SUPREME COURT OF QUEENSLAND

CITATION:	*R v PAM* [2011] QCA 36
PARTIES:	**R** **v** **PAM** (applicant)
FILE NO/S:	CA No 216 of 2010 DC No 118 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction) Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	Order delivered ex tempore 10 February 2011 Further order and reasons delivered 8 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	10 February 2011
JUDGES:	Margaret McMurdo P, Chesterman and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore 10 February 2011** **1. The application for an extension of time to appeal against conviction is refused.** **Delivered 8 March 2011** **2. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant sought an extension of time to appeal against conviction – where the applicant pleaded guilty to one count of maintaining a sexual relationship with a child (count 1) and three counts of rape (counts 2 - 4) – where the applicant argued he was pressured by his legal representative to plead guilty – where the applicant alleged he was not aware of the prosecution case against him – where the applicant produced no evidence to support these contentions – whether the applicant has any prospects of success on appeal – whether it is in the interests of justice to grant the extension

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant sought leave to appeal against sentence – where the applicant was sentenced to eight years imprisonment in respect of count 1 and four years concurrent imprisonment on each of counts 2 to 4 with parole eligibility after 32 months – where there were few mitigating factors – whether the sentence was manifestly excessive

Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, cited
R v AAI [2009] QCA 253, cited
R v BAO [2004] QCA 445, cited
R v BBP [2009] QCA 114, cited
R v GDJC, unreported, Ryrie DCJ, DC No 862 of 2008, 25 July 2008.
R v HAN (2008) 184 A Crim R 153; [2008] QCA 106, cited

COUNSEL: The applicant appeared on his own behalf
B J Power for the respondent

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

[1] **MARGARET McMURDO P:** On 13 September 2010 the applicant, who is now self-represented, filed a notice of appeal against his conviction and an application for leave to appeal against his sentence. His application for leave to appeal against sentence was within the prescribed time limit, but his appeal against conviction was more than two months after his plea of guilty to the charges, the convictions from which he now seeks to appeal. This Court acceded to the suggestion of Mr Power, for the respondent, to treat the applicant's notice of appeal against conviction as an application for an extension of time to appeal against conviction. At the conclusion of the hearing of that application on 10 February 2011, this Court refused the application to extend time to appeal against conviction, stating that it would give its reasons later. The Court then heard the application for leave to appeal against sentence. What follows are my reasons for joining in this Court's order refusing that application, and for also now refusing his application for leave to appeal against sentence.

The District Court proceedings

[2] An indictment was presented in the District Court at Brisbane on 25 January 2010 charging the applicant with maintaining a sexual relationship with a child, T, between 5 November 2001 and 20 May 2007 (count 1); three counts of rape of T between 6 November 2001 and 8 November 2002 (counts 2 to 4); and two counts of indecent treatment of T with the circumstances of aggravation that she was under 12 years and in his care (counts 5 and 6). The matter was adjourned to 18 May 2010 for pre-trial legal argument and T's evidence was to be pre-recorded under the *Evidence Act* 1977 (Qld) on 8 June 2010.

[3] On 18 May 2010, Judge Griffin SC gave rulings as to the admissibility of evidence to be led at trial and adjourned the matter to 8 June 2010.

[4] The hearing resumed before Judge Koppenol on 8 June 2010. The pre-recording of T's evidence did not proceed. Instead, the prosecution amended count 1 by shortening the time period charged to "between 5 November 2001 and 7 November 2004", and endorsed the indictment with the notation that "The Crown hereby indicates that it will no longer proceed on counts 5 and 6". The prosecutor then asked that the applicant "be arraigned on the basis of those amendments". The judge explained to the applicant, who was represented by counsel, the effect of those amendments and discharged him in respect of counts 5 and 6. His Honour asked his associate to arraign the applicant on counts 1 to 4. The applicant pleaded guilty to each count in turn. The judge next asked his associate to administer the allocutus, after which the associate enquired whether the applicant had anything to say as to why sentence should not be passed on him. The applicant responded, "No". The applicant's sentence hearing was adjourned to enable his lawyers to obtain medical reports.

[5] The hearing continued before Judge Shanahan on 17 August 2010. The transcript records that his Honour noted, in the presence of the applicant, that the applicant had pleaded guilty to counts 1 to 4, one count of maintaining and three counts of rape, and that the allocutus had been administered.

