

THE QUEEN

v.

NFB

(Applicant)

**Application for leave to appeal against sentence
Applicant's submissions**

This application

1. NFB ("the applicant") seeks leave to appeal the sentence imposed by Judge Wall DCJ at Townsville on 11 April 2005. On 8 April 2005, the applicant pleaded guilty to an indictment containing 37 counts comprising one count (count 1) of maintaining a sexual relationship with a child under 16 years with circumstances of aggravation: s. 229B *Criminal Code* (between 31 May 1993 and 8 July 2000); 29 counts of indecently dealing with a child under 16 with circumstances of aggravation (counts 2 – 25 and 27 – 31): s. 210(4) *Criminal Code*; 3 counts of incest (counts 26, 32, 33): s 222 *Criminal Code*; and 4 counts of sexual assault (counts 34 – 37): s.352 *Criminal Code*.
2. On 11 April 2005, the applicant was sentenced to 12 years imprisonment with a serious violent offence declaration in respect of Count 1. In respect of Counts 2 – 37 the applicant was sentenced to a concurrent term of 10 years imprisonment. 84 days were declared as presentence custody in respect of the period the applicant spent in custody from the date of arrest on 25 May 2003 until 11 April 2003.¹

Maximum penalties

3. The relevant maximum penalties are counts 1, 26, 32 and 33: life imprisonment²; counts 2 to 21 and 34 to 37: 10 years imprisonment;³ and counts 22 to 25, 27 to 31: 20 years imprisonment.⁴

¹ ARB11.

² ARB18, L40 – ARB19, L30: Pre 1997 maximum was 14 years imprisonment. Post amendment: life imprisonment.

The course of proceedings

4. The applicant was charged on 25 May 2003. There was a committal hearing and the matter was originally set for trial. He was arraigned on 6 April 2005 and entered pleas of not guilty. However, two days later, on 8 April 2005 he was re arraigned and entered pleas of guilty to all 37 counts.⁵

The relevant facts

5. The applicant was born on 4 May 1965, making him 39 years of age at the time of sentence.⁶ He has no prior convictions. He is indigenous.⁷ He had worked in a number of positions after attending Cloncurry State High school including, as a grocery packer, a railway maintenance worker, a machine operator for the local council, a licensed security officer and was a community corrections officer for the Corrective Services Department at the time of arrest.⁸
6. The complainant, (“MT”), is the daughter of the applicant’s de facto spouse, GB. MT was born on 22 October 1985.⁹ The applicant and GB had co-habitated for many years and cared for 10 children including the complainant when he was charged.¹⁰ MT was the eldest female child in this family unit;¹¹ and it was said that she in essence took on the role of de facto mother to the younger children especially when the mother was in hospital. The applicant was not her biological father but he was in a position of *loco parentis* to her.
7. On 24 May 2003 MT, who was by then 17 years old, attended with her mother at the Kirwan Police station and made a complainant in respect of the applicant. No formal statement was taken at that stage.¹² Police then attended the applicant’s house due to a disturbance following GB refusing the applicant entry into the family house. The applicant was made aware that a complaint had been made by MT against him. He then made admissions to the

³ These occurred before the 1 July 1997 amendments to the *Criminal Code*: ARB20, L1-10.

⁴ ARB20, L8 – 20: s.210(4) *Criminal Code*.

⁵ ARB11, L15 – 20: s. 222(1) *Criminal Code*.

⁶ ARB13, L20: s.352(1) *Criminal Code*.

⁷ ARB27, L20-30: The sentencing judge was told that the applicant’s father came from the Torres Strait Islands and his mother is “an Aboriginal lady”.

⁸ ARB27, L30-40.

⁹ ARB15, L5.

¹⁰ The applicant was the biological father of 6 of these children. ARB16, L38.

¹¹ ARB16, L45.

¹² ARB14, L11.

police in a field interview and then in a formal, recorded interview at the police station. The crown prosecutor submitted that “full and frank disclosures” were made in these interviews and that His Honour was correct in finding that the applicant was “very remorseful and upset” after getting “it off his chest” in these interviews.¹³

8. MT attended at the police station the next day and provided a detailed statement. The admissions and this statement comprise the detail of the offending conduct. There is a degree of correlation between the two.

The conduct

9. Count 1 (maintaining unlawful relationship) spanned a period of 6 years and 11 months from May 1993 to July 2000. Counts 2 – 31 (indecent dealing, one count of incest) spanned an overlapping period of 7 years between 1 June 1993 and 7 July 2000. Counts 32 – 37 (indecent dealing and 2 counts of incest) spanned a separate period of about 18 months between 1 January 2002 and 1 May 2003. The total conduct spanned an overall period of 10 years however there was a significant diminishing of the frequency of conduct in the period subsequent to July 2000.
10. MT was about 7 years and 8 months old when the conduct commenced and 17 years old when the police complaint was made. The applicant was 28 years old when the offending conduct started.
11. It is instructive to at least briefly look at the nature of the conduct as it reveals a quite dysfunctional course of events. The applicant first forced the complainant to perform fellatio when she was about to turn 8. It did not proceed to the point of ejaculation on that occasion. She complained to her mother but, whilst there was considerable conflict as a result, no complaint was made to the police and the relationship between the applicant and the complainant’s mother continued including producing several more children. Subsequent to that first incident there were acts of cunnilingus performed by the applicant upon the child increasing to it happening “almost fortnightly”. She said that “on some occasions” he would get her to perform fellatio.¹⁴ This continued for about 2 years. The family then moved to another house which was smaller and the applicant did not seek to continue his indecency as

¹³ ARB14, L20-30.

