SUPREME COURT OF QUEENSLAND

CITATION:	*R v BAO* [2004] QCA 445
PARTIES:	**R** **v** **BAO** (applicant)
FILE NO/S:	CA No 314 of 2004 DC No 94 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Mackay
DELIVERED EX TEMPORE ON:	22 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	22 November 2004
JUDGES:	McMurdo P, Williams JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for extension of time within which to apply for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PRACTICE: AFTER CRIMINAL APPEAL LEGISLATION – MISCELLANEOUS MATTERS – QUEENSLAND – PROCEDURE – EXTENSION OF TIME, NOTICE OF APPEAL AND ABANDONMENT – where applicant convicted of maintaining a sexual relationship with a child with a circumstance of aggravation, sodomy and indecent dealing with a circumstance of aggravation – where sentenced to nine years imprisonment – where complainant child was about nine years old when offences commenced – where offences continued over period of three years – whether any prospect of success on an application for leave to appeal against sentence – whether extension of time should be granted *R v AE* [2001] QCA 136; CA No 19 of 2001, 6 April 2001, cited

	R v C; ex parte A-G (Qld) [2003] QCA 134; CA No 400 of 2002, 24 March 2003, cited *R v R* [2000] QCA 279; CA No 126 of 2000, 14 July 2000, cited
COUNSEL:	The applicant appeared on his own behalf D L Meredith for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

WILLIAMS JA: The applicant pleaded guilty in the District Court on the 14th of May 2004 to one count of maintaining a sexual relationship with a child with a circumstance of aggravation, one count of sodomy and one count of indecent dealing with the circumstance of aggravation. He was sentenced on that date to nine years imprisonment.

The application for an extension of time within which to appeal against sentence is dated 9 September 2004 and was received in the Registry on the 16th of September 2004. The applicant provides as his reason for not filing the application within time certain difficulties that he experienced with the Legal Aid Office.

Within the time limited for appealing the Legal Aid Office informed the applicant that counsel who represented him at sentence did not recommend an appeal; but, nevertheless, the applicant sought to have a meeting with a Legal Aid officer in order to clarify that. In his mind, he wanted to give instructions to appeal.

For various reasons the conference did not take place until shortly after the expiration of the 28 day period. If that was all that was involved it may well be that the Court would grant an extension of time within which to lodge the application for leave to appeal against sentence. But there is no real explanation for the more significant delay in actually lodging the papers and, more importantly, the prospects of success on the hearing of an application for leave to appeal against sentence need to be addressed.

The complainant girl was aged about nine or 10 when the incidents in question commenced and they continued over a period of some three years. The complainant's statement was admitted into evidence on the sentence hearing and that was accepted by counsel for the applicant as the basis on which the applicant was to be sentenced.

That shows that the charges on the indictment were but representative of conduct which occurred over a significant period of time. The statement contained a detailed account of three incidents of sodomy commencing when the girl was aged about nine or 10. It also referred to digital penetration of the girl's vagina one or two times a week over a period of about three years.

The statement also indicates that during that period on roughly a weekly basis the applicant performed oral sex on the girl and she also performed oral sex on him at about the same

frequency. On numerous occasions it appears that she performed oral sex on him to the point of ejaculation.

The applicant also provided the complainant girl with a vibrator when she was aged about 11 and had her use it on herself in his presence on at least three occasions. There were numerous other incidents of oral, vaginal and anal penetration. The matter was also aggravated by the fact that the applicant was a family friend of the complainant. He was living on a rural property owned by the complainant's parents and obviously there was a close family relationship between them. In consequence the conduct in question involved a breach of trust.

The applicant is a mature man. He was aged about 48 when the offences first commenced and they continued until he was aged about 51. He had no relevant previous convictions and it was an early plea of guilty.

The principal points that the applicant makes in his written submissions in support of his application is that there was no violence used and no vaginal intercourse. That is correct, but it has to be said that given the age of the complainant girl when the offences were committed consent is irrelevant. It is fairly clear that the complainant did not truly understand the nature of some of the acts which were committed on her.

The applicant, in his material, has also said that he voluntarily broke off the relationship by moving away from the property; but that does not appear to have been a submission at first instance. The learned sentencing Judge noted that the reason why the applicant left the property was that, because of osteoarthritis in his back, he was no longer able to perform the work that justified his remaining there.

Counsel for the Crown has referred in particular to the sentences imposed in *C; ex parte Attorney-General* [2003] QCA 134, *AE* [2001] QCA 136 and also *R* [2000] QCA 279. When one compares the incidents in question here with the incidents which gave rise to the sentences in those cases it can be said, in my view, that though this sentence may be towards the upper end of the range it is certainly not manifestly excessive.

The learned sentencing Judge considered that after a trial a sentence of at least 10 years could have been imposed and that would have carried with it an automatic declaration that the applicant was convicted of a serious violent offence thereby requiring him to serve 80 per cent of the term. In my view that was a realistic evaluation of the range after a trial.

It should also be noted that the learned sentencing Judge had the discretion to impose a serious violent offence declaration with a sentence of nine years imprisonment, but he determined in the exercise of his discretion not to do so. In my view

there has been a sufficient discount given to the applicant for his early plea of guilty.

If the sentence had been 10 years imprisonment then he would have been obliged to serve eight years before becoming eligible for release into the community. With the current sentence of nine years imprisonment that eligibility will arise after serving four and a half years imprisonment.

In all the circumstances I have come to the conclusion that the applicant has no significant prospects of success on an application for leave to appeal against sentence if and, in those circumstances, the appropriate order is to refuse to extend the time. I would therefore dismiss the application for an extension of time for leave to appeal against sentence.

THE PRESIDENT: I agree.

MACKENZIE J: I agree.

THE PRESIDENT: The order is as outlined by Justice Williams. The application is refused.
