SUPREME COURT OF QUEENSLAND

CITATION:	*R v BCW* [2014] QCA 340
PARTIES:	**R** **v** **BCW** (applicant)
FILE NOS:	CA No 164 of 2014 DC No 509 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	5 December 2014
JUDGES:	Margaret McMurdo P and Holmes JA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Refuse the application for leave to appeal against sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to 14 counts of sexual offences against three different children, two of whom were his step-sons and one of whom was his biological son – where the applicant was sentenced to nine years imprisonment for the most serious count of maintaining a sexual relationship with one of his step-sons while the child was between the ages of ten and 14 – where on two counts of permitting the step-son to sodomise him, as a child under his care, the applicant was sentenced to seven years imprisonment – where the applicant was also sentenced for 11 counts of indecent dealing – where parole eligibility was set after three years imprisonment – where the applicant contends the sentences imposed on the maintaining and permitting sodomy counts were manifestly excessive – whether the sentences were manifestly excessive *House v The King* (1936) 55 CLR 499; [1936] HCA 40, applied *R v BAO* [2004] QCA 445, distinguished *R v BBP* [2009] QCA 114, distinguished *R v EH* [2008] QCA 67, distinguished *R v Nagy* [2004] 1 Qd R 63; [2003] QCA 175, cited

COUNSEL: M Johnson for the applicant
B J Power for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Holmes JA's reasons for refusing this application for leave to appeal against sentence.

[2] **HOLMES JA:** The applicant pleaded guilty to 14 counts of sexual offences against three different children, two of them the sons of his de facto wife and another biological father, and the third his own son with his de facto wife. The most serious count was of maintaining a sexual relationship with one of his step-sons, H, when the boy was between the ages of ten and 14 years. On that count he was sentenced to nine years imprisonment. On two counts of permitting H to sodomise him, as a child under his care, the applicant was sentenced to seven years imprisonment. A parole eligibility date was set after three years imprisonment. He seeks leave to appeal against the sentences on those three counts as manifestly excessive.

The offending and its consequences

[3] The applicant commenced living with H's mother and her children in early 2004. His sexual relationship with H commenced in 2009 and included, as well as the charged acts of permitting sodomy and indecent treatment, other acts of requiring H to fellate and masturbate him and performing fellatio on the boy, all occurring with a regularity of some three times per week. H said that he did not want to perform the sexual acts but was not forced into them, although the applicant became angry if he did not comply. The applicant told the boy that they were in a relationship and would run away together when they were older, and regularly sent him emails expressing his love for him. The permitted sodomy offences occurred when H was between twelve and thirteen years old. On each occasion, the applicant gave H his telephone to search for pornography on line in order to arouse him before putting a condom on H's penis and directing the boy to perform anal sex on him.

[4] Lesser sentences were imposed on the applicant for 11 counts of indecent dealing. Those sentences are not the subject of his application, but that other offending is, of course, relevant, because the head sentence of nine years was undoubtedly set having regard to the overall criminality of his conduct.[1] He was dealt with for eight counts of indecent treatment of H, a child under the age of 16 and under his care. Six of those counts involved the applicant either performing oral sex on H or having H perform oral sex on him, while another two counts involved his kissing the boy.

[5] A further two counts of indecent treatment of a child under 12 who was the applicant's lineal descendant concerned his five year old son, while another count of indecent treatment of a child under the age of 16 and under his care related to his de facto wife's 12 year old son. Those counts entailed exposing the younger boys to indecent acts. On one occasion the applicant fellated and masturbated H on his five year old son's bed, before kissing him; on another, again on the child's bed, he fellated H and then had H perform the same act on him. On both those occasions, his son was also on the bed, playing with a tablet computer. The third, less grave

1 *R v Nagy* [2004] 1 Qd R 63 at 72.

offence of the kind occurred when the applicant kissed H in the presence of the boy's 12 year old brother.

[6] The offending came to light when H's mother heard him shouting at the applicant to stop touching him. The upshot was that H made a complaint to the police that day and the applicant was arrested. He was remanded in custody for four days, which was not declarable because of a minor drug charge on which he was also held. A full hand-up committal was held; an indictment was presented in December 2013; and a pre-recording of evidence was listed for March 2014, but was de-listed when the applicant indicated that he would plead guilty.

[7] Victim impact statements from H and his mother were tendered. H said that he felt his childhood had been taken; the applicant had controlled him and prevented him from leading a normal life. He was unable to attend a mainstream school and felt that he was the object of derision by his peers. His mother said that she was angry, humiliated and betrayed, wondering if the applicant had formed a relationship with her only because she had young sons. H had become withdrawn and his schooling had suffered; the other boys were also troubled, and all three had received counselling.

