SUPREME COURT OF QUEENSLAND

CITATION:	*R v AAF* [2008] QCA 235
PARTIES:	**R** **v** **AAF** (applicant)
FILE NO/S:	CA No 105 of 2008 DC No 1575 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	15 August 2008
DELIVERED AT:	Brisbane
HEARING DATE:	5 August 2008
JUDGES:	Keane and Holmes JJA and Dutney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for extension of time refused**
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 REFUSED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – where the applicant was convicted on his own plea of one count of maintaining an unlawful relationship of a sexual nature with a child under 16 years who was in his care – where the applicant was sentenced to seven years imprisonment with a parole eligibility date fixed after serving 28 months in custody – where the application for leave to appeal against sentence was filed approximately five and a half months after the time for appeal had expired – whether the circumstances are such that the time for the filing of the appeal should be extended *R v SAG* (2004) 147 A Crim R 301; [2004] QCA 286, considered *R v Tait* [1999] 2 Qd R 667; [1998] QCA 304, applied
COUNSEL:	The applicant appeared on his own behalf S G Bain for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **KEANE JA:** On 17 October 2007 the applicant was convicted on his own plea of one count of maintaining an unlawful relationship of a sexual nature with a child under 16 years of age and in the course of that relationship unlawfully and indecently dealing with the child who was in his care. He was sentenced to seven years imprisonment with his parole eligibility date being fixed at 16 February 2010, ie after serving 28 months in custody.

[2] On 30 April 2008 the applicant filed an application for an extension of time within which to apply for leave to appeal against his sentence on the ground that it was manifestly excessive. This application was filed approximately five and a half months after the time for appeal had expired.

The circumstances of the offence

[3] At this point some brief reference to the circumstances of the case is necessary. The applicant pleaded guilty to maintaining a sexual relationship with a young girl who became his step-daughter. He was arraigned on the basis that the relationship was on foot between 25 October 1993 and 27 October 2000; and it was to this charge that he pleaded guilty.

[4] It may be noted that, until July 1997, the maximum penalty for the offence of maintaining an unlawful sexual relationship was 14 years. After 1 July 1997 the maximum sentence was life imprisonment. Before the learned sentencing judge, the Crown Prosecutor accepted that the maximum sentence applicable in this case was 14 years imprisonment.

[5] During the seven year period over which the offence was committed, the complainant was aged between nine and 16 years. The applicant was between 30 and 37 years old. The applicant came into contact with the complainant through his relationship with her mother; and the applicant's abuse of the complainant commenced soon after he began his relationship with her mother. The abuse began as touching and masturbation of the complainant and escalated to having the complainant masturbate him, exposing her to pornography and mutual oral sex. The learned sentencing judge noted, as a circumstance in the applicant's favour, that he did not engage in vaginal penetration of the complainant.

[6] Once the abuse came to light, the applicant co-operated with the authorities. He received credit at sentence for his plea of guilty and co-operation with the authorities.

[7] At sentence the applicant's Counsel submitted that a sentence of six to seven years with parole after a third of the sentence had been served was appropriate.

The explanation for the delay

[8] The applicant has hardly given a satisfactory explanation for his delay in seeking to challenge the sentence imposed on him.

[9] It is apparent from the applicants' explanation that he knew that he had one month in which to lodge an appeal. The applicant asserts that he did not pursue a privately funded appeal because of financial considerations, and that he found out about the

possibility of seeking assistance from Legal Aid Queensland only in late March 2008 when he also learned that he could seek an extension of time within which to seek leave to appeal against his sentence. This assertion tests credulity too far in that the applicant would have the Court accept that he was the only inmate of his correctional facility who was not aware of the role of Legal Aid Queensland in providing legal advice and representation to indigent persons. In any event, none of this serves to explain why an application for leave to appeal against his sentence was not filed on the basis that issues as to representation could be resolved later.

[10] That having been said, the absence of a satisfactory explanation for the applicant's delay may not necessarily be fatal to his application. As this Court explained in *R v Tait*:[1]

> "The recent approach of this Court to the question of extending time in criminal appeals is sufficiently illustrated by *R v Mentink* ([1996] 1 Qd R 532, 536–537, 542; cf *R v Lewis* [1999] 2 Qd R 636) and a number of unreported cases in this Court (*R v Porter* (CA No 160 of 1997, 26 May 1997) especially per Davies JA and per McPherson JA; *R v Wolfven* (CA No 376 of 1997, 28 November 1997); *R v Tatnell* (CA No 42 of 1996, 13 March 1996); *R v Doyle* (CA No 70 of 1996, 2 May 1996)). These suggest that the Court will examine whether there is any good reason shown to account for the delay and consider overall whether it is in the interests of justice to grant the extension. That may involve some assessment of whether the appeal seems to be a viable one. It is not to be expected that in all such cases the Court will be able to assess whether the prospective appeal is viable or not, but when it is feasible to do so, the Court will often find it appropriate to make some provisional assessment of the strength of the applicant's appeal (Compare *Kolalich v DPP (NSW)* (1991) 173 CLR 222, 228; *Gallo v Dawson* (1992) 66 ALJR 859, 860), and take that into account in deciding whether it is a fit case for granting the extension. Other factors include prejudice to the respondent, but in the case of criminal appeals this is not often a live issue. Another factor is the length of the delay, it being much easier to excuse a short than a long delay."

Prospects of success

[11] A provisional assessment of the applicant's prospects of success in his application for leave to appeal against sentence must begin by reference to the circumstance that the sentence imposed on him accorded with that suggested by his Counsel. It is true, of course, that the imposition of a proper sentence is the responsibility of the sentencing judge; but where it is contended that the sentence which was imposed was **manifestly** excessive, the circumstance that the sentence was in accord with that proposed on behalf of the accused person makes that contention difficult to sustain, at least in the absence of exceptional circumstances.

[12] In that regard, the applicant claims that he was pressured by his lawyers into making ill-considered decisions concerning his case. It is significant, however, that he does not suggest that he was not guilty of the offence to which he pleaded guilty.

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1 [1999] 2 Qd R 667 at 668 [5].

[13] One specific complaint is that he wished to dispute the complainant's age at the time the relationship started but was told by his lawyers that this did not matter. There can be no doubt that the period of the relationship alleged by the Crown (and hence the age of the complainant at its commencement) was put clearly to the applicant. He pleaded guilty on that basis. The complaint which he now makes affords no basis to disregard the effect of his plea of guilty. There can be no doubt at all that the complainant was a very young girl when the applicant first began to abuse her sexually, or that this abuse continued for many years. As is apparent from the complainant's victim impact statement, the abuse has had serious and continuing effects upon the complainant.

[14] The applicant also asserts that insufficient weight was given by the learned sentencing judge to the circumstances that his offending behaviour did not involve personal violence, that there had not been penile penetration of the vagina and that he had co-operated with the authorities. It is, however, apparent from the decision of this Court in *R v SAG*,[2] and the other decisions there reviewed, that the seriousness of his offending conduct, involving as it did a grave breach of trust which persisted over a very long period of time, could well have attracted a substantially heavier sentence (notwithstanding the applicant's co-operation with the authorities and the absence of violence and penile penetration of the vagina) without exceeding the bounds of a sound exercise of the sentencing discretion.

[15] In summary, there is nothing in this case which would suggest that the applicant is likely to succeed in his application for leave to appeal against sentence so as to warrant the grant of an extension of time.

[16] Accordingly, I would refuse the application for an extension of time.

[17] **HOLMES JA:** I agree with the reasons of Keane JA and the order he proposes.

[18] **DUTNEY J:** I agree.

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2 [2004] QCA 286.