¹⁴ ARB109, para 18.

frequently.¹⁵ The child recalls the applicant “feeling bad about his conduct, including offering to “cut his hands off” to make him stop doing it to her¹⁶ and desisting for 4 or 5 months at a time after expressing remorse for his conduct.¹⁷ MT also lived with her grandmother on occasions for several months which prohibited the conduct.

12. In June 1996, shortly after another child was born and GB was still in hospital the applicant digitally penetrated the child for the first time. She was then about 11. The specific incident included his showing her a “porn movie” for about 5 minutes, “rubbing her vagina” and inserting a finger which “hurt”. He also stuck “one of his fingers in her bum” and got her to perform fellatio and manual masturbation of him.¹⁸ He did this on one other occasion before GB came home from hospital. The family then moved to “Daintree Street for a few years” where it “wasn’t so bad” as other people lived in that house, however, it seems that the mutual oral sex acts continued albeit less frequently.

13. In June 1999, when MT was 13, the mother was hospitalised with “thyroid problems” for about a week. The applicant indecently dealt with her each morning that week, including digital (both vaginal and anal) penetration and fellatio before he went to work each day. GB had to be re-admitted into hospital because of an infection and MT stayed at home from school to look after the younger children. The applicant came home and, for the first time, forced sexual intercourse. She recalls that he:

“pushed in 4 or 5 times and it hurt. He stopped and wanked himself and cum on the floor... when he came back he was saying that he was sorry and he was angry but I think he was angry at himself.”¹⁹

An incident followed where MT left the house and went to go to a friend’s house. When she returned he was angry at her and punched her in the face. He said: “Do you think your gonna leave” and “if you leave I’ll just do it to” one of her sisters. However, after this incident, the applicant did not interfere with MT “for a long time”.²⁰

¹⁵ ARB110, para 22.

¹⁶ ARB110, para 26.

¹⁷ ARB111, para 27.

¹⁸ ARB111, paras 30-32.

¹⁹ ARB114, para 48.

²⁰ ARB115 para 50-52.

14. The applicant then obtained employment as a correctional officer in Townsville which meant that he lived away from the home much of the time and she recalls only two instances of oral sex and digital penetration occurring in this two year period.²¹
15. The next incidents were in and around the time that another child was born (July 2000) again involving oral sex and digital penetration, but after the child was born there was no conduct “for about 10 months or so.”²² Following that in 2001, “it didn’t happen as much” and “there wasn’t as much oral sex but more grabbing”.²³
16. Then in February and June 2002, there were two more counts of sexual intercourse.²⁴ From that point in time there was intermittent repetition of the oral sex and digital penetration culminating in an incident in February 2003 where a further act of indecency occurred.
17. Then, in April 2003, the last course of misconduct occurred. It covers a substantial number of paragraphs in the complainant’s statement: paras 82 – 129.²⁵ It reveals a man tortured with his own misconduct, fighting his urges and expressing suicidal ideation.²⁶ Most relevantly he did not actually perform any actual sexual activity on that occasion and from that point he did not molest MT again.

Summary of conduct

18. There were 3 acts of sexual intercourse over the entire period with only one count in the period of count 1. The balance of the conduct involved fellatio, cunnilingus and digital penetration. The aggravating features include the duration of the conduct which commenced when the complainant was very young, the position of trust created by the relationship of *loco parentis* and the threat to harm the child’s siblings, if she did not succumb to his conduct or reported it. However, the molestation was not attended by any physical violence as such and although the conduct spanned a decade, it would not be right to regard it as continuous for the entire period. There seems to be protracted periods of many months if not years where no activity took place either due to a lack of opportunity or restraint on the part of the applicant.

²¹ ARB116, paras 56-57.

²² ARB117, paras 62-65.

²³ ARB117, para 68.

²⁴ ARB118, paras 69-70.

²⁵ ARB120 -125.

²⁶ ARB110 (para 26), 111 (para 27), 114 (para 48), 115 (paras 51 & 52) and 117 (paras 65 & 68).

