SUPREME COURT OF QUEENSLAND

CITATION:	*R v Al Aiach* [2006] QCA 157
PARTIES:	**R** **v** **AL AIACH, Manssour** **(applicant)**
FILE NO/S:	CA No 93 of 2006 DC No 25 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	12 May 2006
DELIVERED AT:	Brisbane
HEARING DATE:	27 April 2006
JUDGES:	Jerrard and Keane JJA, Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSON – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – GENERALLY – where applicant pleaded guilty to 13 counts of unlawful and indecent dealing with a child under 16 years and one count of unlawful and indecent assault – where applicant was sentenced to 12 months imprisonment suspended after four months with an operational period of three years – where four complainants worked as employees at applicant's pizza shop – where applicant was 47 and 48 years old when he committed the offences – no prior criminal history – whether sentence was manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSON – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – GENERALLY – where applicant voluntarily sought counselling from a consultant psychologist – where psychologist's report stated that applicant appeared remorseful and predicted a low risk of re-

offending – where sentencing judge did not specifically refer to s 9(6)(f) *Penalties and Sentencing Act 1992* (Qld) (prospects of rehabilitation) but did refer to reports of applicant's psychologist – whether sentencing judge overlooked applicant's prospects of rehabilitation resulting from his own efforts and predicted low likelihood of re-offending – whether the applicant's own efforts to seek psychological counselling constituted "exceptional circumstances" in *R v Jones* [2003] QCA 450 – whether sentence was manifestly excessive

Penalties and Sentencing Act 1992 (Qld), s 9(2)(a), 9(5), s 9(6)(f)

R v Fereiro [2006] QCA 10; CA No 331 of 2005, 6 February 2006, considered
R v G [1994] QCA 086, considered
R v Jones [2003] QCA 450; CA No 285 of 2003, 16 October 2006, considered
R v Pham [1996] QCA 3, cited

COUNSEL: P J Callaghan SC for the applicant
M J Copley for the respondent

SOLICITORS: Boe Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **JERRARD JA:** On 10 April 2006 Mr Al Aiach pleaded guilty to 13 counts charging him with unlawfully and indecently dealing with a child under the age of 16 years, and one count of unlawful and indecent assault. The offences he admitted by those pleas were committed in respect of four teenaged female employees of his, over the period between 12 April 2004 and 8 February 2005. He was sentenced to 12 months imprisonment, suspended after serving four months, with an operational period of three years. He has applied for leave to appeal against those sentences.

[2] The grounds of appeal, amended by leave, are that:

1. The sentencing discretion miscarried by reason of:
   (a) The failure by the learned sentencing judge to determine whether the applicant had demonstrated that his case was attended by exceptional circumstances;
   (b) The failure to find that the applicant's case was attended by exceptional circumstances;
   (c) The significance attached to the decision in *R v Jones* [2003] QCA 450;
2. The requirement that the applicant spend four months in actual custody has created a sentence which is manifestly excessive.

Background matters

[3] The applicant is 49 years old and has no prior criminal convictions of any kind. He was born and raised in Syria, lived and worked as a builder and stonemason in Libya and Jordan, and came to Australia with his wife and eldest child in 1991.

Since then he has run several small retail businesses, and for the past three years a pizza business. He has three children now aged 16, 14, and two; he is the sole provider for the family, and has heavily invested in his pizza business. He has met the costs of private schooling for each of his elder children, and was described to the learned judge as a generous, hard working and family orientated man within a close-knit migrant community.

The offences

[4] The agreed statement of facts presented by the Crown prosecutor, and the indictment, showed that the first six counts of indecent dealing, and the count of unlawful and indecent assault, involved a 15 year old complainant S. There were three counts of indecent dealing involving the 15 year old complainant A, two counts of indecent dealing involving the complainant SJ, a 14 year old person and the sister of the complainant S; and two counts involving the 14 year old complainant E. All offences had been committed during the course of the respective complainants' employment with Mr Al Aiach at the pizza store.

