SUPREME COURT OF QUEENSLAND

CITATION:	*R v BAX* [2005] QCA 365
PARTIES:	**R** **v** **BAX** (applicant)
FILE NO/S:	CA No 162 of 2005 DC No 325 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court
DELIVERED ON:	30 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	23 August 2005
JUDGES:	McPherson and Jerrard JJA and Fryberg J Separate reasons for judgment of each member of the Court, McPherson JA and Fryberg J concurring as to the order made, Jerrard JA dissenting
ORDER:	**Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – applicant convicted by his own guilty pleas of three counts of maintaining a sexual relationship with circumstances of aggravation with three of his four stepchildren – applicant sentenced to nine years imprisonment with serious violent offence declarations made on all three convictions – applicant admitted to committing between 170 and 300 acts of abuse in total – all three children were under 12 during period of abuse – applicant had no prior convictions and had shown remorse – whether the serious violent offence declarations made the sentence manifestly excessive – whether a serious violent offence declaration can be made on a conviction where no actual physical violence *Criminal Code* 1899 (Qld), s 229B *Penalties and Sentences Act* 1992 (Qld), s 161A, s 161B(3)

R v Eveleigh [2002] QCA 219; [2003] 1 Qd R 398, cited
R v SAG [2004] QCA 286; (2004) 147 A Crim R 301, considered
R v SAK [2004] QCA 379; CA Nos 29 and 34 of 2004, 15 October 2004, considered

COUNSEL: C W Heaton for the applicant
B G Campbell for the respondent

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

[1] **McPHERSON JA:** This application for leave to appeal against sentence falls to be considered in the context of the admitted facts that the applicant committed serious acts of sexual abuse against three of his four stepchildren ranging in ages, when the offending began, from four to seven years. He induced the male stepchild to attempt to have intercourse with his sister while the applicant gratified his sexual behaviour by watching them do so and masturbating. The applicant himself had sexual intercourse with the older girl.

[2] He confessed to having abused her on no fewer than 100 to 150 occasions; to doing so to the younger girl, then aged four, some 50 to 100 times; and the boy on some 20 to 50 occasions. He committed these acts when their mother his wife was out of the way including occasions when she was in hospital giving birth to one or both of their own two children. The emotional and social consequences for his wife and the children have been and continue to be disastrous. As can be seen from her victim impact statement, parents of other children with whom these child victims were friends will not now allow them to associate with them. They are being shunned by their peers and made to feel as if they have done something wrong.

[3] The prospects for the rehabilitation of the applicant offender do not seem to me to show that it can be said with any real degree of confidence that he will not re-offend again. To his wife he explained his conduct as having resulted from an inability to control his sexual urges.

[4] The fact that, when ultimately discovered, the applicant fully confessed his wrongdoing and that he carried out these offences without actively using or threatening violence are matters that weigh in his favour; but I do not consider that they have the result that it was outside the proper exercise of the judge's discretion to declare that the convictions were of serious violent offences in the terms of the *Penalties and Sentences Act 1992*. Under s 161A of that Act, an offender is convicted of such an offence if convicted on indictment of an offence against a provision mentioned in the schedule to the Act: s 161A(a)(i)(A). The schedule lists a number of offences that may, and in practice often are, unaccompanied by "violence" in the ordinary acceptation of that term. In those and other instances, violence in that sense is not an ingredient of or a condition precedent to the making of a declaration under the statutory provisions referred to. Among those offences are that of maintaining a relationship of a sexual nature with a child: s 229B of the Code. The applicant committed that offence with each of the three child victims in this case and pleaded guilty to having done so. Having regard to the frequency of his offending there can be no doubt about the validity of his guilty pleas in that

regard. In my opinion, the learned judge cannot be said to have exercised his discretion erroneously in making the declaration that he did.

[5] I would dismiss the application for leave to appeal against this sentence.

