SUPREME COURT OF QUEENSLAND

CITATION:	*R v MCK* [2017] QCA 56
PARTIES:	**R** **v** **MCK** (appellant/applicant)
FILE NO/S:	CA No 234 of 2016 CA No 114 of 2016 DC No 563 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Southport – Date of Conviction & Sentence: 8 April 2016
DELIVERED ON:	7 April 2017
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2016
JUDGES:	Holmes CJ and Gotterson JA and Ann Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Dismiss the appeal against conviction.** **2. Grant the application for leave to appeal against sentence.** **3. Allow the appeal against sentence.** **4. Set aside the sentence imposed at first instance.** **5. Substitute a sentence of four years imprisonment suspended after 12 months for an operational period of five years.** **6. Declare that the appellant has served a period of 365 days between 8 April 2016 and 7 April 2017 of that sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – where the appellant was convicted on his plea of guilty to one count of maintaining an unlawful sexual relationship with a girl under 16 years, with an aggravating circumstance – where the appellant now denies his guilt – where the appellant maintains his guilty plea was not freely entered but was induced by wrong legal advice from his barrister and from a clerk represented to him as a lawyer – where the appellant asserts counsel did not take proper instructions from him – where the appellant asserts that

he was unaware of the nature of the charge to which he pleaded guilty and the allegations on which it was based – whether a miscarriage of justice has occurred

CRIMINAL LAW – SENTENCE APPLICATION – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was sentenced to nine years and 11 months imprisonment with parole eligibility after three years and four months – whether the sentence was manifestly excessive

R v MAN [2005] QCA 413, considered
R v SAG (2004) 147 A Crim R 301; [2004] QCA 286, cited
R v WU [2007] QCA 308, considered

COUNSEL: P J Davis QC, and J R Jones, for the appellant/applicant
C W Heaton QC for the respondent

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

[1] **HOLMES CJ:** The appellant was granted an extension of time within which to appeal against his conviction of one count of maintaining an unlawful sexual relationship with a girl under 16 years, with the aggravating circumstance that in the course of the relationship he had carnal knowledge of her. He had also, within time, applied for leave to appeal against his sentence of nine years and 11 months imprisonment with parole eligibility after three years and four months.

[2] The appellant was given leave to adduce further evidence in the form of affidavits from him, his two sisters, and his solicitor, Ms Fogerty, while the respondent was permitted to adduce evidence in response from the appellant's former barrister, Mr Rosser, and the latter's clerk, Mr Reichman, as well an affidavit from an employee of the office of the Director of Public Prosecutions, which simply exhibited a schedule of facts and correspondence between Rosser and the office. The appellant, Mr Rosser and Mr Reichman gave evidence and were cross-examined; the affidavits of the appellant's sisters, Ms Fogerty, and the Director of Public Prosecutions' employee were admitted without the need for cross-examination.

The appeal grounds

[3] The appellant's notice of appeal states as its grounds that a miscarriage of justice has occurred; that the appellant pleaded guilty to the offence although he was not guilty; and that he relied on advice from Mr Reichman, whom he believed to be a lawyer, and from Mr Rosser, to the effect that he should not go to trial and that the sentence would not involve actual custody, because the complainant would not be believed and because 13 of 14 charges against him had been abandoned. Had he known the true circumstances concerning Reichman's status and the inaccuracy of the advice given him, he would have maintained a plea of not guilty. It is said, in addition, that neither Reichman nor Rosser took proper instructions from him as to the allegations.

The charges against the appellant

[4] In February 2015, the appellant was charged with seven counts of carnal knowledge, six counts of indecent treatment and one count of rape, all allegedly committed against his estranged wife (to whom I shall refer as "W") at times when she was legally a child. On 10 July 2015, he was committed for trial on all of those charges. The indictment which the Crown originally presented contained the count of maintaining an unlawful sexual relationship with W as well as three counts of carnal knowledge, five counts of indecent treatment, two counts of attempted sodomy and one count of rape or, in the alternative, sodomy. After it was indicated that the appellant would plead guilty to the maintaining count, all the remaining counts were the subject of a nolle prosequi.

The agreed factual basis for sentence

[5] The allegations against the appellant were set out in an agreed schedule of facts. It was alleged that when the appellant was 21 years old, he saw W, who was then three months short of 14 years old, and her similarly aged friend at a house near his home. He invited the two girls to his house for a beer. He and W spent some time together on that occasion; he repeated the invitation the next day and they had sexual intercourse. Soon after they began engaging in a regular sexual relationship which included mutual oral sex, instances in which the appellant inserted his finger into or licked W's anus and two attempts to have anal sex with her. (The schedule of facts did not contain any allegation of conduct amounting to completed offences of sodomy or attempted or completed offences of rape. The crux of the allegations, then, was not that the sexual acts occurred against W's will, but that she was not legally of an age to consent to them.)

[6] Over 12 months of the maintaining period the appellant lived with W at the house of her mother and step-father; she was aged between 14 and 15 years old then. The pair remained in a relationship after W turned 16. In 2005, when W was 21, they had a child, and over the ensuing years had two more. They married in September 2009, but the marriage failed after about five months.

[7] In June 2014, W made a statement to police. A pretext telephone conversation was arranged, during which the appellant accepted that he knew W when she was 14 but maintained that they only began a sexual relationship when she was 17. In February 2015, the appellant was interviewed by police and continued to maintain that he did not start a sexual relationship with W until she was 17 years old, although he admitted to having had such a relationship with her when he was living at a particular address at Palm Beach. Other evidence indicated that when the appellant lived at that address, W was aged between 13 years and nine months and 14 years and six months.

[8] The agreed schedule of facts was tendered at the sentence without objection. It was not read to the court but summarised, the prosecutor saying that the offending occurred while the complainant was aged between 13 and 16 and involved "almost daily intercourse and a variety of other sexual acts, oral sex, anal penetration, licking of her anus", as detailed in the schedule.