S

[5] Regarding S, the first count involved his grabbing her bottom with each of his hands; the second (later on the same date) his standing behind her, putting his hand around her waist, and kissing her on the cheek; the third (about a week later) his wrapping his arms around her from behind, kissing on the back of the neck and telling her that she was sexy and had lovely lips. The fourth count, committed around the same time, consisted of his putting his hands on her bottom when standing behind her, then sliding them up and around her waist and cupping her breasts which he squeezed a few times, and his making a statement to the effect that "if that's uncomfortable why don't you just say no?", and then walking away. Later that evening he said "I feel bad for doing that, I made you uncomfortable".

[6] Notwithstanding that recognition of the effect of what he was doing, the fifth count – described by S as the "next time something happened" - consisted in his coming up behind her, putting his hand on the outside of her clothing over her breasts, and using his finger and thumb to rub her nipple in a rolling motion. A little later he stood beside her and asked her "why do you keep them so bundled up like a present?", apparently referring to her breasts. Count 6 involved his again coming up behind her, lifting up her top, and kissing her on the small of her back. Count 7, the count of sexual assault, involved his once again approaching her from behind, placing both hands around her waist, then pulling her back against him and sliding his hands up to her breasts and cupping them. That offence occurred between 26 October 2004 and 18 January 2005, after her sixteenth birthday; counts 1 to 7 occurred between April 2004 and 26 October 2004, before she turned 16.

A

[7] The offences involving the complainant A happened in the period between 1 November 2004 and 28 February 2005. A described Mr Al Aiach as beginning his dealings with her by tapping her on the bottom as he walked past, which he accompanied by remarks to the effect that he was a "touchy" person, and that this was how he became "friendly with workers"; inquiring of her "what have you tried in sex?", remarking that he was "really good, I'm experienced"; and asking if she

became "horny" when she had her menstrual period. He had also inquired when she lost her virginity, how many times had she "had sex" and had said that he became tempted when working with a "sexy girl like you".

[8] On one of the occasions when asking A about her having had "sex", Mr Al Aiach came up behind her and put his arm around her waist and hugged her, leaning on her back. He was breathing heavily at the time, and she told him she felt uncomfortable. He responded by telling her that she would probably feel different another time.

[9] The first occasion when he admitted committing an offence was one in which he grabbed her around the waist, putting his hands on either side of her bellybutton, breathing heavily, and kissed her on the neck, while holding her tightly. On the second occasion, preceded by his inquiring whether she had had "sex with boys" and "how old was the oldest guy", he put his arms around her waist, touching her stomach and the bottom of her bra.

[10] The third and last offence with A involved Mr Al Aiach standing behind her and putting each hand on her bottom. He held her for some five seconds.

SJ

[11] The offences involving SJ were committed on 10 January 2005 after, on her description, he started touching her bottom at work and hugging her, when making comments to the effect that she was "sexy". The first offence consisted of his standing behind her with his arms around her, and then sliding his hands up to her breasts and moving them around. The second offence committed on SJ happened that same night, approximately an hour later, and involved the same sort of conduct. Both those offences were committed when the complainant E was also in the pizza premises, and SJ complained to E that same night about what had happened.

E

[12] E recalled the complaint by SJ, who told E to stay away from Mr Al Aiach. Regarding E, one of the two offences Mr Al Aiach admitted committing against her occurred on 8 January 2005, two days before the date on which the two offences against SJ happened, and the second offence against E also happened on 10 January 2005.

[13] The first offence on E, committed after Mr Al Aiach had told E that she looked "sexy", included Mr Al Aiach sliding his hand down her bust and her bottom, and putting his hands on her bottom. The second offence consisted of his placing his hand on her bottom.

The proceedings

[14] There was a complete "hand-up" committal hearing, with no cross-examination of any complainant, and none were required at any stage to give evidence or be cross-examined. The actual offences admitted were at the very bottom of any possible range of seriousness of those offences, but the circumstances involved exploitation of young employees. After his arrest, Mr Al Aiach sought assistance from a consulting psychologist whose two reports, tendered to the learned sentencing judge, confirmed that Mr Al Aiach had been consulting regularly with the

psychologist from 16 August 2005 until at least 4 February 2006. The psychologist described Mr Al Aiach as seemingly experiencing considerable shame, and suffering anguish from fear of loss of respect; the psychologist expressed the opinion that Mr Al Aiach's risk of re-offending was low, and that he appeared contrite and remorseful.