Crown submissions below

19. It was submitted by the crown prosecutor that:
- “it would be in the Crown’s submission your Honour could arrive at a sentence of nine years’ imprisonment”²⁷ This submission was made “tailored on the fact that there is one act of sexual intercourse which is said to be – taken place”²⁸. “It is only on one occasion where the act of incest occurred ...at the relevant time ... the complainant would’ve been aged 13 turning 14”²⁹. “There’s no suggestion from the complainant there were any other uncharged acts of sexual intercourse”³⁰
 - “The acts were almost – almost exclusively acts of oral sex, either the performance or the receiving of that act”³¹
 - “The duration as charged on the maintaining count, is, in fact, one of seven years”³². The maintaining “commences when she was seven” until 14.³³
 - “The prisoner’s conduct on the night must still have some weight”.³⁴
 - “Given his plea of guilty – I – and I should indicate the complainant has never been subject to cross-examination. She was not required to give evidence at committal and, by his plea of guilty today, the complainant has been saved that ordeal – that your Honour would approach the sentence in that way”³⁵
20. The crown prosecutor suggested that the appropriate penalty was 9 years imprisonment. He referred to: *R v Bartlett* [2002] QCA 448; *R v Reader* [2000] QCA 279; *R v Snow* [2001] QCA 54; *R v Levi* [1999] QCA 423; *R v Dillon* [2003] QCA 305; *R v A* [2001] QCA 136; *R v F* [2001] QCA 137 and *R v B* [2003] QCA 68. He said that *Reader* was “a worst (sic) type of offending in the sense of the acts particularised for the maintaining involved numerous acts of intercourse”³⁶. He referred to *R v Bartlett* [2002] QCA 448 as being less culpable than the applicant.³⁷
21. The sentencing judge erred in rubbishing this submission. Not only was it disrespectful, it was wrong.³⁸

²⁷ ARB25, L40-42.

²⁸ ARB25, L55-60.

²⁹ ARB22, L1-10.

³⁰ ARB22, L10-14.

³¹ ARB22, L15-20.

³² ARB22, L25.

³³ ARB22, L32-40.

³⁴ ARN25, L10-11.

³⁵ ARB25, L30-27.

³⁶ ARB23, L15-25.

³⁷ ARB22, L52 – ARB23, L5.

³⁸ ARB25, L50-55: “His Honour: I think it’s, with respect to you, an atrocious submission to make.”

Applicant's submissions below

22. The matters which were urged on the applicant's behalf included:

- The applicant "is an indigenous Australian, his father was a Torres Strait Islander and his mother ... is an Aboriginal lady".³⁹ "He strongly identifies with the cultural – his cultural attachment to his community".⁴⁰
- "He was educated to grade 12 at Cloncurry State High School, he has been in full-time employment since leaving school. He has worked as a grocery packer in Cloncurry, a truck-laying maintenance ganger for the Queensland Railways, a machine operator for the Cloncurry Shire Council, he has supplemented his – his income by being a licensed security officer at the Leichhardt Hotel in Cloncurry and in 2000 he joined the Department of Corrective Services of Queensland as a community Corrections officer and that employment continued until his arrest in relation to these offence".⁴¹
- "Since being granted bail by the Supreme Court in relation to these matters he has continued to - to work full-time for the K and R Cartage at Cloncurry where he – where eventually when he is released from prison he anticipates he'll be able to return and apply him skills as a mechanical operator in the North West mineral province in cartage work and haulage work".⁴²
- "In the time he's been on bail he has been reporting five days a week to the Cloncurry police and ...he has not missed a single day of such reporting".⁴³
- "He has been a – an active member of his community in Cloncurry in particular with junior cricket and with senior rugby league. He's represented Cloncurry in football at a – at – at representative level for the town. He's also a – an accomplished performer in country and western bands and his band has recorded music and has performed charity events for NAIDOC and the Leukaemia Foundation and the Cloncurry Aboriginal Women's Issue group".⁴⁴
- "My client gave instructions to his solicitors to conduct a committal which took place on the – in November 2003. His instructions were – or at least resulted in the complainant not being cross-examined and nor was the complainant's mother, at committal".⁴⁵
- "...in the records of ... interviews ... my client expressed his deep remorse in relation to his members of his family. And I refer back to your Honour's remarks during your rulings yesterday in relation to those issues. You Honour said these things – your Honour said that my client was truly remorseful".⁴⁶ The following references were made to the applicant's admissions with police:

³⁹ ARB27, L20-25.

⁴⁰ ARB27, L25-26.

⁴¹ ARB27, L30-40.

⁴² ARB27, L48-55.

⁴³ ARB28, L1-5.

⁴⁴ ABR28, L10-20.

⁴⁵ ARB28, L35-40.

⁴⁶ ARB28, L50-60.

- Page 5, line 43 of the field interview with Taylor: “whatever my daughter tells you I’ve done. I’ll admit to everything. I don’t want to hide nothing and I’m not ashamed. I honestly tried to hang myself because – in front of my kids and they cut me down”⁴⁷
- Page 8, line 20 of the formal recorded interview with Taylor: “I’m the one in the wrong, not MT. She’s done nothing. She’s the innocent one. I take the whole responsibility. I wish I could have just loved my daughter the way a father should love your daughter – their daughter, you know?”⁴⁸
- “The Prosecutor’s suggested sentence of nine years is not outside your sentencing discretion although I do accept that it certainly towards the lower end of the range”⁴⁹ “...punishment would be adequate for a head sentence of nine years. I don’t see any point in making any submission about a – a bottom on that. I’d be wasting your Honour’s time and my breath”.⁵⁰

