SUPREME COURT OF QUEENSLAND

CITATION:	*R v HBX* [2019] QCA 155
PARTIES:	**R** **v** **HBX** (applicant)
FILE NO/S:	CA No 28 of 2019 DC No 1822 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction & Sentence)
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction and Sentence: 26 October 2018 (Rackemann DCJ)
DELIVERED ON:	9 August 2019
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2019
JUDGES:	Gotterson and Philippides JJA and Bradley J
ORDER:	**The application for extension of time be refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – SEXUAL OFFENCES – where the applicant was convicted of one count of indecent treatment of a child under 16 under care and one count of sexual assault – where the applicant seeks an extension of time in which to appeal his conviction – where the applicant contended that the verdict was unreasonable or insupportable having regard to the evidence – where the applicant contended that the delay in bringing his appeal was caused by difficulties in acquiring representation – where the applicant contended that there were inconsistencies in the complainant's evidence, that the complainant had motive to lie, that he was prejudiced by evidence of uncharged acts, and that he should have given evidence at his trial – whether it is in the interests of justice to grant an extension of time in which to appeal against conviction CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where, upon his conviction, the applicant was sentenced to concurrent terms of eight months

imprisonment on each offence, cumulative upon a 12 year term of imprisonment he was serving for attempted murder imposed on 4 April 2016 – where a parole eligibility date of 22 November 2025 was made and a declaration as to time served was made – where the complainant was the applicant's niece – where the applicant was 33 to 34 years old at the time of the offending comprising count 1 and, 41 to 42 at the time of count 2, and 58 at sentence – whether it is in the interests of justice to grant an extension of time in which to appeal against sentence

R v McCandless [2006] QCA 199, considered
R v Quinlan [2012] QCA 132, considered

COUNSEL: The applicant appeared on his own behalf
S Cupina for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the order proposed by Philippides JA and with the reasons given by her Honour.

[2] **PHILIPPIDES JA:** The applicant was convicted after trial by a jury of one count of indecent treatment of a child under 16 under care and one count of sexual assault. He was sentenced to concurrent terms of eight months imprisonment on each offence, cumulative upon a 12 year term of imprisonment he was serving for attempted murder imposed on 4 April 2016. A parole eligibility date of 22 November 2025 was made and a declaration was made as to time served.

[3] The applicant seeks an extension of time in which to appeal against his convictions and seeks leave to appeal against his sentence. In considering an application for an extension of time, the Court takes into account whether there is good reason for the delay, the extent of the delay and also if it is in the interests of justice to grant the extension.

[4] The applicant's explanation for the delay in appealing the conviction and bringing the application for leave to appeal against sentence is that, although he completed paperwork for Legal Aid and made contact with Legal Aid a number of times in the period from November 2018 to January 2019, he received no response or assistance and was only told in February 2019 that no appeal had been initiated. Affidavit material filed by the respondent includes records from Legal Aid that indicate that Legal Aid advised that any appeal was required to be filed by 26 November 2018 and that the first record of contact was 29 January 2019. It appears that only some of the documentation required had been sent to Legal Aid.

[5] It is not necessary to reach a concluded view about the issue of delay since, irrespective of that issue, a provisional assessment of the merits of the ground of appeal against conviction does not demonstrate that there is a viable appeal. The proposed ground of appeal against conviction is that the convictions were unreasonable or cannot be supported having regard to the evidence.

[6] The prosecution case centred on the evidence of the complainant, the niece of the applicant, now a married woman with children. The applicant was then married to the complainant's aunt. The complainant's evidence was that when she was about 12 years old, sometime in 1992, the applicant exposed his penis to her and that this occurred at an address at Helensvale. The complainant was sleeping on the lounge when the applicant came and lay in front of her and "flicked" the bathrobe that he was wearing to one side, exposing his penis (count 1).

[7] The complainant also gave the following evidence of another occasion, at the end of 2000, when she and the applicant were together in a car and the applicant pulled over to the side of the road. The applicant started asking the complainant questions about her sex life with her then partner. He exposed his penis and asked if the complainant's then partner's penis was "like this". He then grabbed the complainant by the back of her neck and tried to pull her down to perform oral sex. The complainant yelled, "No. Stop it", and refused to do so. The applicant then relented, apologised, and said, "Don't worry about it. Let's – let's go" (count 2).

