

SUPREME COURT OF QUEENSLAND

CITATION: *R v WAM* [2011] QCA 316

PARTIES: **R**
v
WAM
(applicant)

FILE NO/S: CA No 113 of 2011
DC No 466 of 2011
DC No 1443 of 2010
DC No 1444 of 2010
DC No 1453 of 2010

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 8 November 2011

DELIVERED AT: Brisbane

HEARING DATE: 21 October 2011

JUDGES: Margaret McMurdo P, Fraser JA and Margaret Wilson AJA
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Application for leave to appeal against sentence refused**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to 15 sexual offences contained in four indictments against his three half-sisters and cousin – where the applicant was sentenced to 11 years imprisonment for maintaining a sexual relationship with a circumstance of aggravation and lesser concurrent sentences on the remaining offences – where the applicant contended that the sentence was outside the range for a youthful offender without a relevant criminal history – whether the sentence was manifestly excessive

R v BBY [2011] QCA 69, considered
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, cited
R v PAN [2011] QCA 192, cited
R v P; ex parte A-G [2001] QCA 188, cited
R v SAG (2004) 147 A Crim R 301; [2004] QCA 286, considered
R v ZA; ex parte A-G (Qld) [2009] QCA 249, considered

COUNSEL: H C Fong for the applicant
R G Martin SC for the respondent

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

- [1] **MARGARET McMURDO P:** The applicant was charged with 15 sexual offences contained in four indictments. On the morning of 9 May 2011 prior to the commencement of the trial of the indictment concerning his half sister, N, he pleaded guilty to that indictment and to another indictment concerning his half sister, M, which was listed for trial later in May. He had already pleaded guilty to an indictment concerning his half sister, K, and another indictment concerning his cousin, C. He was sentenced to 11 years imprisonment for maintaining a sexual relationship with N with a circumstance of aggravation (count 6); and to eight years imprisonment on the remaining five rape counts (counts 1 to 5) and two incest counts (counts 7 and 8). On the indictment concerning K, he was sentenced to nine years imprisonment for the single count of maintaining a sexual relationship with a circumstance of aggravation. On the indictment concerning M, he was sentenced to eight years imprisonment on four counts of rape (counts 1, 2, 4 and 5) and two years imprisonment on the count of indecent dealing (count 3). On the indictment concerning C, he was sentenced to three years imprisonment on the single count of indecent dealing. A period of 783 days pre-sentence custody was declared as time already served under the sentence. He has applied for leave to appeal against those sentences contending they are manifestly excessive.

The applicant's antecedents

- [2] The applicant was 28 years old at sentence. He was between 15 and 25 when he committed the offences against N, who was then aged between six and 16. He was aged between 16 and 19 when he committed the offences against M, who was then aged between nine and 11. He was aged between 23 and 25 when he committed the offences against K, who was then aged between 12 and 14. He was aged 16 to 17 when he committed the offence against C, who then was aged between 10 and 11.
- [3] He had some criminal history for street offences, minor dishonesty offences and breaches of domestic family violence protection orders. In respect of all these offences he had been fined, but for a stealing offence committed in May 2007 for which, in June 2007, he was placed on eight months probation with special conditions that he attend programs as directed and address issues of impulse wants, victim empathy and cognitive skills.
- [4] The applicant was remanded in custody two days after N gave her first statement to police on 16 March 2009. Further statements from N and from the other complainants followed. The charges proceeded initially by a full hand-up committal without cross-examination of any complainants. But the charges concerning K involved a pre-recording of evidence on 16 March 2011. The applicant later pleaded guilty to the charges against K on the basis of a contested sentence. K, M, N and their younger brother, NW, were cross-examined. The issues in dispute were resolved and the sentence on the charges concerning K ultimately proceeded uncontested. As I have noted, the applicant entered an early plea of guilty to the charges concerning C. He pleaded guilty to the charges

concerning N and M on the morning the trial concerning N was to commence, with the trial concerning M listed later that month.

- [5] The applicant was his mother's eldest child. He did not know his father until he was a young teenager. His mother's next child was M but her father is unknown. His mother then commenced a relationship with SN and gave birth to four more children, the eldest of whom was N, then K, followed by two boys, L and NW.