Sentencing judges observations and comments

23. In addition to dismissing the Crown Prosecutor’s submissions, Wall DCJ made the following observations during the course of sentence submissions and when passing sentence:
- “You have pleaded guilty and are entitled to credit for that. You have expressed, also, extreme remorse for what you did”⁵¹
 - “I am satisfied that you knew that your wife and daughter had gone to the police station and in all probability had reported what you had been doing even though you did not know the details of what they said.”⁵²
 - “It is also to your credit that you did not cross-examine the complainant or any other members of your family at the committal proceedings, and I accept that you were concerned that family members would not be required to give evidence at the committal and in these proceedings”.⁵³ His Honour noted that the “significant matter is that he hasn’t required the complainant or members of his family to give evidence”.⁵⁴
 - “I accept that you are ashamed of what you had done and that you realise the extent to which you have let you daughter and your family down. As a result you have lost you marriage, your wife, and effectively your children.”⁵⁵
 - “I recognise also the need for rehabilitation in your case and that a sentence should not be imposed which will have a crushing effect on your prospects of rehabilitation”.⁵⁶

⁴⁷ ARB29, L30-40; ARB65, L43 – 55.

⁴⁸ ARB30, L7-15; ARB20 – 30.

⁴⁹ ARB34, L38-40.

⁵⁰ ARB37, L5-10.

⁵¹ ARB47, L50-55.

⁵² ARB48, L1-10.

⁵³ ARB48, L10-20.

⁵⁴ ARB32, L22-24.

⁵⁵ ARB48, L20-29.

⁵⁶ ARB48, L29-35.

- “I cannot accept the suggested sentence by the Crown. On my reading of the various authorities, offending such as yours warrants a higher sentence than that suggested even taking into account the various factors in your favour”.⁵⁷
 - “the sentence I’m going to impose is going to be a lot higher than that (than the 9 years submitted by the Crown prosecutor), subject to hearing from Mr Entriken. I think that’s a – a submission which bears no basis or no relationship to the facts and the consequences for the complainant”⁵⁸
24. Aside from the issue of having proper regard to sentences imposed by this Court for like cases, the most salient features which attend this case are:⁵⁹
- The complainant was 8 years old when the offending conduct started
 - The relationship effectively spanned about 10 years.
 - There were 3 instances involving sexual intercourse, once when she was 13 and twice when she was 14/15.
 - There was no pregnancy caused.
 - There was a relationship of *loco parentis*.
 - There was only one complainant.
 - There was, in the entire period, one act of violence and it was not directly related to the sexual activity per se. There was a degree of emotional blackmail and manipulation.
 - Although the pleas of guilty were late, they were entered following a remorseful confession. Most importantly there was no requirement for either MT or GB to give evidence or be cross-examined.
 - The confessions demonstrate a high degree of remorse and recognition of wrongdoing.

Comparable cases

25. The cases placed before the sentencing judge are summarised in the *attached* schedule.

Submissions on appeal

26. From having regard to the cases placed before the sentencing judge, the range submitted by the crown prosecutor, and the particular circumstances surrounding the applicant’s case, the

⁵⁷ ARM48, L39-45.

⁵⁸ ARB25, L45-50.

⁵⁹ Using the checklist suggested by Jerrard JA in *R v SAG* [2004] QCA 286 para [19] and repeated in *R v DAF* [2004] QCA 368 at para [12].

sentence imposed below is outside the range of sentences imposed for this type of conduct. It is submitted that his Honour erred - in the sense identified in *House v The King* (1936) 55 CLR 499 at 503 - in the exercise of his sentencing discretion:

“It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.”

27. The sentencing judge makes no reference to any comparable case to justify the sentences imposed.
28. The most salient features to support the applicant’s contentions are:
 - 28.1. The applicant pleaded guilty to all offences. There was only one complainant. No violence was associated with the sexual conduct. There were only 3 acts of penile intercourse over the entire period of the offending conduct.
 - 28.2. There has never been cross-examination of the complainant or family members or need for them to give any evidence at all.
 - 28.3. The applicant co-operated fully with Police, made full and frank confessions – providing the only corroboration to the complainant’s allegations – and expressed deep remorse and shame for his conduct.
 - 28.4. The applicant had always been in full employment and had provided for his family.
 - 28.5. The applicant had no other convictions for any offences.
29. The authorities suggest a sentence of circa 8 years was appropriate giving proper regard to all of the relevant features. The cases that are closest to the present are *R v B* [2003] QCA 68 (7 years); *R v F* [2001] QCA 137 (8 years); *R v Hoban* [2000] QCA 384 (8 ½ years)⁶⁰ and *R v Bartlett* [2002] QCA 448 (8 years).
30. There is nothing in the facts that suggest that a serious violent offence declaration is warranted.⁶¹ There was no attempt to interfere with the other children (or any other children) and no identifiable risk of harm to the community in general.

A. Boe
 B O E L A W Y E R S
 24 October 2005

⁶⁰ *Hoban* pleaded not guilty.

⁶¹ See *R v Collins* (2000) 1 Qd R 45 at 48; *R v Orchard* [2005] QCA 141; and *R v BAW* [2005] QCA 334.

**IN THE COURT OF APPEAL
SUPREME COURT OF QUEENSLAND**

C.A. 110 of 2005

THE QUEEN

v.

