SUPREME COURT OF QUEENSLAND

CITATION:	*R v PW* [2005] QCA 177
PARTIES:	**R** v **PW** (applicant)
FILE NO/S:	CA No 102 of 2005 DC No 133 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED EX TEMPORE ON:	30 May 2005
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2005
JUDGES:	McPherson and Keane JJA and Mullins 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. A sentence of two and a half years imprisonment be substituted for that imposed by the sentencing judge**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - APPLICATIONS TO REDUCE SENTENCE - WHEN GRANTED - PARTICULAR OFFENCES - OFFENCES AGAINST THE PERSON - SEXUAL OFFENCES - where the applicant pleaded guilty to four counts of indecent dealing with a child under 12 years of age and one count of taking an indecent photograph of a child under 12 years - where the female child was the applicant's natural daughter and was three years of age at the time of the offences - where the indecent dealing involved the applicant performing oral sex on the child and having the child perform oral sex on him - where applicant had previously committed like offences - where sentencing judge took into account the

applicant's early plea of guilty and co-operation with the authorities - where sentencing judge imposed a sentence of three and a half years imprisonment with respect to each count - whether sentencing judge had adopted an appropriate head sentence - whether sufficient weight had been accorded to the applicant's extraordinary level of co-operation with the authorities as well as his apparent prospects for rehabilitation as evidenced in a psychologist's report - whether sentence imposed was manifestly excessive

AB v The Queen [1999] HCA 46; (1999) 198 CLR 111, applied
R v M; ex parte A-G [1999] QCA 442; [2000] 2 Qd R 543, cited
R v MAI [2005] QCA 36; CA No 257 of 2004, 25 February 2005, cited
R v Schirmer [2002] QCA 221; CA No 62 of 2002, 21 June 2002, distinguished
R v Sybenga [2004] QCA 391; CA No 234 of 2004, 19 October 2004, cited

COUNSEL: A W Moynihan for applicant
C W Heaton for respondent

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

KEANE JA: On 15 March 2005 the applicant pleaded guilty to four counts of indecent dealing with a child under 12 years of age and one count of taking an indecent photograph of a child under 12 years. The offences occurred between 1 January and 1 April 2002. The complainant was the applicant's natural daughter who had been born on 1 October 1998. She was therefore three years of age at the date of the offences.

In October 2003 the complainant initially disclosed to her mother that the applicant had taken an indecent photograph of her. She was taken to the police by her mother. On that occasion she repeated her initial complaint and added that the

applicant had placed chocolate on her vagina and then touched her with his mouth.

The police interviewed the applicant on 14 October 2003. On this occasion he volunteered that he had engaged in other acts of indecent dealing with the complainant.

On one occasion he had placed honey on the child's vagina and performed an act of cunnilingus on her and then placed honey on his penis and had the child fellate him. On that occasion he did not ejaculate in the child's presence. A few days later he became aroused while watching the child drawing while her bottom was in the air. It was on that occasion that he took the photograph. He then removed her pants, placed her on the lounge, applied honey to her vagina and performed cunnilingus on her. He then applied honey to his penis and had the child fellate him.

The applicant had previously committed like offences. He had been sentenced on 20 January 1998 on five counts of indecent dealing with a child under 12 years of age and two counts of wilfully exposing a child under 12 to an indecent act. The applicant had molested his then girlfriend's seven year old daughter over a five night period during which he cuddled her while naked, touched her vagina, exposed the child to him masturbating to ejaculation and on two occasions performing an act of cunnilingus upon her. He was sentenced on that occasion to 12 months imprisonment to be served by intensive

correction in the community together with probation for two years.

The applicant was born on 26 April 1974. He was thus 27 years of age at the time of the offences presently in question and 30 years of age at the time of sentence.

The learned sentencing judge imposed a sentence of three and a half years imprisonment in respect of each count. He made no recommendation for the applicant's eligibility for post-prison community based release.

The maximum penalty to which the applicant was liable was 14 years imprisonment. It is apparent from the reasons which the learned sentencing judge gave that he was strongly influenced by the considerations of deterrence which are reflected in that maximum sentence.

The learned sentencing judge was referred to the recent decision of this Court in *R v Schirmer* [2002] QCA 221; CA No 62 of 2002, 21 June 2002, in which a sentence of three years imprisonment with no recommendation for parole was imposed on a 41 year old man who pleaded guilty to one count of indecent treatment of a child aged seven years who was the niece by marriage of the accused. The accused in that case had a history of similar offences; but the evidence established that he suffered from a personality disorder. There is no suggestion that the applicant suffers from any psychiatric illness.

The learned sentencing judge clearly regarded the offences presently in question as more serious than those involved in *R v Schirmer*.

The learned sentencing judge took into account the early plea of guilty and the applicant's co-operation with the administration of justice.

