SUPREME COURT OF QUEENSLAND

CITATION:	*R v CBO* [2016] QCA 24
PARTIES:	**R** **v** **CBO** (applicant)
FILE NO/S:	CA No 64 of 2015 DC No 531 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 27 March 2015
DELIVERED ON:	12 February 2016
DELIVERED AT:	Brisbane
HEARING DATE:	4 September 2015
JUDGES:	Fraser and Philippides JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS:

1. **Grant the application for leave to appeal against sentence.**
2. **Allow the appeal.**
3. **Vary the orders made in the District Court by:**
   a. **Setting aside each of the orders for imprisonment and the declaration that the conviction on count 12 is a conviction for a serious violent offence, and**
   b. **Ordering that the applicant be sentenced as follows:**
      i. **Ten years imprisonment on each of counts 7, 9 and 10, six years imprisonment on count 4, and three years imprisonment on each of counts 3, 5, 8 and 11, each such term of imprisonment to be served concurrently with each other such term of imprisonment.**
      ii. **Three years imprisonment on count 12, such term of imprisonment to be served cumulatively upon the concurrent terms of imprisonment imposed upon counts 3, 4, 5, 7, 8, 9, 10 and 11.**
4. **Confirm the declaration made in the District Court pursuant to s 159A of the *Penalties and Sentences Act***

1992 (Qld) that the whole of the period between 26 March 2015 and 27 March 2015 during which the applicant was held in pre-sentence custody be imprisonment already served under the sentence for each count.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was found guilty after a trial of one count of maintaining an unlawful sexual relationship with a child under 16, four counts of rape, two counts of indecently dealing with a child, one count of indecently dealing with a child with a circumstance of aggravation that the child was under 12 years, and one count of indecently dealing with a child with a circumstance of aggravation that the child was under the applicant's care – where the applicant was sentenced to an effective sentence of imprisonment of 13 years – where the applicant alleged this was manifestly excessive by reference to comparable sentencing decisions – where the applicant's offending was a very serious example of offending against a child – where the applicant was the complainant's stepfather – where the applicant did not cooperate with the police – where the complainant was very seriously adversely affected – where the offending extended over a period of approximately eight years – where the offending comprehended penile rape – whether the sentence imposed was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced for the offence of maintaining a relationship of a sexual nature with a child under 16 years (count 12) – where the applicant had not been charged with the circumstance of aggravation that, in the course of the relationship, he had committed an offence of a sexual nature for which he was liable to imprisonment for 14 years or more – where the sentence could not be increased to take into account the charged or uncharged offences of rape during the sexual relationship – where Pt 9A of the *Penalties and Sentences Act* 1992 (Qld) could only apply in relation to count 12 because all of the other offences were committed prior to its commencement – where the sentencing judge imposed a global head sentence – where the sentencing remarks made it apparent that the sentence of 13 years imprisonment imposed on count 12 reflected the applicant's criminality in relation to all the offences of which the applicant was convicted – where the applicant argued that Pt 9A of the *Penalties and Sentences Act* 1992 (Qld) had been inappropriately applied – where the applicant argued that this approach involved unauthorised punishment – whether the sentencing

approach used was inappropriate – whether the sentence was manifestly excessive

Corrective Services Act 2006 (Qld), s 12A, s 184
Criminal Code (Qld), s 229B
Penalties and Sentences Act 1992 (Qld), s 161A, s 161B

Griffiths v The Queen (1989) 167 CLR 372; [1989] HCA 39, considered
R v A [2003] QCA 445, considered
R v Breeze (1999) 106 A Crim 441; [1999] QCA 303, cited
R v BBM [2008] QCA 162, considered
R v CAM [2009] QCA 44, considered
R v De Simoni (1981) 147 CLR 383; [1981] HCA 31, applied
R v GQ [2005] QCA 53, considered
R v HAA [2006] QCA 55, considered
R v Mason and Saunders [1998] 2 Qd R 186; [1997] QCA 421, cited
R v Nagy [2004] 1 Qd R 63; [2003] QCA 175, considered
R v SAG (2004) 147 A Crim R 301; [2004] QCA 286, cited
R v Sparrow [2015] QCA 271, considered
Siganto v The Queen (1998) 194 CLR 656; [1998] HCA 74, cited

COUNSEL: P Davis QC for the applicant
S Farnden for the respondent

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

[1] **FRASER JA:** On the fourth day of a trial in the District Court the applicant was found guilty by a jury of one count of maintaining an unlawful sexual relationship with a child under 16 (count 4), four counts of rape (counts 7, 9, 10 and 12), two counts of indecently dealing with a child (counts 8 and 11), one count of indecently dealing with a child with a circumstance of aggravation that the child was under 12 years (count 3), and one count of indecently dealing with a child with a circumstance of aggravation that the child was under the applicant's care (count 5). The applicant was found not guilty of counts 1 and 2. A *nolle prosequi* was entered on count 6.

