SUPREME COURT OF QUEENSLAND

CITATION:	*R v Nugent* [2011] QCA 127
PARTIES:	**R** **v** **NUGENT, Danny James** (appellant)
FILE NO/S:	CA No 281 of 2010 DC No 214 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	17 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	9 June 2011
JUDGES:	Chief Justice, Chesterman JA, Margaret Wilson AJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. That the conviction on count 3 be quashed and a verdict of acquittal be entered on that count; and** **2. That the appeal against conviction otherwise be dismissed.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – OTHER OFFENCES – where appellant was convicted of one count of indecent treatment of a child under 12, two counts of indecent dealing, and two counts of procuring a child to commit an indecent act – where appellant was sentenced to two years nine months imprisonment for each count to be served concurrently – where appellant challenges convictions on three counts on the basis of lack of adequate particularity – where there was evidence from complainant that the encounters followed the same pattern – whether the charges were sufficiently particularized – whether the sentences imposed on the appellant should be reduced *R v F* [1994] QCA 537, cited *R v R* [2001] QCA 488, considered *R v S* [2000] 1 Qd R 445; [1998] QCA 271, cited

COUNSEL:	G McGuire for the appellant R G Martin SC for the respondent
SOLICITORS:	Guest Lawyers for the appellant Director of Public Prosecutions (Queensland) for the appellant

[1] **CHIEF JUSTICE**: The appellant was convicted in the District Court on one count of indecent treatment of a child under 12 years of age (count 1), and four indecency counts in relation to a child under 16, two of them of indecent dealing (counts 2 and 4) and the other two of procuring a child to commit an indecent act (counts 3 and 5). On each count the appellant was sentenced to two years nine months imprisonment, the terms to be served concurrently.

[2] The appellant challenges the convictions on counts 2, 3 and 4 on the ground that the counts were "bad for latent duplicity", because for want of adequate particularity, the jury was left unable "to differentiate between what was specifically alleged in respect of those counts, and what was alleged in respect of other similar uncharged incidents".

[3] The complainant was the son of an employee of the appellant, and was aged between 11 and 12 years at the relevant times. Following various exchanges between Counsel, the particulars on which the prosecution ultimately relied in relation to the subject counts were:

Count 2 – an act of oral sex committed upon the complainant during a period of school holidays, when the appellant gave the complainant $100 in return;

Count 3 – an occasion when the appellant asked the complainant to masturbate himself, that being the first such occasion; and

Count 4 – the last occasion on which the appellant performed an act of oral sex on the complainant, being six to eight weeks prior to his being interviewed by the police (which had occurred on 29 November 2008).

[4] Counsel for the appellant relied substantially on evidence from the complainant that the appellant's encounters with him followed the same pattern, with the appellant touching the complainant's penis, the appellant having the complainant touch the appellant's penis, and the appellant sucking the complainant's penis. Acknowledging that pattern, the complainant agreed with the suggestion that he "can't separate the first time it happened from the second or the last". It may be noted that in other evidence the complainant said that that pattern of behaviour was "pretty much" the norm.

[5] It is well-established that to warrant conviction, the evidence must establish a particularized charge, particularized in such a way that the jury identifies a specific occasion on which the alleged offence occurred, and the manner in which it occurred, sufficient to distinguish that offence from other uncharged acts admitted, say, to establish the relationship between the accused and the complainant. See *R v F* [1994] QCA 537, pp 9, 10 and *R v S* [2000] 1 Qd R 445, paras 14, 15 and 21.

[6] This case illustrates the difficulty the prosecution faces in cases like this where there is alleged repetitive sexual offending of similar character over a substantial period, but it is a difficulty which must be acknowledged and if possible overcome.

[7] The jury should ordinarily be informed of the particulars, to foster a sufficient understanding of the counts on the indictment. That point was made in *R v R* [2001] QCA 488, para 39, and the course was followed here – as will appear.

[8] Counsel for the appellant referred to the poor quality of the s 93A recorded statement of the complainant, and the uncertainty it provoked as to the extent of the charges. But the complainant was recalled for cross-examination at the trial, and the question now – in light of the grounds of appeal – is whether the complainant's evidence, if accepted, provided a reasonable basis for the differentiation between counts 2, 3 and 4 respectively, and other uncharged acts, set out in the third paragraph of these reasons for judgment.

[9] As to count 2, the complainant referred to one occasion during school holidays when in return for committing oral sex upon the complainant, the appellant gave the complainant $100. The Trial Judge referred to the incident in that way in his direction to the jury (AB pp 223-4). Counsel for the appellant contended that the complainant's evidence about payment of the sum of $100 "was not solely related to any allegation of oral sex". In my view, however, the complainant's evidence (AB pp 177-8) could fairly be read as relating the money to the commission of that particular act of oral sex. For legitimate work, the appellant paid the complainant $15 (AB p 125).

[10] The conviction on count 3 cannot be sustained, because there is nothing in the evidence distinguishing a particular instance of that alleged offence from the numerous others of which the child complained. Counsel for the respondent acknowledged that this conviction should therefore be set aside. In light of the prosecution's apparent inability to provide further particularization of this occasion, it is appropriate that a verdict of acquittal be entered.

[11] As to count 4, it was the last occasion on which such an event occurred, and the complainant put it as having occurred six to eight weeks prior to his interview with the police, and in October while he was still at school. That, again, was the basis on which the Judge left that count to the jury (AB p 225). That was a sufficiently distinct occasion, as the charge was particularized, to warrant a conviction if supported by evidence, and there was evidence to support it (AB p 275).

[12] I would order that the conviction on count 3 be quashed and a verdict of acquittal entered on that count, and that the appeal against conviction otherwise be dismissed.

[13] The question arises whether the sentences imposed on the appellant, in respect of the other counts, should therefore be reduced. There is no application for leave to appeal against sentence, but if the quashing of the conviction on count 3 would otherwise warrant a reduction in sentence, then an extension of time would for that purpose be considered. Counsel acknowledged that any reduction in sentence should in these circumstances be no more than marginal.

[14] At the time of committing these offences the appellant was aged 39 to 40 years, and the complainant as said was aged between 11 and 12. The appellant committed

these offences in 2008. Significantly, in September 1999, the appellant was convicted of two counts of indecently dealing with a child under 12, and one of indecently dealing with a child under 16, in all cases over the period 1994-5, and he was sentenced to 15 months imprisonment, with a recommendation that he have access to a sexual offenders treatment program while in custody or on parole. Prior to being sentenced for the instant offences, the appellant had been on remand for them and others for approximately three months. Both Counsel contended for a head term of three years imprisonment, which the Judge apparently reduced to two years nine months because of that pre-sentence custody.

[15] It is a case where the term imposed, said to be referable to the "totality" of the offending, would have been appropriate whether four or five of these offences were committed, so that I would not entertain an application for an extension of time within which to appeal against the sentences imposed in respect of the remaining counts.

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

[17] **MARGARET WILSON AJA**: I agree with the orders proposed by the Chief Justice, for the reasons given by his Honour.