The appellant's response on this appeal to the allegations

[9] In an affidavit filed for the purposes of the appeal against conviction, the appellant denied the allegations contained in the agreed schedule of facts, notwithstanding its admission by consent at his sentence. As to the substance of the allegations, he

deposed that he lived at the Palm Beach address in 1988 when he was aged 21. During that period he met W, who was going out with someone who lived nearby. He did not become involved with her until she was 16 or 17 years old. By that stage she was not at school but was working at her father's hair salon. He was confused when he told the police in his interview that the sexual relationship with W had commenced when he lived at the Palm Beach address. He denied: having sexual intercourse with the complainant when she was under 16; having anal sex with her; or putting his fingers in her anus.

The appellant's account of how he came to plead guilty

[10] The appellant's account, deposed to in an affidavit and elaborated on in evidence, was that he met Mr Reichman in February 2015 when he was held at the Southport watchhouse after being charged with offences against W. Reichman explained that the appellant's father had contacted him; that the appellant's wife had "charged [him] with some pretty serious crimes" and sounded as if she was crazy. The following day, Mr Rosser appeared for the appellant in the Magistrates Court and he was granted bail. (The Queensland Police Service court brief indicates that he appeared on 5 February 2015.) A week or so later the appellant attended the office of the "Legal Advisory Service", the name which Mr Rosser had given his barrister's practice. He saw Reichman, whom he told "the whole story" as the latter took notes. The appellant spoke to Rosser in passing after the meeting. Subsequently he spoke to Reichman by telephone on about a dozen occasions. He had never spoken to Rosser over the telephone.

[11] Counsel for the respondent suggested that it was in fact the day following the bail application that the appellant attended the Legal Advisory Service; and, more significantly, he put to the appellant that on that occasion he had signed three documents: an "Information and Acknowledgement" form in relation to the Barristers Rule relevant to direct briefing; a Costs Disclosure Agreement; and a document headed "Acknowledgement", which among other things contained the sentence:

> "Office conferences being held are not with a qualified lawyer"

and a further statement:

> "If your matter proceeds to representation then all advice and instructions will be by a qualified legal representative; either Solicitor or Barrister. Where a Clerk is involved they will be acting under the instructions of that person".

The appellant said that the signature on the first document "could be" his; he did not recall signing the other documents and the signatures did not look like his. He had not been given copies of any of the documents.

[12] The appellant deposed that he met Mr Rosser again on the second mention of his matter in the Magistrates Court, but they did not speak for long. He accepted in cross-examination that this was the occasion of his committal; the conversation, he said, consisted of being told when to stand and when to sit. The day following that appearance he spoke to Mr Reichman by telephone. Reichman said,

> "I haven't had time to go through your paper work, but while I have you, do you know how you are going to go?".

The appellant answered that he would not be pleading guilty, to which Mr Reichman said

> "You will have to cop something and plead guilty to something or go to trial. The trial will cost you at least $20,000".

The appellant responded that he could not afford $20,000. He would plead guilty to having had sex with W; by which he meant that he would plead guilty to an unlawful carnal knowledge charge. In total he paid between $12,000 and $15,000 in fees to the Legal Advisory Service, including $6,000 paid prior to his sentence hearing.

[13] In cross-examination, the appellant expanded on the conversation; he said that he had telephoned Mr Reichman because he was worried about the charges and the latter had responded that he would let Mr Rosser know; Rosser would get in contact with the Director of Public Prosecutions. The appellant complained that Reichman had failed to explain to him that he could get funding from Legal Aid. In response to questions by me, as to whether the need to pay between $5,000 and $8,000 (the difference between the amount he paid in fees and the $20,000 estimate of costs for a trial) was determinative in his decision to plead guilty, he said that at the time the conversation took place he had already paid $14,000, to which the $20,000 quoted for trial was to be additional.

[14] In February 2016, according to the appellant, Mr Reichman advised him by phone that the 14 charges against him had been reduced to one and that if he were to plead guilty the most he would get would be a five year wholly suspended sentence. He queried whether Reichman was sure he would not go to jail, to which Reichman responded that W's story sounded "crazy", and the judge would not believe her. The appellant contacted Reichman on other occasions to let him know that money had been paid into the Legal Advisory Service account.

[15] On 8 April 2016, the day of his sentence, the appellant deposed, he had a meeting with Mr Reichman in an interview room at the courthouse. Reichman said that he had W's victim impact statement, but advised the appellant against reading it. There was some discussion of whether the hearing should be postponed because the judge was perceived as "not a good one to appear before". It was suggested that a reference in W's victim impact statement to her having suffered post-traumatic stress disorder could warrant challenge and adjournment, but the appellant wanted the matter dealt with. Following that discussion, he had a conference with Mr Rosser who asked him a number of questions about his antecedents; this caused the appellant some unease because he had already provided a good deal of the information. Rosser told him that at worst he would get a five year wholly suspended sentence. He spoke to Rosser only "very briefly".

[16] After the conference, the appellant deposed, he waited in the corridor. Mr Reichman asked him to sign some paper work; he did so without reading it. He was not told the nature of the document. Later, when his current solicitor showed him the schedule of facts, he recognised his signature on it. A copy of the document is annexed to his affidavit. On its last page, before his signature, appear the words "I instruct my legal representative to plead me guilty on the above facts". The appellant said he believed the writing to be Reichman's.

[17] Under cross-examination, the appellant maintained that he did not know what the allegations against him were before the prosecutor read them out in court:

> "That was the first time I've ever heard anything of it, and I was absolutely horrified.
>
> Okay. So you say that was the first time that you ever understood anything about the nature of the allegations?
>
> Yes, as they were being read out".

He still did not understand what was being alleged. He had been under the impression he was pleading guilty to unlawful carnal knowledge.