The applicant's antecedents

[8] The applicant was aged between 31 and 35 years during the period of the offending. His only criminal history consisted of being dealt with three times in the Magistrates Court for possession of utensils or drugs, for which he was fined small amounts, with no conviction recorded.

[9] The applicant's counsel said that he had had a difficult childhood. His parents separated when he was 11 years old. As an adolescent he had been badly treated by his father's new wife and had been abandoned by his father to live in a hostel. He was the subject of bullying at school. After school he had completed an apprenticeship as a mechanic and had worked regularly in that occupation. He had to leave his job when he was arrested, but had obtained other employment. His current employer had provided a letter saying that he would, if possible, re-employ him once he was released from jail.

[10] Counsel said that the applicant had suffered depression and anxiety throughout his adult life and had used marijuana to self-medicate. He had had difficulty with his sexual identity over some years and regarded himself as bisexual. He had not deliberately exposed the younger boys to the acts he engaged in with H, although he accepted that they had witnessed them. He was remorseful, as was reflected in his plea of guilty. The applicant had commenced seeing a psychologist soon after his release from custody in September 2013 and had attended 21 sessions with her. A letter from her, which was tendered, indicated that the focus of their sessions had been to help the applicant to manage his distress and suicidal ideation.

[11] The applicant's mother provided a reference on his behalf. She said that her separation from his father had profoundly affected him. She confirmed that a brief period of living with his father and step-mother had ended with his being left at a shelter. After his release from custody, the applicant had lived with her and her husband and assisted them in many ways. She said that he was distressed and saddened by the effect of his behaviour on the boys.

Sentencing remarks

[12] The sentencing judge described the applicant's conduct as involving both sexual and emotional abuse. He had manipulated H so as to continue with his offending,

which had ceased only when the boy reached an age where he could resist. The aggravating aspects of the maintaining offence were the instances of permitting sodomy; that the relationship was a quasi-parental one; that more than one child was exposed to the conduct; that it involved emotional blackmail and manipulation; and that it had caused harm to H, in particular, and potentially to the younger boys. His Honour accepted that the applicant was remorseful. He adverted to the decision of this court in *R v EH*[2] as the authority of most assistance to him of those cited, but regarded the offending in the case before him as more serious and as justifying a greater sentence than was imposed there.

The applicant's submissions in this court

[13] The applicant submitted that the sentences on the counts of maintaining and permitting sodomy were too high, relying on two authorities, *R v EH*, to which the sentencing judge had referred, and *R v BAO*.[3] The respondent contended that, taking both those cases as yardsticks, they in fact supported the sentence imposed, as did a third case, *R v BBP*.[4]

[14] In *R v BAO*, the applicant pleaded guilty to one count of maintaining a sexual relationship with a circumstance of aggravation, one count of sodomy and one count of indecent dealing with a circumstance of aggravation. He sought an extension of time within which to appeal the sentence of nine years imposed on him. The applicant was a 48 year old family friend of the complainant, a nine year old girl. Over a period of some three years, he had three times committed sodomy on her, and on a weekly basis had performed oral sex on her and required her to perform oral sex on him. He had also, on various occasions, penetrated her digitally, requiring her to use a vibrator in his presence. He submitted that the fact that he had not used violence or had vaginal intercourse with the child should be regarded as militating in his favour.

[15] No parole eligibility date was set at first instance in *BAO*, so that the applicant was required by statute to serve four and a half years before becoming eligible for parole. The sentencing judge observed that, had he gone to trial, a sentence of ten years could have been imposed, carrying with it an automatic serious violent offence declaration requiring that 80 per cent of the term be served. That was described by this Court on appeal as a "realistic evaluation of the range after a trial"; there had been sufficient mitigation to recognise the early plea of guilty in the exercise of the judge's discretion in a way which meant no serious violent offence declaration was made. Although the sentence might be "towards the upper end of the range", it was not manifestly excessive. Since the applicant had no real prospect of success, his application for an extension of time was refused.

[16] *R v EH* concerned an applicant aged between 47 and 50 at the time of his offending. He was convicted, on a plea of guilty, of one count of maintaining an unlawful sexual relationship with a child under 16 years over a period of roughly three years; two counts of indecent treatment of a child under twelve years, with the aggravating circumstance that he was in his care; and six counts of indecent treatment of a child under 16 years with the same aggravating circumstance.

