SUPREME COURT OF QUEENSLAND

CITATION:	*R v LAE* [2013] QCA 189
PARTIES:	**R** **v** **LAE** (applicant)
FILE NO/S:	CA No 147 of 2012 DC No 379 of 2011 DC No 380 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	19 July 2013
DELIVERED AT:	Brisbane
HEARING DATE:	28 February 2013
JUDGE:	Muir and Fraser JJA and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where three sets of offences were committed by the applicant over a period of 14 years in Queensland and in New South Wales against his daughters – where the applicant was given a head sentence of 10 years for the Queensland offences – where at the time of the sentence in Queensland the applicant was serving a five year term of imprisonment for offences committed in New South Wales – whether the sentencing Judge failed to correctly consider the totality principle *Penalties and Sentences Act* 1992 (Qld), s 9 *Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70, considered *Postiglione v The Queen* (1997) 189 CLR 295; [1997] HCA 26, considered *R v Gordon* (1994) 71 A Crim R 459, considered *R v Hunter* (2006) 14 VR 336; [2006] VSCA 129, considered *R v SAG* (2004) 147 A Crim R 301; [2004] QCA 286, cited *R v Todd* [1982] 2 NSWLR 517, considered

COUNSEL: L Reece for the applicant
B J Merrin for the respondent

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

[1] **MUIR JA**: I agree that the application for leave to appeal should be refused for the reasons given by Martin J.

[2] **FRASER JA**: I have had the advantage of reading the reasons for judgment of Martin J. I agree with those reasons and with the order proposed by his Honour.

[3] **MARTIN J:** The applicant seeks leave to appeal against sentences imposed upon him as a result of convictions entered on 8 May 2012. The offences concerned his two daughters.

[4] The charges and the sentences were as follows:

Indictment 379 of 2011 (complainant MGK)

Count	Date of offence	Nature of offences		Maximum Penalty
1	Between 31 December 1990 and 1 January 1996	Maintaining a sexual relationship with a child, with circumstances of aggravation (under 12 years, lineal descendant, with attempted rape)	10 years imprisonment	Life imprisonment
2	Between 22 June 1991 and 1 January 1993	Attempted rape	4 years imprisonment	14 years imprisonment
3	Between 22 June 1991 and 1 January 1993	Indecent treatment of a child under 16, with circumstances of aggravation (under 12, lineal descendant)	2 years imprisonment	10 years imprisonment
4	Between 22 June 1992 and 1 January 1994	Indecent treatment of a child under 16, with circumstances of aggravation (under 12, lineal descendant)	2 years imprisonment	10 years imprisonment
5	Nolle prosequi entered – not proceeded with.			
6	Between 22 June 1992 and 24 June 1995	Indecent treatment of a child under 16, with circumstances of aggravation (under 12, lineal descendant)	2 years imprisonment	10 years imprisonment
7 & 8	Between 22 June 1993 and 24 June 1995	Indecent treatment of a child under 16, with circumstances of aggravation (under 12, lineal descendant)	2 years imprisonment	10 years imprisonment

9	Between 22 June 1993 and 24 June 1995	Attempted rape	4 years imprisonment	10 years imprisonment
10	Between 22 June 1993 and 24 June 1995	Indecent treatment of a child under 16, with circumstances of aggravation (under 12, lineal descendant)	2 years imprisonment	10 years imprisonment
11	Between 22 June 1996 and 24 June 1999	Indecent treatment of a child under 16, with a circumstance of aggravation (lineal descendant)	2 years imprisonment	10 years imprisonment

Indictment 380 of 2011 (complainant LJF)

Count	Date of offence	Nature of offences		Maximum Penalty
1	Between 9 April 1993 and 11 April 1994	Maintaining a sexual relationship with a child, with circumstances of aggravation (under 12 years, lineal descendant)	6 years imprisonment	14 years imprisonment
2 - 7	Between 9 April 1993 and 11 April 1994	Indecent treatment of a child under 16, with circumstances of aggravation (under 12, lineal descendant)	2 years imprisonment on each count	10 years imprisonment

