SUPREME COURT OF QUEENSLAND

CITATION:	*R v HBB* [2011] QCA 157
PARTIES:	**R** **v** **HBB** (applicant)
FILE NO/S:	CA No 138 of 2011 DC No 31 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED EX TEMPORE ON:	14 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	14 July 2011
JUDGES:	Chief Justice, P D McMurdo and Dalton JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where applicant pleaded guilty to seven counts committed against a child he believed to be his biological daughter – where applicant was sentenced to two years six months imprisonment suspended after eight months with three years probation – where application for leave to appeal sentence was filed three months out of time – where applicant was advised of the need to make the application within 28 days but explains the failure on basis of stress of incarceration – whether the application for extension of time should be granted *R v IB* [2008] QCA 356, considered *R v MAI* [2005] QCA 36, considered
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 (Qld) for the respondent

[1] **CHIEF JUSTICE**: The applicant pleaded guilty to seven counts, including digital rape, committed on a child he believed to be his biological daughter, although she was not. The offending occurred over approximately one month, escalating from touching and sucking the breasts to penetration of the vagina and simulated intercourse. The applicant was then 40 to 41 years old and the child was under 16 years of age. She was born on the 6th of October 1993.

[2] The applicant was sentenced to an effective term of two years and six months' imprisonment, which was suspended after a period of eight months, and that effective sentence was coupled with three years' probation. He was sentenced on the 1st of February 2011, and did not file an application until the 1st of June 2011, so that he was approximately three months out of time. He acknowledges that he was advised of the need to make any intended application within 28 days, and seeks to explain his failure to do so on the basis of the stress of incarceration.

[3] Were his sentence remarkable, the obvious inadequacy of his explanation for failing to apply within time would carry less significance, but the sentence imposed was not questionable. An indication of this is its approximate conformity with the ranges advanced by the prosecutor and defence counsel, the latter submitting for two years' imprisonment with the serving of one-third or slightly less.

[4] This was repeated offending over a period, committed against a child to whom the applicant, a person of mature years, stood as guardian. The sentence imposed was plainly open and warranted and if anything was lenient. Mr HBB, the applicant, in his submissions to us today raised three points. Firstly, that he had no prior criminal history. That is true. It is a not uncommon feature of offending of this character within a family context, but it was a matter to which the learned sentencing Judge referred in his remarks and to which he plainly gave relevant weight.

[5] The second point made by the applicant is that the two cases which were referred to the primary Judge, *R v IB* [2008] QCA 356, and *R v MAI* [2005] QCA 36, were cases where the sentence was imposed following conviction by a jury. But, when one examines the sentences imposed in those cases in the context of the present and makes allowance for the circumstance that the sentences were imposed following a trial, adequate adjustment was made in the Judge's selection of the penalty which was imposed here. That penalty sits sufficiently comfortable with the results which ensued in the cases of IB and MAI. I add that significant weight plainly was given by the Judge to the pleas of guilty and the applicant's cooperation with the authorities.

[6] The third point emphasised by the applicant is, as he put it, the complainant came to him and he was asleep at the time of the offences. That is contrary to the statement of agreed facts which was placed before the learned sentencing Judge, which for a number of the offences has the applicant waking up a sleeping complainant and then committing the offences upon her. Plainly at this stage of the matter we must proceed on the basis of the statement of agreed facts put before the primary Judge with, of course, the agreement of the applicant.

[7] In all these circumstances no sufficient basis has been established for any grant of the extension which is necessary and which has been sought. I would refuse the application.

[8] **McMURDO J**: I agree.

[9] **DALTON J**: I agree.

[10] **CHIEF JUSTICE**: The application is refused.