SUPREME COURT OF QUEENSLAND

CITATION:	*R v DAV* [2010] QCA 24
PARTIES:	**R** **v** **DAV** (applicant)
FILE NO/S:	CA No 168 of 2009 DC No 958 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence and Conviction)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 February 2010
DELIVERED AT:	Brisbane
HEARING DATE:	18 February 2010
JUDGES:	Chief Justice, Keane and Holmes JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for extension of time within which to appeal against conviction refused.** **2. Application for extension of time within which to seek leave to appeal against sentence refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where applicant seeks extension of time in which to appeal against conviction – where applicant pleaded guilty to one count of indecent treatment of a child aged under 12 years and six counts of indecent treatment of a child under 16 years of age – where applicant claims that he was inadequately represented at trial – where applicant denies committing the offences and contends that he was in custody at the time the offences were committed – where applicant contends that complaints against him were maliciously motivated – whether the application for extension of time in which to appeal against conviction should be granted APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where

applicant seeks extension of time within which to seek leave to appeal against sentence – where applicant sentenced to 18 months imprisonment to be served cumulatively upon a term the applicant was currently serving – where sentence of 18 months imprisonment not manifestly excessive – where applicant was a child at the time of committing the offence involved in count one and possibly count two – where applicant contends that sentencing Judge overlooked the applicant's age when sentencing the applicant – whether the application for extension of time within which to seek leave to appeal against sentence should be granted

Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, cited

COUNSEL: The applicant appeared on his own behalf
M J Copley SC for the respondent

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

[1] **CHIEF JUSTICE:** By application filed 1 July 2009, the applicant applied for an extension of time within which to appeal against convictions entered in the District Court on 20 May 2004 upon his pleading guilty to one count of indecent treatment of a child aged under 12 years, and six counts of the indecent treatment of a child under 16 years of age. The applicant was then sentenced to 18 months imprisonment, to be served cumulatively upon a term he was currently serving.

[2] The ground of his application for extension of time is expressed as follows:

> "As a child, I went to special school. Although I can read and write a bit, I have difficulty understanding reading and writing and the way the law works.
>
> In the end, I was persuaded to plead guilty to charges I had intended to defend. After coming to jail, I thought about how I could prove my innocence. I realised that I needed to get details of my residence and custody records for the period relating to the charges to try to prove I could not have committed the offences.
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> A few weeks after I was sentenced I first wrote to the Department of Child Safety to get a copy of my placement records. It was not until January 2007 that I obtained all of the records. I then studied the records for a few months, then sent all the material to the barrister, Chris Rosser, who was supposed to have represented me.
>
> I am uncertain of where the material went between then and now, but I sent it to a firm at Caboolture where Mr Rosser had been working, but he'd moved, I think, to Forrest Lake Lawyers. The material was then sent to my former solicitors, McCallum Mylne Lawyers. So far as I'm aware, McCallum Mylne have had the material for a year and a half. During that period McCallum Mylne have corresponded with

> me and Legal Aid Queensland and Legal Aid Queensland has written to me but I have not had assistance to appeal against the conviction.
>
> In July 2008 I contacted the Legal Aid Queensland prison advice service who helped me with the appeal documents."

[3] In an affidavit affirmed on 29 September 2009, the applicant says that he intended to plead not guilty to the offences, but that when the case came on for hearing, his barrister did not appear and he was then inadequately represented by his solicitor. In his oral submissions to us, he said he was under pressure on 20 May 2004, because he was recently sentenced to a substantial term of imprisonment for other offending (to which I will come).

[4] I say at once that there is no material upon which it could be concluded that his representation by the solicitor Mr Mylne was inadequate, so as to give rise to a miscarriage of justice. Further, there is no reason to doubt he pleaded guilty in the exercise of his free choice (*Meissner v The Queen* (1995) 184 CLR 132).

[5] But the applicant effectively contends he could not have committed the offences, because he was then in custody. We are in a position to examine that contention.

[6] The dates on which the respective offences were allegedly committed are:

> Count one: between 21 December 1986 and 1 January 1988
> Count two: between 1 December 1990 and 30 January 1992
> Count three: between 31 January 1994 and 1 March 1994
> Count four: between 30 November 2001 and 31 December 2001
> Count five: between 31 December 2001 and 1 February 2002
> Count six: between 31 December 2001 and 1 February 2002
> Count seven: between 31 May 2002 and 1 July 2002

[7] Material relating to periods for which the applicant was in custody is exhibited to the affidavit of D H Orr filed 11 February 2010. The applicant was given to absconding. Exhibit A to that affidavit shows that the applicant was not actually in custody throughout the period specified in count one. Exhibits B and C establish the same in relation to counts two and three respectively. Additionally in respect of count three, the discharge release notices produced by the applicant at the last hearing of this matter corroborate that he was not in custody for a large part of 1, 2, 3, 6 February 1994, between 8 and 12 February 1994 and after 13 February 1994. There is in Exhibit C no mention of his being in custody for the periods covered by counts four to seven.

[8] The applicant contended that the complaints against him were maliciously motivated, but the pleas of guilty rob that of any present significance.

[9] The material on which the applicant would need to rely to establish his ground of appeal does not do so. The application for an extension of time within which to appeal against conviction should therefore be refused, because there is no sufficient prospect of his successfully having the plea of guilty set aside, and challenging the convictions, were time extended. There is no need to deal with the discretionary considerations, such as delay.

[10] During the last hearing on 22 September 2009, the applicant orally indicated that he sought leave to apply for an extension of time within which to apply for leave to appeal against sentence, and he confirmed that before us. No formal application

was subsequently filed. Discretionary considerations aside, leave should nevertheless not be granted because the appeal would have no reasonable prospect of success.

[11] The applicant was sentenced to 18 months imprisonment to be served cumulatively upon what was presented as a 10 year term currently being served for other offences. In fact, that had been reduced on appeal to nine and a half years, so that the applicant was in a somewhat better position than had been contemplated when he was sentenced on 20 May 2004.

[12] But in any event, a sentence of 18 months imprisonment for this offending could not be considered manifestly excessive, and there is clear reason requiring that it be served cumulatively. The instant offending was completely separate from that involved in the offences which attracted the nine and a half year overall term.

[13] The instant offending involved the indecent treatment of three girls. As taken from the outline of Counsel for the respondent:

> "The complainant to count one was the applicant's eight year old cousin. The applicant kissed her buttocks and lay on top of her and rubbed himself against her. The same complainant was 12 years old when the applicant grabbed and squeezed her breasts (count 2). The complainant to count 3 was the applicant's five year old step-cousin. When the applicant was minding her the applicant pulled his pants down and put the complainant's hand on his penis. The complainant to counts four to seven was aged 14-15 years old. On four separate occasions the applicant fondled her breasts. She was his second cousin."

[14] The applicant complains that the sentencing Judge overlooked the circumstance that when the applicant committed the offence involved in count one, and possibly count two, the applicant was himself a child. The applicant was born on 30 October 1974. But the sentencing Judge was informed, by the prosecutor, of the applicant's date of birth, and it also appears on the criminal history admitted as exhibit one. Also, in his sentencing remarks, the Judge noted that the earliest offence extended back to 1986. There is no basis for concluding that the Judge overlooked the applicant's age when he sentenced him for that offence or those offences.

[15] The application for an extension of time within which to seek leave to appeal against sentence should also be refused.

[16] **KEANE JA:** I agree with the Chief Justice.

[17] **HOLMES JA:** I agree with the reasons of the Chief Justice and the orders he proposes.