SUPREME COURT OF QUEENSLAND

CITATION:	*R v CC* [2004] QCA 187
PARTIES:	**R** **v** **CC** (applicant)
FILE NO/S:	CA No 51 of 2004 DC No 6 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Cairns
DELIVERED EX TEMPORE ON:	31 May 2004
DELIVERED AT:	Townsville
HEARING DATE:	31 May 2004
JUDGES:	McMurdo P, Williams JA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant leave to appeal against sentence** **2. Allow the appeal to the extent of adding to the sentence imposed a recommendation that the applicant be eligible to apply for post prison community based release after serving three years**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where applicant convicted of two counts of rape and one count of indecent assault – where sentenced to eight years imprisonment – where offences occurred some 35 years prior to his plea of guilty – where applicant now 66 years of age – where applicant has demonstrated significant rehabilitation – where complainant was 12 years old at time of offences and violence was involved – whether sentence imposed sufficiently recognised the extent to which the applicant has rehabilitated himself – whether sentence imposed manifestly excessive *R v B* [2004] QCA 182; CA No 49 of 2004, 28 May 2004, considered

R v Irlam; ex parte A-G (Qld) [2002] QCA 235; CA Nos 157 and 173 of 2002, 28 June 2002, considered
R v Losch, CA No 248 of 1980, Court of Criminal Appeal Queensland, considered
R v Pont [2002] QCA 456; CA No 213 of 2002, 28 October 2002, cited

COUNSEL: A W Moynihan for the applicant
L J Clare for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

WILLIAMS JA: The applicant pleaded guilty in the District Court at Cairns on the 28th of January 2004, to two counts of rape and one count of indecent assault. He was sentenced to imprisonment for a period of eight years and seeks leave to appeal against that sentence on the ground that it is manifestly excessive. The events in question occurred some 35 years prior to the plea of guilty.

Between 1 September 1968 and 30 November 1968, the complainant, then a 12 year old girl, was temporarily living with the appellant and his wife while her mother was convalescing. The applicant was her uncle.

On an occasion during that period, he drove the complainant and her cousin to an isolated bush setting in his motor vehicle. He ordered the distressed complainant to remove her clothes. When she refused, he forced her into the vehicle and stripped her. He held a knife to her throat and then had sexual intercourse with her for a period of time. She was allowed to dress and leave the vehicle to urinate, but was

generally kept in the vicinity of the vehicle for a considerable period of time.

It would seem some hours after the first incident, the applicant again removed the complainant's clothes, fondled her breasts, digitally penetrated her vagina, forced her to perform fellatio on him making her sick, and then again had intercourse with her. Subsequently, the applicant slapped her face before again removing her underpants and having sexual intercourse with her.

In all, he had sexual intercourse with her on some five occasions during the episode, though as already noted, only two of those incidents were charged as the offence of rape.

When the complainant refused to masturbate the applicant, he produced a knife and held it to her throat. That was the second occasion on which he had held a knife to the complainant's throat.

Subsequently, shortly before the group left the scene in the motor vehicle, he produced a chain saw which he started and threatened the complainant and her cousin, that if the incident were revealed they could expect retribution. He also produced a rifle at that stage which was used to threaten the complainant and her cousin.

On returning to the home, the complainant complained to her aunt. At that stage she was visibly upset and had blood on

her legs and underwear. Her aunt told her not to tell anybody before helping her to shower and sending her to bed.

The complainant did not make complaint to the police until February 1997, and ultimately after a police investigation the charges in question were laid.

As counsel for the respondent submitted to this Court, it was a brutal and degrading attack, it had sadistic overtones and no compassion was shown. The very significant aggravating factors were that the complainant was aged 12, she was taken to an isolated bush setting, the offender was in loco parentis to her, and gratuitous violence was used involving threats with a knife, a chain saw and a rifle.

The offences were such that, after a trial held shortly after the events, a sentence of the order of 14 to 15 years imprisonment would have been called for.

It is of significance to record that in 1975 the applicant was charged with two counts of incest involving two of his own children. That came before the Townsville Supreme Court in August 1975, and he was sentenced to seven years imprisonment.

The applicant is now aged 66 years. He was 31 at the time of offending.

In the course of her sentencing remarks, the learned sentencing Judge said:

> "You also do suffer from a number of health difficulties which, although clearly cause you some pain, discomfort and difficulties, do not appear to be life-threatening if properly managed, and there is no reason to believe that they will not be properly managed whilst you are in prison."

That would appear to be an accurate summary of the applicant's state of health.

It is not clear when the applicant was released from prison after serving the sentence imposed in 1975 for incest. However, it does seem that since then he has to a large extent rehabilitated himself. He has not consumed alcohol for some 20 years, having joined Alcoholics Anonymous. He has remarried.