[5] At the time of his offending the applicant was aged between 29 and 37 years old. At the time of sentencing he was 50. The circumstances of the offences as described by the learned sentencing judge may be summarised in the following way:

- The offences occurred in Townsville prior to the applicant separating from his then wife who was the mother of the two children.
- Over a period when MGK was aged between seven and 11 years old he subjected her to frequent instances of inappropriate sexual conduct for his own selfish gratification.
- While his conduct did not extend to penile penetration it did extend to other types of degrading acts that occurred over the objections and obvious distress of his daughter at the time. This included the insertion of a spoon and confectionary snakes into her vagina, his performance of oral sex on her, him forcing her to take his penis into her mouth and on one occasion, ejaculating into her mouth.
- There were also instances of forced attempted penile rape.
- After separation there was a further instance when his daughter was 13 years old. On a visit to see her in her new house he went to her bedroom when she was in bed and touched her on her lower stomach and moved his hand towards her genitals before she rolled over to prevent anything further happening.

[6] In respect of the other daughter:

- He maintained a sexual relationship with her in Townsville over a period of about two months when she was aged five.

- There were six particularised incidents of indecent treatment. These included instances of licking and inserting his tongue into her vagina and digital penetration of her.

[7] These acts were achieved through physical intimidation and some use of force. The applicant made specific threats of harm to each girl in order to avoid them informing on him. These threats were successful until 2004 when complaints were made to police. The applicant was arrested in Wollongong in February 2005 and, although declining to be formally interviewed, told the police that he had not committed any offence.

[8] The delay in this matter coming before the courts in Queensland is explained by the applicant's conviction for similar offences in New South Wales. There were two sets of convictions: the first in 2006 and the second in 2009.

The 2006 convictions

[9] In November 2006 the applicant was convicted in Wollongong of three offences of aggravated indecent assault committed with his 11 and 12 year old step daughters. The applicant had married the mother of these two young girls in 1998. The offences occurred in and around 2000 during separate visitations by each girl with their mother and the applicant.

[10] The conduct in respect of these offences involved the applicant touching the thigh and breast of one girl and in respect of the other, touching her breast after lifting her shirt. He also touched the outside of her genitals after pulling her underclothing to one side and saying: "Let me kiss it." The applicant was sentenced to a term of two years imprisonment with a non parole period of 15 months.

[11] With respect to the younger girl the offences were committed at the end of 2000 when she stayed with her mother and the applicant for two months. It is not clear when the offences concerning the older girl were committed. The statement of facts used in those proceedings only identifies the offences as having been committed during a two week period in the period 1999-2000.

The 2009 convictions

[12] Further convictions were recorded against the applicant in March 2009 in respect of conduct which occurred in 2004. There were two offences of aggravated sexual assault of a victim under 16 years old. The victim was the applicant's 10 year old daughter from a relationship with another woman. These offences involved the applicant rubbing his erect penis against the outside of the girl's genitals with direct contact. She was also threatened by the applicant in order to obtain her silence. These offences were not disclosed until May 2008 and, thus, were not dealt with until March 2009. On that occasion the applicant was sentenced to a term of five years imprisonment to commence from the point of his arrest and incarceration on 24 July 2008. A non parole period of three years and nine months was set.

Matters considered on sentence

[13] So far as the Queensland offences were concerned, the learned sentencing judge took into account the following:

- The young ages of the children when the offending commenced (seven and five years).

- The lengthy period of the relationship with MGK.
- The gross breach of trust involved in offending in respect of his own children in the household where he was expected to care for them.
- The fact that there was more than one victim of his offending.
- That the offending involved intimidation of his daughters to obtain compliance.
- With respect to his elder daughter, force was used in order to have her perform particular acts.
- The applicant emotionally manipulated his older daughter by threatening that he would touch her younger sister if she did not cooperate.
- He threatened both girls with harm if they informed on him.