[18] The appellant conceded that during his interview the police had taken him through his wife's allegations but, he said, because he was "thrown off" by the situation, he did not absorb what was happening. Over the next 12 months, the nature of the allegations did not sink in because he did not believe "it happened" or was right. He acknowledged that he knew on the day of sentence that the charge was maintaining an unlawful sexual relationship, but he did not appreciate that it was different from unlawful carnal knowledge. He had made no enquiry of Mr Rosser and Mr Reichman about the allegations against him because he believed they would let him know if he needed to be told anything. He did, however, agree that, given the nature of the pretext call, he knew at least that the allegation was one of his having a sexual relationship with W before she became an adult. He had pleaded guilty to an offence which reflected that only because he felt he had no other option, based on Reichman's advice. Although he had asked Reichman whether he was sure he would not go to jail, he had not entertained the possibility that pleading guilty to an offence involving sex with a child put him at risk of imprisonment.

[19] In re-examination, the appellant was asked to identify all the factors leading to his plea of guilty. He said that he had pleaded guilty because Mr Reichman had told him

> "You have to plead guilty or cop something or go to trial"

and he had answered that he could not afford to go to trial. He was not aware that free or cheap legal representation was available. Neither Rosser nor Reichman had explained to him the significance of the reduction in charges from 14 to one or the impact of that on the seriousness of the overall allegations. He thought his situation had been improved. He had not at any stage had a meeting at which he went through the brief of evidence or discussed its contents. He believed Reichman to be a lawyer.

Mr Rosser's account of his dealings with the appellant

[20] Mr Rosser made an affidavit in which he described "Legal Advisory Service" as both a "community initiative" and his "legal practice as a sole practitioner". Mr Reichman, he said, was his clerk and office manager. Rosser had telephoned the appellant's father after the latter had spoken to Reichman about his son's arrest. A recording of the conversation was in evidence. The appellant's father explained that his son had been arrested and needed a solicitor. Rosser said that he would see what he could find out. He ultimately spoke to police and informed them that Reichman would be speaking to the appellant at the watchhouse and that he, Rosser, would appear for the appellant the following day. He duly appeared on the instructions of the appellant's father and successfully made a bail application, after which he told the appellant to see him as soon as possible.

[21] The appellant attended his office the next day and gave him instructions to act. On this occasion, Mr Rosser deposed, he explained he was a barrister who took direct briefs, while Reichman was his clerk and would be the regular point of contact. The appellant was asked to sign documents including the Acknowledgement form, which Rosser described as an acknowledgement that the appellant

> "would not act solely on any information given by a clerk [of Rosser's] office"

(although in fact the document in question said that office conferences were not held with a qualified lawyer). It was usual practice to give clients copies of those documents, although he could not specifically recall giving them to the appellant. The appellant informed him he wanted to plead guilty to at least to some of the charges.

[22] On 22 April 2015, Mr Rosser and Mr Reichman discussed the matter and decided that Rosser would contact the appellant to discuss the brief with him and arrange for him to attend his office to go through the exhibits and give instructions as to whether he wanted the committal to proceed by way of full hand-up procedure or with cross-examination of witnesses. This discussion was recorded by Reichman in the form of a note which is exhibited to Rosser's affidavit, which under the heading "Review" reads –

> "Get him in to go through brief –
>
> Obtain inst [instructions] as to FHU [full hand-up committal] or apply for XXN [cross-examination]".

[23] On 2 July 2015, Mr Rosser spoke to the appellant on the telephone, reading out some of the statements to him and talking about strategy for the committal hearing. At the time of the conversation, Rosser said, the appellant was in Dysart and had not received letters but would be back in a week. There is a file note of the conversation in what appears to be Rosser's handwriting. It says that because the appellant had not been heard from, "we" had to attend court and that the appellant is in Dysart and will return in a week, with the dates "8 July – 14 July". Rosser said that he arranged with the appellant to attend his office at some date he could not now recall between 3 and 9 July 2015. On that occasion, he took instructions from the appellant. However, he could not produce any corresponding note.

[24] On the day of the committal, 10 July 2015, Rosser deposed, he spent an hour going through the brief of evidence with the appellant in an interview room at the courthouse. The appellant was particularly concerned about his admissions in the police interview to having had a sexual relationship with W while living at the Palm Beach address, which, it could be proved, occurred when W was under age. The appellant asked how long he would "get" (by way of sentence) and Rosser said that he could not be sure, because the Crown intended to introduce a maintaining charge. The appellant said that he would not plead guilty to charges of rape and sodomy but assented to Rosser's discussing a possible guilty plea with the prosecutor. (In fact there do not appear, at that stage, to have been distinct charges of rape and sodomy; the allegation was that the sodomy had been committed by force and hence amounted to rape.) The only note of what occurred on this occasion is recorded on the same piece of paper as the 22 April note; it is to the effect that the appellant has been committed on 14 charges with no plea entered, below which the words appear:

"Try to negotiate on rape and expect a maintaining charge to come".

Those notes were made, Mr Rosser said, after the committal (which was by way of full hand-up) was completed and he had discussed the prospect of a withdrawal of the rape and sodomy charges with the prosecutor.

[25] The indictment was mentioned in the District Court on 1 February 2016. On 3 February, Mr Rosser said, he spoke to the appellant and told him the charges the indictment contained. The appellant said he wanted the matter resolved. Rosser asked if he was still prepared to plead guilty to the charges other than the rape and sodomy charges and suggested he might be able to have them reduced to a single charge of maintaining a sexual relationship. This was, however, a serious charge and other people he acted for had received significant sentences of imprisonment. He would do some research to find if there were any comparable matters before any further steps were taken on a guilty plea. He did so and found four District Court sentences where immediately suspended sentences of imprisonment had been imposed for the offence; in particular, one whose circumstances was similar to the appellant's. He advised the appellant that while the custodial component of his sentence could be as long as 12 to 18 months, other people had received suspended sentences and he would make submissions to the judge for that outcome. The appellant asked how long a suspended sentence could last, and he replied that the maximum operational period was five years. Rosser denied ever having told the appellant anything about receiving a five year wholly suspended sentence.