[2] The applicant was sentenced to 13 years imprisonment for each of counts 7, 9, 11 and 12.[1] The sentencing judge imposed concurrent terms of imprisonment of seven years for each of counts 4 and 5 and concurrent terms of imprisonment of four years for each of counts 3, 8 and 10. In respect of count 12, the sentencing judge declared that the applicant had been convicted of a serious violent offence. Such a declaration was automatically required because that sentence was one of or exceeding 10 years imprisonment.[2]

[3] The applicant filed a notice of appeal against his conviction and sentence. He subsequently abandoned the appeal against conviction. The ground of the application

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1 The applicant submitted that the term of 13 years imprisonment was imposed for counts 7, 9, 10 and 12, but the (unrevised) sentencing remarks agree with the verdict and judgment record in recording that this term was imposed for counts 7, 9, 11 and 12.

2 *Penalties and Sentences Act* 1992 (Qld), ss 161A(a), 161B.

for leave to appeal against sentence is that the sentence was manifestly excessive. The applicant argued that the effective sentence of 13 years imprisonment with the declaration was shown to be manifestly excessive by reference to comparable sentencing decisions and, secondly, that the way in which the sentence was structured resulted in the sentence being made manifestly excessive by an inappropriate application of Pt 9A of the *Penalties and Sentences Act* 1992 (Qld). Before discussing those arguments I will outline the relevant facts.

The Offences

[4] When the offending commenced the applicant was in a relationship with the complainant's mother. During the period of offending they married. Count 3 occurred whilst the complainant and the applicant were in the swimming pool at the family home with no one else about. At this time the applicant digitally penetrated the complainant's vagina. The sentencing judge (who was the trial judge) found that count 3 occurred when the complainant was eight or nine years old.

[5] The offence of unlawfully maintaining a relationship of a sexual nature with a child under the age of 16 years in s 229B of the *Criminal Code* was introduced by an amendment which commenced on 3 July 1989,[3] when the complainant was eight years old. Count 4 charged that offence for the period of about eight years and seven months between 3 July 1989 and 19 March 1997 (when the complainant was no longer under the age of 16 years). Counts 5, 7, 8, 9, 10 and 11 were committed during the period of the unlawful sexual relationship the subject of count 4. The sentencing judge found that those specific offences were examples of the applicant's sexual offending in the course of the unlawful sexual relationship charged in count 4 where there was a particular feature of the offending which the complainant could recall to identify the specific offences.

[6] The maintaining offence in count 4 occurred during two distinct (albeit continuous) periods. In the first period, every week during a period of about four and a half years from when the complainant was eight in 1989 until she was about 12 or 13 in 1993 or 1994, the applicant would kiss, fondle, and digitally penetrate the complainant's vagina. (In cross-examination the complainant indicated that this sometimes happened more frequently than weekly, sometimes twice or three times a week.) Mostly the applicant would go into the complainant's bedroom and lie with her after her mother had put her and her sister to bed. At other times it occurred in the applicant's bedroom. If the complainant did not go in to say goodnight to the applicant, he would tell their mother that she and her sister could not even be bothered to say goodnight to him, as a result of which the complainant's mother would become angry and tell the complainant and her sister to go and say goodnight to him. On some of those occasions the applicant indecently dealt with the complainant in his bed. Consistently with the complainant's evidence, the sentencing judge found that there were numerous occasions of digital penetration.

[7] The second period of the maintaining offence commenced when the family moved to a different house in 1993 or 1994, when the complainant was about 12 or 13. It endured for three or four years, until the complainant turned 16 in 1997. In relation to that period the complainant gave evidence that the applicant's sexual offending extended also to regular and frequent sexual intercourse. The complainant gave evidence that she submitted in order to protect her younger sister. Sexual intercourse

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3 Act 17 of 1989.

occurred at least once a week and sometimes more often. It usually occurred in the applicant's or the complainant's bed very early in the morning. There were hundreds of instances of sexual intercourse in which the applicant ejaculated. On one occasion (count 8) the applicant bit the complainant, causing her some pain, whilst he was indecently dealing with her and he then had sexual intercourse (count 9). The applicant said that the bite was in a place where everybody would see it; in that context she referred to a desire to kill herself, but noted that she could not die because everybody would know.

[8] In 1997 the complainant became able to stand up to the applicant and refused to acquiesce to his behaviour. The complainant gave evidence that she told the applicant that she "didn't want to do it anymore and we can't do it anymore."[4] The offence of rape charged in count 12 occurred after the complainant's sixteenth birthday. It was alleged to have been committed between 1 January and 21 September 1998; therefore it must have been committed at least two years after the rapes charged in counts 7, 9 and 10 (alleged to have been committed between 1 January and 31 December 1995) and more than nine months after the end of the maintaining period (3 July 1989 to 19 March 1997). Whilst the complainant was doing her hair to get ready to go to work the applicant appeared and told her, "You are going to hate me for this". He pushed her down onto the bed, he forced her arms up around her chest so that he could put all of his weight on to her, and undressed her and himself enough to have sexual intercourse. The complainant resisted by scratching the applicant's shoulder but she could not deter him. Having no alternative, she closed her eyes and lay still, waiting for the applicant to finish. The applicant did so, got up and walked out. Later that day the applicant asked the complainant whether or not she still loved him. She then left home and made a complaint.