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(Applicant)

Corrigenda

The applicant's outline

31. Para 1 first sentence: "... Judge Wall QC, DCJ" and in subsequent references to His Honour. There should also be a comma after the words "37 counts".
32. Para 2, last sentence should read: "...from the date of arrest on 25 May 2003 until 15 August 2003 and from 8 April 2005 until 11 April 2005".
33. Para 9, first sentence should read: "Count 1 (maintaining unlawful relationship) spanned a period of 7 years and 2 months from 31 May 1993 to 8 July 2000".
34. Para 9, third line should read "Counts 32 – 37 (4 counts of sexual assault and 2 counts of incest)".
35. Para 24, first dot point, " the complainant was 7½ years old when the offending conduct started".
36. Para 24, second dot point, "the period of offending spanned almost 10 years".

**IN THE COURT OF APPEAL
SUPREME COURT OF QUEENSLAND**

C.A. 110 of 2005

THE QUEEN

v.

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Comparable sentences

37. *R v Bartlett* [2002] QCA 448 (24 October 2002) (McPherson JA, Cullinane and Holmes JJ)

37.1. Charge: Maintaining an unlawful relationship of a sexual nature with a circumstance of aggravation, namely rape

37.2. Circumstances:

- Offence was committed over a period of almost 3 years from the beginning of 1999 to November 2001
- The complainant was 12 when the unlawful relationship commenced
- The applicant was the complainant's step father
- The applicant's conduct included touching and kissing her breasts, performing oral sex upon her on one occasion, and once or twice digitally penetrating her vagina
- The complainant was raped by the applicant on at least 2 occasions
- The applicant's conduct occurred whilst the complainant's mother was either elsewhere in the house or asleep in bed
- The police came to speak to the applicant as a result of the complainant telling a school friend what had been happening. Initially the applicant admitted only to the fondling of the complainant's breasts, suggesting that that had been accidental. However on the following day he telephoned the police and informed them that everything the complainant had said was true, and in a subsequent recorded interview he freely admitted his guilt

37.3. Mitigating factors:

- The applicant was remorseful
- The applicant cooperated with police after an initial denial of conduct
- The applicant had a good work history
- Plea of guilty

37.4. Antecedents: The applicant was 35 at the time of sentencing

37.5. Criminal history: minor which does not include any offence of a sexual nature

Sentence: 8 years imprisonment with a recommendation for parole after 3 years (not disturbed on appeal) (maximum life imprisonment)

38. *R v Hoban* [2000] QCA 384 (22 September 2000) (McPherson and Thomas JJA, Jones J)

38.1. Charges: 3 counts of indecent dealing with a girl under 14; one count of indecent dealing with a girl under 16; one count of attempted sodomy; one count of rape and 2 counts of indecent assault

38.2. Circumstances:

- The period spanned by the 8 charges in the indictment was 8 ½ years, covering a period when the complainant was between 10 and 18 and the applicant 36 and 44.
- The complainant's mother corroborated her daughter including evidence of having found the applicant in bed with the complainant on 2 occasions in June 1989, another occasion in 1992 or 1993 when she found him sitting on the complainant's bed dressed only in underpants.
- The mother taped a telephone conversation with the appellant in which there were admissions by him of having sexually assaulted the complainant, of not knowing why he did it, that he felt terrible about it, that it was cracking him up, that it had gone on for years, that he could only say he was sorry, that he did not "make her" and so on.
- The applicant gave evidence denying that anything sexually untoward had ever occurred between him and the complainant. He admitted the taped telephone conversation with the complainant's mother, stating that he had been drunk at the time and that he was trying to satisfy her.

38.3. Mitigating factors: Any mitigation by way of remorse was minimal.

38.4. Plea: not guilty

38.5. Criminal history: Minor convictions in 1979 and 1986

Sentence: the sentence imposed for the rape was 8 ½ years imprisonment, and for all other offences concurrent sentences of 3 years imprisonment (upheld on appeal)

39. *R v Levi* [1999] QCA 423 (7 October 1999) (de Jersey CJ, Davies JA, Jones J)

39.1. Charge: Maintaining an unlawful relationship with his stepson with 2 circumstances of aggravation; the first that during the relationship he had carnal knowledge by anal intercourse with the child who was then under 16, the second that the child was under his care.

39.2. Circumstances:

- There were 9 acts of anal intercourse which occurred over a period of 2 ½ years whilst the child was aged between 9 ½ and 12
- The conduct also included 2 incidents where the applicant rubbed his penis against the child's anus without penetration
- At the relevant time, the applicant was separated from his wife, the child's mother
- After the last of the nine sodomies which occurred on 7 July 1998 the child complained to his mother who then called in the police
- The applicant was arrested and charged but initially declined to take part in an interview

- The offences were committed in part during a period in which the applicant was serving a suspended sentence

39.3. Mitigating factor: only mitigating factor was the applicant's plea of guilty

39.4. Criminal history: a number of previous convictions, the most significant of which are:

- 1985 – 2 counts of rape and 3 counts of indecent assault – 10 years imprisonment
- 1991 – escape from custody – 6 months imprisonment cumulative upon his previous sentence
- 1997 – serious assault on a police officer, going armed, wilful damage, assault and resisting police – 12 months imprisonment suspended after 3 months for an operational period of 18 months

Sentence: 11 years imprisonment; reduced by the COA from 13 years imprisonment

40. *R v F* [2001] QCA 137 (9 April 2001) (Williams JA, White and Homes JJ)

