2-37.