[9] The applicant did not give or call evidence. His case, as it was put in cross-examination of the complainant, was that the only occasions when there was sexual contact between the applicant and the complainant were in 1997 after the complainant had turned 16 and the complainant was then a willing participant.

Sentencing remarks

[10] The sentencing judge characterised the applicant's offending as a very serious example of offending against a child; so much was accepted by the applicant in submissions in this application. With reference to the relevant factors summarised by Jerrard JA in *R v SAG*,[5] the sentencing judge observed that: the offending began when the complainant was only eight or nine; it extended to rape when the complainant went into Year 8; it extended over a period of approximately eight years; and it comprehended penile rape. There was no child born as a result of the sexual offending (the applicant had had a vasectomy so the complainant was not exposed to the risk of impregnation but it was not clear whether or not she was aware of that); the applicant was the complainant's stepfather; there was only one complainant; in respect of two counts (counts 8 and 12) there was actual physical violence.

[11] The sentencing judge referred also to the absence of any co-operation by the applicant with the police. (The sentencing judge noted that the applicant had told police that there had been sexual activity – implicitly consensual – between him and the complainant after she was 16. This does not amount to co-operation which should attract mitigation of

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4 Transcript, 23 March 2015, 1-27; AB 37.

5 [2004] QCA 286.

the sentence.) The sentencing judge found that the applicant had shown no remorse. It was apparent from the complainant's appearance whilst giving evidence and from her victim impact statement that the offending had a profound and devastating effect upon her, as was entirely to be expected.

[12] The applicant was aged between 39 and 48 at the time of offending and he was 65 at the time of sentence. He had a good employment history, having worked for one company for more than 20 years. He had a criminal history but it was of no significance to this sentence. The sentencing judge took into account that there was no suggestion of any subsequent offending, which was relevant to the issue of the extent to which the applicant posed a risk to the community and the relevance of personal deterrence. Three referees spoke well of the applicant's behaviour in other respects. The references suggested that the applicant was not somebody who would give effect to any generalised sexual interest in young children.

[13] The sentencing judge observed that, but for the delay in bringing the matter to trial because of the delay in the making of the complaint, an appropriate head sentence for the offending was 14 years imprisonment. Taking into account that during that period of delay there had been no subsequent offending and the applicant had become much older so that prison would be much more of a burden on him, the sentencing judge moderated the head sentence to one of 13 years imprisonment.

Consideration

[14] The maximum penalty for each of the offences of rape charged in counts 7, 9, 10 and 12 was life imprisonment. The maximum penalty at the relevant times for each of counts 3, 8 and 11 was five years imprisonment. The maximum penalty for count 5 was 10 years imprisonment.

[15] The maximum penalty for the offence of maintaining a relationship of a sexual nature with a child under 16 years in count 4 for the whole of the period charged in that count was seven years imprisonment.[6] The applicant was not charged with the circumstance of aggravation that, in the course of the relationship, he had committed an offence of a sexual nature for which he was liable to imprisonment for 14 years or more. If the applicant had been charged with and convicted of that circumstance of aggravation he would have been liable to imprisonment for life. That the applicant might have been convicted of this circumstance of aggravation if it had been charged could not be taken into account by way of increasing the sentence for count 4. The High Court's decision in *R v De Simoni*[7] compels the conclusion that the sentence for count 4 could not be increased to take into account the charged or uncharged offences of rape during the sexual relationship of which the complainant gave evidence. The charged offences of rape of which the applicant was convicted could of course attract the appropriate punishments, but the uncharged offences of rape could not attract any punishment.

[16] It must also be accepted that Pt 9A of the *Penalties and Sentences Act* 1992 (Qld) was capable of application in this sentence only in relation to count 12, because all of the other offences of which the applicant was convicted were committed before Pt 9A commenced to operate.[8] Subject to qualifications which are not presently relevant,

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6 The maximum penalty was increased to 14 years with effect from 1 July 1997: Act No 3 of 1997. It was subsequently increased to life imprisonment with effect from 1 May 2003: Act No 3 of 2003.

7 *R v De Simoni* (1981) 147 CLR 383 at 388-392 (Gibbs CJ, Mason and Murphy JJ agreeing).

8 See *R v Mason and Saunders* [1998] 2 Qd R 186; *R v Breeze* (1999) 106 A Crim 441.

the effect of a declaration under Pt 9A that a particular conviction is a conviction of a serious violent offence is that the prisoner's parole eligibility date is the day after the day on which the prisoner has served the lesser of 80 per cent of the prisoner's term of imprisonment for the serious violent offence or 15 years.[9] In the absence of such a declaration, a prisoner's parole eligibility date for sentences of imprisonment of the length imposed upon the applicant would be the day on which the prisoner has served half the period of imprisonment to which the prisoner has been sentenced, unless a different parole eligibility date is fixed for the prisoner by the sentencing court under *Penalties and Sentences Act* 1992 (Qld), Pt 9 Div 3.[10] (Again that is subject to qualifications which are not presently relevant.)