[15] It became common ground on the appeal that s 9(6) of the *Penalties and Sentences Act 1992* (Qld) ("the *Act*") was critical to a determination of the appropriate sentence. Section 9(5) of the *Act* provides that the sentencing principles stated in s 9(2)(a) of the *Act* (that a sentence of imprisonment should only be imposed as a last resort, and that a sentence which allows an offender to stay in the community is preferable) do not apply to the sentencing of an offender for any offence of a sexual nature committed in relation to a child under 16 years. Section 9(6) provides that in sentencing an offender to whom subsection (5) applies, the court must have regard primarily to the following –

(a) the effect of the offence on the child;

(b) the age of the child;

(c) the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another;

(d) the need to protect the child, or other children, from the risk of the offender reoffending;

(e) the need to deter similar behaviour by other offenders to protect children;

(f) the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender in a way acceptable to the community;

(g) the offender's antecedents, age and character;

(h) any remorse or lack of remorse of the offender;

(i) any medical, psychiatric, prison, or other relevant report relating to the offender;

(j) anything else about the safety of children under 16 the sentencing court considers relevant.

[16] The learned sentencing judge did not expressly refer to s 9(6) when passing sentence, but did refer to the ages of the complainants; to the fact that Mr Al Aiach was the employer of each and in a position of authority and control over them; to the fact that the complainants were therefore vulnerable to any conduct to which he may have wished to subject them; to the fact that employment in fast food outlets was a very common source for young people to be introduced to the workforce and which enabled them to gain confidence in their development of work skills and earn some money, thereby encouraging a degree of independence and self-esteem; and to the fact that Mr Al Aiach's conduct cut across the very core of that important development process in the young. The learned judge also described the need for

courts to protect vulnerable young people from sexual molestation by employers, and to the need for deterrence to other members of the community, and that the latter is a significant factor in the sentencing process.

[17] The judge also described taking into account Mr Al Aiach's early plea of guilty, his co-operation with the administration of justice, the references and reports tendered on his behalf, and the submissions of his barrister. The judge also expressly took into account the remorse shown by Mr Al Aiach.

The application

[18] A specific complaint made on the application is that the learned judge did not make any reference to the matter in 9(6)(f), namely the prospects of rehabilitation, although the judge did refer to the reports tendered for Mr Al Aiach. Because the judge did expressly refer to those reports, I consider that Mr Callaghan SC was unpersuasive in the argument that the learned judge had overlooked Mr Al Aiach's prospects of rehabilitation, resulting from his own efforts and his predicted low likelihood of re-offending.

[19] The submission that the judge had failed to determine whether Mr Al Aiach had shown that his case has exceptional circumstances, and the submission that the judge should have found that it did, reflected the statements of this Court in, for example, *R v G* [1994] QCA 086 and *R v Jones* [2003] QCA 450, which are frequently enough repeated by sentencing judges and by this Court. In *R v G* this Court wrote as follows (on an Attorney's appeal) in respect of an offender who pleaded guilty to three offences of indecently dealing and one of indecent treatment in respect of three different girls, two aged 15 and one aged 13 (one a stepdaughter, another a daughter, and a third a house guest), and whose offences spanned a period of seven years:

> "In those circumstances offences of this kind involving a number of different victims over an extended period may ordinarily be expected to attract a term of imprisonment ranging from 18 months to two years or more.... The real question now, however, is whether the respondent should be sent to detention or whether, as His Honour thought, there were exceptional circumstances warranting suspension of the term of imprisonment imposed."

[20] In *R v G*, the offender was originally sentenced to a total of nine months, completely suspended; this Court increased the sentence to a total of two years, completely suspended. The offender's conduct in *R v G* was considerably more serious than Mr Al Aiach's. But in *Jones* this Court heard an application for leave to appeal against a sentence of four months imprisonment imposed, after a trial, on a 70 year old applicant for one count of sexual assault of a school girl. He was a school and tour bus driver, who invited the 16 year old complainant to sit on his knee when speaking with her, after she had arrived at his bus to retrieve from it some luggage, in order to wait for another bus that would take her home. As it transpired, he told her he wished he was 17 again, put his hand around her waist and squeezed her right breast with his hand outside her clothing, kissed her on the face; he moved to another seat on his bus where she joined him in response to his invitation, and he placed his hand under her shirt and attempted to touch her left breast. He again tried to kiss her.

