SUPREME COURT OF QUEENSLAND

CITATION:	*R v H* [2003] QCA 392
PARTIES:	**R** **v** **H** (applicant)
FILE NO/S:	CA No 171 of 2003 DC No 65 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	12 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	25 August 2003
JUDGES:	McMurdo P, Jerrard JA and Philippides J Separate reasons for judgement of each member of the Court, each concurring as to the orders made.
ORDER:	**Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – PARICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – where applicant pleaded guilty to one count of maintaining a sexual relationship with a circumstance of aggravation, two counts of incest and two counts of indecent treatment of a child under 16 – where applicant sentenced to concurrent sentences of eight years, six years and three years imprisonment respectively – where recommendation for consideration for post prison community based release after three years was made – whether sentence manifestly excessive CRIMINAL LAW – JURISDICTION – JUDGEMENT AND PUNISHMENT – SENTENCE – factors to be taken into account – where offender in a de facto relationship with complainants natural mother – where offending took place in the family home over a two year period – where applicant has no relevant criminal history – where matter proceeded by way of ex officio indictment – whether sentence manifestly excessive *R v B* [1997] QCA 213; CA No 58 of 1997, 18 June 1997

R v B [1995] QCA 636; CA No 328 of 1995, 23 October 1995
R v D [1996] QCA 363; CA No 307 of 1996, 24 September 1996
R v F [2001] QCA 137; CA No 383 of 2000, 9 April 2001
R v F [1998] QCA 131; CA No 31 of 1998, 7 April 1998
R v J [1992] QCA 425; CA No 264 of 1992, 4 December 1992
R v L [2002] QCA 268; CA No 80 of 2002, 26 July 2002
R v M [1997] QCA 470; CA No 347 of 1997, 28 October 1997

COUNSEL: A J Moynihan for the applicant
P F Rutledge for the respondent

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

[1] **MCMURDO P:** I agree with the reasons for judgment of Philippides J and with the order proposed.

[2] **JERRARD JA:** I have read and respectfully agree with the reasons for judgment of Philippides J, including her Honour's observation that the reference to an appropriate sentencing range of "at least five years imprisonment, and perhaps six years" in *R v L* [2002] QCA 268, was a description of an indicative minimum head sentence. This is particularly so where, as in this case, the maximum available head sentence was life imprisonment.

[3] In that regard I note that in three other sentences not disturbed by this court on appeal, and referred to by the Crown in argument, sentences of seven, nine, and eight years imprisonment were imposed, in circumstances where the maximum available penalty was 14 years imprisonment. These were respectively the decisions in *R v J* [1992] QCA 425, where seven years was imposed after a trial, *R v D* [1996] QCA 363, where nine years was imposed following a plea, and *R v B* [1997] QCA 213, where eight years was imposed following a trial. In *B* this court referred (at page 4) to the observation at page 10 of the judgment in *J*, where this court noted then that sentences imposed by single judges of the District Court indicated a range from five to eight years, such that the sentence of seven years imprisonment in *J*, although at the higher end of the range, was clearly within it; and remarked (in *B*) that the table of comparable sentences provided by the Crown (in *B*) clearly indicated a range if not equivalent to that described in *J*, then perhaps a little higher. That being then said of matters in which the maximum was 14 years, it is difficult to see why eight years exceeds the available range where the maximum is life.

[4] I agree that the application for leave to appeal should be dismissed.

[5] **PHILIPPIDES J:** This is an application for leave to appeal against the sentence imposed upon the applicant on the ground that the sentence was manifestly

excessive. On 8 May 2003, the applicant was convicted on his own plea in respect of five counts as follows:

- one count of maintaining a sexual relationship with a circumstance of aggravation, in respect of which the applicant was sentenced to eight years imprisonment;
- two counts of incest, in respect of which a sentence of six years imprisonment was imposed;
- two counts of indecent treatment of a child under 16, in respect of which a sentence of three years imprisonment was imposed.

[6] A recommendation was made that there be consideration for post prison community based release after three years imprisonment. All sentences were concurrent.

[7] The applicant was between 41 to 43 years of age at the time that the offences were committed. The applicant has no prior relevant criminal history. He had been living with the complainant and the complainant's natural mother, with whom he had been in a de facto relationship for some seven years, and with whom he had two children. The complainant described the relationship between herself and the applicant as close and affectionate until the offending conduct began.