[26] The appellant gave Rosser instructions to make a submission to the Director of Public Prosecutions to the effect that he would plead guilty to one charge of maintaining a sexual relationship with a child. Rosser made the submission by way of email, sent on 9 February 2016. It is in evidence; it sets out as considerations that the offending was alleged to have been committed during the early years of the appellant's relationship with W, which subsequently developed into a marriage producing children; that the allegations had surfaced only during the deterioration of the marriage; that the appellant denied "many of the allegations"; and, in particular, that he strongly denied the sodomy and rape allegations, but would plead guilty to maintaining a sexual relationship. Under cross-examination, Mr Rosser said that he had previously identified which specific allegations the appellant denied and advised him as to the impact of accepting them on sentence, but he did not have notes to that effect.

[27] The submission was accepted. Rosser informed the appellant accordingly, and advised him to ensure that there were people supporting him in court on sentence to achieve a positive appearance. The appellant told him his family members did not know the full extent of the matter and he had informed them he would "walk out of court". Rosser responded that was there was every chance he would go to jail and an immediately suspended sentence was unlikely, so he should let his family know that. Prior to sentence, he contacted the appellant asking for photographs of him with W and their children showing them as a happy family.

[28] On the day of the sentence hearing, Mr Rosser said, he met the appellant at the courthouse, Reichman arriving later. Rosser told the appellant that he considered W's victim impact statement to be "grossly exaggerated" and that there was an available argument that as an unsigned version typed by an officer of the Director of Public Prosecutions' office, rather than W herself, it could be challenged. The appellant responded that if it was exaggerated he would prefer the judge see it so

that he would understand the type of person W was. Rosser told the appellant that it would be possible to adjourn the sentence, because (according to Rosser) the appellant had just disclosed details to him of post-traumatic stress disorder; but he did not want an adjournment. Rosser went through the schedule of facts with the appellant, reading from one copy of it while the appellant followed on another copy. The appellant then signed the schedule of facts below words handwritten by Rosser:

> "I instruct my legal representative to plead me guilty on the above facts"

Rosser recorded the appellant's not wishing an adjournment and having signed the schedule of facts on the single sheet of paper which also contained the notes of 22 April and 10 July 2015. Below that is a brief entry, recording the sentence imposed. During the conference, Rosser said, he also had the appellant sign a typewritten document headed "Plea of Guilty Instructions". However, as he could no longer find that document, he had annexed an unsigned copy of it to his affidavit.

[29] Cross-examined about his preparation of the appellant's case, Mr Rosser accepted that the police brief comprising the statements and exhibits contained no marking or note. The exception was W's first statement, which had handwriting on it that he thought looked like Mr Reichman's. He would have made notes recording his consideration of the brief on a pad or his computer, but was unable to produce them. He did not have to make extensive notes because this was always to be a plea of guilty. He maintained, however, that he had taken instructions.

[30] It was put to Mr Rosser in cross-examination that he had left it to the morning of the sentence to obtain information about the appellant's antecedents (personal history). He said that was not so; he had merely conferred to formalise what he was going to say and to go over it with the appellant, to make sure that it was correct. On questioning by me as to whether there existed a statement of antecedents, he said that there was a document which he had found in the last week on a shelf in his office, which set out the antecedents used in sentencing. It was now in the possession of the respondent and was produced; Mr Rosser identified it as the notes he took at the conference immediately before the sentence.

[31] That set of notes became an exhibit. It sets out details of the ages at which the appellant and W had children and married and the details of the breakdown of the marriage; as well as some submissions which Mr Rosser apparently intended to make on sentence. Those notes are followed by notes of some remarks made by the sentencing judge. Mr Rosser conceded that he had no prior notes of the appellant's antecedents. The conference was for the purpose of getting last minute instructions about the appellant's background and family, so that it would be up-to-date.

Mr Reichman's account of his dealings with the appellant

[32] Mr Reichman deposed that he had visited the appellant in the watchhouse when he was first arrested, to tell him that an application for bail would be made for him in the morning. He immediately advised the appellant that he was a clerk and that his "boss", who was a barrister, had been talking to the appellant's father. The following day the appellant attended Rosser's office and had a conference with the latter, for parts of which Reichman was present. The appellant, Reichman said, lived on a remote island, so there was not much contact with him; he recalled him attending the practice about three times. (In fact the appellant lived on Macleay Island.)

[33] On 10 July 2015, at the courthouse, Mr Rosser had gone through the brief of evidence with the appellant. He, Reichman, recalled the appellant saying a number of times, "How long am I going to get?" and also saying that he would consider pleading guilty to some of the charges. Reichman denied at any time saying the appellant would have to "cop to something". He had advised the appellant that the total cost, should he go to trial, would be about $20,000. He denied giving the appellant any legal advice; he had not spoken to him about charges being dropped, nor had he mentioned a wholly suspended sentence. He did not tell the appellant that W's story was "crazy" or that the sentencing judge would not believe her.

[34] Mr Reichman recalled in the lead-up to the appellant's sentence telephoning him to follow up whether he had sent through material for the purpose of the sentence. On the day of the sentence, Reichman said, he arrived late at the courthouse. The appellant and Mr Rosser were already in an interview room. Rosser was reading a schedule of facts aloud, while the appellant followed what he said on another copy. The appellant signed the schedule of facts and guilty plea instructions. Reichman had not had the appellant sign any documents. He also denied having written the notes on W's statement, saying that it might be the writing of a work experience student.