The numerous references placed before the Court demonstrate that, for some 15 years at least, he has enjoyed the reputation of a worthwhile member of the community. As Justice Jones said in the course of argument, the Court is today sentencing a different person to the person who committed the offences.

He is entitled to be given credit when it comes to sentencing for his plea of guilty and for the extent to which there is demonstrated rehabilitation. The sentence must also have regard to his current age and his state of health.

In the course of submissions on the question of sentence, reference was made to a number of previous decisions of

Appellate Courts. Counsel for the respondent relied on the decision of the Court of Criminal Appeal in R v Losch, CA 248 of 1980. That case involved the rape and sodomy of a 12 year old girl in a secluded area of bush by a 24 year old male. He was sentenced to 15 years' imprisonment on the count of rape and 10 years' imprisonment with hard labour on the count of sodomy, the sentences to run concurrently. That demonstrates in broad terms the range that I indicated earlier as what may have been the sentence imposed on this applicant if he had been sentenced after a trial, closer to the date of the offence in question.

Counsel for the applicant referred to R v. Pont [2002] QCA 456, and R v. B, [2004] QCA 182. In the latter case, there is a review of a number of cases of this Court in recent years, where sentences from eight to 10 years were confirmed for serious offences of rape, but it has to be said that none of those involved the degree of violence which is associated with the offending here. When weapons such as those to which I have referred are used to threaten a 12 year old girl, a significantly higher sentence is usually called for.

The final case to which I wish to refer is one that was not referred to in the course of argument; it is the case of R v Irlam; ex parte A-G(Qld) [2002] QCA 235. There are some similarities between that case and this, if only because of the length of time between the serious offending and the matter being dealt with by the Court.

Irlam was convicted of three counts of indecent dealing with a girl under 12, one count of rape and two counts of indecent dealing with a girl under 17. He was acquitted on a number of other charges. He was the head teacher at a two teacher school in North Queensland, and the various complainants were all young pupils at that school. The offences took place between April 1969 and September 1971. The matter was not brought before the Courts until the year 2002.

Irlam was initially sentenced to five years' imprisonment, suspended after 12 months on the count of rape. It was against that sentence that the Attorney-General appealed. At the time of sentence, Irlam was aged 75, was wheelchair-bound and required continual care of his health. As was said by the Court of Appeal:

> "While an offender's ill health is a mitigating factor in circumstances where imprisonment will lead to additional burdens beyond those experienced by others, that feature must not be allowed to overwhelm appropriate reflection of the grave nature of offences like these."

The Court of Appeal considered that the learned sentencing Judge had placed too much weight on the factors of the incarceration being in Brisbane away from his family who were in North Queensland, and his poor health. The sentence that was substituted on the Attorney's appeal was seven years' imprisonment, with a recommendation that the offender be eligible for post-prison community based release after serving two years of that term.

That to my mind, is a guide as to the appropriate sentence to be imposed here. This case must, because of the degree of violence involved, be considered as somewhat worse than Irlam, though as I have already indicated, there are some comparable features.

In my view, it cannot be said that the head sentence of eight years' imprisonment was manifestly excessive, given the degree of violence used. However, in my view, the overall sentence did not give sufficient recognition particularly to the extent to which the applicant has rehabilitated himself in the 15 to 20 years since his release from prison from serving the seven year sentence for incest.

In all the circumstances, it is appropriate to add to the head sentence of eight years, a recommendation that he be eligible to apply for post-prison community based release after serving three years. That is an amelioration mainly necessitated by his age and the extent of his rehabilitation.

Therefore, I would grant leave to appeal against sentence, allow the appeal to the extent of adding to the sentence imposed, a recommendation that the applicant be eligible to apply for post-prison community based release after serving three years.

THE PRESIDENT: I agree.

JONES J: In cases where charges are laid after a long delay, reason for the delay is relevant to the sentencing process, as too are matters of the subsequent conduct of the accused, any rehabilitation or show of remorse, and the accused's current circumstances.

It is necessary, though not always easy, to make comparisons of sentences for like conduct giving rise to the subject offence. It is much more difficult to make a comparison of the individual factors to which I have referred.

The applicant at the time of these offences and the subsequent offences of incest, suffered from chronic alcoholism. For the offences of incest he was sentenced to seven years' imprisonment in 1975. The operative effect of the earlier threats to the complainant ought to have ceased or been substantially reduced by that time.

Since serving that sentence, the applicant's life has changed, that he has not touched alcohol for 25 years. He has remarried and has rehabilitated himself such that he is a respected member of his community. He is a changed man - a person quite different to the one whose past conduct must now be punished.

Recognition of the importance of the applicant's rehabilitation in this case requires his early consideration for post-prison community based release. The remarks of

Chesterman J in R v D'Arcy, [2001] QCA 325 at paragraphs 167 to 170, are apposite in this context.

I agree with the order proposed by Justice Williams.

THE PRESIDENT: The orders are as proposed by Justice Williams.