[21] This Court dismissed his application for leave to appeal, with the principal judgment being given by McPherson JA, who stated in the course of it that:

> "While the offending behaviour with which we are concerned can be said to be at the lower end of the scale, I think it is generally true to say that when an adult commits a sexual offence on a young person, they must expect to undergo imprisonment unless there are some exceptional circumstances which persuade the Judge that that should not take place in that particular case."

In *Jones* one problem facing that applicant was that he had showed no remorse, having gone to trial; in those circumstances his age and the relatively very mild extent of his offending behaviour did not save him from a term of imprisonment.

[22] The actual result in *Jones* does make it difficult to establish that these sentences were manifestly excessive. Mr Al Aiach offended on many more occasions than Mr Jones did, was much more persistent, and offended against four complainants. He knew he was upsetting S, but re-offended with her. It has often enough been remarked that in circumstances of this kind, namely serial sexual offending by an adult against young persons, the offender can ordinarily expect a term of some actual imprisonment. But whether or not the circumstances, including those personal to the offender, are described as exceptional or special, the question is whether or not actual imprisonment is manifestly excessive, and should be answered with reference to the matters specified in s 9(6) of the *Act*, and to comparable decisions of this Court describing and evidencing the appropriate sentencing principles.

[23] In Mr Al Aiach's matter the prosecution informed the learned sentencing judge that the Crown accepted that his plea of guilty was an indication of genuine remorse, also said by the Crown to be particularly evidenced on a reading of the psychiatric report. However, the Crown also referred to the aggravating features, namely multiple complainants, offences committed over a 12 month period, and that Mr Al Aiach was in a position of authority. I was persuaded by Mr Callaghan SC's submissions, and those made to the learned sentencing judge, that the proper application of those sentencing principles declared in s 9(6), and the previous decisions of this Court, did leave an entirely non-custodial sentence as one within the range, and against which the Attorney-General could fail in an appeal. But that does not mean that a short term of imprisonment was manifestly beyond the range of available sentences, and the decision upheld in *Jones* shows that it was not. I do not consider it was necessary for the learned judge to expressly state whether or not exceptional circumstances existed in this matter, and if they did, it was not mandatory that a non-custodial sentence be imposed; that conclusion would only enliven the discretion.

[24] Since preparing these reasons I have had the benefit of reading those prepared by Keane JA, and respectfully agree with His Honour that the application for leave to appeal should be dismissed.

[25] **KEANE JA:** On 10 April 2006, the applicant pleaded guilty to 13 counts of indecent treatment of a child under 16 years of age and one count of sexual assault. He was sentenced to 12 months imprisonment, to be suspended after serving four months, for an operational period of three years.

[26] The applicant seeks to appeal against the sentence on the grounds that:

1. The sentencing discretion miscarried by reason of:
   (a) The failure by the learned sentencing judge to determine whether the applicant had demonstrated that his case was attended by exceptional circumstances;
   (b) The failure by his Honour to find that the applicant's case was attended by exceptional circumstances;
   (c) The significance attached by his Honour to the decision in *R v Jones* [2003] QCA 450.
2. The requirement that the applicant spend four months in actual custody has created a sentence which is manifestly excessive.

Circumstances of the offence

[27] The offences were committed between April 2004 and February 2005. There were four complainants. The complainants were girls aged between 14 and 16 years of age who were employed by the applicant in his pizza shop. The offences occurred while the complainants were working with him at the shop.

[28] In relation to the first six of the counts of indecent treatment, the complainant was aged 15 years. The incident the subject of the count of indecent assault occurred after her 16th birthday. The incidents of indecent treatment began after she had worked for the applicant for about two months, and involved touching her bottom on the outside of her clothes, kissing her on the neck and cheek and the bottom of her back. On one occasion, he put his hands on her buttocks, then slid them up and squeezed her breasts a few times. She "froze", and he said that if she felt uncomfortable, she just had to say "No". Later, he drove her home. During the drive, he told her that he felt bad about making her uncomfortable. The incident of sexual assault occurred after her 16th birthday when the applicant grabbed her from behind and cupped his hands around her breasts. She told him to go away.