[6] Before the hearing, the prosecutor had provided the judge and the applicant's counsel with her written submissions (exhibit 1) which she essentially repeated in making the following oral submissions. The applicant was 51 years old at sentence and between 44 and 46 at the time of the offending. He had a criminal history (exhibit 3) beginning in 1981 which included convictions for drug and dishonesty offences and offences of violence. He had breached community based orders and operational periods of suspended terms of imprisonment in the past. On 4 April 2005 he was convicted of an assault against T's younger brother and placed on a two year probation order which he subsequently breached a number of times. He had served terms of actual imprisonment in the past. He had been in custody for the present offences since 23 January 2009.

[7] The facts of the offending the subject of these applications were as follows. The applicant had been effectively T's step-father since she was about 12 months old. The applicant and T's mother subsequently had a daughter. T was five years old when the sexual abuse commenced. The unlawful relationship continued over three years, stopping shortly before her eighth birthday. The applicant repeatedly physically abused T before he began to sexually abuse her. T and the other children in the family had been the subject of child safety complaints but mostly remained in the custody of the applicant and T's mother, whom the applicant ultimately married. The applicant regularly removed T's clothes and inserted his finger into her vagina. She attempted to physically resist. Later he began to regularly insert his fingers into T's anus. T experienced pain in the vaginal and anal areas at the time of the abuse. The applicant also touched T's breasts on occasions. Count 2 was a specific occasion when the applicant inserted his finger into T's vagina. Count 3 was a specific occasion when he inserted his finger into T's anus. Count 4 was an occasion when he inserted a stick-like object into T's anus and she had resulting sores. T complained to a foster-parent about the applicant's abuse and the matter was eventually reported to police. A medical examination of T about four years

after the alleged abuse revealed signs of past vaginal and anal injury. When police interviewed the applicant, he admitted to physically assaulting T on occasions, but he denied sexually assaulting her.

[8] T's foster mother provided a victim impact statement in which she described T as a very troubled young woman. Many of her present difficulties seemed to relate to the applicant's sexual abuse of her. T had been attending sexual assault counselling weekly for six months. The counsellors advised this would be an ongoing need. T was also receiving support for dealing with her anger.

[9] The prosecutor submitted that the applicant's plea of guilty should be treated as timely. It saved T the trauma of recounting the dreadful events of her childhood. Whilst the applicant did not admit these offences to police, he did admit physically abusing T. This showed some remorse on his part. On the other hand, the applicant was a mature man with an unfavourable criminal history who sexually abused a very young child in a background of physical violence towards his victim. He was effectively her step-father so that the offences were a serious breach of trust resulting in extended psychological injuries to T. The appropriate penalty was eight years imprisonment with parole eligibility after three years.

[10] The applicant's counsel made the following submissions at sentence. The appropriate head sentence was between seven to eight years imprisonment with a parole eligibility date set at one-third of the head sentence. He placed emphasis on the applicant's plea of guilty.

[11] He tendered a report from psychologist Peter Perros (exhibit 5) which was to the following effect. Mr Perros interviewed the applicant for about 90 minutes on 2 July 2010 after reading the prosecution material. The applicant gave him details of his background. He had a dysfunctional upbringing in which he moved between his mother, father and grandmother. He claimed to have been sexually molested by a priest, an experience which haunted him throughout adolescence. He had congenital scoliosis which made him more vulnerable to musculo-skeletal injuries. He subsequently sustained back injuries in work and car accidents in 1990 and 2008. He was prescribed opiate analgesics which led him to become addicted to heroin. He still suffered from chronic pain which had contributed to the anger he manifested towards his children. He had complex psychological issues affecting his personality and interpersonal style. The offending behaviour was inconsistent with his past criminal history. Anti-depressant medication was associated with erectile dysfunction in males. The applicant's pain and anger likely contributed to the offences against T whom he found difficult to manage. He had poor anger management resulting from chronic pain and stress levels. He would probably benefit from counselling to deal with his childhood trauma and poorly developed interpersonal style.

[12] Another report from a senior government medical officer, Dr Don Spencer, (part of exhibit 6) confirmed the applicant's opioid dependency and long-standing polysubstance abuse which made him "difficult to manage because of his manipulative and confronting manner" and that he had "repeatedly failed to comply with treatment".

[13] General practitioner Dr Mammino confirmed in a letter (also part of exhibit 6) that he treated the applicant between June and December 2008 with 5 mg of Diazepam three times a day. This proved very effective in the management of his stress resulting from a back injury suffered in an accident.