40.1. Charge: Maintaining an unlawful sexual relationship of a sexual nature with a child under 16, and that the relationship involved his having carnal knowledge of the girl

40.2. Circumstances:

- Offending conduct commenced when the girl was 11, and did involve sexual intercourse from about that time
- The offences had adverse effects on the young girl which were continuing at the time of sentence
- At appeal applicant candidly conceded that he had intercourse with the girl when she was aged 14 and that that conduct was done with intent to reap revenge against the girl's mother, his then wife
- At appeal applicant disputed that the events in question commenced at a time when the girl was aged 11
- Applicant was self represented at application for extension of time to appeal
- Judges were of view that application for leave to appeal against sentence would have no prospects of success and therefore the application was refused

40.3. Plea: guilty

40.4. Criminal history: numerous offences including some property offences

Sentence: 8 years imprisonment for the maintaining; 4 years imprisonment with respect to each of the other seven offences; sentences to be served concurrently; with a recommendation that the applicant be eligible for parole after 3 years

41. *R v B* [2003] QCA 68 (21 February 2003) (McPherson and Davies JJA, Philippides J)

41.1. Charges: 2 counts of maintaining an unlawful relationship with a circumstance of aggravation

41.2. Circumstances:

- Complainant was in each case a step daughter of the applicant

- The complainant in the first count was at the time of the offences between 10 and 12 years of age
- The offences were committed over a period of 18 months
- Eleven events were particularised. These included masturbating in front of her, performing oral sex on her and having the complainant masturbate. The applicant attempted to have intercourse with her on three occasions over this period.
- The other complainant, a sister of the first was 4 when the offences against her were committed. They extended over a 4 ½ year period. She was 9 when the offending ceased
- The offending behaviour was similar and on one occasion included an attempt to have intercourse with her
- A number of offences committed on one complainant were committed in front of the other
- There were four acts that amounted to attempted rape. He abandoned one of these only when it became clear that his wife was returning home
- The Applicant threatened the complainants that they would be in trouble if they told their mother of what occurred

41.3. Antecedents:

- Applicant was 28 years of age at time of appeal
- He was at time of offending a heavy consumer of marijuana
- He was explained by a psychiatrist for the purpose of his sentence hearing. This revealed no psychiatric or psychological disorder. No satisfactory explanation for his offending conduct was given

41.4. Mitigating factors:

- To his psychiatrist he expressed remorse
- During his plea of guilty his counsel said he was remorseful

41.5. Plea: guilty

41.6. Criminal history: small number of criminal offences, mostly drug related, his only other offence being a breaking entering and stealing as a child

Sentence: 7 years imprisonment on each offence to be served concurrently (upheld on appeal). An order made pursuant to s 19 of the *Criminal Law Amendment Act 1948* that the applicant report his name and address to the officer in charge at Townsville Police Station within 48 hours of being released from custody and thereafter for a period of 15 years was set aside by the Court of Appeal

42. *R v R* [2003] QCA 285 (11 July 2003) (Davies, Williams, Jerrard JJ)

42.1. Charges: 2 x unlawful and indecent dealing with a child under 12 years old; 2 x rape

42.2. Circumstances:

- The complainant was the applicant's stepdaughter
- Count 1 involved the applicant unzipping his pants and exposing his penis to her, inviting her to either touch or play with his penis and to kiss it and lick it or to rub it. She declined then he placed her hand on his penis and moved her hand up and down

- She described that at age 7 the applicant would enter her room, remove her from her bed, take her to the kitchen, and invite her to kiss his penis and lick it like ice cream. She complied with these requests because she was too scared to say no
- Conduct also included the applicant putting his fingers inside the complainant's vagina and climbing on top of her. When on top of her the applicant would attempt to push his penis inside. He was unable to achieve penetration
- Count 2 involved the applicant exposing his penis, making the complainant rub it, kiss it and lick it
- Count 3 was a count of attempted rape. The jury disagreed and were discharged without returning a verdict on this charge. While swimming at Bribie Island the applicant pulled the swimmers of the complainant to the side and tried to insert his penis into her vagina. Penetration did not occur
- The complainant describes that the applicant would regularly come into her room and have sex with her. He would start rubbing her private parts, spit on his hands, rub her vagina, climb on top of her, penetration would occur. This intercourse started before she started menstruating, which happened when she was about 12 and in grade seven. The intercourse continued after she started menstruating
- Count 4 involved a specific occasion of sexual intercourse. The applicant got into the complainants bed and intercourse occurred
- Count 5 involved intercourse with the complainant in her bed

42.3. Plea: not guilty

Sentence: 8 ½ years imprisonment reduced by the COA from 10 years imprisonment on each count of rape, 2 years imprisonment on the counts of indecent dealing, to be served concurrently

43. *R v Fogarty* [1996] QCA 490 (6 December 1996) (Pincus JA, Thomas and White JJ)