[29] In relation to the next three counts of indecent treatment, the complainant was 15 years of age. The incidents of offending involved the applicant kissing the complainant on her neck, touching her under her clothing, including her stomach and the bottom of her bra, and touching and holding her bottom. On one occasion, the complainant had to struggle to get away. On another occasion, the applicant engaged in intrusive questioning of the complainant in relation to sexual matters.

[30] In relation to the next two counts of indecent treatment, the complainant was 14 years of age. She was the younger sister of the first complainant. On two occasions on one evening, the applicant put his arms around her and touched her breasts on the outside of her clothing.

[31] The last two counts of indecent treatment involved another 14 year old complainant. On one occasion, the applicant touched her bottom on the outside of her clothing, and on another occasion he slid his hand across her breast.

[32] It may be noted that none of these incidents were accompanied by the use of force or threats of physical violence. On most occasions when he was asked to desist by the complainant, he immediately complied. There was no evidence of any long term adverse physical or psychological effect upon any of the complainants.

[33] The complainants told each other what the applicant had done to them, but they were reluctant to report the matter to the authorities because they needed the wages they earned from their employment with the applicant. Eventually, one of the complainants told her mother who reported the matter to the police. On 21 February 2005, the applicant was visited by the police. On this occasion, he declined to be interviewed.

The applicant's circumstances

[34] The applicant was born in Syria on 25 November 1956. He has been married for 17 years and has three children, the eldest of whom is 16 years old and the youngest of whom is two years old.

[35] The applicant has no criminal history. He does not use alcohol or drugs. His business provides for himself and his family. His wife is disabled and does not speak English.

[36] After the applicant was charged, he sought counselling from Dr McCulloch, a consulting psychologist. Reports from Dr McCulloch suggest that the applicant is genuinely ashamed of himself for his misconduct, and that his offending was an aberration and that he is at a low risk of reoffending. The applicant has the support of his wife and members of his ethnic community. Having regard to the applicant's age and previous good record, there appears to be no good reason to doubt the correctness of Dr McCulloch's opinion.

[37] The Crown Prosecutor accepted that the applicant was genuinely remorseful and was otherwise of good character.

The sentence

[38] The learned sentencing judge was informed of the applicant's cooperation with the administration of justice; and that there was no cross-examination of witnesses at the preliminary hearing of the charges, and the applicant gave an early indication of his intention to plead guilty. The learned trial judge expressly took these matters into account in passing sentence. His Honour also referred to the reports which were tendered on the applicant's behalf, and to "the remorse which has been expressed for your behaviour".

[39] On the other hand, the judge expressed his concern at the applicant's abuse of his position of authority over vulnerable young women. His Honour said:

> "… you were the employer of the four girls who were employed in your pizza shop and, as such, you were in a position of authority and control over them and in respect of whom you held an important position of trust, particularly because of their age. They were, therefore, vulnerable to any conduct to which you may have wished to subject them.
>
> Employment in fast food outlets is a very common source for young people to be introduced into the work force as it enables them to gain confidence in their development of work skills and earn some money which encourages a degree of independence and self-esteem. Your type of conduct cuts at the very core of this important

> development process in young people who may be reluctant to report it, as we have heard here, for valid economic reasons.
>
> Our courts must protect vulnerable young people from sexual molestation by employers such as you and deterrence to other members of the community, who may also be in a position of power over our youth, must be a significant factor in the sentencing process."

[40] His Honour indicated that he had particular regard to the decision of this Court in *R v Jones*.[1]

The application

[41] The applicant had contended, before the learned sentencing judge, for a sentence of 12 months, either wholly suspended, or to be served by way of an intensive correction order. It was argued on the applicant's behalf that this was a case of "exceptional circumstances" justifying such an order. It may be noted here that the Crown Prosecutor had suggested that one approach to the appropriate sentence was a sentence of 12 to 18 months imprisonment with a complete or partial suspension.