[6] **JERRARD JA:** On 18 May 2005 BAX pleaded guilty to an ex-officio indictment charging him with three counts of maintaining a sexual relationship with a child, each count having circumstances of aggravation. All three counts had as circumstances of aggravation that the child with whom the sexual relationship was maintained was under 12 years of age, and that BAX had unlawfully permitted himself to be indecently dealt with by the respective child. Regarding the complainant J, his plea also admitted the circumstances of aggravation that in the course of the relationship he had indecently dealt with J, unlawfully procured J to commit an indecent act, and had had unlawful carnal knowledge of J. Regarding the complainant S, the further circumstances of aggravation admitted by his plea were that he had unlawfully and indecently dealt with that child, and procured that child to commit an indecent act in the course of the relationship; regarding the complainant D, his plea also admitted the further circumstance of aggravation of his having unlawfully procured D to commit an indecent act.

[7] BAX was sentenced to nine years imprisonment, and the learned sentencing judge declared each conviction to be for a serious violence offence, pursuant to s 161B(3) of the *Penalties and Sentences Act* 1992 (Qld) ("the Act"). BAX has applied for leave to appeal against that sentence, arguing that the declaration that BAX had been convicted of three serious violent offences should not have been made.

[8] The three complainant children were BAX's stepchildren. He married their mother on 13 March 1998. He began molesting J in 2000, when she was six. That same year he began molesting S, when she was four. He began molesting his stepson D in 2003, when he was aged seven.

[9] The period in which he admitted by his plea having maintained a sexual relationship with J lasted two and a half years from 17 September 2000 until 27 May 2003. Another plea of guilty admitted also maintaining a sexual relationship with S over that same time. He maintained a sexual relationship with D between 1 January 2003 and 27 May 2003, when his offending came to light. His wife found a pornographic magazine in D's bedroom that day, and that discovery resulted in BAX admitting sexual abuse of D and his sisters J and S. The police were called, and BAX participated in a record of interview in which he fully admitted persistent abuse of those three children during the periods charged.

[10] BAX's wife had four children from a previous relationship, and she and BAX had two children of their own, aged three and two when BAX was arrested in May 2003. He admitted having begun abusing both J and S when his wife was in hospital between October 2000 and 18 January 2001, having their youngest child. Regarding J, he admitted to the police that his initial abuse of her while her mother was in hospital had included touching her on her vulva, performing cunnilingus on her, having her touch his penis, and having her perform fellatio on him. She was six years old. That abuse continued for two and a half years, and in the course of that it developed into both digital penetration of her vagina, and penile intercourse, the latter both happening on the one occasion in 2003, when she was eight. There had been one occasion of penile penetration of the labia in 2001, but the vaginal

penetration was two years later. The child said that the latter had hurt, and that it was rough. He also exposed her to pornographic images and videos, and on one occasion had D attempt to have vaginal intercourse with J, while BAX watched them and masturbated.

[11] His abuse of J had also included his often enough rubbing his penis between her buttocks, and on one occasion when she knew she was in trouble for taking a packet of chewing gum from BAX's bedroom, he gave J the choice of sucking on his penis or being smacked. She chose the former. On another occasion or occasions he procured the child to sit with her bottom on his face while he licked the cheeks of the bottom, and procured the child to commit fellatio upon him as he did that. The abuse he perpetrated happened whenever BAX got the chance; usually when his wife was outside the house or in bed at night. BAX explained to the police that he was unable to control his urges to touch the children: he confessed to between 100-150 occasions on which he abused J.

[12] The offences committed on S included touching her vulva and having her touch his penis when she was aged four, and his performing cunnilingus on her at that time; and he admitted abusing that child between 50-100 times. Regarding D, he started abusing him when D was seven, exposing D to pornographic material and masturbating him. He performed fellatio on D, who declined to do likewise in return. BAX admitted interfering with that child between 20-50 times.

[13] The points made on BAX's behalf on his application include that he did not use violence, or threats of it, or coerce or intimidate the children into doing what he wanted. Even so, he admitted to the police that he believed that sometimes the children simply wanted to please BAX, and they would agree to his requests because they did not know what else to do.