The facts of the offending

- [6] The offending against N occurred over an eight year period. The applicant began to have penetrative penile vaginal sexual intercourse with N when she was six or seven years old and he was 15 or 16 years old. Counts 1 to 5 were particularised occasions prior to the applicant's 18th birthday. The maintaining offence, count 6, covered the full eight year period from when she was eight years old until she disclosed the offending to police just prior to her 17th birthday. During this time, the applicant had regular penile sexual intercourse with her on a great many occasions, sometimes more than once a day and on one afternoon on eight occasions. The offending included oral sex, digital penetration and penile penetration. It continued after he had formed a permanent relationship with his girlfriend and became a father. In 2008, when she was 16 and he was 25, he had penile vaginal sex with her when she had a vaginal infection and then had anal sex with her for the first time (count 7).
- [7] In February 2009 she tried to cease all contact with him because of his prolonged sexual, physical and verbal abuse. In March 2009, the applicant visited the family home on NW's birthday. The next day, the applicant had penile vaginal sexual intercourse with her for the last time. She told him she did not want to have sex and said "fuck off" as loudly as she could, but he persisted (count 8). She made it clear to him she wanted nothing more to do with him. He said if he lost her he would commit suicide and asked her to think things over.
- [8] The offending concerning K occurred over a 20 month period between 2006 and 2008 when K was aged between 12 and 14 and the applicant was 23 to 25. It involved penile vaginal penetrative sex at a time when the applicant lived in a flat near the family home and K and her younger brother, NW, would visit. He regularly had sex with her while NW was in the shower. The applicant told her that if she did not visit him he would commit suicide. After sex, he instructed her not to tell anyone or he would do "something", by which she understood he was threatening to commit suicide in front of them or something similar.
- [9] The offences concerning M occurred between 1999 and 2002 when M was aged between nine and 11 and included penetrative vaginal penile sexual intercourse, digital vaginal penetration and oral sex performed on her. The offending always occurred in his room with the door closed. She particularised five occasions (counts 1 to 5). He did not have sex with her after about October 2002. He told her, "I can't wait for you to grow up and have my children."
- [10] The applicant's cousin, C, remembered an occasion when she was 10 or 11 when she was with the applicant looking for lizards outside at their grandmother's place. He told her there were some lizards in the laundry and locked the door. He told her to sit on his lap. She was hesitant but complied as she trusted him. He put his fist underneath her vagina and rubbed his hand on the outside of her clothes, asking her if she liked it. She said she did not. After a while he stopped and told her to take

her pants off. She complied. He told her to get down on her knees and see if she could see any lizards and to look under the door. She complied. He was behind her and touched and licked her vagina inside and out. He then stopped and got up and told her not to tell anyone; to keep a secret.

The victim impact statements

- [11] All the complainants provided victim impact statements as did their maternal grandmother, who was also the applicant's grandmother. K explained that she was embarrassed by the offending. She knew her school principal and teachers had learned of what the applicant had done. She had taken up smoking because of the resulting stress and was now physically and psychologically addicted to it. She felt her friends looked at her strangely. She had sought medical help. She tried to commit suicide and was taken to the adolescent in-patient unit at Royal Brisbane Hospital for some weeks and was now receiving counselling. She still had flashbacks about the offences and felt depressed and suicidal.
- [12] N explained that after she made her complaint to police, she missed a great deal of school. She did not feel her school friends could understand what she had been through. She was unable to attend her school formal because she had missed so much school. She suffered fits due to the stress resulting from the offending. She had trouble sleeping and was frightened that when the applicant was released he would hurt her. She had lost all self-confidence. The applicant used to check her social networking sites. He would tell her that her friends told him she was on drugs when this was quite untrue. She felt liberated now that the applicant was in prison and at last she was free to spend her weekends as she wanted. She was now happier, close to her siblings and looking forward to her future.
- [13] M stated that she had stopped her casual job because she could not face people and felt under emotional stress as a result of the offending. She had taken up drinking alcohol and using drugs to try and wipe out the stress and make her feel better about herself. She had lost confidence and was sad that she and her sisters could not see their nieces and nephew (the applicant's children) because of these charges.
- [14] C stated that reliving the applicant's conduct towards her when making the complaint unleashed an emotional roller coaster. She lost her job and cried a lot. She began taking drugs to stop her emotional pain. She had begun counselling as she realised she needed to move on and start the healing process. She hated the applicant for what he had done to her and what he took away from her and for making her blame her family when it was all his fault. She hated that she was scared of him and that he blamed everyone else for the damage he did.
- [15] The grandmother spoke of the family's love for the applicant and the betrayal she felt because of the physical and mental pain he had caused her beautiful granddaughters. She was confident that the complainants, who came from a strong female line, would "win this battle". She hoped the applicant's time in prison would be a turning point for him and that he would rehabilitate, but his actions towards the complainants were those of a "sick little bastard".