[14] The learned sentencing judge also took into account other relevant matters:

- The applicant's guilty pleas. These had to be viewed in light of the fact that the complainants were required for cross-examination at committal proceedings and that, so far as the charges concerning MGK were concerned, the plea was not notified until the trial was listed for hearing.
- That the respondent had no criminal history prior to the commission of the offences in Queensland.
- Regard had to be had to the overall effect of the sentences because they were to be imposed during the currency of his existing sentence and that, apart from a period of about two months in 2008, the applicant had been in custody in respect of this offending since November 2006.
- The total non parole period designated in respect of the New South Wales sentences was five years and three months and that his non parole period had been completed on 23 April 2012.

[15] At the sentencing hearing, counsel for the applicant submitted that the appropriate starting point was in the range of 11 to 12 years imprisonment but that that level should be lowered (to take account of the sentences served in New South Wales) to a head sentence of seven years.

The applicant's case

[16] The applicant's case was described by his counsel in the following, summary, way:

> "…the learned sentencing Judge in this case did not make sufficient allowance for the operation of the totality principle. That the sentence of 10 years is a reasonable one for the offences for which Mr LAE, the applicant, came to be sentenced is not in issue. The overall effect of the sentence when combined with a term already served in New South Wales is."

Statutory provisions

[17] Before I turn to consider the application of the totality principle as advanced for the applicant it will be convenient to note the provisions of the *Penalties and Sentences Act* 1992 (Qld) ("the Act") which are specifically applicable in a case of this nature.

[18] First, there is s 9(2)(k) which provides:

> "(2) In sentencing an offender, a court must have regard to—
>
> …
>
> (k) sentences imposed on, and served by, the offender in another State or a Territory for an offence committed at, or about the same time, as the offence with which the court is dealing;
>
> …"

[19] It should be noted that, while s 9(2)(k) directs that regard must be had to these circumstances, it does not mandate a particular course of action or result.

[20] Secondly, there are provisions relating specifically to sexual offences. They are:

> "(5) Also, in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years—
>
> (a) the principles mentioned in subsection (2)(a)[1] do not apply; and
>
> (b) the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.
>
> (5A) For subsection (5)(b), in deciding whether there are exceptional circumstances, a court may have regard to the closeness in age between the offender and the child.
>
> (6) In sentencing an offender to whom subsection (5) applies, the court must have regard primarily to—
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> (a) the effect of the offence on the child; and
>
> (b) the age of the child; and
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> (c) the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another; and
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> (d) the need to protect the child, or other children, from the risk of the offender reoffending; and
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> (e) the need to deter similar behaviour by other offenders to protect children; and
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> (f) the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community; and
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> (g) the offender's antecedents, age and character; and
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> (h) any remorse or lack of remorse of the offender; and
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> (i) any medical, psychiatric, prison or other relevant report relating to the offender; and
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> (j) anything else about the safety of children under 16 the sentencing court considers relevant."

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[1] Sec 9(2)(a) provides:

"In sentencing an offender, a court must have regard to—

(a) principles that—

(i) a sentence of imprisonment should only be imposed as a last resort; and

(ii) a sentence that allows the offender to stay in the community is preferable;"

The principle in *Mill v The Queen*

[21] The applicant relies on the principle in *Mill v The Queen*,[2] where the application of the totality principle in particular circumstances was considered.

[22] In *Mill* the applicant had committed three armed robberies. Two had been committed in Victoria and one in Queensland, and all had occurred within a period of six weeks. He was sentenced first in respect of the Victorian offences to 10 years imprisonment with a non parole period of eight years. When released on parole he was returned to Queensland where he was convicted of the Queensland offence and sentenced to imprisonment for eight years with a recommendation that he be considered for parole after three years in recognition of the fact that he had already served eight years for the Victorian crimes. Special leave to appeal was granted on the ground that the case raised an important question regarding the appropriate principle of sentencing to be applied when crimes *closely related in time and nature* are committed in more than one State or Territory of the Commonwealth.