43.1. Charges:

43.2. Circumstances:

- Appeal against conviction as well as appeal against sentence
- The applicant was convicted of 1 count of rape; 6 counts of indecent dealing with a child under 16; 3 counts of wilfully exposing complainants to an indecent video tape; 1 count of wilfully exposing a complainant to indecent pictures
- All but 2 of the convictions related to a particular complainant. Each of the other 2 complainants was a person to whom the appellant exposed an indecent video tape
- The applicant was the complainant's de facto father
- Consistent attempts were made by the applicant to corrupt the complainant, including showing her pornographic material
- The earlier occasions involved putting his hand inside her shirt and attempting to remove her pants. This progressed to his asking her to "rub his dick for him" and exposing his penis, followed by a more boisterous incident which was interrupted by a boarder in the house
- On another occasions he put his hand down the front of her pants so that his fingers went in "a little bit but not right in"
- The next occasion was rape. Whilst the complainant and the applicant were walking home he pulled her into a public toilet, sat her on the toilet seat and despite her resistance removed her pants. The penetration that was achieved was described as "only a little bit". The incident went on for about 2 to 3 minutes before she was able

to push him away, pull up her pants and walk home. She later discovered she was bleeding

- The applicant showed a complete lack of remorse
- Complainant was subjected to a trial
- Conduct continued over a period of 7 months

43.3. Mitigating factors:

43.3.1. There were no gratuitous violence or threats involved

43.4. Plea: not guilty

43.5. Criminal history: insignificant consisting of 4 drink driving offence and 1 of wilful damage follow by a breach of bail

Sentence: 8 ½ years imprisonment, 3 years imprisonment, 5 months imprisonment respectively, served concurrently, upheld by the COA

44. *R v BAW* [2005] QCA 334 (9 September 2005) (McMurdo P, Jerrard JA and Wilson J)

44.1. Charges: 3 counts of maintaining an unlawful relationship of a sexual nature with 3 different children (3 of his grandchildren) who were under the age of 12 (A, B, C);

- 1 count of indecent dealing with a boy under 14 (his younger brother in law) (D);
- 12 counts of indecent dealing with a girl under the age of 14 (E);
- 6 counts of incident dealing with a girl under the age of 14 (F & G);
- 2 counts of indecent dealing with a child under the age of 12 (H)

44.2. Circumstances:

- The offences spanned approximately 40 years
- The first in time was a count of unlawful and incident treatment of a boy under 14, the applicant's brother in law, committed in 1964
- The next group of offences were committed between 1980 and 1983 on the applicant's god daughter. The next offences were committed in 1984 and 1985 on two complainants who were the young daughters of a friend of the applicants
- The maximum penalty for these offences was 7 years imprisonment
- The conduct involved exposing A to witnessing BAW abusing C, persuading her to place her hand on BAW penis, rubbing a vibrator against A's vulva, inducing A to perform fellatio upon him, performing cunnilingus on A, exposing her to exposing her to watching him perform cunnilingus upon C, and offering A \$10 to touch him on the penis or allow him to touch her on the vulva
- The acts relied on involving B included rubbing her vulva with his finger, inducing both her and A to place their hands on his penis when in each other's company, rubbing a vibrator against her vulva and when in A's company, performing cunnilingus upon her, exposing her to watching him perform cunnilingus on C and offering her \$10 to touch him on the penis or allow him to touch her vagina
- The conduct involving C included all of the same depravity, and rubbing his penis against that child's vulva. There appears to have been more acts involving C than either A or B
- The offence committed against D, then aged between eight and nine, consisted in BAW performing fellatio upon D, and D then doing likewise to BAW.

- After that offence, close to 20 years passed before BAW committed the next series of offences to which he pleaded guilty, the 12 counts of indecent dealing with E, D's daughter. The offences committed against E happened when she was aged between two and five years and four months old. They involved rubbing her vulva, placing her hand on his penis and inducing her to masturbate him, inducing her to suck his penis, attempting to place his finger inside her vagina, ejaculating into her mouth after persuading her to perform fellatio, causing his dog to lick the child's vulva while BAW masturbated, persuading her to masturbate him in the presence of another unidentified small girl, and performing cunnilingus upon her.
 - The offences committed on the child F were committed between January 1984 and 1 March 1985. That child was the daughter of friends of his with whom he went ten pin bowling. She was aged between eight and nine years when offended against. BAW admitted to four offences committed against her, one of which included persuading that child and the child G to take off their clothes and to perform fellatio on him. Each naked child in turn was then persuaded to sit on BAW's face; eventually he ejaculated. On another occasion the same conduct occurred with F and G, with each being induced to perform fellatio on him while he performed cunnilingus on each of them, and the other sexual offences committed on F also involved cunnilingus and fellatio on one occasion, and inducing that child to masturbate BAW on another.
 - The offences committed against G were likewise committed between 1 January 1984 and 1 March 1985. G's family were friendly with BAW. Two offences were admitted which involved her, both committed when she was between six and seven. Only one of those offences admitted by BAW was alleged to have occurred in the presence of F; the other was alleged to have happened when G was alone with BAW. The first – in the presence of F and BAW – involved, on G's recollection, both children performing fellatio on BAW. G had also been induced to masturbate BAW, while he touched F's vulva. The incident admitted by his plea as having happened when G was alone with him involved her masturbating him, performing fellatio upon him, and his touching her vulva.
 - The final victim, H, was the daughter of a friend who was in the same motorcycle club as BAW. Those offences were committed between 1 March 1993 and 1 May 1993, when that child was aged nine. The offences consisted of his rubbing her vulva when purporting to give her a piggyback, and his deliberately touching her vulva on another occasion, on which he asked "Do you like that?"; she said "No".
- 44.3. Mitigating factors:
- Service in the 3RAR between 1962 and 1968 which included active service in both Malaya and Vietnam
 - Plea: guilty
- 44.4. Criminal history: conviction in 1960 when he was 19 years old for unlawful carnal knowledge of a girl under the age of 17 for which he was admitted to probation

Sentence: 8 years imprisonment (on each count of maintaining) to be served concurrently; BAW deemed a serious violent offender; sentence upheld on appeal

**IN THE COURT OF APPEAL
SUPREME COURT OF QUEENSLAND**

C.A. 110 of 2005

THE QUEEN

v.