The prosecutor's submissions at sentence

- [16] The prosecutor submitted that the sentencing range for sexual offences against multiple child complainants began at eight years imprisonment and continued up to

16 or even 18 years imprisonment. She referred to the criteria noted by Jerrard JA in *R v SAG*¹ and observed that in the present case the four complainants were very young, the relationships occurred over a lengthy period; penile rape had occurred during the relationships which included many episodes of unlawful carnal knowledge. She also referred to *R v BBY*² which was in some ways more serious and where a sentence of 14 and a half years imprisonment was imposed which the Court of Appeal did not consider manifestly excessive. The psychologist's report to be tendered in favour of the applicant by his counsel claimed the applicant had been sexualised from a young age. The offences occurred in a sibling relationship as opposed to a child parent relationship and the applicant pleaded guilty to some charges at an early stage. In light of these matters, a sentence of 10 to 12 years imprisonment should be imposed to reflect the totality of the applicant's offending. She emphasised the applicant's emotional manipulation of the complainants and that he appeared to take every opportunity to sexually abuse his sisters.

The psychological report

- [17] Defence counsel tendered a psychological report from Mr Nick Smith, who interviewed the applicant in prison for one hour and 45 minutes. The applicant reported being "shipped around" between relatives when his mother had difficulties managing his behaviour as a child. He did not get on with his stepfather, SW, whom he claimed physically abused him until he was about 15 years old and "big enough to fight back". His mother told him she loved him only twice in his life. His most pleasant memories were times spent with his maternal grandmother. He described his worst memories as being with his stepfather and with his female cousin, V, who was two years older than him. She engaged him in sexual behaviour when he was about five years old. He had three children aged from two to seven, all of whom resided with their mothers and with whom he had no current contact. He completed year 9 at school and commenced a chef's course in early year 10. He began to use cannabis heavily. He enjoyed abattoir work as it required skill and ability to use a knife with precision. He had three long term girlfriends in his life, two of whom were the mothers of his children. He had had three episodes of casual sex but preferred to be in a relationship with a sexual partner.
- [18] His cousin, V, initiated sexual encounters with him when he was five and she was seven. These would continue every time they saw each other. They escalated to mutual oral sex and rubbing each other's genitals. He felt pressured into these sexual encounters with V and felt unable to resist, although he was never physically forced. After a few years he began to enjoy it. This behaviour continued until his late teens when he first had sexual intercourse with V. The behaviour was secret but he did not consider there was anything wrong with what they were doing. His cousin, A, V's sister, who was the same age as the applicant was also involved in a few episodes of sexual behaviour when they were both around six or seven. He did not feel guilty about this conduct but it made him feel sexual interactions were normal between children in families and predisposed him to engage in sexual behaviour with his sisters and younger female cousins. He denied having any sexual fantasies about children and stated that he preferred women his own age or older.
- [19] When he was about 18 or 19 he began to realise that sexual behaviour with his sisters was wrong but it was something they all grew up with. He would not have

¹ [2004] QCA 286, [19].

² [2011] QCA 69.

sex with any other children. He ceased using cannabis at age 23 or 24 and denied that cannabis or alcohol was a major factor in his offending. He had also experimented with psilocybin mushrooms, MDMA and methamphetamine, the latter being a factor in his breaches of domestic violence orders. He denied ever using any physical force on his sisters and stated they were all willing participants.

