SUPREME COURT OF QUEENSLAND

CITATION:	*R v Jones* [2003] QCA 450
PARTIES:	**R** **v** **JONES, Sidney Arthur** (applicant)
FILE NO/S:	CA No 285 of 2003 DC No 97 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Mackay
DELIVERED EX TEMPORE ON:	16 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	16 October 2003
JUDGES:	McPherson JA and Mackenzie and Wilson JJ 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 – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – whether exceptional circumstances must be present after conviction of sexual offence against a young person to avoid some period of imprisonment
COUNSEL:	B Devereaux for the applicant D McKenzie for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

McPHERSON JA: This is an application for leave to appeal against a sentence of four months' imprisonment imposed in the District Court at Mackay on 21st August 2003. The applicant was convicted after a trial on an indictment charging one count of sexual assault on a school girl. After having been

convicted, the applicant was released on bail some 12 days later pending the outcome of the appeal that is now before us.

The applicant for leave to appeal against sentence is 70 years old. Until the events giving rise to this application, he was a school and tour bus driver in and around Mirani. The complainant was at that time a girl aged 16 years who was a student at a local High School. On the last day of school in 2002, which was the 29th November, the students returned from a camp where they had been for a while to the school.

Although the complainant was not a passenger on the applicant's bus, her luggage was being carried on his bus. On arrival she went to the applicant's bus to retrieve her luggage and to wait for a bus which would take her home. The complainant spoke to the applicant as had happened some three to four times a week since she had met him in the role of a bus driver. They began speaking while they were standing next to the bus, but then another bus arrived and the applicant needed to move his bus, so he suggested to the complainant that she get on his bus while he moved it out of the way.

The complainant sat on the corner in front of the first seat on the passenger side of the bus with her legs dangling over the stairs. The applicant was in the driver's seat. The complainant began telling the applicant about an event she had attended in Brisbane on the previous weekend. During her story, the applicant asked the complainant to sit on his knee, which she did.

The applicant told the complainant he wished he was 17 again, and put his arm around the complainant's waist and squeezed her right breast with his hand outside her clothing. The complainant moved back to the place she had previously occupied. The applicant stood up as if to leave the bus and then bent down to kiss her face. She turned her head away from the applicant and the kiss landed on the corner of her mouth. This act was repeated so that the applicant kissed her on the face twice.

The applicant then moved away and sat in the second seat of the bus and invited the complainant to join him. She did. He put his hand under her shirt and moved it towards her left breast. She told him to stop, and he did. The applicant told the complainant that he saw her breasts every day and that he thought that they were wonderful, and that she should let him feel the other one. He then tried to kiss her again and she told him to stop. Thereupon he asked her to forgive him.

At that point, or shortly afterwards, someone else came on to the bus to look for something and then left to go. The applicant then left to go and find her friends after composing herself. She was evidently upset by the experience, found a friend and told her about the incident, and her friend then took her to what is described as "a sexual harassment teacher" and a complaint was made to her.

The applicant's victim impact statement complains that she has suffered embarrassment as a result of what was done to her and

a loss of confidence, as a result of which, as it seems fairly clear, she felt it necessary to change schools from the one she had previously been at.

The applicant now complains that his sentence of four months' imprisonment is too severe. His counsel submits that the sentencing Judge erred in placing too much weight on what was said to be the position of trust held by the applicant. It was submitted before us that the applicant was not in a position different from that of any other adult, largely as I understand it, because the complainant was not a passenger on his bus at the time of the offences and he was therefore not directly responsible for her.

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.

Counsel submits correctly that in exceptional circumstances, it is possible to impose a non custodial sentence for an offence of this type. The problem here to my mind is there are no circumstances that can be pointed to in this case that make it exceptional, indeed there are some factors that weigh against the applicant in this instance.

Reference is made to the case of *Stanley Lipinski* (1994) Australian Criminal Reports 54 which concerned several victims of a much younger age than the complainant here. A non custodial sentence was nevertheless imposed on appeal in that case. It was one in which the applicant himself who had voluntarily confessed to the offences which had occurred some 25 years before pursued his determination to the point of repeatedly asking the police to prosecute him. He had undergone a religious conversion and was extremely remorseful about these matters which had occurred some many years before and he wanted to express his sorrow and regret to the victims.

In that case it was thought that the circumstances were such that a sentence of imprisonment would not have served any purpose at all.

In the case of Libl, Ex Parte Attorney-General, CA number 22 of 1996, at first instance a wholly suspended sentence was imposed on a taxi driver who molested a 33 year old woman who suffered from quadriplegia, cerebral palsy and controlled epilepsy. She was described as being at the lowest end of the normal intellectual range.

On appeal this Court held that even considering the substantial mitigating circumstances that were relied on in favour of the applicant, and which included an early plea of guilty as well as the fact that he had been under particularly serious stress at the time of the offence, the sentence was too lenient. It was regarded as not adequately punishing the

applicant for the serious nature of the crime nor of serving the purpose of deterring others. The Court considered that sexual molestation of persons in the condition of the complainant in that case as in the case of children should attract a custodial sentence. In the result the sentence imposed was one and a half years' imprisonment with a recommendation for parole after six months.

In the present case, there seem to be none of the exceptional circumstances considered relevant in the case of *R v Lipinski*. The applicant in this case showed no remorse. He did not plead guilty but went to trial and he did not, of course, therefore entitle himself to a reduction in sentence for having pleaded guilty and spared the complainant the experience of going to Court and giving evidence. There was no evidence at all that he was suffering from any sort of mental distress at the time of the offence that might have caused him to commit it. In fact the applicant gave evidence at his trial and his description of events was rather different from the complainant's.

He claimed that it was the complainant who "plonked down" on his knee and not he who invited her to sit there. Of course he was perfectly entitled to defend himself according to his view of what the facts were, but the jury found against him and he is bound to accept that he lost what might have been the chance of impressing the Judge with his remorse for the offence he had committed.

The sentencing Judge took into account the position of trust as her Honour saw it that the applicant held. The finding to that effect has been challenged by Mr Devereaux on behalf of the applicant, but whether he was precisely in a position of trust or not due to the fact that the girl was not formerly a passenger on his bus, the fact remains that he was in a position of authority with respect to the children whom he frequently carried to and from the school and his behaviour was seriously inappropriate for a position of that kind.

To this I must say I would add that the sort of remarks that he made to her at the time of the offence disclosed that he was concentrating on her appearance to an extent which I think is not ordinarily to be expected in someone who acts in the position which he occupied.

It is clear that whether he was in charge of the bus in which she travelled or not, he was a trusted bus driver and a friend to many people in the community who expected that he would behave himself when he had the charge of their children.

He took advantage of his position and his conduct according to the complainant's victim impact statement has had a serious affect on the way in which she interacts with others, especially males.

Considering the circumstances of this case and the lack of what I see as any exceptional considerations here, the appeal should in my opinion be dismissed. A warrant will need to

issue for the arrest of the applicant if my colleagues agree with this view of matters.

MACKENZIE J: I agree.

WILSON J: I agree.

McPHERSON JA: Yes. The application for leave to appeal against sentence is dismissed and a warrant will issue - it is common to let it lie. Is that what you ask?

MR DEVEREAUX: Yes.

McPHERSON JA: The Court directs a warrant issue for the arrest of the applicant but that for seven days or until further order, it lie in the Registry.