[42] The first criticism of the sentencing judge's decision advanced on the applicant's behalf in this Court relates to his Honour's reference to *R v Jones*. There it was said that "when an adult commits a sexual offence on a young person, they must expect to undergo imprisonment unless there are some exceptional circumstances".[2] The submission made below on the applicant's behalf was that this is truly a case of exceptional circumstances which necessitated a non-custodial sentence. In this Court, the applicant contends that the judge did not address that submission. In particular, it is said that his Honour did not advert to the significance of the following factors:

- (i) the applicant's conduct was at the lower end of the scale of offending;
- (ii) there was no suggestion of any serious or permanent adverse impact on any of the complainants;
- (iii) the applicant was a 49 year old family man with no previous criminal record;
- (iv) the applicant entered a timely plea of guilty which, apart from its utilitarian value to the administration of justice, was accepted as being indicative of genuine remorse;
- (v) there is good reason to believe that the applicant is unlikely to reoffend;
- (vi) the applicant's business will be adversely affected if he is imprisoned, and he is the sole provider for his family including his disabled wife who does not speak English.

[43] The applicant contends that, as a result, his Honour failed to conclude that this is a case where exceptional circumstances were established, and that, therefore, the applicant should not have been sentenced to actual imprisonment. The applicant also contends that his Honour should have appreciated that *R v Jones* was a case where the offender had shown no remorse and had gone to trial. Further, it was a case in which the complainant's victim impact statement showed that the offending

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1 [2003] QCA 450; CA No 285 of 2003, 16 October 2003.

2 [2003] QCA 450; CA No 285 of 2003, 16 October 2003. See also *R v G* [1994] QCA 086; CA No 10 of 1994, 12 April 1994.

conduct had had a serious effect on the complainant's interactions with others, especially males. In that case, a sentence involving four months actual imprisonment was upheld by this Court.

[44] It should, in my view, be clearly stated that the observations in *R v Jones* were not intended to be, and should not be treated as if they were, a statutory formulation of the judicial analysis required in every case. No such gloss can be put upon the provisions of s 9(6) of the *Penalties and Sentences Act 1992* (Qld).

[45] Statements in this Court that an adult who commits a sexual offence on a young person should expect to be imprisoned for his offence in the absence of exceptional circumstances[3] were intended to be, and should be, understood as an authoritative affirmation that considerations of denunciation and deterrence are of such importance in cases of sexual offences by adults against children that it will only be in exceptional cases that the balancing process involved in fixing upon an appropriate sentence will not result in a sentence involving actual imprisonment. It should not be thought that a sentencing judge commits an error of law by failing expressly to analyse the circumstances of each case to ascertain whether those circumstances are truly "exceptional" or sufficiently "exceptional" to warrant a departure from a prima facie rule that a term of imprisonment must be imposed. No such prima facie rule exists.

[46] Next, in my respectful opinion, it is not a fair reading of the sentencing remarks of the judge to say that they show that the sentencing judge regarded the decision of this Court in *R v Jones* as requiring that a term of four months actual imprisonment be imposed in this case. It is true that his Honour referred to *R v Jones* without adverting to the very real differences between the facts of this case and those involved in *R v Jones*, but his Honour's remarks show that he was fully alive to the need to recognise the applicant's early plea of guilty, his remorse for his offending and Dr McCulloch's views as to the applicant's prospects of rehabilitation.

[47] It must also be said that there are factors of concern present in this case that were absent from *R v Jones*. The obvious factors in this regard are that there were four complainants, that the offending conduct persisted over a lengthy period of time, and that the applicant took advantage of his power in a relationship akin to one in which he stood *in loco parentis* to the complainants to indulge his sexual instincts in a way which was not welcomed by them.

[48] In oral argument, senior counsel for the applicant placed particular emphasis on s 9(6)(f) of the *Penalties and Sentences Act 1992* (Qld) and the absence of specific reference by the sentencing judge to the positive opinion of the applicant's prospects of rehabilitation advanced by Dr McCulloch. Nevertheless, it is clear that his Honour did refer to Dr McCulloch's reports. Further, it cannot be said that a term of imprisonment was, as a matter of law, not available as a sentencing option by reason of the applicant's prospects of rehabilitation, even taking into account the other circumstances in mitigation to which his Honour referred. No statutory provision and no decision of this Court supports that proposition.