[17] The sentencing remarks make it clear that the sentence of 13 years imprisonment imposed on count 12 reflected the applicant's criminality not only in count 12, but also in each of the other offences of which the applicant was convicted. The applicant submitted that because the appropriate sentence for the offending charged in count 12 should have been less severe than 13 years imprisonment, the sentencing judge's approach involved unauthorised punishment (by way of deferral of parole eligibility) for the counts other than count 12. In most cases of multiple offending the imposition of a global head sentence is an appropriate sentencing approach. The applicant argued that this was not appropriate where, as in this case, that approach would result in a longer period of custody being served before the prisoner was eligible for parole than would be the case if, instead, a cumulative sentence or sentences were imposed. The respondent acknowledged that this possibility should be taken into account in assessing the sentences.

[18] In *R v Nagy*[11] Williams JA said:

> "Where a judge is faced with the task of imposing sentences for a number of distinct, unrelated offences there are a number of options open. One of those options is to fix a sentence for the most serious (or the last in point of time) offence which is higher than that which would have been fixed had it stood alone, the higher sentence taking into account the overall criminality. But that approach should not be adopted where it would effectively mean that the offender was being doubly punished for the one act, or where there would be collateral consequences such as being required to serve a longer period in custody before being eligible for parole, or where the imposition of such a sentence would give rise to an artificial claim of disparity between co-offenders. That list is not necessarily exhaustive. Such considerations may mean that the other option of utilising cumulative sentences should be adopted."

[19] The reference to "collateral consequences such as being required to serve a longer period in custody before being eligible for parole" is explained by an earlier passage in Williams JA's reasons. His Honour referred to a passage in the judgment of Brennan and Dawson JJ in *Griffiths v The Queen*,[12] which concerned provisions in ss 20A and 21 of the *Probation and Parole Act* 1983 (NSW), the effect of which was that certain offences attracted a non-parole period of 75 per cent of the sentence unless there were exceptional circumstances:

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9 *Corrective Services Act* 2006 (Qld), s 12A.
10 *Corrective Services Act* 2006 (Qld), s 184(2), (3)(a).
11 [2004] 1 Qd R 63 at 72-73 [39].
12 (1989) 167 CLR 372 at 378.

> "The effective sentence which a court determines to be appropriate punishment for a series of offences can be framed, in most cases, either as sentences for the several offences to be served concurrently, or as cumulative sentences or as sentences which are in part cumulative and in part to be served concurrently. If, with full awareness that s 20A applied only to those serious offences which were committed after 1 January 1988, the Court of Criminal Appeal chose to impose the head sentence of fifteen years for the armed robbery committed on 8 January 1988 and to impose lesser sentences for all the other offences to be served concurrently with the fifteen-year sentence, the sentences so imposed are not open to objection. . . . The true thrust of the applicant's argument must be that, in a case where s 20A applies to some serious offences in a series but not to others in the series, it is wrong to impose the full effective head sentence on the serious offence or offences to which s 20A applies. We would agree that the differing application of s 20A warrants consideration of the appropriateness of imposing the full effective sentence on the offence or offences to which s 20A applies, but no error of principle appears merely from the Courts having chosen that course."[13]

[20] Similarly, Williams JA referred to passages in the joint judgment of Gaudron and McHugh JJ in *Griffiths v The Queen*[14] including their Honours' statement that "in most, if not all, cases the automatic imposition of s 20A to a head sentence based on a course of conduct involving both "serious" and non-serious offences must result in an injustice to the prisoner since it is unlikely that the judge would specify a non-parole period equivalent to three-quarters of the sentence in respect of offences which are not serious offences within the meaning of s 20A", and that if the sentencing judge decided instead to impose a cumulative sentence although only one course of criminal conduct was involved, "the totality principle requires that the total length of the sentences must not exceed what is appropriate for the course of criminality." Jerrard JA, who agreed with this aspect of Williams JA's reasons, specifically referred to the significance of the classification of an offence as a "serious violent offence", observing that it may be necessary to impose consecutive terms of imprisonment "to avoid, for example, inflating a sentence for a serious violent offence to one of 10 years or more" thereby producing the effect that the prisoner must serve 80 per cent of that sentence before being eligible for post-prison community-based release. Muir J agreed with those reasons of Williams and Jerrard JJA.

[21] Those passages suggest that, whilst the approach of imposing a head sentence which reflects an offender's criminality in other counts will not necessarily be open to objection if the sentencing judge has appropriately taken into account the parole consequences applicable for one or more but not all of the offences, the sentence is likely to be objectionable if those consequences have not been addressed. As Morrison JA observed in *R v Sparrow*:[15] "Even though adopting the approach of imposing the higher sentence on certain offences would produce the sort of consequences seen in *Griffiths*, the High Court said that did not mean that a court could not do so in an appropriate case."[16]

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13 [2004] 1 Qd R 63 at 70-71 [32].

14 (1989) 167 CLR 372 at 394.

15 **[**2015] QCA 271 at [49].