[23] The High Court referred to the reasons of Street CJ in *R v Todd*,[3] where his Honour said:

> "it would be wrong, in my opinion, to disregard the practical situation that the appellant had already served a substantial period of imprisonment in Queensland for offences **so closely related in time and character** to the Sydney offences. ...
> ... where there has been a lengthy postponement, whether due to an interstate sentence or otherwise, fairness to the prisoner requires weight to be given to the progress of his rehabilitation during the term of his earlier sentence, to the circumstance that he has been left in a state of uncertain suspense as to what will happen to him when in due course he comes up for sentence on the subsequent occasion, and to the fact that sentencing for a stale crime, long after the committing of the offences, calls for a considerable measure of understanding and flexibility of approach - passage of time between offence and sentence, when lengthy, will often lead to considerations of fairness to the prisoner in his present situation playing a dominant role in the determination of what should be done in the matter of sentence; at times this can require what might otherwise be a quite undue degree of leniency being extended to the prisoner." (emphasis added)

[24] In the unanimous decision of the High Court the following appears:[4]

> "…In our opinion, the reasoning expounded in *Todd* is correct and reflects a just and principled approach to the problem of sentencing when an offender comes to be sentenced many years after the commission of an offence because during the intervening period he has been serving a sentence imposed in another State **in respect of an offence of the same nature and committed at about the same time**. But, with respect, we think that the exposition of principle in *Todd* has been misunderstood by the Court of Criminal Appeal in

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2 *Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70.
3 [1982] 2 NSWLR 517.
4 *Mill v The Queen* (1988) 166 CLR 59 at p 65-66.

> *Jenkyns* and in the present case. The principle is not confined in its operation to the fixing of a non-parole period. **It applies also to the fixing of a head sentence which, when considered in association with the head sentence imposed by the first sentencing court, must be seen to be appropriate in all the circumstances.** In the absence of statutory provisions enabling the new sentence to be backdated to a time when the offender was in custody serving the earlier sentence in the other State, **it is not correct for the second sentencing court to determine the head sentence by reference to the normal tariff applicable to the offence for which he is then being sentenced, leaving the fixing of a non-parole period alone to reflect the principles laid down in *Todd*.** The long deferment of the trial or punishment of an offender, with the consequent uncertainty as to what will happen to him, raise considerations of fairness to an offender which must be taken into consideration when the second court is determining an appropriate head sentence. **The intervention of a State boundary denies to an offender the opportunity of having the series of offences dealt with together by a sentencing court which can avail itself of the flexibility in sentencing provided by concurrent sentences**." (emphasis added)

[25] The conditions which have to exist before the totality principle, as enunciated in *Mill*, can be applied are that the offences must be:

(i) of the same nature; and
(ii) committed at about the same time.

This is narrower than the prescription in s 9(2)(k) of the Act in that the offences must be of the same nature.

[26] In *Mill*, the three robberies were committed in the same six week period. In this case the three sets of offences were committed over a period of 14 years. The offences in Queensland were committed over a long period of time – between 1990 and June 1999 (MGK) and, during that period, separate offences in 1993-1994 (LJF). The first set of New South Wales offences involved two victims – it is unclear when the offence involving one of them occurred but it must have occurred after June 1999 and before the end of 2000. The offences with the second victim occurred in late 2000. The second set of New South Wales offences occurred in 2004.

[27] In summary, the offences and the punishments were:

Time of offences	Time Convicted	Punishment
1999(?) – 2000 (NSW)	2006	2 years – non-parole 15 months
2004 (NSW)	2009	5 years – non-parole 3 years 9 months
1990 – 1999 (Qld)	2012	10 years – parole eligibility after 4 years

[28] The applicant had completed his sentence for the New South Wales 2000 offences in November 2008.

[29] He was sentenced for the Queensland offences while still serving the sentence imposed in 2009.

[30] While the offences committed by the applicant are of the same nature I do not regard them as having been committed at about the same time. Apart from the uncertainty about the timing of the offence for one of the victims in the first New South Wales conviction there is a gap of about 18 months between the last Queensland offence and the second New South Wales offence in 2000. There is also a larger gap between that offence and the second tranche of New South Wales offences – about four years.

[31] In those respects, then, neither s 9(2)(k) of the Act nor the *ratio* in *Mill* apply. That, though, is not the end of the matter.

