SUPREME COURT OF QUEENSLAND

CITATION:	*R v BAQ* [2005] QCA 31
PARTIES:	**R** **v** **BAQ** (applicant/appellant)
FILE NO/S:	CA No 328 of 2004 DC No 267 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	18 February 2005
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2005
JUDGES:	McMurdo P, Williams JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal against sentence granted** **2. Appeal allowed** **3. Set aside the sentence imposed below and in lieu thereof order that the applicant be imprisoned for three years, suspended after serving 12 months, with an operational period of three years**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – WHEN GRANTED – applicant convicted of attempted incest and sentenced to three and a half years imprisonment with recommendation for eligibility for post-prison community based release after serving 14 months – where complainant 17 years old and pregnant at time of offence – no penetration – isolated incident – early plea of guilty – whether the sentence was manifestly excessive *Criminal Code, Evidence Act and Other Acts Amendment Act (no.17)* 1989 (Qld) *R v T* [1999] QCA 330; CA No 203 of 1999, 18 August 1999, considered

COUNSEL:	A J Glynn SC for the applicant/appellant R G Martin SC for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant/appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with the orders proposed by Williams JA for the reasons he gives.

[2] **WILLIAMS JA:** On 19 August 2004 the applicant pleaded guilty in the District Court to a charge of attempted incest committed between 1 January and 15 February 1993. He was sentenced to three and a half years imprisonment with a recommendation that he be eligible for post-prison community based release after serving 14 months of that sentence. He seeks leave to appeal against that sentence on the ground that it was in all the circumstances manifestly excessive.

[3] The complainant, the lawful daughter of the applicant, was aged just over 17 years at the material time. The offence occurred shortly after the complainant had broken off a relationship with a young man. It is not clear whether she had been living with that person, but when the relationship broke up she was three months pregnant and at the material time she was living with her parents. On the occasion in question only the complainant and the applicant were in the home. The relevant facts are very briefly stated in the record.

[4] The applicant pushed the complainant onto the double bed, exposed his penis, opened the complainant's legs, pulled her underpants to one side and then lay on top of her. He made two or three thrusts seeking to attain penetration but failed to do so. He then desisted. The complainant asserts she saw "some wet stuff on the bed" but the applicant denied ejaculation. It was accepted by the learned sentencing judge that the applicant "probably ejaculated and that was the reason that the incident came to an end."

[5] The incident was an isolated one occurring as already stated early in 1993. No formal complaint was made to the police until August 2003. In the intervening 10 years there had been an overtly harmonious relationship between the complainant and the applicant. By the time the matter was dealt with in court the complainant was the mother of a number of children and had a longstanding happy relationship with her partner. However, as revealed in her Victim Impact Statement, notwithstanding the overt happy relationship with her father she had been troubled over the years by the events in question.

[6] The applicant was aged 44 at the time of the offence and was 56 years of age when sentenced. After his arrest the applicant's wife separated from him. The applicant had no prior criminal history. He had a good work record until about 1991 when, because of a variety of ailments, he became medically unfit for work.

[7] In the light of exchanges between Counsel at the bar and the learned sentencing judge it would appear that the sentence may have proceeded on the basis that in 1993 when the offence was committed the maximum penalty for attempted incest was seven years imprisonment. In fact the penalty had been increased to 10 years

imprisonment by the *Criminal Code, Evidence Act and Other Acts Amendment Act (No.17)* 1989 (Qld).

[8] The learned sentencing judge accepted that the offence was "an isolated one" but he also observed that the applicant "desisted only because of your inability to penetrate the complainant with your penis, not because of any change of heart or intention on your part." In consequence he regarded the offence as "a very serious one". He noted that the complainant was entitled to "your protection" and the conduct was a "betrayal of a child by a parent".

[9] But he then took into account the plea of guilty, the "expressed remorse", the absence of any previous convictions and the good work history in determining what was the appropriate penalty. He also referred to the fact that the applicant was not in good health and was on a variety of medication.

[10] In all of those circumstances the sentence imposed was, as stated above, three and a half years imprisonment with a recommendation for post-prison community based release after 14 months.

[11] Before this court Counsel for the applicant relied heavily on the decision of this court in *R v T* [1999] QCA 330; CA No 203 of 1999, 18 August 1999 in support of the submission that the sentence imposed at first instance was manifestly excessive. That case involved the commission of seven offences against the offender's daughter who was about 13 years of age at the relevant time. There were six counts of indecent dealing and one count of attempted incest. He was sentenced to 18 months imprisonment on each of four of the indecent dealing counts, two years imprisonment on the remaining two indecent dealing counts, and three and a half years imprisonment on the count of attempted incest. There was in that case a timely plea of guilty and the maximum sentence for the attempted incest was 10 years imprisonment as is the case here. Derrington J observed that "the appropriate sentence in the circumstances such as this for the attempted incest is about three to four years." In that case the complainant girl went to reside with her father after a marriage breakup and becoming dissatisfied with living with her mother and her mother's new partner. The incidents giving rise to the charges lasted for some four hours. The conduct was varied and explicit. In broad terms the offender made the complainant handle his erect penis, fondled her breasts and played with her nipples, put his penis in her mouth, fondled her vagina and penetrated it with a finger, moved his finger in and out of her vagina for some time and then inserted his tongue for some time, and brought his penis into contact with her vagina with sufficient pressure to separate the labia majora but did not penetrate. Finally, whilst kneeling between the complainant's legs, he masturbated himself to ejaculation. By comparison that conduct can be seen to be much worse than that of the applicant here. In this case there was no penetration of the complainant in any way and the whole episode was extremely brief. Whilst it may be that premature ejaculation prevented commission of a more serious offence nevertheless the applicant is to be punished only for what he actually did.

[12] The more serious aspect of the applicant's conduct is the breach of trust involved; this was a case of a father taking advantage of a vulnerable daughter aged 17.

[13] There was, as the learned sentencing judge found, genuine remorse, and there was co-operation with the police after the formal complaint was made. An offer was made to plead guilty to a charge of attempted incest even before the committal.

[14] There are, as both Counsel pointed out in the course of the hearing, few if any relevant authorities primarily because most cases recently before the courts involving sexual conduct by a father with a daughter have involved more than a single brief episode such as here. Whilst all this court ultimately held in *R v T* was that the sentence of three and a half years imprisonment was not manifestly excessive, it must be said that by comparison the conduct here was far less reprehensible than that involved in that case.

[15] This is a case where the offence was committed some 11 years prior to sentence and during the intervening period the offender has demonstrated genuine remorse and there had been no repetition of the conduct during that period. Overtly the applicant had been in a good relationship with his daughter and her family. But, of course, one cannot overlook the underlying impact on the complainant revealed by the contents of her Victim Impact Statement.

[16] Particularly because there was no actual penetration in any way of the complainant, the genuine remorse, and the early plea of guilty I have come to the conclusion that the sentence imposed was manifestly excessive. Taking into account those factors, and also the age and medical condition of the applicant, I have come to the conclusion that the appropriate sentence in this case was imprisonment for a period of three years, suspended after 12 months with an operational period of three years.

[17] I would therefore grant leave to appeal, allow the appeal, set aside the sentence imposed below, and in lieu thereof order that the applicant be imprisoned for three years, suspended after serving 12 months, with an operational period of three years.

[18] **MACKENZIE J:** I agree with the orders proposed by Williams JA for the reasons given by him.