SUPREME COURT OF QUEENSLAND

CITATION:	*R v TAJ* [2018] QCA 305
PARTIES:	**R** **v** **TAJ** (applicant)
FILE NO/S:	CA No 7 of 2018 DC No 203 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Townsville – Date of Sentence: 23 November 2017 (Chief Judge O'Brien)
DELIVERED ON:	9 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	18 July 2018
JUDGES:	Sofronoff P and Gotterson JA and Boddice J
ORDER:	**The application for an extension of time within which to apply for leave to appeal is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant was convicted of one count of maintaining an unlawful sexual relationship with a child and ten counts of rape – where the applicant was sentenced to 11 years imprisonment in respect of each count on the indictment, to be served concurrently – where the offending involved non-gratuitous violence that was linked to the applicant's desire for sexual gratification – where the applicant applied for an extension of time within which to apply for leave to appeal against his sentence – where the applicant attributed his delay in filing an application for leave to appeal against sentence to his illiteracy, his need for assistance with completing forms, and the closure of the Legal Aid office over the Christmas and New Year period – whether it would be in the interests of justice to grant the applicant an extension of time within which to apply for leave to appeal against his sentence – whether the proposed ground of appeal contained in the applicant's draft application for leave to appeal against sentence has any measurable prospect of success *R v BAO* [2004] QCA 445, distinguished *R v BAY* (2005) 157 A Crim R 309; [2005] QCA 427, considered

R v BCA [2011] QCA 278, distinguished
R v R [2000] QCA 279, considered
R v SAG (2004) 147 A Crim R 301; [2004] QCA 286, applied
R v Tait [1999] 2 Qd R 667; [1998] QCA 304, applied
R v TS [2009] 2 Qd R 276; [2008] QCA 370, considered

COUNSEL: P J Wilson for the appellant (pro bono)
D Balic for the respondent

SOLICITORS: Howden Saggers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Gotterson JA and the order his Honour proposes.

[2] **GOTTERSON JA:** On 13 October 2017 in the District Court at Townsville, the applicant, TAJ, was convicted on pleas of guilty of one count of maintaining an unlawful sexual relationship with a child and ten counts of rape. All offences concerned the same female complainant, the applicant's stepdaughter. The sentence hearing was convened for 23 November 2017. On that date, the applicant was also convicted on pleas of guilty of two offences which had been charged summarily. They were an offence of unlawfully producing a dangerous drug (cannabis) and an offence of unlawfully possessing dangerous drugs (cannabis and diazepam).

[3] The applicant was sentenced to imprisonment for a term of 11 years in respect of each offence charged on indictment. In respect of the summary offences, he was convicted and not further punished. A period of some 787 days was declared to be time already served under the sentence. The duration of the sentence compelled a serious violent offence declaration with the consequence that the applicant must serve 80 per cent of the term in custody.

[4] Relying on s 671(3) of the *Criminal Code* (Qld), the applicant filed in this Court a Form 28 notice of application for extension of time within which to appeal against conviction and to apply for leave to appeal against sentence on 10 January 2018. He also filed with it a Form 26 notice of appeal against conviction and an application for leave to appeal against sentence. At the hearing of the application on 18 July 2018, he sought leave to abandon his appeal against conviction and to amend his single ground of appeal in respect of his application for leave to appeal against sentence.[1] This was not opposed. Leave was granted,[2] with the result that the applicant's only proposed ground of appeal is that his sentence is manifestly excessive.

[5] Two issues which are central to the exercise of the discretion to grant an extension of time here are whether there is good reason for the applicant having delayed in filing an application for leave to appeal, and whether it would be in the interest of justice to grant the extension of time sought.[3] The latter necessarily depends upon the prospects that an application for leave to appeal against sentence would have of

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1 Appeal Transcript ("AT") 1-2 ll19-20.
2 AT1-2 ll24-30.
3 *R v Tait* [1999] 2 Qd R 667 at 668; [1998] QCA 304.

success,[4] those prospects themselves depending very much on the prospects of ultimate success of the proposed ground of appeal. I intend to address each of these issues following a brief consideration of the circumstances of the offending.