[8] The applicant maintained a sexual relationship with the complainant in the family home over a two year period from Christmas 2000, usually in the mother's absence. There was regular sexual interference during that period, involving the applicant touching the complainant's genitals and breasts and his placing his erect penis against her. The conduct lasted up to 30 minutes at a time and would occur between one and up to several times a week, and escalated to two particularised acts of incest.

[9] A couple of months before the first act of incest, the applicant told the complainant "I want to have sex with you because you are a virgin. I have never had sex with a virgin before and you will be the first". The complainant said that the first act of sexual intercourse lasted for about one hour. She said that it was the first time she had ever had sex with anyone and it hurt a lot. She felt angry, frightened and disgusted.

[10] The second particularised act of intercourse took place in November 2002. The complainant was in the bathroom drying herself after a shower and the applicant came in and said "let's have a quickie before the girls wake up". The complainant did not really know what the prisoner was talking about, but thought that sex would be involved and replied "no". The applicant then raised his voice and threatened that he would tell the complainant's mother bad things about her if she failed to comply. The applicant told her to bend over and pushed her head down so that she was leaning over the bath tub, the applicant then had sex with her from behind for a period of about 15 minutes, only stopping when one of the complainant's younger sisters started crying. The applicant then told her "don't tell anyone, or you won't have a family". The offences only ceased after the complainant made a complaint to the school counsellor, who advised the police.

[11] The complainant's victim impact statement reveals the severity of the consequences of the offences for the complainant; she has lost a sense of trust in her family and

others, has nightmares, difficulty sleeping and feels stressed and confused by what occurred.

[12] In imposing sentence, her Honour took into account as mitigating factors the pleas of guilty, the fact that the matter proceeded by way of ex officio indictment, the fact that the applicant did not seek to blame the complainant, the applicant's lack of any relevant criminal history and the evidence of the applicant's own difficult upbringing. Her Honour also took into account as aggravating factors, the applicant's abuse of trust, particularly given the close relationship between the complainant and the applicant before the offending conduct, the applicant's expressed motivation that he wanted to have sex with the complainant because she was a virgin, the nature of the second act of incest, which her Honour described as "inhuman, humiliating, physically disgusting", the applicant's less than frank approach in the police interviews and the threat to tell the complainant's mother bad things about her if she complained.

[13] Before the sentencing judge, it was submitted on behalf of the Crown that the overall sentencing range was one of six to nine years imprisonment and that a sentence in the range of seven to eight years imprisonment was appropriate, coupled with a recommendation for early release. The defence contended for a range of four to five years imprisonment, plus a recommendation.

[14] On behalf of the applicant it was argued that the learned sentencing judge had erred in imposing sentence, in that sentence was imposed on the basis of an erroneous view of the facts. In this regard references was made to a comment that there had been two "brutal rapes" and to other comments describing the applicant's conduct as brutal. The sentencing remarks in their entirety reveal that the sentence was not imposed on the basis that any charged acts of rape were involved, and that the term "rape" was used loosely to describe the two particularised acts of sexual intercourse which occurred in a context where consent was blurred. I am not persuaded that there was any relevant error in her Honour in the use of the term or in the view taken of the facts. Her Honour was entitled to take the view that the conduct involved was brutal. The first incident took place over the period of an hour and was clearly a terrifying ordeal and the second was characterised by threats aimed at ensuring the complainant's compliance and silence and by rough treatment. The applicant abused his position of trust and power and did so in the context of his expressed motivation to have sex with the complainant because she was a virgin. I cannot accept the applicant's submission that the conduct could only have been appropriately described as brutal if it had been accompanied by gratuitous violence, the use of a weapon or the infliction of physical injury.

[15] Before this Court, it was submitted on behalf of the applicant that the sentence imposed was beyond the permissible range, which it was said was one of four to six years imprisonment. It was submitted that, given the matters of mitigation, particularly the ex-officio plea, the sentence which should have been imposed was one of six years imprisonment, with a recommendation for post prison community based release after two years.