[14] BAX faced maximum terms of life imprisonment for each of those offences of maintaining a sexual relationship with a child. Aggravating features of his conduct include that there were three children with whom those relationships were maintained; the position of trust he had over each of them; their young age at the start of those relationships; that he had unlawful penile intercourse with one of them; that he attempted to procure D to commit incest with J, apparently for BAX's gratification; and that he offended against them so often. His statements made in part justification, that the children were willing, simply shows that he succeeded in achieving the complete sexual corruption of their childhood.

[15] BAX's counsel on the appeal, Mr Heaton, did not contest that a sentence of nine years imprisonment was within the range of available sentences. However, Mr Heaton argued that BAX's prospects of rehabilitation were good, and that the community did not require the additional protection given by the declarations of convictions of serious violent offences. Mr Heaton submitted that while BAX's behaviour was insidious and abhorrent, it had not been violent, and it otherwise lacked the qualities for which a declaration under s 161B(3) should be reserved. Further, BAX has no previous convictions, had acknowledged a need for counselling, and had shown remorse.

[16] Mr Heaton suggested that declarations that a sexual offender had committed a serious violent offence should be reserved for cases where the offence had been accompanied by threats of violence, or else where there had been coercion of the

victim. He conceded that emotional manipulation of a child victim of a sexual offence, which is one of the means by which offenders procure children's silence about what is being done to them, could justify a declaration. He also conceded that the occasion on which BAX had offered J a choice of being smacked or committing fellatio was an example of the sort of manipulative conduct which could justify a declaration, but Mr Heaton submitted it was the only example of that conduct by BAX.

[17] In *R v Eveleigh* [2002] QCA 219 Fryberg J undertook an extensive analysis of decisions in this Court which had considered Part 9A of the Act, and the proper approach to sentencing, both in circumstances in which serious violent offence declarations were mandatory by reason of the sentence imposed being 10 years or more, and in circumstances where it was discretionary pursuant to either s 161B(3), or, for that matter, 161B(4). His Honour summarised the position[1] in these terms:

> "1. The exercise of the sentencing discretion is an integrated process involving a consideration of all of the circumstances of the case.
> 2. The 1997 amendments provided judges with additional sentencing tools to use in the course of this process.
> 3. Those tools must be used as part of the overall sentencing process, not applied in the course of a separate step taken after the balance of the sentence is determined.
> 4. In considering what head sentence to impose, a judge should take into account the consequences of any exercise of the powers conferred by those amendments.
> 5. However, on the authorities as they presently stand, where that exercise of power is mandatory, adjustments may be made to the head sentence only within "the range".
> 6. The judge should also take into account all relevant sentencing principles, including relevant considerations set out in s 9 of the *Penalties and Sentences Act* 1992, in formulating all aspects of the sentence, not solely in relation to the head sentence; but subject of course to the explicit terms of s 9.
> 7. Where the making of a declaration is discretionary, the considerations which potentially may be taken into account in the exercise of the discretion are the same as those which may be taken into account in relation to other aspects of sentencing.
> 8. Where the making of a declaration is discretionary:
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> (i) seriousness of and violence in the course of the offence are not essential conditions for the making of a declaration;
> (ii) seriousness of and violence (actual or threatened) in the course of the offence are relevant factors in deciding whether a declaration is appropriate;
> (iii) seriousness of and violence (actual or threatened) in the course of the offence do not require the making of a declaration.
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> 9. Where the making of a declaration is discretionary, the discretion is unfettered. In particular, it is not necessary that the circumstances of the case should take it beyond the "norm" for cases of its type.
> 10. All aspects of a sentence must have a legitimate purpose.[2]

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1 At [111] of the judgment

2 See s 9(1) of the *Penalties and Sentences Act*

> 11. The sentencing judge should state the reasons for the sentence, both in terms of the nature of the components of the sentence and their severity. If the reasons are implicit in the remarks of the judge, the sentencing discretion will not be held to have miscarried."

