SUPREME COURT OF QUEENSLAND

CITATION:	*R v MAC* [2004] QCA 317
PARTIES:	**R** **v** **MAC** (applicant)
FILE NO/S:	CA No 118 of 2004 DC No 9 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	3 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2004
JUDGES:	Davies and Jerrard JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT – SENTENCE – JUVENILE OFFENDERS – RELEVANT PRINCIPLES – where applicant pleaded guilty to sexual offences against children including one count of rape against a 10 year old boy, one count of attempted rape against a three year old girl and one count of attempted rape against a six year old boy – where applicant 13 - 14 years old at time of offences and 15 years old at time of sentence – where applicant sentenced to four years detention to be released after serving 50 per cent of that time – whether sentence manifestly excessive *Juvenile Justice Act* 1992 (Qld), s 263(3), s 302(1)(b) *R v JAJ* [2003] QCA 554; CA No 321 of 2003, 12 December 2003, considered
COUNSEL:	K M McGinness for the applicant M J Copley for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the

respondent

[1] **DAVIES JA:** I agree with the reasons for judgment of Jerrard JA and with the order he proposes.

[2] **JERRARD JA:** On 2 February 2004 MAC pleaded guilty in the Children's Court to one count of having raped C and two counts of having unlawfully and indecently dealt with C, a child then under 12 years of age; and a further count of having unlawfully and indecently dealt with N, also a child then under the age of 12 years. On 10 February 2004 MAC pleaded guilty to two further counts, one being the attempted rape of N and the other the attempted rape of M. On 6 April 2004 MAC, who was then still 15, was sentenced pursuant to Division 10 of the *Juvenile Justice Act* 1992 to four years detention, and the learned sentencing judge ordered pursuant to s 227 of that Act that he be released from detention after serving 50 per cent of that sentence. Two hundred and twenty one days of pre-sentence custody was automatically counted as part of that period of detention, pursuant to s 218.

[3] MAC has applied for leave to appeal against that sentence, arguing it is manifestly excessive.

[4] The offences committed against C probably all happened on the same day, when he was 10 years old, and was described as taking place a couple of weeks after the Ipswich Show in 2002. C is the son of a friend of MAC's mother, whom C's mother visited with C and his sister on the occasion the rape occurred. C told his mother on the way home that MAC "put his penis up my bum" and after that information was conveyed by one mother to the other, MAC's mother confronted MAC about it. He denied it, his mother contacted the police, and MAC admitted the incident to them.

[5] The offences which were counts 2 and 3, unlawfully and indecently dealing with C, consisted of MAC putting his penis in C's mouth, and MAC fondling C's penis. Those offences were alleged in the indictment to have occurred on an unknown date between 1 June 2003 and 4 July 2003 at Ipswich. Those dates were incorrect; the information the Crown Prosecutor put before the court was that the three offences were all committed on the one occasion. Leave has been sought, and is granted, to amend the indictment to charge counts 2 and 3 as occurring on the same date as that charged for count 1.

[6] Count 6, the attempted rape of M, was committed upon MAC's three year old niece. That offence occurred at MAC's home, while M was a visitor. On her way home from the visit she told her mother that MAC had touched her vagina, and when this information was communicated to MAC's mother, she confronted MAC with it. He admitted to her that he had pulled that child's pants down and touched her on the vulva, and when interviewed by police he admitted to having attempted to insert his penis into that child's vagina.

[7] The offences described in counts 4 and 5, the indecent dealing and attempted rape of N, came to light after MAC's mother approached a female neighbour and asked that neighbour to speak with her children about any sexual contact with MAC. This resulted in N describing to his mother how MAC had attempted to insert his penis into N's anus, and how MAC had put N's penis in MAC's mouth and had bitten it. MAC admitted both of these incidents when interviewed by the police. N was a six

year old boy when those offences were committed. MAC was 13 when he offended against C, either 13 or 14 when he offended against M, and probably 14 when he offended against N. He was born on 15 July 1988, and is now 16. He was co-operative with the police, admitting the offences, and entered an early plea of guilty.

[8] The learned sentencing judge was assisted by a psychological report prepared at the Griffith University Adolescent Forensic Assessment and Treatment Centre, dated 1 April 2004, and a pre-sentence report dated 5 April 2004. The information conveyed in those reports included that MAC had witnessed his own father being violent to his mother and tiny sister when MAC was a toddler. His parents had separated when he was two years old and from about that time he had exhibited temper outbursts, aggression and violent behaviour. He had been suspended and expelled from primary and secondary schools, "multiple times", for such behaviour.