The totality principle

[32] What needs to be considered now is the wider totality principle which was referred to in *Mill* and further considered in *Postiglione v The Queen*.[5] "The totality principle of sentencing requires a judge who is sentencing an offender for a number of offences to ensure that the aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved."[6]

[33] The basis for this broad principle was identified by McHugh J in the following way:

> "In *Kelly v The Queen* O'Loughlin J, sitting in the Full Court of the Federal Court of Australia, applied the following unreported remarks of King CJ in *R v Rossi*:
>
> > 'There is a principle of sentencing known as the principle of totality, which enables a court to mitigate what strict justice would otherwise indicate, where the total effect of the sentences merited by the individual crimes becomes so crushing as to call for the merciful intervention of the court by way of reducing the total effect.'
>
> The application of the totality principle therefore requires an evaluation of the overall criminality involved in all the offences with which the prisoner is charged. Where necessary, the Court must adjust the prima facie length of the sentences downward in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences."[7] (citations omitted)

[34] Another account of the principle which has been frequently cited can be found in *Principles of Sentencing*:

> "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive

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5 (1997) 189 CLR 295.

6 Per McHugh J at 307-308.

7 At 308.

> sentences, to review the aggregate sentence and consider whether the aggregate is "just and appropriate". The principle has been stated many times in various forms: "when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong["]; when … cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences."[8]

[35] Those expositions of the totality principle do not apply to the circumstances of the applicant. One part of the sentencing process had already taken place and the learned sentencing judge had to take that into account. The particular example of the principle of sentencing upon which the applicant really relies is that referred to in *R v Gordon*,[9] where Hunt CJ at CL said:

> "When a custodial sentence is to be imposed which will be cumulative upon, or which will overlap with, an existing custodial sentence, the judge must take into account that existing sentence so that the total period to be spent in custody adequately and fairly represents the totality of criminality involved in all of the offences to which that total period is attributable."[10]

[36] This was echoed by the Victorian Court of Appeal in *R v Hunter*[11] where the following was said:

> "There must be relativity between the totality of the criminality and the totality of sentences, not only for the offences for which the person is being sentenced, but for the sentence which the person is currently serving."[12]

[37] The learned sentencing judge clearly referred to this as a guiding principle when sentencing. He said:

> "Fixing that period in the first instance requires assessment of the offending before the Court and then, also requires that regard be had to the overall effect of the sentences that will have been imposed upon you for the totality of your sexual offences. This is because today's sentences are to be imposed during the currency of your existing sentence and because and apart from a period of about two months from May to July 2008, you have been in custody in respect of this offending since the 7th of November 2006; that is, a period of about five and a-half years."

Was that principle applied?

[38] The applicant argues that the 10 year head sentence, on top of the five year sentence already being served, demonstrated that the totality principle (as enunciated in

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8 D A Thomas, *Principles of Sentencing* (2nd ed, Heinemann, 1979) 56–7.

9 (1994) 71 A Crim R 459.

10 Ibid at 466.

11 (2006) 14 VR 336.

12 Per Maxwell P, Buchanan and Redlich JJA at [30].

Gordon) had not been observed. In order to deal with that submission both parties referred to the detailed analysis by Jerrard JA in *R v SAG*[13] of the many factors which can be relevant in sentencing for these types of offence. In that decision, his Honour closely examined many sentences considered by this Court at [23]-[34] and I will not repeat that here. It is sufficient to say that, of the many serious examples he considered, the range was from eight to 17 years imprisonment.

[39] The head sentence imposed in this case together with the New South Wales sentence results in a total sentence of 15 years. The force of the sentence under challenge was ameliorated by the setting of a parole eligibility date of 23 May 2016, that is, four years after the sentence was imposed.

[40] It is clear that his Honour was aware of the principle to be applied. He applied it to the accepted facts. This was a case deserving of condign punishment. The applicant's behaviour with his two daughters was appalling. When taken into account with the sentence which was being served in New South Wales this sentence is at high end of the range but not manifestly excessive. It adequately and fairly represents the totality of the criminality involved in all the offences to which the total period is attributable. No error in the sentencing process has been demonstrated.

[41] I would order that the application for leave to appeal against sentence be refused.

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13 (2004) 147 A Crim R 301; [2004] QCA 286.