SUPREME COURT OF QUEENSLAND

CITATION:	*R v KN* [2005] QCA 74
PARTIES:	**R** **v** **KN** (applicant)
FILE NO/S:	CA No 19 of 2005 DC No 368 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	17 March 2005
DELIVERED AT:	Cairns
HEARING DATE:	17 March 2005
JUDGES:	McMurdo P, Jerrard JA and Jones JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for extension of time to appeal refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – where applicant pleaded guilty to numerous sexual offences over a period of four to five years – victim in position of trust – sentence not manifestly excessive
COUNSEL:	J Bradshaw for the applicant C Heaton for the respondent
SOLICITORS:	Paul Williams & Associates for the applicant Director of Public Prosecutions (Queensland) for the respondent

JONES J: The applicant seeks leave out of time to appeal against the severity of sentences imposed on him by the District Court at Cairns on the 9th of December 2004. The

reason for the application being made out of time has been explained by the applicant's counsel, Mr Bradshaw, in an affidavit sworn by him on the 2nd of February 2005. The Crown indicated it accepts that statement of facts. Were that the only relevant circumstances I would have favoured granting such leave. Of more significance is whether the appeal, if leave were granted to proceed, had any prospects of success.

The offences and penalties imposed are as follows:

> Maintaining a sexual relationship with a child - eight years' imprisonment;
> Seven counts of incest - four years' imprisonment on each count;
> Two counts of indecent dealing with a child under the age of 12 years - two years' imprisonment on each count;
> All terms of imprisonment were ordered to be served concurrently.

The complainant was born on 23rd May 1990. The complainant was the applicant's stepdaughter. The complainant's mother was a Filipino national who, in 1996, came to Australia with her daughter, then aged six, and soon after married the applicant. The applicant was 57 years of age at the time of sentencing. The offending spanned a period of five years.

The first offending occurred when the complainant was approximately nine years of age. This involved the applicant touching the complainant on her breasts and vagina, and

masturbating himself against her vagina area. He convinced her that this was normal conduct between father and daughter. He secured her silence by suggesting she would suffer consequences from her mother if she complained.

The first act of intercourse occurred shortly before the complainant's 12th birthday. Sexual intercourse thereafter occurred on a regular basis. This was possible because the mother was often absent from home on activities associated with her being a member of the Army Reserve. In addition to the seven acts of incest identified in the indictment, there were a number of uncharged acts of intercourse which formed part of the particulars on the first count of maintaining a sexual relationship.

The applicant had no prior convictions and it was accepted by the learned sentencing judge as being "a productive, hard-working, law-abiding member of the community". His plea of guilty was acknowledged by the learned sentencing judge as deserving of "substantial credit" in moderating the sentence. At the time of sentencing the learned Crown Prosecutor and learned defence counsel, having had regard to a number of comparable sentences, agreed that the range penalty in a case such as this fell between eight years and 12 years.

The learned sentencing judge considered that had the applicant been convicted after a trial, the appropriate penalty on the major offence would have been 11 years' imprisonment. Because of the mitigating factors he imposed a penalty of eight years' imprisonment.

The particular grounds upon which the applicant bases this application are that the learned sentencing judge did not give sufficient weight to the applicant's personal antecedents, and that he erred in not making an earlier recommendation for post-prison community based release. Counsel for the applicant argued that a number of circumstances ought to have persuaded the sentencing judge to make a recommendation for early release after serving two and a-half years' imprisonment. Additionally, to the favourable aspects already mentioned, applicant's counsel points to the following:

(1) Lack of injury to the complainant;
(2) Lack of any suggestion of paedophilia;
(3) The fact that he has shown genuine remorse;
(4) His raising of a family from a previous marriage; and
(5) The reduced prospects of employment if he does not achieve early release.

Those matters, in the main, were referred to during the course of submissions before the learned sentencing judge. The fact that he has not made specific reference to each one of them does not mean that they were not taken into account in his Honour's consideration, and indeed most of those matters are

embraced in his Honour's finding that the applicant was a productive, hard-working, law-abiding member of the community.

Counsel on behalf of the Crown in his written submissions referred to three decisions of this Court, namely:

(1) *R v Kelly* [2002] QCA 387 in which Justice of Appeal Williams commented that the schedule of other comparable cases considered by the Court of Appeal suggests that the applicable range for offending of this nature is seven to 13 years' imprisonment;
(2) *R v H*, Court of Appeal 349 of 2003, where a sentence of 10 years' imprisonment was imposed, thereby bringing into play the requirement that 80 per cent of the total sentence would be served before being eligible for release;
(3) *R v Bartlett* [2002] QCA 448, where a sentence of eight years with a release recommendation after three years was imposed for maintaining a relationship with a stepdaughter who was 12 years old when the offending commenced.

Each of those cases is similar in some respects, but each also has relevant distinguishing features. In the Queen versus H the complainant was subject to physical violence and threats, as well as the sexual conduct. In *R v Kelly* the complainant fell pregnant to the offender and gave birth to his child. In the *R v Bartlett* the offending was not as prolonged nor as constant as in the subject case, but it included two acts of

rape. Also the complainant child there was older when the offending began. In the instance of Bartlett, the sentence of eight years' imprisonment with a recommendation for release after three years was not disturbed.

Here, the essence of the application is that the sentence imposed, though heavily moderated to take account of mitigating features, should have been further moderated by a recommendation for early release. The learned sentencing judge explained his approach to sentencing in considerable detail. He explained why he favoured a reduction in the head sentence rather than making a recommendation for early release.

I can find no error in his Honour's reasoning in this respect and I am satisfied that he made proper allowances for all the mitigating features when fixing the sentence which he ultimately imposed. The factors drawn to our attention and relied on by the applicant here do not warrant any further moderation of sentence which, to my mind, was already at the lower end of the discretionary range. I would therefore dismiss the application.

THE PRESIDENT: I agree with Justice Jones that the application for an extension of time within which to apply for leave to appeal against sentence should be dismissed.

In my view, had an early recommendation for eligibility for release on parole been made after the applicant had served three years imprisonment, that sentence too would have been within range but, for the reasons given by Justice Jones, the sentence of eight years imprisonment with no recommendation was, in all the circumstances here, not manifestly excessive. For that reason it is pointless to grant the application to extend time to apply for leave to appeal against sentence.

JERRARD JA: I agree with the reasons for judgment of Justice Jones and of the President. Mr Bradshaw had urged on this Court a submission that at first had concerned me, namely that the learned sentencing judge had taken into consideration in mitigation only the fact of the plea of guilty and not the other relevant matters to which Mr Bradshaw had referred us.

However, as Justice Jones has said, the sentencing judge did refer to the fact of the applicant being otherwise a productive and a hard-working member of the community who was generally in other respects law-abiding, now 57 years of age and with no criminal history, and who was a well regarded person in his community. It follows, as Justice Jones has said, that the sentencing judge therefore did take those matters into consideration.

Further, as has been observed, the learned sentencing judge could have imposed a higher head sentence in this matter and would have been justified in doing so, even after the plea, and could then have recommended that the applicant be

considered for release on parole at a stage earlier than halfway through that longer head sentence.

The judge explained his reasons for not doing that and accordingly the applicant cannot show that the eight year sentence, without such a recommendation, results in a manifestly excessive sentence. That is what he needed to show to succeed on this application. Accordingly I agree it has to be dismissed.

THE PRESIDENT: The application for an extension of time is dismissed.