[14] In sentencing the applicant, the judge made the following observations after referring to the facts of the offending. It would be inappropriate to take into account separate offences of violence with which the applicant had not been charged. Nevertheless, the applicant's offending was so serious that it warranted the eight year term of imprisonment suggested by the prosecution. The applicant was a mature man. The offending commenced when T was only five years old. She was his step-daughter so that this was a significant breach of trust. The offences persisted over a three year period. They involved penetration of both T's anus and vagina to such an extent that she was left with injuries. The circumstances were more serious than in *R v HAN*.[1] The impact of the offending on T was severe, as the victim impact statement demonstrated. The applicant had a long and significant criminal history although not for sexual offences. The applicant had pleaded guilty, saving T from having to give evidence. The judge referred to the psychologist's report and the fact that the applicant claimed to have been sexually abused himself as a child. The judge also noted the applicant's medical problems but considered that matter did not require the sentence to be mitigated. His medical issues could be catered for in jail, and the seriousness of his offending outweighed those personal circumstances. It was appropriate to set parole eligibility at one-third of the total sentence.

[15] The judge sentenced the applicant to eight years imprisonment in respect of count 1 and four years concurrent imprisonment on each of counts 2 to 4 and ordered that he be eligible for parole on 22 September 2011 after serving 32 months. Time spent in pre-sentence custody of 571 days was deemed to be time already served under the sentence.

The application for an extension of time to appeal against conviction

[16] The applicant provided no satisfactory explanation for his delay in filing his appeal against conviction. As he was self-represented, it was possible that he considered the appeal periods did not commence to run until the conclusion of the sentencing process. But the far more likely reason for his delay in appealing his convictions for the four offences to which he pleaded guilty is that he did not want to set aside those guilty pleas until he received a sentence with which he was unhappy. Even had the applicant given a satisfactory explanation for his delay in appealing his conviction or attempting to set aside his pleas of guilty, there would have been no point in extending time to appeal against conviction if, inevitably, such an appeal would have failed. As this Court was in possession of a full record of the proceedings in the District Court, it was able to consider the merits of the applicant's proposed appeal against conviction in determining whether to grant his application to extend time to appeal against conviction.

[17] The applicant's grounds as stated in his application were as follows:

> "I had very poor legal advice. I am innocent of these charge and was prepared for trial when on the first day of cross-examination of the alleged victim my Barrister … told me that I had no chance of winning a trial because I would not get a jury that was not bias to sex charges, especially involving a child. He said a trial was based upon "tactics" between him and the proscetution. I was always of the impression that a trial was based on allegations and defence, and justice. That is all I want – justice. Even on the day of my

[1] (2008) 184 A Crim R 153; [2008] QCA 106.

> sentencing I wanted to withdraw the guilty plea, but was told by [my barrister] that it was too late because I had signed the "guilty" papers and not to say a word whilist in court, as it would make things worse for me. I wanted to withdraw my plea then and there also. I only had the opportunity to review the Q.P. 9 statements of the alleged victim and my ex-wife a week before sentence date, and if it were not so serious it would be laughable. I told this to [my barrister] and he told me that a jury would see it differently, as a child in shock from the ordeal, but this allegedly happened about 8 years ago. A lot of time to complain to someone or even make up a better story. My Ex-wives Q.P. 9 conflicts with the alleged victims. All I want is proper justice, which I think I'm entitled to. Not tactics. I aggree that a jury could be bias, but I would like trial by Judge. Also other comparitive sentences are much less. I am innocent and will prove so." (errors as in original)

[18] The applicant expanded on these allegations in a detailed handwritten outline of argument and in oral submissions. He claimed that he had intended to plead not guilty until the day T's evidence was to be pre-recorded. His barrister, he claimed, emphasised that he:

> "had no chance at trial and once he started to cross-examin the alleged victim there will be no turning back, because it was the start of the trial. He also told me that I would not win and would receive a sentence of 12 to 14 years jail with an S.V.O. His advise was to plead guilty and he could bargain with the prosecution for a possible six year term, or with a good psycologist report a possible five year term. I class this as intimidation or a 14 year gun to my head to sign a guilty plea. I still had not viewed any Q.P. 9. allegations made against me, I was in shock and reluctantly signed the guilty papers." (errors as in the original)

[19] He claimed he did not see the prosecution material against him until a week before he was sentenced in August 2010. This was after he had entered his guilty pleas on 8 June 2010. When he read the case against him, he was shocked at T's allegations. There were conflicts between T's statements and the statements of her mother (the applicant's former wife). He claimed he rang his solicitor and told her he did not want to plead guilty to this "absolute rubbish". He claimed his solicitor told him it was too late for him to change his mind.