[18] I respectfully consider the cases Fryberg J referred to support the propositions that that learned judge drew from them, including the proposition that where the making of a declaration is discretionary, seriousness of and violence in the course of the offence are not essential conditions for the making of a declaration, but are clearly relevant in deciding whether it is appropriate. I observe that none of the cases to which His Honour referred appeared to be ones in which the relevant offence was maintaining a sexual relationship, and the cases analysed seem principally to be ones of manslaughter, rape, and robbery. But it is impossible to hold that a declaration cannot be made for an offence of maintaining an unlawful sexual relationship with a child, since that offence is specifically listed in the schedule to the Act. Section 161B(3) of that Act empowered the sentencing judge to declare that BAX had been convicted of a serious violent offence if convicted on indictment of an offence against a provision mentioned in that schedule. The lack of any grounds specified in Part 9A on which a court could or should exercise the discretion to make that declaration has necessarily resulted in the court attempting to do that, in a manner consistent with the legislation and its apparent purpose, with the results summarised in the judgment of Fryberg J. Significantly, the earlier decisions of this Court support his proposition that a sentencing judge making a discretionary declaration that a conviction is for a serious violent offence may – and I observe, perhaps must – take into account in the exercise of that discretion the same considerations as those which may be taken into account in relation to other aspects of sentencing.

[19] Those relevantly appear in s 9 and s 13 of the Act. Section 9(6) provides that when sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years, the court must have regard primarily to the matters therein specified. Those include the effect of the offence on the child, the child's age, the nature of the offence including whether physical harm or the threat of physical harm happened, the need to deter similar behaviour by other offenders, the prospects of rehabilitation of the offender, his or her antecedents, age and character, remorse or lack thereof, and any medical, psychiatric, prison, or other relevant reports relating to the offender. Mr Heaton contended that there were demonstrable prospects of rehabilitation evidenced in the contents of a report from a psychologist tendered to the sentencing judge, but that submission really depended upon the passages in the report which described BAX as now having some insight into his behaviour, and indicating remorse which the psychologist believed was genuine. The report does not describe any insight into the actual consequences for the children of the offence committed upon them, and it contains material suggesting that BAX tends to source his behaviour to conduct by his wife in their marriage. I did not consider that the contents of the report provided strong support for the submission that BAX had good prospects of overcoming his addictive sexual attraction to children of both genders.

[20] The learned sentencing judge specified that the discretion to declare that all three convictions were for serious violent offences was being exercised because of the facts admitted in the schedules provided by consent to the learned judge, the circumstances of aggravation contained in the indictment and described in that

schedule, and the contents of the victim impact statements. BAX's wife described in those how their family had lost all but two friends when his offending was discovered, neighbours had stopped letting their children play with hers, J had nightmares and often broke into tears, having lost the "man she loved and trusted as her father by something she don't understand", D had the most frequent and severe nightmares of all the children and wet his bed on six out of seven nights as well as showing extreme bursts of anger at small situations, and C would not go to sleep on most nights until around midnight, for fear of bad dreams. J and D each wrote a statement; the contents support the mother's description of their lives at present. That description in turn raises relevant matters under s 9(6) of the Act.

[21] The learned judge's sentence is open to criticism on the ground that the judge imposed the same sentence in respect of each of the offences, although the offending behaviour committed against J appears to have been more serious. However, no point was taken about that on the application, and it would only be worth raising if a nine year head sentence could not be justified either in respect of any child, or as a head sentence imposed to reflect the overall criminality of what BAX did. The grounds described in s 9(6), particularly the young ages of these three victims, the need to deter other offenders, and the effect of the offences on each victim, did raise for exercise the discretion to declare at least the offence involving J a serious violent offence. The applicant's counsel did not seek to distinguish the matters of the other two children, for the obvious and common sense reason that success on two out of three applications to overturn the nine year sentence with the declaration would be of no benefit to BAX.

[22] Mr Campbell, for the respondent Director, submitted that all three declarations were justified in the circumstances, since they properly reflected the very serious consequences the offences had had on the children. He contended that in the overall exercise of a sentencing discretion, the net result of a head sentence of nine years with a minimum period of 80 per cent to be served before eligibility for parole was appropriate and within range; and argued that that sentence gave sufficient consideration to BAX's detailed and prompt confessions to the police, and his pleas of guilty, together with his other co-operation with the administration of justice. That included that none of the children had been required to give evidence.