- [20] He first began engaging in sexual behaviour with his sister, M, when she was six or seven years old. She became generally very sexualised in her behaviour and he stopped their sexual relationship after a few years. He then engaged in sexual behaviour with his next oldest sister, N, when she was 10 or 12, in contrast to the statement of facts that this began when she was six. He claimed that when he was 18 or 19 he told N that they had to stop having sex but she persisted and he was unable to end the relationship. She began to over-eat, self-harm, and accuse him of ignoring her when he began a relationship with a girlfriend. She said she loved him too much to allow him to cease his behaviour; she needed his love. He was concerned that she had a profile on a social networking web site containing sexually explicit information. He claimed his relationship with K did not begin until she was about 13 or 14, in contradiction of K's statement to police.
- [21] Mr Smith described the applicant as a friendly, well-groomed, attentive man, apparently of average intelligence who displayed minimal insight into the impact of his sexual behaviour on his sisters and cousins, although voicing some degree of awareness that incestuous relationships were unacceptable to society. He minimised his own responsibility for his behaviour, blaming his cousin, V, for sexualising him and making him consider incest was normal. Although he displayed minimal empathy or remorse, he acknowledged that his sexual behaviour with his sisters must not continue and expressed enthusiasm about completing a sex offender treatment program in prison. He did not have any evident symptoms of mental illness although his criminal behaviour, suicide attempts and emotional manipulation of his sisters and cousin may indicate the presence of anti-social and borderline personality disorders. A diagnosis of paedophilia was not warranted at this time.
- [22] The applicant demonstrated some evidence of psychopathy and was at moderate risk for future sexual offending with the most likely context being within his family. His current awareness of the unacceptability of incestuous relationships, however, reduced his level of risk in the near future. When returned to the community, if contact resumed with his sisters, there was a risk that their past relationship pattern would re-assert itself. His willingness to engage in a sex offender treatment program may be because of his strong psychopathy rating. As psychopathic individuals are less likely to modify anti-social behaviour and have higher rates of recidivism, particularly for violent offences, it is unlikely that his risk rating will reduce in the foreseeable future. The presence of psychopathic and emotionally unstable personality traits was to be expected in someone like the applicant whose emotional development was undoubtedly distorted by his dysfunctional upbringing.
- [23] The complexities of the applicant's relationship with his victims was that this sort of intra-familial sexual abuse does not occur without loving feelings between perpetrator and victim often inextricably entwined in the sexual aspects of the relationship. As he became aware that these incestuous relationships were inappropriate, he rationalised his behaviour as being normal within his family and failed to persist in efforts to stop it. He was impaired by his family history and

socialisation but he continued in the behaviour to satisfy his own needs, ignoring those of his siblings.

Defence counsel's submissions at sentence

- [24] Defence counsel noted the sentencing judge's experience in these matters and adopted the sentencing range of eight years and upwards as appropriate in this case. He submitted that a sentence of less than 10 years imprisonment should be imposed.
- [25] Counsel emphasised the applicant's sexualisation at a young age by a slightly older cousin. He was still a young man who was, at the time of his arrest, in full employment. The plea to the charges concerning N was a late plea but was still useful and his pleas in respect of other charges were timely. An effective global penalty to reflect all his offending bearing in mind the mitigating features was one of nine years six months or nine years nine months. Lesser concurrent sentences should be imposed on the remaining counts.