His Honour referred to a psychologist's report tendered on behalf of the appellant which referred to the circumstance that the applicant has completed a community sex offender program. The report also noted that:

> "While he clearly gains some insights from this treatment, his current offences and attitude towards his offences indicate he still has some distorted cognitions in this area. His attitude is a little immature and while his behaviour appears to be more opportunistic than skilled and predatory, he does not seem to fully appreciate the impact of his actions on his victim … he has … shown good motivation and sought treatment and is keen to engaged in further treatment."

The learned sentencing judge recorded that he did not attach any particular weight to this report. It seems that his Honour was not greatly assisted by the psychologist's commendation of the applicant for his "motivation", being more concerned with the applicant's actual conduct and the serious nature of the offences.

It is submitted for the applicant that the sentence imposed was manifestly excessive.

Counsel for the applicant sought to make good his submission by a two step exercise. First, he submitted that the authorities suggest a range of head sentences from 18 months to four years imprisonment and he cited, amongst other decisions, *R v M; ex parte A-G* [1999] QCA 442; [2000] 2 Qd R 543; *R v Sybenga* [2004] QCA 391; CA No 234 of 2004, 19 October 2004 and *R v MAI* [2005] QCA 36; CA No 257 of 2004, 25 February 2005. Counsel took from the authorities the proposition that a notional head sentence of the order of four years imprisonment was indicated as being at the very high end of the appropriate range.

Next, counsel suggested that the notional head sentence should be moderated for the applicant's early pleas of guilty and the high level of his co-operation with the authorities, including the disclosure of offences otherwise unknown to them. In this regard, if one took a reduction in the notional head sentence of one-third as a reasonable allowance for these moderating factors, the exercise would suggest a period of imprisonment of the order of two years and eight months.

This exercise does serve to demonstrate that counsel for the applicant was correct in his suggestion that the learned sentencing judge must have started well beyond the period of four years imprisonment indicated as the top end of the range of appropriate sentences before applying necessary moderating factors. But in *R v Schirmer* the accused also received the benefit of a plea of guilty so that, in that case, the

notional head sentence was necessarily greater than three years. And in *R v Schirmer* there was not the strong element of breach of trust in relation to a child of very tender years, which is a disturbing feature of the present case. The learned sentencing judge regarded the offending here as more serious than in The *R v Schirmer* and that view is difficult to gainsay. However, that is not the end of the matter.

In this case there was an unusually high level of co-operation on the applicant's part with the authorities, including his voluntary disclosure. That is indicative of real remorse and justifies the view that the applicant has shown a determination to control his behaviour. His co-operation involving his voluntary disclosures is relevant, not merely to the moderating of the sentence which is otherwise appropriate, because of the savings to the administration of justice, but also to the importance of the consideration of deterrence rather than the prospects of rehabilitation.

In *AB v The Queen* [1999] HCA 46 at [113]; (1999) 198 CLR 111 at 155, Justice Hayne said:

> "An offender who confesses to crime is generally to be treated more leniently than the offender who does not. And an offender who brings to the notice of the authorities criminal conduct that was not previously known, and confesses to that conduct, is generally to be treated more leniently than the offender who pleads guilty to offences that were known. Leniency is extended to both offenders for various reasons. By confessing, an offender may exhibit remorse or contrition. An offender who pleads guilty saves the community the cost of a trial. In some kinds of case, particularly offences involving young persons, the offender's plea of guilty avoids the serious harm that may be done by requiring the victim to describe yet again, and thus relive, their part

> in the conduct that is to be punished. And the offender who confesses to what was an unknown crime may properly be said to merit special leniency. That confession may well be seen as not motivated by fear of discovery or acceptance of the likelihood of guilt; such a confession will often be seen as exhibiting remorse and contrition."

The learned sentencing judge did not recognise the dual relevance of the applicant's special co-operation with the authorities and the special leniency which that level of co-operation is said to merit. His voluntary confession is a compelling indication that special leniency in the interests of what appear to be substantial prospects of rehabilitation is called for in this case. In my opinion, while some weight was afforded to the co-operation shown, his Honour erred in failing to appreciate the dual relevance of the applicant's co-operation with the authorities.

In these circumstances it falls to this Court to exercise the sentencing discretion afresh.

The applicant submits that the sentence which should have been imposed is two and a half years imprisonment.

In my opinion, that submission should be accepted. It reflects an assumption of a notional sentence of four years and a substantial moderation by reference to the exceptional co-operation of the applicant with the administration of justice and the special leniency accorded by reason of the real remorse of which that level of co-operation is compelling evidence.

In my opinion, the application for leave to appeal against sentence should be granted, the appeal should be allowed and a period of two and a half years imprisonment should be substituted for that imposed by the learned sentencing judge.

McPHERSON JA: I agree.

MULLINS J: I agree.

McPHERSON JA: The order is that the appeal is allowed and a sentence of two and a half years imprisonment is substituted for that imposed by the sentencing judge.