[17] The boy concerned in the maintaining count suffered from the difficulties associated with Asperger's syndrome. The sexual relationship entailed four acts of masturbation and sucking of the boy's penis and another of the applicant rubbing lubricant on his penis and procuring him to sodomise the applicant. Those acts occurred on four

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2 [2008] QCA 67.
3 [2004] QCA 445.
4 [2009] QCA 114.

different occasions while the complainant was staying at the applicant's house, and on the last occasion, while the applicant was on bail. The indecent treatment counts entailed six relatively brief instances of the applicant's touching the genitals or genital area of two boys, aged at the relevant times between 11 and 13, and two instances on which the applicant showed his son and two friends (aged 13 and 14) pornographic films, having first given them alcohol to drink.

[18] The applicant was sentenced to seven years and nine months imprisonment on the maintaining charge, with an eligibility for parole date set after three years, while concurrent sentences of four years imprisonment were imposed on the indecent treatment counts. The head sentence was calculated on a notional head sentence of nine years imprisonment, recognising a period of 15 months already spent in custody which could not be declared. Having regard to a number of authorities, including *R v BAO*, this Court concluded that nine years was too high a starting point for the sentence. The offending in *R v EH*, with the exception of procuring sodomy, was not of the same gravity and was confined to a relatively limited number of instances. Eight years was the proper starting point. The sentence was adjusted accordingly.

[19] In *R v BBP*, the applicant, who was convicted after a trial, was sentenced to eight years imprisonment for raping his niece, who was nine or ten years old, and a lesser term of imprisonment for indecently dealing with her. The intercourse was described as "shallow and momentary"; he had desisted when it became painful and the child pushed him away, but had then made her masturbate him. He made the child promise that she would not reveal his conduct by telling her she would get into "big trouble" if she did so. This Court regarded it as significant that the complainant was the applicant's niece and the rape had occurred in her own home; the offence involved an appalling betrayal of his responsibility as an adult to protect the child. The sentence, though substantial, was not manifestly excessive. The application for leave to appeal against it was refused.

The submissions on appeal

[20] The applicant submitted that *BAO* and *EH* involved graver offending, while *BBP* had no real relevance because it involved an entirely different factual background of a single rape. *BAO* was more serious because it involved penetrative acts on a younger child. The offending in *EH* should be regarded as worse because the more serious offences were committed on a child with Asperger's syndrome, and some of the offences were committed while the applicant was on bail. There were also offences committed against three further complainants. The applicant here should not have received a heavier sentence than the eight years imposed on appeal in that case. It should be borne in mind that no physical violence had been used on H.

[21] The respondent pointed out that the penalty imposed in *BAO* was actually more severe: although in that case there was an early plea of guilty, no declaration of eligibility for parole was made. The sentencing judge was correct to regard the offending in *EH* as less serious. *BBP* was not on its facts similar, but it was an example of the seriousness with which the court regarded abuse by a relative of a vulnerable child. The effect on the victim in the present case was a very significant consideration. It was to be remembered that it was not sufficient for the applicant to show that the sentence was different from sentences imposed in other cases; it had to be demonstrated, in *House v The King*[5] terms, that the sentence was "unreasonable or plainly unjust",[6] so that a failure properly to exercise the discretion could be inferred.

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5 *House v The King* (1936) 55 CLR 499.

6 *House v The King* at 505.

Conclusion

[22] Factual comparison between cases in an endeavour to establish a hierarchy of heinousness is not necessarily fruitful. But, taken as yardsticks, I do not consider that *EH* and *BAO* illustrate error in this sentence. It may be noted that H was only ten years old when the abuse began, not much older than the complainant in *BAO*. The permitted sodomies occurred when he was 12 or 13, at a critical stage of adolescent development. The applicant had a relationship of trust with him of a degree not present in either *EH* or *BAO*, of which he comprehensively took advantage over a long period. H was in a more vulnerable situation than the complainants in those cases, because he lived with the perpetrator of the abuse as part of his family, and over a period of years was unable to escape his constant importuning. The offending was persistent; H estimated it as occurring three times per week. The submission that the lack of violence was a redeeming feature loses some of its potency when one considers the relationship of control and manipulation which the applicant had established over a lengthy period.

[23] It need hardly be said that there is no single correct sentence in a case such as this. The sentencing judge had to balance the gravity of the offending against the mitigating circumstances – the applicant's timely plea of guilty, his lack of relevant convictions, the difficulties of his own childhood, his uncertainty about his sexual identity and the fact that he exhibited some level of remorse. But having regard to the persistence of the conduct, the abuse of the relationship between H and the applicant, its profound effect on H, and the fact that some of the worse activities were performed in indifference, at best, to the presence of a young child, I do not consider that it has been shown that his Honour erred in the exercise of his sentencing discretion.

[24] I would refuse the application for leave to appeal against sentence.

[25] **DALTON J:** I agree with the reasons and the order proposed by Holmes JA.