[23] That last matter has concerned me, namely whether sufficient consideration was given by the sentence to BAX's pleas of guilty, and to his very detailed confessions. Head sentences of nine years after pleas of guilty imply that, had there been a trial and no co-operation with the administration of justice, the appropriate head sentence would have been in the range of 12 years. Since BAX admitted by his pleas an occasion of unlawful carnal knowledge of J when she was eight, a sentence of 12 years may have been supported after a trial, relying on the results in the cases analysed in *R v SAG* (2004) 147 A Crim R 301, but I think that sentence would be at the high end of the scale, judged by those decisions. In the later decision of this Court in *R v SAK* [2004] QCA 379, that appellant, who was convicted by a jury of charges including a count of maintaining a sexual relationship with a child for nine years with the circumstance of aggravation that he raped the child in the course of it, lasting from when she was five until she was 15, was sentenced to 11 years imprisonment. That was upheld on appeal. That offender's behaviour included unlawfully and indecently dealing with that child when she was under 12 years of age, and his 11 year sentence on the charge of maintaining the sexual relationship

was concurrent with terms of imprisonment of two years in respect of the offences of indecently dealing, and nine years in respect of rape.

[24] He later pleaded guilty to other charges of sexual offences relating to a different stepdaughter, which included a count of maintaining a sexual relationship with that child for four years, and upon whom he committed rape while she was a child under his care; and three other counts of rape. Pleas to those offences involving that second stepdaughter were made six months after the conclusion of the trial involving the first, and that offender received a concurrent 11 year and three month sentence on the count of maintaining, after a plea. That was in effect a cumulative nine months sentence for the commission of that second set of offences against the second stepdaughter. Regarding the first stepdaughter, in respect of whom there was a trial, that trial was the last of three trials – one had resulted in the conviction being overturned on appeal – to which that complainant was subjected, and that complainant suffered physical violence at that offender's hands, as well as being forced to submit to sexual intercourse on an apparently regular basis between the ages of 12 and 15.

[25] That use of violence makes that case involving SAK apparently worse than this one, and a notional head sentence after a trial in the matter of the offences committed on J should not be more than the 11 years to which SAK was sentenced. The overall facts in this case resemble more those in *R v SAG*, except that that offender's conduct had persisted for much longer, simply because he had not been found out as quickly as BAX. SAG was sentenced to 14 years after a trial, and that sentence was upheld.

[26] In my opinion the learned sentencing judge must have started with too high a notional head sentence to arrive at a sentence of nine years imprisonment with a declaration in respect of all three offences, after pleas of guilty and the very full confessions BAX had made. Accordingly, although grounds did exist for exercising the discretion to make the relevant declarations, I consider that it was a wrong exercise of it to do so, given his co-operation. A minimum term of four and a half years imprisonment to be served before a prisoner is eligible for any form of post-prison community based release is a long term of imprisonment, and BAX can expect first to have to perform adequately on other forms of such release, such as release to work and home detention, before being allowed on parole. I would allow the application and the appeal, and vary the sentences imposed by removing the declaration from each that the conviction was for a serious violent offence.

[27] **FRYBERG J:** I have had the advantage of reading in draft the reasons for judgment of Jerrard JA. I respectfully adopt his Honour's statement of the facts of this application. Perhaps unsurprisingly, I also agree with his analysis of the law relating to serious violent offences.

[28] Regrettably, I must with respect differ from his Honour on the question whether the sentences imposed in the present case were manifestly excessive by reason of the making of the declarations. I do not pause to consider whether if the charges relating to any one victim had stood alone a declaration would have been warranted. In my judgment the total criminality of the applicant's conduct was such that the sentences imposed were within the discretion of the sentencing judge. Indeed, to my mind a heavier sentence would have been within range.

[29] I would dismiss the application.