[16] In making this submission, reliance was placed upon the decision of this Court in *R v L* [2002] QCA 268. In that case, the offender had maintained a sexual relationship over a nine month period with his 14 to 15 year old natural daughter,

which included acts of masturbation and fellation and escalated to one incident of incest. A sentence of four years imprisonment with a recommendation for consideration for post prison community based release after 15 months, was not disturbed on appeal, the appellate court recognising that the sentence imposed reflected an important feature of mitigation that the offender had come forward voluntarily in respect of the offences.

[17] Counsel for the applicant relied on the statement by the Court in *R v L* that, without the mitigating factors present in that case, the appropriate sentencing range would have been "at least five years' imprisonment and perhaps six years" and sought to extrapolate from that statement the proposition that the appropriate sentencing range for this case was four to six years. I am unable to accept that submission. The statement referred to was, as submitted by the Crown, simply a statement as to the indicative *minimum* head sentence appropriate in *R v L*. That minimum range of five to six years was based on a period of offending of nine months (as opposed to the period of 2 years in this case) and one incident of incest (as opposed to the two incidents involved in the present case). Indeed, because of those distinguishing features, *R v L* was relied upon by the Crown as supporting the sentencing range it put forward of seven to eight years and the sentence imposed in this case.

[18] *R v F* [2001] QCA 137 was put forward by the Crown as a comparative. The offender in that case pleaded guilty to eight charges alleging sexual offences committed on his step-daughter, including a count of maintaining an unlawful relationship of a sexual nature with a child under 16 years, involving his having unlawful carnal knowledge of the complainant. The offending conduct began when the child was 11 at the latest and involved sexual intercourse from that time, although there is no specification of the frequency of that conduct. The offence of unlawful carnal knowledge was committed when she was 14 years of age. A sentence of eight years imprisonment in respect of the maintaining charge and four years imprisonment for the other seven offences to be served concurrently, with a recommendation for parole after three years was imposed at first instance. Leave for extension of time to appeal was refused. Whilst *R v F* would indicate that the sentence imposed here was high, it does not point to it being beyond the applicable range.

[19] A number of other cases were referred to where lesser sentences were imposed on offenders in respect of counts of maintaining an unlawful relationship with a child, in circumstances where apparently more serious offending was involved. However, those case are of limited assistance, given that they involve sentences imposed under a different sentencing regime; that is in circumstances where the maximum sentence applicable was one of 14 years, as opposed to a maximum applicable sentence of life imprisonment in the present case, because of the circumstance of aggravation. In this category are *R v B* [1995] QCA 636, *R v M* [1997] QCA 470 and *R v F* [1998] QCA 131.

[20] In *R v B*, a sentence of seven years with a recommendation for parole after three years was imposed on appeal in respect of a count of maintaining a sexual relationship with a child under the age of 16 years, with a circumstance of aggravation that the offence of carnal knowledge was committed in the course of that relationship. (The offender had also pleaded to three counts of indecent dealing

and four counts of unlawful carnal knowledge). The period of the relationship extended over three and a half years and involved several acts of intercourse with a child aged 13 when the offences began.

[21] In *R v M*, a 27 year old offender pleaded guilty to eight counts involving sexual contact with a four year old boy. A sentence of five years imprisonment with a recommendation for parole after 18 months imposed in respect of a charge of maintaining a sexual relationship with a child under 16 years with a circumstance of aggravation (the child was under 12 years of age and was in the offender's care) was not disturbed on appeal. In addition to the different sentencing regime applicable there, the sentence imposed reflected a major mitigating factor of the offender's intellectual handicap and psychiatric difficulties. There was none of the premeditated and deliberate conduct displayed by the applicant in this case.

[22] In *R v F*, concurrent sentences of five years imprisonment with a recommendation for parole after 18 months were imposed on appeal, in respect of four charges of maintaining a sexual relationship with a child under 16 years. The four charges concerned behaviour engaged in over a period of three years in respect of four children; two pairs of sisters in respect of whom the applicant was in a position of trust. Again in addition to the different sentencing regime applicable there, the sentence imposed on appeal was influenced by the unusual feature that, as in *R v L*, the offender implicated himself.

[23] Given the sentences imposed in the above cases in the context of a less severe sentencing regime than that applicable here and the sentence imposed in *R v L*, I consider that while the sentence imposed was at the upper end of the sentencing range and a lighter sentence might also properly have been imposed, the sentence imposed was, nevertheless, one within the sentencing discretion. I would dismiss the application.