[20] He added that, after his committal in the Magistrates Court, he was unhappy with his lawyers (the same lawyers who acted for him in the District Court). He applied to Legal Aid (Queensland) ("LAQ") to have his lawyers replaced because he had no confidence in them, but LAQ refused his request well before he pleaded guilty.

[21] The applicant contended that, if the convictions were set aside, he would be able to prove his innocence by calling evidence attacking T's credibility. He claimed to also have evidence from his biological daughter that would dispute T's statements as to the timing of his alleged offending against T.

[22] The applicant provided neither evidence of the allegations he made against his lawyers nor evidence of the matters which he claimed would prove his innocence of the charges. His general description of the defence evidence he would call at a trial did not appear to seriously undermine the prosecution case. But more importantly,

even on the applicant's submissions to this Court, he pleaded guilty to the charges against T after accepting advice from his counsel. That advice was that he would receive a significantly lesser sentence if he pleaded guilty before T's evidence was recorded than if he did so later or after he was convicted at trial. That advice was sound. Whilst this Court has not seen a transcript of T's evidence, it seems that the medical evidence of her injuries was persuasive, independent evidence capable of supporting her allegations against the applicant, at least in a general way. The prosecution case against him therefore had some strength. Having heard the applicant make oral submissions to this Court, his counsel may have feared that the jury would not find him persuasive. Were the applicant to attack T's credit, as he claims he would have done at a trial, his lengthy and significant prior criminal history may have been placed before the jury. For these reasons, as his counsel advised, there was a very real risk that he would have been convicted at a trial. He then would have been sentenced without the mitigating benefit of cooperation with the authorities and a timely plea which saved T the trauma of giving evidence and being cross-examined. After trial, he may well have received, as his counsel advised, a 12 to 14 year sentence of which he would have to serve approximately 80 per cent before becoming eligible for parole.

[23] The applicant is a mature, articulate and assertive person. He has had many appearances in the Magistrates Court and has also appeared regularly in the District Court. He has previously succeeded in applying for an extension of time to appeal against sentence in this Court. He has a lengthy criminal history which strongly suggests he is familiar with the workings of the criminal justice system.

[24] At the hearing of this application, he informed this Court that he was present in the Magistrates Court at his committal proceedings on the charges against T where some prosecution witnesses were cross-examined. It seems to me implausible that he was not aware, at least in a general way, of T's allegations against him when he pleaded guilty in the District Court on 8 June 2010. Judge Koppenol explained to him before he pleaded guilty the effect of the prosecution amendments. He then voluntarily entered pleas of guilty to each of the four counts. When the allocutus was administered and he was asked if he had anything to say as to why sentence should not be passed on him, he responded "No". Before Judge Shanahan sentenced him, the applicant was interviewed by psychologist Mr Perros. Nothing in the report of Mr Perros suggested the applicant disputed his responsibility for the offences against T; was incapable of giving instructions to his counsel; or was intimidated by his lawyers into pleading guilty. When the sentencing proceeding continued before Judge Shanahan, the applicant made no effort to have his guilty pleas set aside. He did not gainsay anything counsel stated in their submissions at sentence.

[25] On the material before this Court, it is impossible to conclude otherwise than that, when the applicant pleaded guilty before Judge Koppenol on 8 June 2010, he understood the nature of the charges to which he was pleading and intended to plead guilty to them. He entered his guilty pleas in open court in the exercise of a free and informed choice based on sound legal advice. At some point after his sentence on 17 August and his filing of his irregular notice of appeal on 13 September, he came to regret his decision to plead guilty. He now claims that he was pressured into entering those guilty pleas and that he was innocent. But as Brennan, Toohey and McHugh JJ explained in *Meissner v The Queen*:[2]

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[2] (1995) 184 CLR 132, 141; [1995] HCA 41.

> "A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty. An inducement to plead guilty does not necessarily have a tendency to pervert the course of justice, for the inducement may be offered simply to assist the person charged to make a free choice in that person's own interests. A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea."

[26] Later their Honours added:

> "Argument or advice that merely seeks to persuade the accused to plead guilty is not improper conduct for this purpose, no matter how strongly the argument or advice is put. Reasoned argument or advice does not involve the use of improper means and does not have the tendency to prevent the accused from making a free and voluntary choice concerning his or her plea to the charge."[3]

[27] The applicant did not demonstrate, either in his written or oral submissions, that his pleas of guilty resulted in a miscarriage of justice warranting the granting of an appeal against conviction so that the convictions and the guilty pleas on which they were based can be set aside. It followed that, as the applicant's proposed appeal against conviction would inevitably fail, it would be pointless to extend time in respect of it. For those reasons, I joined in the order of this Court on 10 February 2011 refusing the application to extend time to appeal against conviction.