NFB

(Applicant)

Applicant's Reply

45. The Deputy Director, in his outline makes reference to a number of decisions of this Court to seek to support the submission that: "No strictly comparable case has been identified. The following may assist in fixing the range."⁶²
46. In each of these cases there are matters of distinction which favour the applicant:
- 46.1. *R. v. Krieger* C.A. 13 of 1991 – 15 years imprisonment (eligible for parole after 7½ years)
- There were acts of sodomy.
 - The applicant, the complainant and her mother (his sister) were in a somewhat dysfunctional relationship.
 - "In the course of committing the offences, the child suffered both vaginal and anal bleeding..."⁶³
 - "The medical evidence from the psychiatrist is to the effect that he is presently at risk of re-offending."⁶⁴
- 46.2. *R. v. B* C.A. 394 of 1998 – 9 years imprisonment (reduced from 12 years)
- The offences spanned from 1987 to 1996, when the complainant was aged between 7 and 16.
 - The appellant threatened to "kill her family and then her" if she told anyone.⁶⁵

⁶² Page 5.

⁶³ Page 2.

⁶⁴ Page 4.

⁶⁵ Page 4.

- After penetration on one occasion “there was blood coming from her vagina”.⁶⁶
- There were about “20 to 25” acts of penile penetration commencing when the complainant was in grade eight.⁶⁷

46.3. *R. v. Myers* C.A. 353 of 2001 – 11 years imprisonment (after trial and unsuccessful appeal against conviction)

- Contested trial and appeal against conviction.
- No remorse or willingness to facilitate the course of justice.
- The complainant was 9 years of age at the commencement of the relationship.
- He told her he would kill her if she ever told anyone.
- There was an “enormous detrimental impact on the complainant”.⁶⁸

46.4. *R. v. R* C.A. 126 of 2000 – 11 years imprisonment

- R was on a suspended sentence.
- He bribed the complainant “submitting her to a form of prostitution”.⁶⁹
- “... the applicant had confessed to these offences and offered to plead guilty. The complainant was therefore saved the ordeal of a full committal and trial with all the difficulties for young witness that that entails. Had those matters stood alone it may well be that the head sentence in this case would have been viewed as excessive”.⁷⁰
- from comments to a counsellor, “the applicant was inclined to place some of the blame for these offences on the complainant herself”.⁷¹
- R had previous convictions for sexual offences including an 8 year term for 2 counts of rape of a 15 year old in 1986 and an 18 month term (suspended after 6 months for 3 years) for indecent assault of a woman in 1996. This operative period was in force at the time of these offences.

46.5. *R. v. GQ* [2005] QCA 53 – 10 years imprisonment (serious violent offence declaration automatically invoked)

- Penile penetration at age 11.

⁶⁶ Page 5.

⁶⁷ Page 8.

⁶⁸ Page 12.

⁶⁹ Page 3.

⁷⁰ Page 6.

⁷¹ Page 7.

- Sexual intercourse occurred on a regular basis “from that time” viz. when she was 11, “until she was 16”, “about three or four times a week”.⁷²
- “Most reprehensible was the unprotected nature of the sexual intercourse which left the complainant at risk of pregnancy”.⁷³
- Aggravating feature was the provision of alcohol to such a young girl.

46.6. *R. v. BAO* [2004] QCA 445 – 9 years imprisonment (no serious violent offence declaration)

- Complainant was about 9 or 10 years of age when the incidents commenced.
- Three incidents of sodomy when she was about 9 or 10.
- Digital penetration of the girl’s vagina one or two times a week over a period of about three years.
- Provided the complainant with a vibrator when she was about 11 and had her use it in his presence.

47. Accepting that there are “infinite variations in the circumstances of the offences which requires some flexibility in applying the range”,⁷⁴ (White J in *R v GQ* [2005] QCA 53 citing the Chief Justice in *R v C; ex parte A-G* [2003] QCA 134), none of the abovementioned cases, except *Krieger* support the sentence of 12 years imprisonment following a guilty plea attended with remorse and a facilitation of the course of justice. *Krieger* is attended with idiosyncratic features and is nearly 15 years old. The cases of *R v B C.A. 394* of 1998 and *R. v. BAO* [2004] QCA 445 support the submission that the sentence imposed upon the applicant below was manifestly excessive.

A. Boe
 B O E L A W Y E R S
 26 October 2005

⁷² Page 5.

⁷³ Page 7 -8.

⁷⁴ Page 9.