The judge's sentencing remarks

- [26] The judge adjourned to consider the sentence overnight and the next day gave the following reasons for imposing the effective 11 year sentence. The applicant preyed upon his younger, physically weaker sisters and committed countless acts of rape and incest upon them. He also offended against his cousin. He had pleaded guilty to two counts of maintaining unlawful sexual relationships with two children and nine counts of rape, two counts of incest and two counts of indecent dealing. He took what he wanted, when he wanted and his appetite was insatiable with the only limitation being his need for secrecy.
- [27] The most intensive offending was against N beginning when she was six or seven and he was 15. After he turned 18 and she was nine, he maintained a full blown sexual relationship with her for seven years continuing until his arrest when she was almost 17 and he was 26.³ There were regular and frequent acts of sexual intercourse. By the end of the relationship he was sodomising her. He would call on her for sex at any opportunity and his mistreatment of her was degrading. Her childhood must have been overshadowed by his abuse. He even forced her to have sex with him whilst her friends waited elsewhere in the house for her 11th birthday cake to be served. Even when confronted by his girlfriend about his sexual relationship with N, he continued it. At times when he was angry with his girlfriend, he had sex with N, often on a daily basis and on one occasion eight times in a single day. There were times when he physically and verbally abused her. He continued to have sex with her even when she was in pain with a genital infection. He was possessive and manipulative. On one occasion, he hanged himself in front of her and hours later forced her to have sex with him. She suffered from cerebral palsy and as a result of the applicant's offending felt isolated and lacked confidence. Only now that the applicant was in jail did she feel some hope for her future.
- [28] The gap between the first and second periods of offending against N was marked by four rapes against M and the incident involving the applicant's then 10 year old cousin, C. His offending against M robbed her of her self-esteem and she used drugs and alcohol to get by.
- [29] Towards the end of his relationship with N, he commenced a relationship with K, who was only 12 when he was 23 or 24. This continued for almost two years and

³ In fact, the applicant was then 25.

involved frequent sexual intercourse. He achieved K's compliance by threatening to commit suicide and to hurt her if she told anybody.

- [30] The applicant was now 28 years old with three children. He had a reasonable work history and was articulate and well spoken. These were his first convictions for sexual offences but they occurred over at least 10 years and involved persistent re-offending with multiple victims, leaving a trail of damaged lives. The applicant had some criminal history and was on probation for eight months when the offences against K and N continued, in breach of that probation order.
- [31] The applicant reported numerous suicide attempts, but was not diagnosed with any psychiatric disorder although he had borderline personality traits and strong indications of psychopathy. He was sexualised by his young cousin when he was only five years old. This may be part of the explanation for the applicant's deviant behaviour but it was no excuse. He knew what he was doing was wrong and he kept it secret from his family. The victims had no idea that it had also happened to their sisters. He had shown little insight into his behaviour and its effect on the victims. He had not recognised his responsibility for any resulting dysfunction in them or the unequal relationship he had with each of them. He saw himself as a victim of his older cousin and had no real empathy for the victims of his offences.
- [32] In his favour, the applicant had pleaded guilty and ultimately accepted all the allegations outlined in the schedules of facts. The psychologist considered he was at moderate risk of further sexual offending. It was unclear whether he would be responsive to treatment even though he was willing to undergo the sexual offenders' treatment program.
- [33] This was not a case of incest between siblings in an equal relationship. The applicant used his power as the older brother to cajole, coerce and emotionally manipulate his young sisters and cousin, with significant detrimental long-term effects on them. He was an adult for the last eight years of the offending.
- [34] He was still young and had no prior convictions for sexual offences. His offending did not involve significant use of physical force. It would be wrong to artificially reduce the sentence below 10 years to avoid the declaration of a serious violent offence when the appropriate penalty to reflect the applicant's offending was 11 years imprisonment.

The applicant's submissions in this application

- [35] The applicant's counsel in this application contended that the sentence was outside the range for a youthful offender without a relevant criminal history. *SAG*, where a 14 year sentence was imposed, and *BBY*, where a 14 and a half year sentence was imposed, were more serious than this case.
- [36] *R v ZA; ex parte A-G (Qld)*⁴ was more comparable. *ZA*'s offending involved offences against six boys aged between 10 and 15 years including two counts of maintaining an unlawful sexual relationship with a child. In all, he committed 34 sexual offences. He was 48 years old and had previous convictions in 1995 and 2001 for sexual offences against a child. *ZA* pleaded guilty and was sentenced to nine and a half years imprisonment on the maintaining counts with lesser concurrent

⁴ [2009] QCA 249.

sentences on the remaining counts. The maintaining counts were not declared to be serious violent offences. In determining the Attorney-General's appeal against inadequacy, this Court referred to the principle stated in *R v McDougall and Collas*⁵ that courts should not attempt to subvert the intention of Pt 9A *Penalties and Sentences Act 1992* (Qld) by reducing what would otherwise be regarded as an appropriate sentence. The sentence imposed on ZA failed to reflect the serious nature of his offending against young children whom he enticed and groomed in a persistent and calculated manner in circumstances which involved a breach of trust. ZA had two prior convictions for sexual offences so that deterrence and community protection were important factors. This Court substituted a sentence of 10 years imprisonment. This had the effect that he was required to serve 80 per cent of the sentence before eligibility for parole.