[8] The complainant gave other evidence that the applicant used to do sexual acts to her from when she was quite young. The complainant could not remember the exact age that this started and said "it was just a normal part of my life and it was just something that happened when I was so young that it just became normal". The complainant would stay overnight at the applicant's house because her mother and father worked a lot. She gave evidence that on those nights, the applicant would wait until her aunt was asleep and then "come out in his robe and he would have nothing on underneath", pour himself some alcohol and put a pornographic film on. He would ask the complainant to watch it with him and ask about her doing to him what she saw on the film.

[9] The complainant also gave evidence of events at a birthday party when she was about 12 that "later on that night when everything was done and the party was finished, that night was the first night that [the applicant] actually came out and tried to penetrate me". He put his penis against her vagina but could not penetrate the complainant. In this passage of evidence, the complainant stated that the applicant had previously put his fingers in her vagina.

[10] The complainant gave evidence of having made a complaint about the events of count 2 to her husband early on in their relationship around 2011. She also told her partner at the time when the incident occurred. She referred to complaining to another former partner in about 2008. It was the complainant's evidence that she also made a complaint to her husband and her partner at the time count 2 occurred, about the events of count 1, in the same timeframes.

[11] The prosecution called seven other witnesses. Their evidence concerned the complainant's age and the preliminary complaint made by the complainant. Evidence was also given of the complainant having visited the applicant's house and of the applicant having pornographic video tapes at the relevant period and that the applicant's penis was not circumcised. The arresting officer also gave evidence as to the inability to locate one of the preliminary complaint witnesses, a former partner of the complainant.

[12] When admissions were made as to the complainant's date of birth, tenancy records of the address at Helensvale for a period from September 1992 to March 1994

establishing the tenant as "HBX", and photographs of the residence taken by police in November 2016 were also tendered. No evidence was given or called by the applicant.

[13] The trial judge gave the usual directions as to the onus and standard of proof and that separate consideration of the charges was required. In addition to directions as to the elements of the offences, directions were given as to the use of preliminary complaint evidence and the use of evidence of sexual or discreditable conduct not the subject of charges.

[14] In contending that the convictions were unreasonable or could not be supported having regard to the evidence, the applicant raised a number of matters including inconsistencies between the evidence given by the complainant and the medical evidence as to whether the applicant was circumcised or not. That inconsistency concerned the complainant's evidence that the applicant was circumcised based on her having seen the top of the applicant's penis during the events of count 2. A general practitioner gave evidence that the applicant was, in fact, not circumcised. The applicant's former wife was unable to recall whether the applicant's penis was circumcised.

[15] Another inconsistency arose in relation to the complainant's evidence that she told her current husband and then partner at the time of the events of count 2, about *both* counts 1 and 2. In the course of giving evidence, the complainant's husband stated that the complainant had told him about the events comprising count 2, however, he did not state that he had been told about count 1. He struggled to recall certain details of his conversations with the complainant during his evidence. The complainant's former partner also gave evidence that he had been told by the complainant that the applicant "touched me", but did not recall inquiring further, or ever being told any details of how old the complainant was when the abuse occurred or the details of it.

[16] The applicant also raised an alleged inconsistency between the photograph adduced at trial of the applicant's dressing gown, which the applicant contends is "completely different to the one [the complainant] reckons [the applicant] wore when allegedly offending". The extent to which inconsistencies in the evidence undermined the complainant's evidence was a matter for the jury to consider.

[17] The applicant also contended that the complainant was motivated to lie in order to receive money and was an unreliable witness. In cross examination, the complainant was asked questions concerning a motive for her to lie in her account concerning the conduct of the applicant. It was suggested that it had to do with trying to get out of paying some money. A direction was given as to the need to consider whether the complainant had a motive to lie. The trial judge directed the jury that, "If you reject the motive to lie put forward on behalf of the defence, that does not mean that the complainant is telling the truth".[1] In addition, his Honour directed the jury in accordance with a *Longman* direction[2] that the jury scrutinise the complainant's evidence. The jury were entitled to be satisfied that the complainant's evidence was sufficiently reliable and credible in respect of the events in question.