Contact between the appellant's family and Rosser and Reichman after the sentence

[35] One of the appellant's sisters (whom I shall call "Ms A") contacted Reichman by telephone on 8 April 2016, after her brother was sentenced. According to her, Reichman said, among other things, that he had warned the appellant that the sentencing judge was "brutal" and that he should consider postponing the hearing. He described hearing W speak to her father after the sentence and saying that the appellant had not been expected to go to jail. According to Ms A, Reichman said that she should contact W and ask her to retract her statement. Ms A spoke to Reichman again the following day, when he advised that an appeal should be brought against sentence, counselled against a bail application because it would be advantageous for the appeal if the appellant had spent some time in jail, and made derogatory remarks about the sentencing judge. On 11 April, she spoke to Reichman by telephone once more. Reichman said that he had spoken to the appellant who wanted Mr Rosser to represent him on an appeal; there was a 21 day time limit which it was important to meet and he would be able to do the "paperwork". He offered to visit the appellant in the watchhouse and obtain his instructions to lodge the appeal. She believed Reichman was a lawyer.

[36] In her affidavit, the other sister, "Mrs B", deposed that her husband spoke to Mr Rosser after the appellant's sentence. (There is no affidavit from Mr B in evidence, but Rosser has exhibited a recording of the telephone call to his affidavit.) According to Mrs B, she first spoke to Mr Reichman on 11 April by telephone and made contemporaneous notes from which she later prepared her affidavit. The notes include reference to costs of between $12,000 and $13,000 to appeal and $6,000 to apply for appeal bail; that it would not be worth seeking appeal bail, since it would be better if the appellant had already served some time; and that the appellant will be moved to Arthur Gorrie within two or three days. Ms A was present and could hear the conversation on speaker.

[37] According to Mrs B, Mr Reichman said in this conversation that he had warned the appellant about the judge; that he should not continue before him. She asked why Reichman had waited until the night before the sentence to tell the appellant to

produce photographs, and Reichman said that it was because the judge had at the last moment changed his mind and indicated that he would accept photographs. Reichman advised her to make contact with W and persuade her to retract her statement; he later sent her an email attaching W's victim impact statement. He made derogatory remarks about both the sentencing judge and W. Reichman advised that the appeal had to be lodged within 21 days and gave her a figure for its costs, while saying that "if it were [his], business [he] would do it for free." This, together with his discussion of the sentence and the possible appeal, led her to believe that he was a lawyer.

[38] On the following day, again speaking by telephone, Reichman said that he would visit the appellant in the watchhouse and confirm his instructions. In another conversation on 15 April, when Mrs B asked if he had done so, Reichman said that the appellant was at Wacol and he did not intend to drive all the way there. When she indicated that the appellant would seek other lawyers, he offered to give her a referral.

[39] Mr Reichman did not deny speaking to Ms A and Mrs B, but denied most of the statements they attributed to him. He maintained that he had not said anything abusive about the sentencing judge or W; he had not suggested that Ms A or Mrs B contact W; he had not referred to a 21 day time limit for an appeal; and he had not mentioned the Arthur Gorrie centre: he knew that sentenced prisoners were not sent there. He sent the email attaching W's victim impact statement at Mr Rosser's direction. A copy of the email, sent on 11 April 2016, is annexed to Reichman's affidavit. It gives his title as "Barrister's Clerk".

[40] As I have already mentioned, the recording of Mr B's conversation with Mr Rosser was in evidence, although untranscribed. There are some significant features of it. It is Mr B who raises with Rosser whether it would help if W were to retract her story, and Rosser, not surprisingly, confirms that it would. They discuss the possibility of a member of the appellant's family speaking to W and Rosser says that he would be prepared to talk to her if she were willing. Also in that conversation, Rosser mentions that someone heard W say after the sentence that she could not believe the appellant went to jail. Mr B asks if a solicitor was involved in the case; Rosser replies that he did the work on a direct basis, so that no solicitor was needed; it was better for him to obtain first-hand information from the appellant.

[41] Rosser tells Mr B that an appeal would involve a lot of work and cost between $12,000 and $13,000. He estimates the costs of an application for appeal bail at between $5,000 and $6,000 and gives his initial view that it is not worthwhile; it would be unlikely to succeed since the appellant faced the prospect of at least some jail even if he were successful on appeal. The time he spent in custody would be taken into account on an appeal against sentence. The appellant would probably be taken to the Arthur Gorrie Reception Centre after a few days in the watchhouse. Rosser says that he will email W's victim impact statement to Mr B once the latter has provided an email address.

Counsel's submissions

[42] Counsel for the appellant submitted that this court should find the appellant was not told what the offence of maintaining an unlawful sexual relationship entailed and accept his evidence that he thought he was pleading to an offence of unlawful carnal knowledge. The appellant's record of interview with police was not in evidence, so

the extent to which W's allegations were put to him then were not known. When he was arrested he was not charged with maintaining a sexual relationship. Although there had been a pretext telephone call on 14 July 2014, all that was known of it was what appeared in the schedule of facts; which was that the appellant had maintained that he had only begun a sexual relationship with W when she was 17. Although the appellant was arraigned on the maintaining charge, the remaining charges which formed the particulars of the maintaining charge had been discontinued, so that there was nothing about the arraignment that would enlighten him.

[43] The absence of notes produced by Rosser or Reichman; the fact that the police brief contained almost no markings except those on W's statement which both Rosser and Reichman had denied making; and the fact that Rosser was still taking antecedents immediately before the sentence hearing all pointed to a conclusion that the appellant was not advised as to the content of the police brief, the substance of the charge, or the likely penalty. The only contrary evidence was that from Rosser and Reichman, neither of whom could be accepted as reliable, and the signed copy of the schedule of facts, as to which the appellant had given evidence that it was not explained to him and he had not read it. The appellant's evidence was that he had been assured that he would not go jail, and Rosser's submission on sentence, in which he argued for a sentence involving no actual custody, supported a view that he had given such advice.

[44] The proper conclusion was that the appellant, knowing charges had been dropped and having been told he would not go to jail, did not realise the seriousness of his position. He did not appreciate the nature of the charge, was not in possession of all the facts and did not have a genuine consciousness of guilt; the plea accordingly was not a true admission of guilt.

