SUPREME COURT OF QUEENSLAND

CITATION:	*R v BBE* [2006] QCA 532
PARTIES:	**R** **v** **BBE** (applicant/appellant)
FILE NO/S:	CA No 292 of 2006 DC No 1299 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	8 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	8 December 2004
JUDGES:	McMurdo P, Helman and Philippides JJ 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 and sentences imposed at first instance set aside** **3. Instead, on counts 1 to 3, order that applicant be sentenced on each count to three years imprisonment suspended after six months with an operational period of five years** **4. On count 4, order that applicant serve six months imprisonment and three years probation on the usual terms and conditions in the *Penalties and Sentences Act* 1992 (Qld) with the additional special condition that the applicant receive medical, psychiatric and psychological treatment with particular emphasis on his sexual problems and his sex offending** **5. Applicant has consented to probation on these terms** **6. The Department of Corrective Services is to receive a copy of Mr Hatzipetrou's report (Exhibit 2) and Dr Rosevear's report (Exhibit 3)** **7. Sentences will commence from original sentencing date**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND

INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – where applicant pleaded guilty to two counts of rape involving digital penetration, one count of rape involving penetration with the tongue and one count of indecent dealing with a child under 12 – where complainant child was applicant's five year old niece – where applicant has no prior criminal convictions and is intellectually impaired – where offences were only discovered after applicant admitted to them to his sister – where applicant was sentenced to four years imprisonment on each count of rape and two years concurrent imprisonment on the indecent dealing – whether the sentence was manifestly excessive in all the circumstances

Penalties and Sentences Act 1992 (Qld), s 93

R v SAH [2004] QCA 329; CA No 184 of 2004, 10 September 2004, considered

COUNSEL: R A East for applicant
M R Byrne for respondent

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

THE PRESIDENT: The applicant pleaded guilty on 9 October 2006 in the District Court at Brisbane to two counts of rape involving digital penetration, one count of rape involving penetration with the tongue, and one count of indecent dealing with a circumstance of aggravation with the complainant a child under 12. He was sentenced to four years' imprisonment in respect of each count of rape and two years' concurrent imprisonment on the count of indecent dealing. He was given a parole eligibility date of 9 October 2007, 12 months from the date of sentence. He contends that the sentence was, in the special circumstances apposite here, manifestly excessive.

The applicant has no prior criminal convictions and is intellectually impaired.

The offences occurred between 30 October 2004 and 15 October 2005 when the applicant was aged 21 and 22. The complainant on all counts was the applicant's five year old niece. The first count occurred in this way: The applicant was at the complainant's home. She invited him into her bedroom to show him a toy. He laid her across her bed on her back and inserted his finger into her vagina for about 20 seconds, penetrating her to a depth of about two centimetres, apparently on two occasions. He later told police that when he thought about what he was doing, he stopped. He told the complainant to keep the incident a secret.

On another occasion the applicant was again visiting the complainant's home. He went to use the toilet and met the complainant walking through a hallway. He asked her if she would like to spend some time with him. He took her into the lounge room, sat down on a sofa and she sat on his lap. He asked if he could have a "quick look". She said "No". He spread her legs open, pushed aside her undies and licked and sucked her vagina. The child was resisting. The episode took about 20 seconds. He told police that she was "screeching a little", looked as if she wanted to cry and as if he was hurting her. He again told her not to tell anyone. These circumstances constituted count 2.

Count 3 turned solely on the applicant's confession to police that he inserted his finger into the complainant's vagina on another occasion, although he did not provide great detail. He told police the episode lasted about 10 seconds; he may have been affected by alcohol because he could not remember very much.

Count 4 occurred when the applicant licked the complainant's vagina at the home of the applicant's father where he was housesitting, and the complainant and her family visited him there. He went into his own bedroom and asked her to come onto the bed. He asked her if he could have a "quick look". She refused. He asked her to lie back on the bed. She said she wanted to go outside. He said that if she loved him she would stay there and let him do what he needed to get done. He told police she was not comfortable and nor was she co-operative. He pushed her skirt up, pulled her underpants to the side, exposed her vagina, got onto his knees and licked her vagina from the bottom to the top for about 10 seconds. He was worried he might get caught and he acted quickly.