16 Whether or not that is permissible in relation to a sentence for a Commonwealth offence combined with a State sentence may involve different considerations: see *R v NK* [2008] QCA 403 at [3], [74]-[78], [94]-[96].

[22] In that case both parties had urged the sentencing judge to adopt that approach. That is not so in this matter. At the sentence hearing the respondent submitted that it was appropriate to sentence globally, with the head sentence attaching to count 12 because it was, objectively, the most serious of the individual rape counts and it carried the highest maximum penalty. The applicant opposed that approach. He pointed out that the maintaining offence pre-dated the serious violent offence provisions in Pt 9A. The applicant submitted that if count 12 were used as a vehicle for a sentence which reflected the criminality in the maintaining offence in count 4, it would carry with it an automatic serious violent offence declaration if the term of imprisonment were 10 years or more, resulting in the applicant serving considerably more time in custody than if the indictment had been drafted correctly. (That was a reference to the respondent's omission to add to count 4 the aggravating circumstance that, during the course of the relationship, the applicant had committed a sexual offence for which he was liable to imprisonment for 14 years or more which, had the jury accepted this, would have resulted in a maximum penalty of life imprisonment.) The applicant also submitted that the sentence for count 12 could not reflect the "uncharged acts" that would be taken into account only under count 4. For count 12, the applicant could be sentenced only in relation to the circumstances of count 12 itself, including the context in which it was committed. The applicant submitted that the sentence for count 12 could not exceed about nine years imprisonment, otherwise it would reflect what should have been charged in count 4. The sentencing remarks do not advert to this issue.

[23] The respondent relied upon the decision in *Siganto v The Queen*[17] that certain amendments to the *Sentencing Act* 1995 (NT) were intended to apply to offenders sentenced after the commencement of that Act for offences committed before its commencement. However *Siganto v The Queen* was referred to in *R v Breeze* in which the court held that, upon the question of retrospectivity of the serious violent offences provisions in Pt 9A, *R v Mason and Saunders* should continue to be followed: see [16] of these reasons. The decision in *R v Ianculescu*[18] upon which the respondent relied also does not assist. In that case the Court decided that if part of the maintaining period occurred after the commencement of Pt 9A on 1 July 1997, then that regime would apply to the offence taken as a whole. In this case the maintaining period concluded before the commencement of Pt 9A.

[24] The sentence must be set aside because the sentencing remarks reveal that the sentencing judge did not take into account the very material consequence of imposing the head sentence on count 12 that parole eligibility was automatically deferred by the operation of Pt 9A with respect to offences to which it did not apply. It is necessary to sentence the applicant afresh.

[25] The respondent submitted that, if the sentence upon count 12 of 13 years imprisonment with the serious violent offence declaration should be set aside, the Court might impose consecutive sentences, with a parole eligibility date fixed after half of the overall term; or the Court might instead calculate the parole eligibility point with reference to the halfway point of the first term of imprisonment, for the maintaining offence, and parole eligibility for a cumulative term at a point somewhere between the mid-point to 80 per cent of that term for count 12; or the Court could adopt an "integrated approach", fixing a parole eligibility date at an appropriate period for a head sentence reflecting the overall criminality.

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17 (1998) 194 CLR 656.
18 [2002] Qd R 521.

[26] The applicant submitted that a sentence of 13 years imprisonment was shown to be excessive by *R v CAM*,[19] *R v BBM*,[20] *R v HAA*,[21] and *R v GQ*.[22] In *CAM*, a sentence of eight years imprisonment was imposed on a plea of guilty to maintaining a sexual relationship over a four year period with a step-daughter aged between 12 and 16. Penile penetration commenced when the complainant was 12 or 13 years old, it occurred three or four times during the first three and a half years of the relationship and on numerous occasions during the last three or four months; the offender regularly engaged in other sexual offending against the complainant. An aggravating feature was that the offender and his wife reached an "agreement" with the then 15 year old complainant that she would seek to have his child. There were bribes and emotional blackmail of various kinds and disastrous long term effects on the complainant's psychological and emotional development. Whilst some aspects of that case are more serious than the present case, in this case the maintaining offence endured for more than eight years, and the sentence of eight years imprisonment in *CAM* was imposed on a plea of guilty, implying a sentence after a trial of about 11 to 12 years, and the Court decided in *CAM* only that the sentence was not manifestly excessive.

[27] In *BBM*, the Court exercising the sentencing discretion afresh because of sentencing errors which it is not necessary to discuss here, concluded that a sentence of 10 years imprisonment with the automatic declaration that the offence was a "serious violent offence" should be imposed for one count of maintaining an unlawful relationship of a sexual nature with the offender's adopted child, who was aged between eight and 15 years. The offending involved gross breaches of trust in treating the young and disabled complainant as an object of the offender's sexual satisfaction over a long period. It included unlawful carnal knowledge from when the complainant was 14 years old, in which she suffered pain. That complainant was very seriously adversely affected. It was, however, a sentence imposed after an early plea of guilty, justifying what was described as a "very significant reduction in the sentence that otherwise would have been imposed."