[45] The respondent's counsel pointed out that from the first conversation with the appellant's father, Rosser had made it clear that Reichman was his clerk; having told the father that, there would be little point in attempting to deceive the appellant as to this. The "Acknowledgement" which the appellant signed should have made it clear to him that he could not expect legal advice from Mr Reichman.[1] Having been interviewed by police, the appellant must have heard the allegations made by W; and it was improbable that anyone would plead guilty to an offence of a sexual nature against a child without ascertaining what the underlying allegations were. Nor was it probable that a defendant would engage a lawyer and pay a large sum of money without establishing what the case was about. The appellant was informed that the judge might present some difficulty for him and given the option of an adjournment; he could hardly have remained confident that he would not go to jail.

Credibility and reliability

[46] The major difficulty in finding the facts in this case is that there were compelling reasons for doubting the veracity of all three witnesses who gave oral evidence: the appellant, Mr Rosser and Mr Reichman.

[47] The appellant's insistence that he had not contemplated the possibility of imprisonment is difficult to reconcile with his claim of having questioned Reichman about whether the latter was sure he would not go to jail. His claim that he knew nothing of W's

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[1] In fact its terms, "Office conferences…are not with a qualified lawyer" suggested that he could not expect legal advice from Mr Rosser either.

allegations as to their relationship before he heard them in court is simply not credible. It is one thing for him to assert that he did not understand what the maintaining charge encompassed, but it is quite another to say on oath that he had never before heard any of the allegations outlined against him. His police record of interview was not among the documents before the court; presumably its absence reflects one of many lapses in Mr Rosser's filing system. Nonetheless, it is impossible to believe that the appellant was not asked questions based on W's extensive statement setting out her allegations against him – indeed, he admitted as much – or that the allegations failed to make any impression on him. Nor is it plausible that having been charged with seven counts of carnal knowledge, six of indecent treatment and, most significantly, one of rape, he would placidly have proceeded through committal without enquiring what they might have been about.

[48] I do not accept the appellant's sworn claim that he had never spoken to Rosser on the telephone. Rosser's handwriting appears at various points throughout the material, for example in the notes as to the appellant's antecedents. It is a form of printing which is distinctive, and quite unlike Reichman's handwriting. It appears on the file note of the telephone conversation Rosser said he had with the appellant on 2 July 2016, and there is no reason to doubt the note's authenticity. The appellant's denial of any telephone contact with Rosser may be the result of mistake rather than deceit, but it leads me to doubt his reliability as to whom he had conversations with.

[49] The appellant's claim in response to my questioning about the impact of the cost of trial, that he had already paid $14,000 at the time the $20,000 was quoted in July 2015, seems to have been an off the cuff rationalisation to explain his willingness to plead guilty. Other evidence indicates that he had not in fact paid $14,000 at that time. According to his affidavit, at least $6,000 of the total amount he paid in fees was not transferred until the period before sentence; which seems to be supported by some copies of bank records annexed to his solicitor's affidavit, indicating deposits in February and March 2016. My strong impression was that the appellant would say what he regarded to be in his best interests on his appeal, without much regard for the truth.

[50] Regrettably, however, I do not accept Mr Rosser as an unfailing witness of truth either. Mr Rosser was cross-examined at length by counsel for the appellant about the nature of his practice. Of significance for present purposes as going to his credit are two matters. Firstly, a video on the Legal Advisory Service website showed Mr Rosser, dressed as a barrister and describing himself as a barrister at law, recommending that members of the public contact Legal Advisory Service, twice using the expression "talk to them". The webpage contains the words,

> "Recommendation. Chris Rosser, Barrister of [sic] Law, recommends talking to Legal Advisory before seeing any other Law firm for Traffic Offences, Police charges and any other court appearances."

Mr Rosser maintained that this was no more than a recommendation to the public that they use his service, and it was not misleading.

[51] Secondly, Mr Rosser set up a webpage for "Court Advisory Service", which purported to offer free legal advice in Brisbane on a variety of legal problems. The webpage stated:

> "Our experienced lawyers and barristers service all law courts on the Gold Coast, Brisbane and northern NSW"

and made other references to "our lawyers and barristers". Mr Rosser, while conceding that "Court Advisory Service" consisted of no one but him, claimed that the representation was justified because if clients wished, he referred them on to someone else qualified.

[52] For present purposes, I will say no more than that Mr Rosser's attempts to explain and justify his statements in his advertising of his two "Services" were not credible. In addition, his denial of the suggestion by the appellant's counsel that he had left it to the morning of the sentence to take the appellant's antecedents, and his assertion that he was merely formalising what was to be said, also sat badly with his later concession that he took information about the details of the appellant's background at the last minute in order to have it "up to date".

[53] Mr Reichman agreed, under cross-examination, that he was convicted in August 2014 of two offences: the first, of engaging in legal practice when he was not admitted as a legal practitioner, over about five months at the beginning of 2013, and the second, of representing that he was entitled to engage in legal practice, over a period of about a year, ending in February 2014. Some of those offences involved his falsely representing to magistrates that he was a solicitor. After he was fined for those offences, he was convicted of a further set of offences occurring between September 2013 and 21 January 2015, of engaging in legal practice while not a legal practitioner; these offences related to his attending police interviews with clients of Mr Rosser's. Remarkably, he also admitted to conducting a summary trial in a Magistrates Court at Leeton in New South Wales in relation to another client of Mr Rosser's in October 2012, before he had even received his law degree.

[54] Notwithstanding Mr Reichman's discreditable history, particularly of deceiving courts by representing that he was a legal practitioner, he was the only one of the three witnesses giving oral evidence here whose answers appeared to be frank. There was, at least, nothing he said which defied belief.