The offences came to light, not by a complaint from the complainant child, but when the applicant made admissions to his 17 year old sister. She contacted the child's family who, in turn, made a complaint to police. The complainant was interviewed in two recorded sessions with police on 15 October and 6 November 2005. She was not able to precisely particularise events so that the charges brought turned on the applicant's confession to police.

The prosecutor stated at sentence that the applicant had "offered maximum co-operation" and an early plea of guilty. He conceded that the applicant was intellectually impaired, had no prior convictions and was a young man, but he emphasised that the child was very young, the offences were persistent and there was a degree of force used to overcome her reluctance. The applicant told police that the offences were premeditated in that he "had his eye on the complainant" for about three months before committing the offences. The prosecutor submitted that a sentence of six years' imprisonment with an early parole eligibility date was appropriate.

The prosecutor tendered three victim impact statements, one from each of the complainant's parents and another from the applicant's younger sister to whom he initially confessed. The statements graphically supported the prosecutor's submission that the applicant's actions had ripped the family apart and caused significant distress to the complainant child's immediate and extended family unit.

Defence counsel at sentence emphasised the applicant's frankness to police in his record of interview and submitted that this showed he was someone seeking help from the police, had genuine concern for the welfare of the child and was truly remorseful for his actions.

He tendered a psychological report from Mr Luke Hatzipetrou who interviewed the applicant on 11, 16 and 24 May 2006. The psychological assessments undertaken indicated that the applicant had a low IQ and significant deficits in communication, functional academics, social skills, self-direction and leisure. He met the criteria for the diagnosis of intellectual disability. He had partial insight into the seriousness of his actions but his judgment and reasoning were impaired. He presented as a socially naïve and immature young man who was co-operative in the interviews. He showed symptoms of high anxiety, stress and depression. He was confused as to his sexual orientation. He had suffered symptoms of social anxiety and panic attacks. He had considered perpetrating similar acts upon his then 16 year old sister but decided instead to victimise his young niece because he thought she would be more compliant. Because of his intellectual impairment he had a poor understanding of the nature and consequences of his acts and the impact of them. He recognised, however, that his actions were wrong and he felt guilt and heightened anxiety about them. He had significantly impaired understanding of relationship boundaries, adult responsibilities and the importance of trust and feelings of safety within family relationships. He had a history of special school education and childhood developmental delay associated with his intellectual disability. His parents separated and divorced when he was a teenager and he had a tenuous relationship with his stepfather. These relationship problems stemming from adolescence were exacerbated by his social skills impairments,

social anxiety and low self-esteem. He appeared to be functioning in the mentally deficient borderline range of intelligence at the bottom fourth percentile in the community. He has however been able to sustain semi-skilled employment with the assistance of an employment agency. His actions were disturbing and reflected behaviours and attitudes consistent with a disorder of sexual depravity in the context of an intellectually impaired man. His capacity to understand the consequences of his actions at the time of the offences was likely to be significantly impaired. He had several cognitive distortions and a pattern of arousal consistent with paedophilia. His treatment of his sexually deviant behaviour is a priority. He should actively participate in the Sexual Offenders' Intervention Programme offered by Corrective Services, but is unlikely to benefit from a model of treatment for non-intellectually impaired sexual offenders. The treatment he requires is not available within Corrective Services, but is available from mental health service providers with expertise in the treatment of intellectually disabled sexual offenders. Mr Hatzipetrou recommended a comprehensive psychiatric review by a forensic psychiatrist. He considered the applicant also required support to form functional peer relationships and assistance on basic sex education. He noted the applicant appeared motivated to address his deviant behaviours and to develop strategies to reduce the risk of recidivism. He was likely to have employment and had the support of members of his family. Mr Hatzipetrou concluded that these factors, combined with his remorse and guilt, reduced the applicant's risk of

reoffending, but noted that he will require regular supervision and support whilst participating in rehabilitation programmes.

I note that it seems the applicant's frank but sometimes concerning statements to Mr Hatzipetrou seem consistent with a lack of guile and cunning probably associated with his intellectual disability.

Defence counsel also tendered a report from Dr Rosevear, a doctor experienced in caring for victims and perpetrators of sexual abuse. He had counselled the applicant on five occasions, the last being 16 December 2005. He noted the applicant was confused about his sexuality, had been sexually assaulted by a good male friend in 2004 and had found this hard to deal with, and that he had expressed great remorse for his actions. Dr Rosevear noted that his work with the applicant had been preliminary and that the applicant had complex issues that had not yet been fully explored. He would be happy to provide future counselling if the applicant wished.