[49] Considerations of deterrence are an important factor in cases such as the present. It may be accepted that, in some cases, proper recognition can be given to

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3 See also *R v Phuc Minh Pham* [1996] QCA 003; CA No 435 of 1995, 6 February 1996; *R v Moffat* [2003] QCA 95; CA No 439 of 2002, 11 March 2003.

considerations of deterrence by a suspended sentence. Such cases may sensibly be described as involving exceptional circumstances. The circumstances summarised in paragraph [18] above do not mean that the present case is one in which the circumstances are such as to compel the conclusion that a custodial sentence is not warranted. This is especially so when the matters referred to in paragraph [23] above are also borne in mind, as they must be in the process of synthesis involved in arriving at a proper sentence.[4]

[50] By way of example in this regard, in *R v Fereiro*,[5] this Court upheld a sentence of 18 months imprisonment suspended after eight months for an operational period of three years in a case of two counts of indecent dealing with a 15 year old girl by a podiatrist in the course of his treatment of her, and one count of secretly filming the same complainant in various stages of undress in the next door massage room of a physiotherapist. The offender was 33 years old. He pleaded guilty at an early stage. He had sought professional help and had some prospects of rehabilitation. The particular features of the offending which were regarded as supporting the decision were the abuse by the offender of his position of professional trust, and his persistence.

[51] In the present case, the applicant did not abuse a position of professional trust, but he did exploit a position of authority over vulnerable young women. He was a persistent offender, with four young women, over a long period of time. The mitigating factors in this case are strong in comparison to those in *R v Fereiro*, but they are not such as to establish that it was wrong of the sentencing judge to regard a short period of actual imprisonment as warranted by the more serious circumstances of the applicant's offending.

[52] These considerations also lead me to the view that the sentence which was imposed was not manifestly excessive.

Conclusion and orders

[53] The application for leave to appeal should be refused.

[54] **PHILIPPIDES J:** I have had the advantage of reading the reasons of Jerrard JA and Keane JA and agree that the application for leave to appeal against the sentence imposed on the applicant should be refused for the reasons stated by them.

[55] I wish to make some additional comments concerning the submission made on behalf of the applicant to the effect that the learned sentencing judge erred in failing to consider whether the case was attended by "exceptional circumstances" so as to warrant a non-custodial sentence.

[56] The sentence imposed in respect of the applicant's plea to 13 counts of indecent treatment of a child under 16 years of age and one of sexual assault was 12 months imprisonment, suspended after 4 months for an operational period of 3 years.

[57] The governing principles that apply generally in sentencing an offender pursuant to s 9(2)(a) of the *Penalties and Sentences Act 1992* (Qld) ("the Act") do not apply to the sentencing of an offender for any offence of a sexual nature committed in

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4 *Markarian v The Queen* [2005] HCA 25; (2005) 79 ALJR 1048.
5 [2006] QCA 10; CA No 331 of 2005, 6 February 2006.

relation to a child under 16 years. The applicable sentencing guidelines in such cases are set out in s 9(6) of the Act. There is no requirement in that section to separately consider whether or not exceptional circumstances exist in any particular case. The matters which it is said constitute the exceptional circumstances, including the applicant's rehabilitation prospects and his voluntarily undergoing counselling, are a part of the considerations made relevant in sentencing an offender by s 9(6) of the Act.

[58] While the expression "exceptional circumstances" might conveniently sum up mitigating factors present in a particular case which favour a non-custodial sentence, the matter of "exceptional circumstances" is not to be seen as a super-added matter of consideration additional to those in s 9(6) of the Act. It would be wrong to view the statement in *R v Jones* [2003] QCA 450 that "in exceptional circumstances, it is possible to impose a non custodial sentence" for a sexual offence as stating the contrary. Furthermore, decisions such as *R v G* [1994] QCA 086 and *R v Pham* [1996] QCA 3 to which reference was made must in this respect be treated with caution as they preceded the introduction of s 9(6) of the Act which came into force on 1 May 2003.