SUPREME COURT OF QUEENSLAND

CITATION:	*R v AAD* [2008] QCA 4
PARTIES:	**R** **v** **AAD** (applicant/appellant)
FILE NO/S:	CA No 282 of 2007 DC No 445 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Cairns
DELIVERED EX TEMPORE ON:	4 February 2008
DELIVERED AT:	Brisbane
HEARING DATE:	4 February 2008
JUDGES:	de Jersey CJ, Muir JA, Fraser JA 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. Allow the appeal** **3. Set aside the sentence imposed at first instance, although not disturbing the declaration for pre-sentence custody as time already served, and in lieu thereof order that the applicant be imprisoned for a period of four years**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT – SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT - CIRCUMSTANCES OF OFFENDER - where applicant convicted of rape - where applicant inserted finger into vagina of six year old girl - where applicant has criminal history- where applicant 30 years old when offence was committed - where plea of guilty- whether sentence imposed was manifestly excessive CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT- SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT - CIRCUMSTANCES OF OFFENCE - where applicant convicted of rape- where applicant inserted finger

into vagina of six year old girl - where surrounding circumstances of offence considered - whether sentence imposed erroneously took into account conduct other than that involved in the offence

Penalties and Sentences Act 1992 (Qld) s159A

R v BBE [2006] QCA 532, considered
R v Cooksley [1982] Qd R 405, cited
R v NH [2006] QCA 476, considered
R v PAA [2006] QCA 56, considered
R v SAH [2004] QCA 329, considered

COUNSEL: S Ryan for the appellant
G P Cash for the respondent

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

MUIR JA: On 26 September 2007, the 32 year old applicant was sentenced to imprisonment for five years for the digital rape of a six year old girl.

The complainant, then almost seven, was the informally adopted daughter of a woman with whom the applicant had a de facto relationship. The appeal is on grounds that (a) the sentence was manifestly excessive and (b) the learned sentencing Judge erred by taking into account separate offences which included conduct which was not part of the offence to which the applicant pleaded guilty and which conduct was more serious than the conduct which was the subject of the guilty plea.

On 12 June 2005, in the complainant's mother's apartment, the applicant, according to the complainant, put his hands in her pants:

> "touched [her] privates… [told her to go into the bedroom and lie down on the bed where] he put his hand in her pants and touched her and then he got [her] hand and made [her] touch his private parts and then he got [her] to kiss him there on his private parts."

The complainant stated that the applicant had inserted his finger in her vagina and had then caused her to "chew" on his penis.

The applicant was originally charged with two counts of rape and one count of indecent dealing. One count of rape, count 3, concerned the last-mentioned act. The other count of rape was in respect of the digital penetration and the indecent treatment count was in respect of the alleged touching of the applicant's genitals in the course of the acts constituting count 3.

On 5 February 2007, the prosecution accepted the applicant's guilty plea in respect of count 1 and entered a nolle prosequi in respect of the other counts. The applicant applied to withdraw his guilty plea on 25 September 2007. The application was refused and the applicant was sentenced on the following day.

In his sentencing remarks, the learned sentencing Judge stated, in effect, that he was proceeding on the basis that the applicant, prior to inserting his finger in the complainant's vagina, had "put his hands down the front of her shorts, touched her on the 'vagina'" and that subsequently he had taken "her hand and placed it on his penis and then forced her head on to his penis so that her mouth touched it."

In his sentencing remarks, the sentencing Judge observed that there was "no rational basis for not believing the complainant's minimal account in respect of the other conduct." He said, that such a conduct, although not charged, was a "somewhat aggravating feature of the digital penetration."

It was argued on behalf of the applicant that "no attempt was made to determine the basis of the [guilty] plea" and that commonsense and fairness required that the applicant be sentenced only on the circumstances which formed the basis of count one.

On the hearing of the application to withdraw the applicant's plea of guilty on count one, the learned Crown prosecutor revealed that counts two and three had been withdrawn because the subject acts "all happened on the same occasion." He added, "It's all wrapped up into the one event."

The sentencing Judge observed that, to an extent, the applicant had received a benefit for his plea of guilty in that only the offence of rape was proceeding. The Crown prosecutor agreed with the Judge's proposition and counsel for the applicant remarked:

> "He technically doesn't have on his record two counts- guilty of two counts of rape and one of indecent dealing but from a sentencing point of view, I would see no distinction, no benefit."

In the course of submissions on the sentencing hearing, the applicant's counsel made submissions on the basis that the acts constituting the original counts two and three were relevant to the exercise of the sentencing discretion.