[28] In *HAA*, the court refused leave to appeal against a sentence of 12 years imprisonment after a trial on an offence of maintaining an unlawful sexual relationship, with one count of rape and 15 counts of unlawful carnal knowledge in the course of that relationship. The complainant was the granddaughter of the offender's de facto partner. The relationship occupied four years, commencing when the complainant was nine years old. Regular penile/vaginal intercourse occurred during the last three years of that offending. In the one count of rape the offender placed his penis in the complainant's mouth. Having regard to the considerably longer period of the maintaining offence in this case and the four counts of rape, *HAA* does not seem to be as serious, notwithstanding that in *HAA* the offender threatened the complainant that he would give up work and leave her grandmother if she told anyone, a threat which was significant because the grandmother was ill and needed the offender's support.

[29] In *GQ*, the court refused an application for leave to appeal against a sentence of 10 years imprisonment, with an automatic serious violent offence declaration, for an offence of maintaining a sexual relationship for a period of some six years, with the circumstance of aggravation of rape and unlawful carnal knowledge during the relationship. That offender also pleaded guilty to two counts of indecent dealing with

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19 [2009] QCA 44.
20 [2008] QCA 162.
21 [2006] QCA 55.
22 [2005] QCA 53.

a child under 12, two counts of rape (one of which occurred when the complainant was 16) and one count of indecent assault also when she was 16. The complainant was the offender's wife's niece. Sexual intercourse first occurred when that complainant was 11 years old, by which time she had become physically mature. Thereafter sexual intercourse occurred on a regular basis until that complainant was 16. Bearing in mind that the period of offending in the present case was considerably longer than in *GQ*, the sentence of 10 years imprisonment with a serious violent offence declaration upon a plea of guilty is consistent with a sentence of 13 years imprisonment after a trial in this case.

[30] The applicant argued that in the few cases involving a single complainant in which the sentences approached or exceeded the applicant's sentence the offending was more serious than in this case. The cited cases were analysed in *R v A*.[23] The applicant submitted that the offender in that case began abusing his foster daughter when she was three and a half years old. Whilst that was the basis upon which a sentence of 15 years imprisonment was imposed by the sentencing judge, the indictment was defective in so far as it alleged a maintaining offence for a period of more than three years before the legislation which created that offence commenced on 3 July 1989. On appeal the indictment was amended to reduce the charged period to a period commencing from when the complainant was seven years old and concluding when she turned 16. Thus the period of offending was similar to the period in this case. The nature of the offending was also comparable. That offender was the complainant's foster father. He was re-sentenced on appeal on the basis that he had engaged in "escalating corruptive behaviour", including rape. That offending had a devastating effect upon the complainant, it involved a very great abuse of trust during her formative years, and the offender was not remorseful - similar features exist in this matter. The very serious feature in *A* that the offender fathered a child by the complainant is not present here, but absent from that case was the serious feature of the applicant's offending that, after the complainant ceased to be a child, the applicant forcibly raped the complainant even though she had made very clear her abhorrence of the applicant's sexual offending against her (count 12). Whilst *A* was a more serious case overall, a sentence of 13 years imprisonment in this case is consistent with the more severe sentence of 14 years imprisonment imposed in *A*.

[31] The applicant referred to the four sentencing decisions cited by the President in *R v A*. In *R v S*,[24] the Court set aside a sentence of 20 years imprisonment imposed upon a plea of guilty to an offence of maintaining an unlawful relationship of a sexual nature with a female child under the age of 16 years in the course of which the offender had carnal knowledge by anal intercourse of a child under 12 years and committed rape upon the child. A sentence of 15 years imprisonment was substituted. More serious features of that offending were that the complainant was the offender's natural daughter, the offending commenced when the complainant was only four years old, some of the sexual offending was worse than in this case, and the offender corrupted the complainant to the extent of paying her money to participate. On the other hand the period of offending was significantly shorter, and that offender made full admissions, entered an early plea of guilty, and had a dysfunctional upbringing. In those circumstances, the sentence of 15 years imprisonment imposed upon a plea of guilty in *S* is not inconsistent with a sentence of 13 years imprisonment in the applicant's case. *R v L*[25]

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23 [2003] QCA 445.
24 [1993] QCA 367.
25 [2002] QCA 144.

was a more serious case insofar as that offender was sentenced for maintaining an unlawful relationship of a sexual nature with two different children and he was also convicted of sexual offending against a third child; as is to be expected, that offending attracted a much more severe sentence, a term of imprisonment of 16 years with eligibility for parole after serving half of this, upon a plea of guilty. The sentencing judge in that case considered that, apart from the discounting factors (lack of convictions and an early plea of guilty) the appropriate sentence would have been 20 years imprisonment.

[32] In *R v Krieger*[26] the Court of Criminal Appeal refused an application for leave to appeal against an effective sentence of 15 years imprisonment, under which the offender would be entitled to apply for parole at the halfway mark. That offender was convicted of a wide variety of sexual offending against a child for about four years commencing when the child was seven years old. The offender was the complainant's uncle and lived with the complainant and her mother. His offending involved regular carnal knowledge, sodomy and other indecent dealing. The offending had a very serious effect upon the child. She suffered vaginal and anal bleeding in the early stages of the unlawful relationship. The nature of the offending overall was worse than in this case, but the period of offending was materially shorter. The differences in the period of offending and the nature of the offences limit the usefulness of *Krieger* as a comparable sentencing decision.