[9] The psychological report described him as having some self awareness of his problem, as being embarrassed and unwilling to talk about his offences, and having had limited sexual education and guidance. MAC could not describe any adult who he felt could assist him with those matters. He was considered to lack understanding of community standards and to lack skills in self control. The assessment described that he had adopted a detached and competitive personality style, and did not appear to anticipate fulfilment in interpersonal relationships. He had had very limited satisfying contact with peers or with adults, and had apparently found the company of children less threatening and more attractive. It was considered that there was a moderate to high risk of his committing further offences.

[10] The pre-sentence report included the information that in his home MAC experienced his mother being very angry at his sexual offending behaviour, which behaviour had resulted in his arrest in July 2003 and his being placed on bail on 21 July 2003. That bail was revoked on 16 September 2003 when MAC was charged with the further offending behaviour which had come to light after his mother spoke with her neighbour. MAC's mother decided in September 2003 to cease contact with MAC when that bail was revoked, and in the result MAC had no contact with his mother for at least six weeks. The pre-sentence report described them as not having an open relationship, a description both gave, and they had not discussed MAC's offences in detail. The report also described how MAC was stigmatised as a sex offender and at risk of assault by other children in his custody environment; and how he claimed that he had no recall of the actual offences, and resisted discussing them.

[11] The psychologist's report advised that MAC needed offence specific counselling, the development of a relapse prevention plan, and help with the establishment of safety boundaries and rules and the development of skills in emotional regulation. It advised that specific dangers for him included ongoing limitations on his emotional and behavioural regulation, ongoing limitations on his cognitive distortion regarding sexuality, and ongoing absence of support regarding appropriate sexual behaviour. The pre-sentence report advised that in detention, MAC would have access to offence specific counselling, which would be provided by staff from that Griffith University Adolescent Centre.

[12] It is clear from both reports that MAC's mother, and by inference her de facto partner, has found MAC's behaviour challenging and difficult to deal with for a number of years. No criticism of his mother is intended by the observation that

returning MAC to her home environment would return him to a situation in which some of the matters which were identified as dangers for his future behaviour would be present. On the other hand the learned sentencing judge was informed that MAC's need for offence specific counselling could be satisfied while he is in detention, and there was no reason for the judge to expect that would not include the development of an appropriate relapse prevention plan and assistance in understanding community expectations and in establishing safety boundaries and rules. That is, on what the sentencing judge was told, detention had the capacity to meet needs MAC actually has and which might not otherwise be met; and meeting those needs is an obligation unequivocally placed on the chief executive (of the Department of Communities) by s 263(3) and 302(1)(b) of the *Juvenile Justice Act*. Counsel for the DPP and the Public Defender, and officers of that Department, have assisted the court with the results of enquiries which reveal that MAC is receiving the recommended counselling in detention, as the sentencing judge anticipated. MAC is also attending an education program at the Brisbane Youth Detention Centre.

[13] As the learned sentencing judge observed, at the end of the day the judge was faced with a count of rape against a 10 year old boy, a count of attempted rape against a three year old girl, and a count of attempted rape against a six year old boy. These are all extremely serious offences, which the judge accurately described as likely to lead to a sentence of up to 10 years imprisonment, had MAC been sentenced as an adult.

[14] The seriousness of the offences committed justifies the conclusion of the learned sentencing judge that the only sentence open in relation to the offences was a sentence of detention, and the only real question was how much detention was appropriate. No information was put before the judge as to where MAC would live if not placed in detention. The information that was before the judge made this a difficult matter in which to impose sentence, but the sentence imposed was not shown to be either manifestly excessive or a sentence which was contrary to the best interest of MAC, which is his having competent and professionally trained adults attempt to help him. The sentence does not appear manifestly excessive by comparison with the sentence imposed in *R v JAJ* [2003] QCA 554, where a sentence of three years detention was imposed on an offender who had anally raped his three and a half year old step-brother. That offender had been 16 years old at the time of the offence and 17 when sentenced. He had no prior convictions, like MAC; and had suffered what the President described as a background that was startling and remarkable in its extent and degree of disfunctionality, even in the context of the many reports setting out dysfunctional backgrounds of offenders, constantly placed before this court. That offender also had what the President considered to be encouraging prospects of rehabilitation, and the President thought it was desirable that he be supervised for a lengthy period after his release from detention. Mullins J agreed with the President that it was appropriate to reduce the ordered sentence of four years detention to one of three.

[15] In this matter it is impossible to be confident about prospects of rehabilitation, but possible to have some confidence that those are best not harmed by the opportunity for counselling and limit setting provided by the sentences imposed. Accordingly I would dismiss the application.

[16] **MULLINS J:** I agree that the application should be dismissed for the reasons given by Jerrard JA.