All submissions, however, were on the basis that the offence of rape was constituted only by the acts, the subject of count one. The sentencing Judge made it plain in his sentencing remarks that he was not proceeding on the basis "that there was actual insertion of the penis into the child's mouth."

Putting aside the consensus of the Crown and the applicant as to the basis on which the sentence should proceed, the sentencing Judge was entitled to consider the circumstances in which the offence was committed and not regard it as a random act divorced from the actions and behaviour of which the act formed part. That was so notwithstanding that such circumstances included a contravention or contraventions of the criminal law. See the *R v Cooksley* [1982] Qd R 405 at 419.

In particular, it was appropriate for the sentencing Judge to consider the act of digital penetration in light of the more extended sexual misconduct to which the complainant was

subjected by the applicant. In my view, the sentencing Judge did not punish the applicant for an offence other than that charge by count one.

I now turn to a consideration of the appropriateness of the sentence imposed. The applicant was 30 years of age at the time of the offence and was 32 when sentenced. He was born on Thursday Island and raised on various Torres Strait Islands.

He completed his year 12 schooling, enjoyed some success in playing rugby league but does not appear to have worked for any extended period. His criminal history includes convictions for indecent assault and rape in March 1996.

He was sentenced to eight years' imprisonment for the latter offence. Whilst on bail in respect of the rape charge, he stabbed his de facto wife. For that offence, he received a sentence of two years' imprisonment, cumulative on the sentence of eight years.

Of the comparable sentences relied on by counsel, the ones described below appear to be the most relevant. In *R v SAH* [2004] QCA 329, a sentence of five years with a recommendation for post prison community-based release after 18 months, imposed after a plea of guilty for an offence of rape committed by the 19 year old applicant by inserting a finger or fingers into the anus of a three year old boy in his care, was reduced on appeal to a term of three years, suspended after 12 months. The Court, on appeal, took into account the relative youthfulness on the applicant, his limited prior criminal history which did not include sexual offences, an early plea and the applicant's childhood experience of sexual abuse.

In *R v NH* [2006] QCA 476, the 51 year old offender was a married teacher with no prior convictions. On three occasions, he fondled the vulval region of an eight year old daughter of his friends and on another occasion digitally penetrated her vagina. He was in a position of trust and threatened to tell others about her father's imprisonment if the

complainant disclosed his conduct. Sentences of two and a half years on each count were substituted for the three year sentences imposed at first instance.

The applicant, in *R v PAA* [2006] QCA 56, was a man in his mid to late 70s who was sentenced to terms of imprisonment with a recommendation for post-prison community-based release after 18 months, on three counts of rape, four counts of indecent treatment of a child under 16 and one count of indecent treatment of a child under 12. All the offences were committed over a two year period by the applicant on grandchildren. The three counts of rape involved digital penetration of a six year old girl's vagina on three separate occasions. One of the counts of indecent treatment involved the applicant procuring the complainant to fondle his penis. Another occurred when the applicant lay naked on top of a young grandson and began moving his body. In reducing the parole eligibility date, the Court took into account the applicant's age, his remorse, the fact that he would be required to serve sentence in Australia rather than in his home country, New Zealand and early pleas of guilty.

In the *R v BBE* [2006] QCA 532, the 22 year old applicant was sentenced to four years imprisonment on each of two counts of rape involving digital penetration, one count of rape involving tongue penetration and one count of indecent dealing with his five year old niece. The offences occurred over a short period of time and came to light when the applicant confessed to his sister after ceasing his offending behaviour. He suffered from some intellectual impairment and cooperated fully with authorities. The sentences for rape imposed at first instance were set aside on appeal and substituted with sentences of three years' imprisonment, suspended after six months with an operational period of five years.

It is difficult to discern a clear sentencing range from these authorities. That is no doubt the result of the diverse circumstances in which sexual offences of the subject nature occur and the differing ages and backgrounds of the offenders.

The subject offence concerned one incident only and significantly, in terms of gravity, the penetration was digital, not penile. The complainant, however, was very young and the applicant was in something of a position of trust.

He has the benefit of a plea of guilty and he had experienced sexual molestation in his youth. Although his criminal record includes serious sexual offences and an offence of unlawful wounding, the authorities discussed above suggest that nevertheless, the sentence imposed was manifestly excessive.

I would allow the application for leave to appeal to the extent of setting aside the five year term of imprisonment imposed at first instance, but not disturbing the declaration under section 159A of the *Penalties and Sentences' Act* 1992 (Qld) and substitute therefore, imprisonment for a term of four years.

THE CHIEF JUSTICE: I agree.

FRASER JA: I agree also.

THE CHIEF JUSTICE: The orders of the Court are as indicated by Justice Muir.