[33] The fourth decision cited in *R v A* is *R v Myers*.[27] There were some serious aggravating features of the offending in that case, including that the offence of maintaining a sexual relationship involved regular penile/vaginal intercourse with a nine or ten year old child and the offender threatened to kill the complainant if she ever told anyone. Furthermore the maintaining offence and five counts of rape which were particulars of the maintaining offence, each attracted a maximum penalty of life imprisonment. That case, however, involved a far shorter period of offending (eight months). Furthermore the applicant's abuse of his role as the complainant's step-father was a serious breach of trust, a feature absent in *Myers*. The Court's decision in *Myers* to refuse the application for leave to appeal against the sentence of 11 years imprisonment on the maintaining charge, with eight years' concurrent imprisonment on the other charges, does not indicate that a more severe sentence would be inappropriate for the applicant's offences.

[34] The applicant referred to many sentencing decisions in which there were multiple complainants. It is necessary to mention only *R v SAG*.[28] That offender was given an effective sentence of 14 years imprisonment to be served cumulatively with a sentence of four years imprisonment he was then serving, which had been imposed about two years and three months earlier in respect of other sexual offending. He was convicted after a trial of many sexual offences against three of his step-daughters, in addition to the sexual offending, to which he had earlier pleaded guilty, against his fourth step-daughter (R). The sentences were: eight years imprisonment in respect of the maintaining charge concerning the eldest step-daughter (G), the period of that offence occupying about two and a half years when G was aged 13 to 16; four years imprisonment for other offending involving G, including two indecent assaults of G when she was 18; 12 years imprisonment for maintaining a sexual relationship with the third eldest step-daughter (P), for five years and nine months while she was aged between 10 and

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26 [1991] QCA 53.
27 [2002] QCA 143.
28 [2004] QCA 286.

16 and lesser, concurrent terms for indecent treatment and other sexual offences against her, 14 years imprisonment for each of four counts of rape of the second eldest step-daughter (N), and for maintaining a sexual relationship for seven and a half years commencing when N was eight years old; and lesser concurrent terms for the other offences.

[35] Jerrard JA described the effective sentence of 14 years imprisonment as being at the high end of the scale but not manifestly excessive when considering the other sentences imposed, the aggravating factors and given the lack of relevant mitigating factors.[29] The absence of offences of penile intercourse committed on any of the three step-daughters whilst a child, however, made the head sentence of 14 years manifestly excessive if it was cumulative to the sentence being served in respect of R. For that reason the application for leave to appeal and the appeal were allowed and the sentence imposed by the sentencing judge was varied by ordering that all sentences imposed be served concurrently with the preceding sentence of imprisonment. One aggravating matter which is present in the applicant's case but not in *SAG*, is the occurrence of three counts of penile rape during the course of the relationship (charged as separate offences here). That is significant even though Jerrard JA observed that the benefit SAG could get from the absence of offending of this type was "considerably dissipated" by his convictions for the penile rape of N while she was still a teenager. The serious aggravating circumstance of sexual offending against more than one child victim was present in *SAG* but not in the applicant's case. Otherwise there is not much to distinguish between the present case and *SAG*; there were found to be no relevant mitigating factors in *SAG* and the mitigating factors identified by the sentencing judge in this case have limited weight. *SAG* was, overall, a more serious case. However, when account is taken of the circumstance that the applicant committed multiple counts of rape against a child and a serious rape offence after she had turned 16, the sentence of 14 years imprisonment in *SAG* is consistent with a sentence of 13 years imprisonment in this case.

[36] In this case the sentence for the maintaining offence must be fixed in light of the maximum penalty of seven years imprisonment in the absence of any circumstance of aggravation. The example of that offence in this case, whilst very serious, was not in the worst category of such offences. It did not involve aggravating factors such as violence additional to that inherently involved in the offence, serious threats, or sexual offending in the presence of another victim. An appropriate penalty for that offence is six years' imprisonment.

[37] Each of the offences of rape in counts 7, 9, 10 and 12 attracted a maximum penalty of life imprisonment. Although the first three of those counts occurred during the period of the maintaining offence, for reasons already given the penalty for the maintaining offence does not comprehend punishment for those offences. In *R v P*[30] the Court found that there was no prospect of showing in the circumstances of that case that a sentence of eight years' imprisonment was manifestly excessive for a single count of rape of a twelve and a half year old complainant by her step-father. The circumstances were that, whilst the complainant's mother was away from home, the offender started touching the complainant. After she told him to stop and got up to walk away, the offender grabbed the complainant, pushed her down, disregarded her continuing objection, lay on her so that she could not move, and then had sexual

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29 [2004] QCA 286 at [36].
30 [2001] QCA 25.