[55] I did not find the affidavits of the appellant's sisters of assistance in determining whether Reichman had been represented as a lawyer. Counsel for the appellant suggested that the significance of their evidence was that it showed Reichman had given them legal advice, from which it might be inferred that he had acted similarly in relation to the appellant. But although they attributed a number of statements to Mr Reichman, their affidavits were made some months after the events, in the case of Mrs B with the assistance of a note which she says was made of her conversation with Mr Reichman. However, its contents reflect very closely the conversation which Mr Rosser had with Mr B on the day the appellant was sentenced. The advice which Ms A attributed to Reichman, as to the prospects of an appeal bail application and the advantages of focusing instead on an appeal against sentence, bears a very strong resemblance to what was said by Mr Rosser to Mr B. The figures recorded in the note for the costs of an application for appeal bail and of an appeal against sentence are precisely those provided by Rosser to Mr B. Rosser's indication that the appellant would soon be moved to Arthur Gorrie also matches what appears in that note.

[56] In short, it seems to me that Mrs B is mistaken in regarding her file note as recording a conversation with Reichman; it is much more likely that it details the conversation between her husband and Rosser, to which she may have listened by speaker. Ms A's recollection may also have been influenced by that conversation. It is noteworthy that although both Mrs B and Ms A attribute to Mr Reichman a proposal that they make contact with W and persuade her to retract her statement, it was Mr B who first made that suggestion, to Rosser. Ms A's account of Reichman's advice against a bail application and observation about the advantages of the appellant having spent some time in jail pending appeal closely reflects what Rosser said to Mr B.

[57] While the recollections of Ms A and Mrs B may well be honest, I do not think they are reliable as to who said what, as between Reichman and Rosser. I would not, therefore, place reliance on them in assessing what Reichman's role was.

Conclusions

[58] I doubt that Mr Reichman was held out to the appellant or his family as a lawyer, given the early indication to the appellant's father that he was a clerk, the clear statement to the contrary by Rosser in the phone call with Mr B and the email which gave his job title as "Barrister's Clerk". But it is not of great moment; the real questions are whether when the appellant pleaded guilty he either did not appreciate the nature of the charge of maintaining an unlawful relationship, or did not make his plea freely and voluntarily, as the result of an inducement in the form of unjustifiable advice that he would not face imprisonment.[2]

[59] The appellant's own answer when asked in re-examination to identify what had led to his plea of guilty focused on his claim of Reichman's having told him that he would have to "cop something" or go to trial and his inability to afford the quoted cost of a trial. But the advice, if given, was accurate; those were his alternatives. If he made a choice to plead guilty rather than face the financial burden of the trial, it does not follow that it was not a free choice. There is nothing in the suggestion that he should have been told of the possibility of Legal Aid; no evidence was put before the court as to his income as a mine worker or whether he would have been eligible for Legal Aid; in fact it seems improbable.[3]

[60] I do not accept all of Mr Rosser's evidence about the level of his preparation or instruction-taking. For example, although he referred to having arranged a conference with the appellant in the week before the committal, it is entirely undocumented. It seems to me more likely in view of Mr Rosser's minimalist approach that, while he may have spoken to the appellant on the telephone on 2 July about the allegations, he took instructions only on the day of the committal, not at any conference in the preceding week. The conference at the courthouse is the only such occasion Reichman deposed to as having occurred in July 2015. I accept that Rosser did speak to the appellant prior to the committal, raised with him the prospect of a maintaining charge, and established that he was unwilling to plead guilty to the rape count involving sodomy. I think that it is highly improbable that Rosser would have made the submission to the Director of Public Prosecutions without having obtained instructions on that point.

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2 See *Meissner v the Queen* (1995) 184 CLR 132 at 141; *R v Wade* [2011] QCA 289 at [51].

3 The only evidence on the point consisted of what was put to the court in submissions on sentencing: that the appellant was a "fly-in, fly-out" mine worker.

[61] I reject the appellant's evidence that he was told by both Reichman and Rosser that he would not get more than a five year wholly suspended sentence. It is one thing to advocate for a non-custodial outcome, as Rosser did in his sentencing submissions; it is quite another to assure a client that it will be achieved. I have formed an unfavourable view of Mr Rosser's manner of practice and record-keeping, but he has practised in criminal law for many years. There could be no advantage for him in guaranteeing a non-custodial outcome in a case such as this; and the instinct for self-preservation which I am sure he possesses would prevent his doing so. It is most unlikely that Mr Rosser either formed a view or informed the appellant that the worst case scenario for him was a five year wholly suspended sentence; and if he did not do either of those things, it is also unlikely that Reichman, as his clerk, did. It seems to me much more likely that the appellant has seized on an outcome (a wholly suspended sentence) which was raised with him as the best possibility and now consciously or unconsciously misrepresents it as being the only possibility put to him. It follows that I do not accept that his plea was rendered other than voluntary by reason of any wrong advice that he was given to its likely outcome.

[62] The question, then, is whether the appellant understood what was entailed in the count of maintaining an unlawful relationship to which he pleaded guilty. I have already said that his claim that he had no idea of what W had alleged against him is inherently implausible. But that is not the same as knowing what were the allegations relevant to the maintaining count; so that the finding on whether he did or did not have the opportunity to read the schedule of facts before sentence becomes critical.

[63] The appellant maintained that he spoke only "very briefly" to Rosser on the morning of his sentence and that it was Reichman who raised with him the possibility of challenging W's victim impact statement. However, Rosser's evidence that it was he who spoke to the appellant about that matter is supported by an exchange between him and the sentencing judge during submissions, in which Rosser said that he had raised the possibility of a challenge with the appellant, but his client did not wish to take that course. That evidence suggests that the appellant's account of the respective roles of Reichman and Rosser is, at best, mistaken.

[64] In any case, I accept that it is Mr Rosser's handwriting (not, as the appellant claimed, Reichman's) which appears on the schedule of facts in the printed words "I instruct my legal representative to plead me guilty on the above facts". It is consistent with printing elsewhere in the material which is plainly Rosser's, and it does not resemble Reichman's handwriting. It seems to me more probable than not that the writer of those words also obtained the appellant's signature to them. The existence of one of Rosser's very few file notes, recording the signing of the schedule of facts immediately before the details of the sentence imposed also gives some contemporaneous support for his evidence that it was he who obtained the appellant's signature on the document.