Circumstances of the offending

[6] The first three offences of rape were alleged to have occurred when the complainant was aged between nine and 11 and before the maintaining period began. The maintaining offence was alleged to have taken place between 30 June 2013 and 23 September 2015, when the complainant was between 11 and 13 years old. It was constituted by the other seven offences of rape. They were alleged to have taken place between 30 June 2013 and 1 August 2013; 1 July 2013 and 1 September 2013; 25 September 2013 and 2 December 2014; 31 December 2014 and 1 April 2015; 1 August 2015 and 25 September 2015; and on 19 September 2015 and 22 September 2015, respectively.

[7] The offending involved penile rapes and some violence.[5] The applicant used handcuffs, rope, sex toys, blindfolds and a gag ball on the complainant. He also choked her, used physical force to hold her down and slapped her in the face when she refused to be raped by him. He would ask her to marry him and would kiss and cuddle her after the rapes. He touched her on her breasts and buttocks as she walked past, sent sexualised images to her and made her take pregnancy tests.[6] The learned sentencing judge accepted that this violence was not "gratuitous", but was linked to the applicant's "sexual gratification".[7] It was nonetheless a "source of great humiliation" for the complainant.[8]

Delay

[8] The delay was quite short. The applicant was sentenced on 23 November 2017. Hence, he had until 23 December 2017 to appeal. He filed his application for leave to appeal on 10 January 2018.

[9] In his Form 28, the applicant attributes his failure to file an application for leave to appeal by 23 December 2017 to his illiteracy and his need for assistance with completing forms. He asserts that he sought assistance from Legal Aid within the 30-day period allowed to file an application for leave to appeal; that they sent him documents, but that, due to his illiteracy, he required assistance to fill them in; and that he was delayed in obtaining that assistance due to the closure of their office over the Christmas and New Year period.

[10] The respondent does not challenge the adequacy of the applicant's explanation.[9] I accept that it sufficiently explains the delay. Nevertheless, it is the viability of the appeal that is the determinative factor here for the decision whether to grant or refuse an extension of time. I now turn to consider that issue.

Interests of justice

[11] The thrust of the applicant's case is that comparable sentences relied on by the respondent both at his sentencing hearing and at the hearing of this application

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4 Ibid.
5 Sentencing Transcript ("ST") 1-10 ll2-14; AT1-3 ll11-16.
6 Ibid l14.
7 Sentencing Remarks ("SR") 2 ll18-24.
8 Ibid.
9 Respondent's Outline of Submissions ("ROS") at [8]. See also AT1-4 ll28-31.

(namely, *R v TS*,[10] *R v BAY*[11] and *R v R*[12]) involved offending that is more serious than his own. In those cases, the sentences imposed were 12, 10 and 11 years respectively. The applicant submits that the cases of *R v BCA*[13] and *R v BAO*,[14] which involved sentences of nine and 10 years imprisonment respectively, are more comparable.[15]

[12] Although differences can be identified with *TS*, *BAY* and *R*, this case involves many of the features that Jerrard JA listed in *R v SAG*[16] as "substantially increasing a sentence for an offence of maintaining a sexual relationship". That list, which was referred to by Mackenzie AJA in *TS*,[17] includes:

> "• the young age of the child when the relationship thereafter maintained first began;
> • maintaining a relationship for a lengthy period;
> • penile rape during the course of the relationship;
> • unlawful carnal knowledge of the victim;
> • whether the commission of those offences was over a long period;
> • whether the victim bore a child to the offender;
> • whether there had been a parental or protective relationship;
> • whether the offender was being dealt with for offences against more than one child victim;
> • whether there had been actual physical violence used by the offender, and if not, whether there was evidence of emotional blackmail or other manipulation of the victims."