intercourse. The offender threatened to harm the complainant or her mother if she made a complaint. In *R v F*,[31] a sentence of eight years imprisonment was imposed in respect of two counts of rape committed by an offender against his thirteen year old step-daughter in which no gratuitous violence was added to the inherently violent nature of rape. In *R v WQ*[32] Keane JA (White and Philip McMurdo JJ agreeing) observed that *R v F* and *R v P* showed "that the criminality aggravated by the betrayal of trust, involved in the rape of a young teenage child by that child's father is regarded as warranting a sentence of the order of eight years after a trial." In that case, as in this, there was the further aggravating feature that the offender was aware that the complainant had previously been subject to sexual abuse (in that case, by another person) and that the complainant had been adversely affected by that abuse. Keane JA's following observations are also relevant here:

> "This feature of the case is a matter of special concern, in that the appellant callously preyed upon his own son for sexual gratification in a way which was likely to compound the ill effects of the earlier abuse to which his son had been subjected. There was no suggestion of any remorse on the appellant's part for his abuse of his son in this way."[33]

Having regard to those aggravating circumstances, Keane JA concluded that the effective sentence of seven years imprisonment in that case was at the lower end of the range of sentences that probably could have been imposed.[34]

[38] With those decisions in mind, an appropriate sentence for the three counts of rape (counts 7, 9 and 10) occurring the period of the maintaining offence, if considered apart from the other counts, would be about eight or nine years imprisonment. That being so, taking into account also the criminality in the maintaining offence (count 4), counts 7, 9 and 10 should attract the total period of imprisonment of 10 years, to be served concurrently with the sentence of six year's imprisonment on count 4 and sentences of three years imprisonment on the indecent dealing offences.

[39] Those sentences do not take count 12 into account. The circumstances of count 12 were very serious: see [8] of these reasons. There should be a substantial sentence of imprisonment for count 12 and it should be cumulative upon concurrent sentences for the earlier offences in circumstances in which, unlike each of the other specific offences, this offence was committed after the termination of the sexual relationship charged in count 4, it was committed after the complainant had matured sufficiently to enable her to strongly voice her objection and physically resist the applicant, at least two years had elapsed after the other offences of which the applicant was convicted, and the applicant's gross breach of trust as the complainant's step-father was aggravated by his appreciation and acknowledgement that the complainant would hate him for this offence. Since the respondent did not advocate for a lengthier aggregate term than the 13 years imposed by the sentencing judge, a cumulative sentence on count 12 could not in any event exceed three years. The very substantial reduction from a sentence of about eight or nine years imprisonment which count 12 otherwise might attract if it were considered in isolation takes into account both the mitigating factors (see [12]-[13] of these reasons) and the requirement in the circumstances of this case to moderate the sentence "to ensure that the aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality

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31 [2001] QCA 416.
32 [2006] QCA 518 at [23].
33 [2006] QCA 518 at [24].
34 [2006] QCA 518 at [25].

involved".[35] I have also taken into account that parole eligibility will arise at the mid-point of the aggregate sentence of 13 years imprisonment. (Because counts 1 – 11 cannot attract a serious violent offence declaration (see [16] of these reasons), s 161C of the *Penalties and Sentences Act* 1992 (Qld) does not apply to require the imposition of a serious violent offence declaration in respect of the effective sentence of 13 years imprisonment.)

[40] This sentence is less severe than that imposed by the sentencing judge in that the applicant will be eligible for parole after he has served half of the term of thirteen years rather than after he has served 80 per cent of that period. That is a consequence of the fact that the legislation mandating the 80 per cent pre-parole eligibility period was not enacted until after the applicant had committed all but one of the offences of which he was convicted. In that context, no sufficient ground appears in this case to defer parole eligibility beyond the time prescribed by the applicable legislation.

Proposed orders

[41] I would make the following orders:

1. Grant the application for leave to appeal against sentence.
2. Allow the appeal.
3. Vary the orders made in the District Court by:
   (a) setting aside each of the orders for imprisonment and the declaration that the conviction on count 12 is a conviction for a serious violent offence, and
   (b) ordering that the applicant be sentenced as follows:
      (i) Ten years imprisonment on each of counts 7, 9 and 10, six years imprisonment on count 4, and three years imprisonment on each of counts 3, 5, 8 and 11, each such term of imprisonment to be served concurrently with each other such term of imprisonment.
      (ii) Three years imprisonment on count 12, such term of imprisonment to be served cumulatively upon the concurrent terms of imprisonment imposed upon counts 3, 4, 5, 7, 8, 9, 10 and 11.
4. Confirm the declaration made in the District Court pursuant to s 159A of the *Penalties and Sentences Act* 1992 (Qld) that the whole of the period between 26 March 2015 and 27 March 2015 during which the applicant was held in pre-sentence custody be imprisonment already served under the sentence for each count.

[42] **PHILIPPIDES JA:** I agree with the reasons of Fraser JA and the orders proposed.

[43] **ATKINSON J:** I agree with the reasons of Fraser JA and the orders proposed.

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35 *Postiglione v The Queen* (1997) 189 CLR 295 at 307-308, concerning the "totality principle".