- [37] A global sentence of between eight years and nine years and three months should be imposed without a declaration that any of the offences are serious violent offences.

Conclusion

- [38] In ZA, the sentencing judge imposed a sentence outside the appropriate range to avoid the effects of Pt 9A. This Court, in substituting a sentence of 10 years imprisonment which did not avoid the effects of Part 9A, did not state that a greater penalty than 10 years would have been outside the appropriate range there. ZA does not demonstrate that the sentence in this case is manifestly excessive.
- [39] The applicant and his victims were half brother and half sister in the counts concerning N, M and K and cousins in the count concerning C. The evidence suggests the applicant was sexualised at age five by his seven year old female cousin, V. His upbringing was dysfunctional although there is no suggestion incest was openly condoned within the family. A much lesser penalty than 11 years imprisonment would have been appropriate had the age difference between the applicant and his victims been small, or had the applicant ceased his offending against his victims when he became an adult and formed adult sexual relationships. But, as the primary judge identified, the applicant's offending which spanned about a decade, continued for another seven or eight years after he became an adult.
- [40] The offences against N commenced when she was about six and he was 15 or 16. The offences against M commenced when she was nine and he was 23. The offences against K commenced when she was 12 and he was 23. And the offences against C commenced when she was 10 and he was 16. The offences against N, M and K involved penile rape and unlawful carnal knowledge over prolonged periods. Whilst the applicant was not a father figure to the victims, as a considerably older brother he was in a position of trust and held familial power over them. There was no physical violence but he clearly used his dominance within the family dynamic to manipulate his victims emotionally, sometimes threatening suicide if they did not comply. He has limited insight into the effect of his offending on the victims.
- [41] The applicant, to his credit, pleaded guilty but only after K, N, M and their younger brother, NW, had been cross-examined and K had pre-recorded her evidence. His guilty plea in the cases concerning N came only on the morning of the trial. Nevertheless, his guilty pleas were a most important mitigating feature. His youth, good employment record and willingness to participate in the sexual offenders

⁵ [2007] 2 Qd R 87; [2006] QCA 365, [18].

treatment program whilst in prison auger well for his rehabilitation, but according to psychologist, Mr Smith, there are elements about his personality that place reservations on that prospect.

- [42] The most serious cases of offending against multiple young children, even when there are timely pleas of guilty, can result in sentences of 17 years imprisonment: see, for example, *R v P; ex parte A-G*⁶ and *R v PAN*.⁷ Those cases were much worse even than the present. In *SAG* and *BBY*, sentences of 14 years and 14 and a half years imprisonment were upheld by this Court. They were also more serious than the present case where the applicant was sexualised by a slightly older cousin at a young age and commenced offending as a juvenile following a dysfunctional upbringing. He had some criminal history, although none for offences of this kind, and committed some of his offending whilst on probation. The prolonged and serious nature of his offending against four complainants continued for many years after he became an adult. It has had a devastating effect on his victims. For these reasons, a global sentence to reflect all his offending of at least 10 years imprisonment had to be imposed. The 11 year term of imprisonment chosen by the sentencing judge was within the appropriate range and adequately reflected the significant mitigating factors. It was not manifestly excessive.
- [43] The application for leave to appeal against sentence must be refused.
- [44] **FRASER JA:** I have had the advantage of reading the reasons for judgment of the President. I agree with those reasons and with the order proposed by her Honour.
- [45] **MARGARET WILSON AJA:** I agree with the order proposed by the President and with her Honour's reasons for judgment.

⁶ [2001] QCA 188.

⁷ [2011] QCA 192.