The application for leave to appeal against sentence

[28] I turn now to the application for leave to appeal against sentence.

[29] Judge Shanahan's sentencing observations set out earlier in these reasons[4] succinctly list the very serious aspects of the applicant's offending against T. The maximum penalty on each of the four offences was life imprisonment. He shamefully breached his parental responsibilities in committing serious sexual abuses on his step-daughter over about three years when she was aged between five and eight. Years later, the physical and psychological scars of that abuse were still apparent. He was a mature man with a poor criminal history, including for an assault on T's brother and for robbery with violence. As count 1, maintaining a sexual relationship with T, encompassed the conduct which counts 2 to 4 related, it was appropriate to impose a head sentence on count 1 which reflected the totality of the applicant's offending in all four counts. The offending warranted a very significant term of imprisonment as a head sentence.

[30] In his oral submissions, the applicant contended that a comparable case which demonstrated that his sentence was manifestly excessive. He did not provide copies of the case but it seems he was referring to the unreported District Court decision of *R v GDJC* who was sentenced by Judge Ryrie on 25 July 2008.[5] GDJC pleaded guilty to maintaining a sexual relationship with his step-daughter, three counts of

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3 Above, 143. See also Deane J at 149 and Dawson J at 157.

4 See [14] of these reasons.

5 Unreported, Ryrie DCJ, DC No 862 of 2008, 25 July 2008.

indecent treatment of her when she was under 12 and in his care, and one count of rape of her. The offences occurred between April and December 2006. The rape was an act of sodomy. On other occasions, he came into the girl's room, removed her pants, and rubbed his penis against her vagina. On the last such occasion, he realised the seriousness of his actions and attempted suicide. He had a good work history and had made efforts to rehabilitate whilst in prison. His family unit had broken down as a result of his offending. By the time of sentence, he had spent 20 months in custody and had made impressive efforts to rehabilitate. He had a limited criminal history and no convictions of a like nature. The judge noted that, had the child been younger, the sentence would have been heavier. The judge imposed an effective sentence of five years imprisonment, suspended forthwith (that is, after serving 20 months) with an operational period of five years and, in respect of one count, placed GDJC on three years probation with a condition that he receive treatment. The judge specifically stated that the head sentence of five years reflected the 20 months already spent in custody. Without that factor, Judge Ryrie would have imposed a sentence of six years imprisonment with parole eligibility after two years.

[31] It is difficult to glean all the relevant facts from the published sentencing remarks in *GDJC* but it does not seem to be as serious as the present case. The offending occurred over a period of months, not years; the complainant seemed to be older than T; the offending in itself seemed not as serious as there was no medical evidence of past vaginal and anal injuries; and GDJC did not have the extensive criminal history of the present applicant. I am not persuaded *GDJC* demonstrates that the sentence in this case is manifestly excessive.

[32] Seldom are two cases precisely comparable in their combination of aggravating and mitigating features, but the cases relied on by the respondent, *R v BBP*;[6] *R v AAI*;[7] *R v HAN*[8] and *R v BAO*,[9] demonstrate in a general way that the head sentence of eight years imprisonment imposed on the applicant was within the appropriate range, given his relatively timely guilty plea. The concession of the applicant's counsel, in light of the timely guilty plea, that a head sentence of seven to eight years imprisonment was appropriate, was rightly made.

[33] Judge Shanahan set a parole eligibility date at one-third of that sentence. This generously recognised the few mitigating features, namely, the plea of guilty before T was required to give evidence, and the applicant's dysfunctional background and life problems, including his own alleged sexual abuse as a child by a person in authority. The sentence was by no means manifestly excessive. It follows that the application for leave to appeal against sentence must be refused.

FURTHER ORDER:

The application for leave to appeal against sentence is refused.

[34] **CHESTERMAN JA**: I agree that the application for leave to appeal against sentence should be refused for the reasons given by the President. I also agree with her Honour's reasons for the order, made earlier, refusing the application to extend time to appeal against conviction.

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6 [2009] QCA 114.
7 [2009] QCA 253.
8 (2008) 184 A Crim R 153; [2008] QCA 106.
9 [2004] QCA 445.

[35] **WHITE JA**: On 10 February 2011 after hearing the application the court refused to extend time to appeal against conviction indicating that reasons would be delivered at a later date. The court then heard the application for leave to appeal against sentence. I have read the reasons of the President for making that order extending time to appeal against conviction and I agree with those reasons. I also agree with her Honour's reasons for refusing the application for leave to appeal against sentence.