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1 Summing up Transcript at 5.25-5.27.

2 *Longman v The Queen* (1989) 168 CLR 79.

[18] The applicant also complained that evidence was allowed to be given as to discreditable conduct. That conduct was said to relate to a third charge relating to "pinching the [complainant's] nipples and buttocks" at a waterpark, which was withdrawn for lack of evidence. As mentioned, the trial judge gave a specific direction as to the use of evidence of sexual or discreditable conduct not the subject of charges, including that the jury were required to be satisfied of the evidence concerning those matters beyond reasonable doubt before they could consider that evidence. No complaint was made as to those directions at trial. The jury were entitled to consider that evidence in accordance with the directions given to them.

[19] The applicant appears to have a complaint as to not giving evidence and stated that he should have given evidence at his trial. He stated that he was advised by his barrister not to give evidence, but contended that, in consequence of following that advice, he could not "express [his] innocence". The applicant was represented at trial by counsel and a forensic decision was taken by counsel in that regard. Counsel's forensic decision that the defence case would not be best served by the applicant giving evidence can be understood as an entirely rational one. Having called into question the credibility of the complainant, the applicant, had he given evidence, would have placed his own credibility in issue and would have exposed himself to cross examination about his criminal history. That criminal history included a conviction for fraud for which he was sentenced to 18 months imprisonment to be served concurrently with his sentence for attempted murder. That offending was the subject of an unsuccessful appeal against conviction and sentence.

[20] An independent assessment of the evidence does not demonstrate that it was not open to the jury to convict the applicant of the offences. The proposed appeal is not one that would have any prospect of success. It is thus not in the interests of justice to grant the extension sought.

[21] As to the extension of time to seek leave to appeal against sentence, that also should be refused. The sentencing judge referred to the seriousness of the offending, including the serious features of preying upon a young girl who was the applicant's own niece and under his care. The applicant was a mature man at the time of the offences, being 33 to 34 years old at the time of count 1 and 41 to 42 at the time of count 2. He was 58 at sentence.

[22] His Honour determined that, in relation to count 1, the aggravated indecent treatment offence, the applicant was required to receive a sentence involving actual imprisonment unless there were exceptional circumstances. It is to be observed that defence counsel conceded that the offending called for a term of imprisonment including a term that saw the applicant serve actual further time in jail. His Honour specifically had regard to considerations of totality taking into account the 12 year term the applicant was currently serving. In that respect, the sentencing judge explicitly stated that it was appropriate for the sentence to be reduced to some extent, in recognition of the principle of totality, but that it was also appropriate that the sentences impose some additional time, both in relation to the full time discharge date and in relation to the parole eligibility date.

[23] The sentence imposed was in line with the comparatives referred to of *R v McCandless*[3] and *R v Quinlan*[4] and had appropriate regard to considerations of totality.

[24] In *McCandless*, the applicant was convicted of one count of wilfully and unlawfully doing an indecent act in a place to which the public was permitted to have access and sentenced to six months imprisonment followed by 18 months of probation. On appeal, that sentence was altered to two months imprisonment with 18 months of probation. The applicant had masturbated in the carpark of a secondary school and had been witnessed by schoolchildren, some as young as 13 and 14 years old. The applicant was 26 at the time of offending and 28 at sentence and showed no remorse. He had no significant criminal history.

[25] In *Quinlan*, the appellant was convicted of one count of sexual assault and sentenced to six months imprisonment, suspended after seven weeks for an operational period of 12 months. That sentence was not disturbed on appeal. The appellant had grabbed the complainant's right breast while driving her home in his taxi. The appellant was 56 at the time of offending, suffered from a debilitating illness and had no criminal history.

[26] The full time discharge date in respect of the sentence imposed by his Honour was 15 December 2027. In imposing concurrent eight month terms of imprisonment cumulative on the 12 year term of imprisonment, his Honour set a new parole eligibility date only four months beyond the existing date of 22 July 2025. Any complaint that the sentence imposed was manifestly excessive is without substance.

Order

[27] In those circumstances, the application for an extension of time should be refused.

[28] **BRADLEY J:** I agree with the reasons for judgment of Philippides JA and the order proposed by her Honour.

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3 [2006] QCA 199.
4 [1997] QCA 132.