[13] A number of these aggravating factors are present in the applicant's case.[18] Firstly, the complainant was young: she was aged between 11 and 13 during the maintaining period, and could have been as young as nine at the time of the rapes preceding it. Second, the maintaining period, of some two years and two months, was lengthy. Third, the penetrations were all penile.[19] Fourth, the applicant was the complainant's stepfather.[20] Fifth, the offending involved physical violence: the applicant choked the complainant, used physical force to hold her down and slapped her in the face.[21] Lastly, there was an element of manipulation in that the applicant would ask the complainant to marry him and kiss and cuddle her after the rapes.[22]

[14] As well, the applicant's conduct in using handcuffs, rope, sex toys, blindfolds and a gag ball, and requiring her to take pregnancy tests, humiliated the complainant.[23] It

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10 [2009] 2 Qd R 276; [2008] QCA 370.
11 (2005) 157 A Crim R 309; [2005] QCA 427.
12 [2000] QCA 279.
13 [2011] QCA 278.
14 [2004] QCA 445.
15 The respondent submits that the applicant's sentence "sits comfortably within a reasonable spectrum of sentences", as outlined by this Court in *TS*, *BAY* and *R*.
16 (2004) 147 A Crim R 301; [2004] QCA 286 at [19].
17 *TS* at [22] (Fraser JA and Daubney J agreeing). See also *BAY* at [30] per Atkinson J (McMurdo P and Jerrard JA agreeing).
18 ST1-12 ll34-43; AT1-5 ll1-21.
19 AT1-3 ll11-16.
20 Sentencing Remarks ("SR") 2 ll15-16.
21 ST1-10 ll4-7.
22 Ibid ll9-10.
23 Ibid ll3-8, l14.

may be accepted, as the applicant contends,[24] that the physical violence was towards the lower end in terms of physicality; however, it satisfied the applicant's desire for gratification, and in that way, it further humiliated the complainant.

[15] In my view, and particularly given the many aggravating features identified in *SAG* that are present in this case, the learned sentencing judge was justified in adopting the cases advanced by the prosecution as broadly comparable. Those cases, like the present one, bore many of those aggravating features.[25] Moreover, the sentencing judge was directed to the list of features set out in *SAG* and to those aspects of the applicant's offending that involved those features. He did not, however, adopt the prosecution's submission that a sentence of 12 years imprisonment was appropriate.[26] Instead, he imposed an 11-year sentence after "considering the cases to which [he] had been referred".[27]

[16] I note that the sentences in *BAO* and *BCA*, upon which the applicant relies, do not show that the sentence imposed must have been the result of a misapplication of principle, or that it is unreasonable or plainly unjust. At a factual level, the offending in *BAO* and *BCA* was of a markedly different order. It did not involve penile rapes, nor non-gratuitous violence and humiliation of the kind that occurred in the present case.

[17] Furthermore, in *BCA*,[28] there was approval of de Jersey CJ's observation in *R v C; Ex parte Attorney-General (Qld)*[29] that "for roughly comparable offending and after allowing for a plea of guilty a range generally commencing at about the level of 10 years' imprisonment would apply". The sentence in the applicant's case was, quite properly, fixed above that starting point by reason of the aggravating features identified above.

[18] Having regard to this and to all the cases to which this Court has been referred, I am of the view that the sentence imposed by the learned sentencing judge was appropriate. It does not bespeak a misapplication of principle. I am unpersuaded that the applicant's sentence is manifestly excessive. His proposed ground of appeal has no measurable prospects of success.

Disposition

[19] For these reasons, I consider that the applicant has no reasonable prospects of obtaining leave to appeal against his sentence. His application for an extension of time within which to apply for such leave must therefore be refused.

Order

[20] I would propose the following order:

1. The application for an extension of time within which to apply for leave to appeal is refused.

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24 AT1-4 ll14-15.

25 See, for example, *TS* at [23] and *BAY* at [30]-[32].

26 ST1-14 ll38-39. Defence counsel submitted that a sentence of between nine and 10 years imprisonment was appropriate: ST1-21 ll23-24.

27 SR2 l32.

28 At [49].

29 [2003] QCA 134, Jerrard JA and White J agreeing.

[21] **BODDICE J:** I agree with Gotterson JA.