Defence counsel urged the judge, because of the special circumstances of the case, to treat the applicant's problem by sentencing him to a three year probation order. The judge expressed the view that gaol was inevitable in this case because of the type and number of offences. Defence counsel then submitted that a term of imprisonment of two to three years should be imposed if a gaol term was inevitable,

pointing out that as a young intellectually impaired man he would be easy prey in the prison system.

The primary judge in his sentencing remarks referred to all the relevant exacerbating and mitigating circumstances, ultimately determining that a gaol sentence should be imposed with an early parole eligibility date to reflect the mitigating factors. His Honour observed that the Corrective Services Department should make every effort to provide the applicant with appropriate counselling and release him back into the community with appropriate support. After sentencing the applicant to an effective term of four years' imprisonment with parole eligibility 12 months later, his Honour recommended that the applicant participate in sex offenders' treatment courses, both in custody and on parole, tailored to meet his intellectual deficits and ordered that a copy of Mr Hatzipetrou's report be provided to the Department.

The applicant's counsel now contends that, whilst the head sentence was certainly at the high end of the appropriate range had the applicant been of average or normal intellect, in the light of Mr Hatzipetrou's report and the special circumstances here, it was manifestly excessive. He contends that a sentence of 12 months' imprisonment to be served by way of an intensive correction order coupled with a probation order should be substituted, and that in the particular circumstances of this case his Honour placed too much weight on general deterrence.

The respondent's counsel contends that but for the applicant's intellectual ability a head sentence of four to five years' imprisonment with a parole eligibility after 16 to 20 months would have been appropriate. He contends that only a minimal reduction of the otherwise appropriate sentence was warranted because of the applicant's mental condition. The applicant was aware of the wrongfulness of his actions which constituted serious breaches of the criminal law. The applicant had not had counselling since May 2006 and then it was in the context of preparing a forensic report for Court. The sentence was within the range in the light of the requirement for personal and general deterrence.

Counsel have referred us to a number of cases, none of which is comparable to the present unusual case. Perhaps the most relevant was *R v SAH* [2004] QCA 329; CA No 184 of 2004, 10 September 2004, where a sentence of five years imprisonment with a recommendation for parole eligibility after 18 months, imposed on a 19 year old who had pleaded guilty to one count of raping a three year old boy in his care by inserting a finger into the boy's anus, was reduced on appeal to three years' imprisonment to be suspended after 12 months with an operational period of three years. SAH had prior convictions for dishonesty and was on probation at the time of the rape although he had no previous convictions for sexual offences. There was no suggestion he had the intellectual deficits of the present applicant.

Although *SAH* involved only one count of rape, it strongly indicates that the sentence imposed in this case was manifestly excessive bearing in mind the applicant's extreme remorse, outstanding co-operation with the administration of justice, and his intellectual deficits and associated problems which made him considerably less culpable for his offending than otherwise. Importantly, he stopped his offending and confessed to his sister before any complaint had been made. The offences would not have been detected had he not frankly admitted his conduct to his sister. The combination of these most unusual factors here do make the sentence imposed manifestly excessive, although I agree with his Honour's assessment that the offences were so serious as to require an actual period of custody.

In my view, the competing interests of community protection, deterrence, denunciation and rehabilitation are best served by granting the application for leave to appeal, allowing the appeal, setting aside the sentences imposed at first instance and instead imposing the following sentences: On each of counts 1 to 3 three years' imprisonment suspended after six months with an operational period of five years.

On count 4 six months' imprisonment and three years' probation on the usual terms and conditions set out in the *Penalties and Sentences Act* 1992 (Qld), together with a special condition that he receive medical, psychiatric and psychological treatment as directed by the Community Corrections officer

with a particular emphasis on his sexual problems and on treatment for sex offending.

I note the applicant has consented to probation on these terms. I would, like the primary judge, order that the Department of Corrective Services receive a copy of Mr Hatzipetrou's report (Exhibit 2) and also a copy of Dr Rosevear's report (Exhibit 3). I note, of course, that the sentences will commence from the original sentencing date.

HELMAN J: I agree with the orders proposed by the President and with her reasons.

PHILIPPIDES: I also agree.

THE PRESIDENT: The orders are as I have proposed.