[65] Given that evidence, taken with what I regard as the appellant's general tendency to tailor his evidence to suit his case, I reject his claim that Reichman had him sign the document unread. I accept instead what both Reichman and Rosser say on this point: that Rosser read through the schedule of facts as the appellant followed on another copy. In consequence, I do not accept that the appellant failed to appreciate the nature of the charge of maintaining an unlawful sexual relationship to which he pleaded guilty. It is more probable that he was prepared to accept responsibility for the

allegations made against him in connection with the maintaining charge, once the more damaging allegations of rape and sodomy had been withdrawn, in the hope that he might (not would) escape a custodial sentence. Not having contemplated (not surprisingly) the sentence of almost ten years imposed on him, he now regrets his decision.

[66] No miscarriage of justice having been demonstrated, I would dismiss the appeal against conviction.

The application for leave to appeal against sentence

[67] Counsel for the respondent very properly conceded that the sentence of nine years and 11 months imprisonment was manifestly excessive; it was "unreasonable or plainly unjust". That is, unquestionably, a correct assessment. It is difficult to understand how the sentencing judge arrived at the sentence; it was certainly not the result of anything submitted by the prosecutor. His Honour seems to have been unduly influenced by W's victim impact statement, which referred to her suffering "Stockholm disease" and "PTS syndrome". Neither of those purported self-diagnoses was the subject of any evidence; they should have been treated by the sentencing judge with great caution. Counsel for the respondent also conceded that the sentencing judge fell into error in finding the appellant "entirely responsible" for W's present psychological state, when it was clear that she had been the victim of protracted sexual abuse as a child.

[68] The application for leave to appeal against sentence must be allowed and the sentence set aside. The question, then, is how this court should re-sentence the appellant.

[69] The appellant is 40 years of age and has a good work history. He had a relatively minor criminal history primarily for offences relating to possession of drugs and utensils for which he was fined; the last offence was in 2000. At the date of sentence, it was more than 16 years since the end of the unlawful relationship; W's complaint arose in the context of custody disagreements. Prior to sentence, the appellant shared with W equal custody of the three children of their marriage, and it appears that he has been a good father, as well as supporting his family financially. His plea of guilty was a timely one, entered immediately agreement was reached with the Crown that the maintaining charge alone would proceed, although his appeal against conviction precludes any conclusion of remorse.

[70] Counsel for the respondent made helpful submissions, acknowledging a number of significant aspects of the case: that while the relationship was inappropriate, there was nothing to suggest that it was other than a result of mutual affection; that it entailed no breach of trust, because the appellant was not in any position of responsibility for W; that there was no power imbalance in their relationship or manipulation, often a feature of offending of the type; that the appellant was himself a young man of 21 when the relationship began; and that he had a relatively minor criminal history.

[71] Adverting to features identified as aggravating in *R v SAG*,[4] counsel noted that the unlawful relationship lasted for about two years and three months and involved regular sexual intercourse and that W was only 13 years and nine months of age when it began. However, other significant features identified in *SAG*, such as the use of force, violence, threats, emotional blackmail, or psychological manipulation

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4 [2004] QCA 286.

were absent. It was not a case involving more than one complainant, and there was no indication of paedophilic tendencies in the appellant, so the need to protect the community was not as acute as in cases where those circumstances were present.

[72] Counsel for the appellant referred to two cases which I have found useful as a guide in the unusual circumstances of this case. The first was *R v MAN*.[5] The applicant there pleaded guilty to two counts of maintaining a sexual relationship with a child under the age of 16 years. He was between 19 and 22 years of age when he formed relationships with twin sisters, aged between 12 and 15 years at the relevant time. Both relationships were described as affectionate. Each girl bore two children. After the relationships with both complainants had broken down, the applicant continued to provide financial support for the children. The complainants' mother vouched for him as a responsible parent and explained that at the time he began his relationships with her daughters, he was as immature as they. The sentence initially imposed, of nine years imprisonment, was set aside on appeal, and a sentence of five years imprisonment with a recommendation for parole after 18 months was substituted.

[73] In *R v WU*,[6] the applicant had been sentenced to four years and six months imprisonment, suspended after 428 days (the time spent in pre-sentence custody) on a count of maintaining an unlawful relationship with a child under 16 years. He had formed a friendship with a 14 year old girl; he turned 20 during the existence of their relationship. He was charged with unlawful carnal knowledge of her and released on bail with a condition he did not have contact with her, but breached the condition by resuming the relationship. It was accepted that it was an affectionate relationship, although there were two assaults during it which caused the complainant minor injuries. It was accepted that the relationship was not predatory nor maintained for reasons for sexual gratification. It did not result in the birth of any children. The sentence imposed was set aside on appeal and a sentence of three years imprisonment, suspended after 428 days, was substituted.

Conclusion

[74] Having regard to all the circumstances of this case, outlined above, I am satisfied that the appropriate sentence is one of four years imprisonment. As counsel for the respondent accepted, the appellant's history does not suggest that supervision on his release is necessary for community protection. Accordingly, I would suspend the sentence after 12 months for an operational period of five years. To avoid any doubt I would declare that the appellant has served a period of 365 days between 8 April 2016 and 7 April 2017, the date of delivery of this judgment, of that sentence.

Orders

[75] In summary, I would make the following orders:

1. Dismiss the appeal against conviction.
2. Grant the application for leave to appeal against sentence.
3. Allow the appeal against sentence.
4. Set aside the sentence imposed at first instance.

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5 [2005] QCA 413.
6 [2007] QCA 308.

5. Substitute a sentence of four years imprisonment suspended after 12 months for an operational period of five years

6. Declare that the appellant has served a period of 365 days between 8 April 2016 and 7 April 2017 of that sentence.

[76] **GOTTERSON JA:** I agree with the orders proposed by Holmes CJ and with the reasons given by her Honour.

[77] **ANN LYONS J:** I agree with the reasons of Holmes CJ and the orders proposed by her Honour.