SUPREME COURT OF QUEENSLAND

CITATION:	*R v CBA* [2011] QCA 281
PARTIES:	**R** **v** **CBA** (applicant)
FILE NO/S:	CA No 215 of 2011 DC No 38 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Mackay
DELIVERED ON:	11 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	5 October 2011
JUDGES:	Muir and Fraser JJA and Margaret Wilson AJA 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 – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant pleaded guilty to one count of maintaining a sexual relationship with a child under 16 years – where the applicant was sentenced to five years imprisonment with parole eligibility after 20 months – where the applicant wished to appeal the sentence on the ground that it was manifestly excessive – where the applicant applied for leave to appeal against sentence approximately nine months out of time – whether the proposed appeal has prospects of success – whether the sentence imposed was manifestly excessive – whether the application for extension of time should be granted *Penalties and Sentences Act* 1992 (Qld), s 13 *R v Davies* [1998] QDC (11 December 1998), cited *R v Holland* [1995] QDC (10 October 1995), cited *R v Martin* [2002] QCA 201, considered *R v Myers* [2009] QCA 14, cited *R v SAU* [2006] QCA 192, considered *R v Tait* [1999] 2 Qd R 667; [1998] QCA 304, cited *R v Walden* [2010] QCA 13, considered *R v W* [1998] QCA 343, considered *R v Wing* [2007] QCA 138, considered

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

[1] **MUIR JA**: I agree that the application for an extension of time should be refused for the reasons given by Margaret Wilson AJA.

[2] **FRASER JA**: I agree with the reasons for judgment of Margaret Wilson AJA and the order proposed by her Honour.

[3] **MARGARET WILSON AJA**: The applicant pleaded guilty to one count of maintaining a sexual relationship with a child under 16 years. He was sentenced to five years imprisonment with parole eligibility after 20 months (i.e., after serving one-third of the sentence).

[4] The applicant wishes to appeal against the sentence on the basis it was manifestly excessive. He submitted that the sentencing judge erred as follows:

(a) in over-estimating untested information in statements made by the victim;

(b) in under-valuing the guilty plea: it saved not one, but two young people from the trauma of giving detailed interviews with the Crown prosecutor;

(c) in ignoring that the applicant would have to live with his own shame and guilt for the rest of his life;

(d) in not considering that the guilty plea prevented further trauma to extended family members who were willing to testify on the applicant's behalf;

(e) in over-valuing the relevance of comparable sentences presented to the court.

[5] The applicant was represented by counsel before the sentencing judge, who received an agreed statement of facts. The applicant has not had legal representation since then, and he appeared before this court self-represented, by video link from the prison where he is serving his sentence.

[6] The sentence was passed on 27 September 2010. The applicant then had one calendar month within which to apply for leave to appeal against sentence. However, he did not file his application until 26 July 2011 – approximately nine months out of time. Accordingly, he seeks an extension of time in which to seek leave to appeal against sentence.

[7] On an application for an extension of time it is relevant to consider whether there is good reason for the delay and whether it would be in the interests of justice to grant the necessary extension: *R v Tait*.[1]

[8] The applicant explains his delay by his being self-represented and difficulties he encountered in assembling comparable authorities. As I shall explain, I consider that the proposed appeal does not have prospects of success, and so it is not necessary to consider the adequacy of this explanation.

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1 [1999] 2 Qd R 667, 668; [1998] QCA 304.

[9] The applicant was the step-uncle of the complainant who was aged 14 to 15 years at the time of the offending. The offending took place over eight months. It involved touching the complainant's breasts and groin; digital penetration of her vagina; penetration of her vagina with a vibrator; the complainant performing oral sex on the applicant and the applicant performing oral sex on her; and multiple acts of vaginal intercourse to ejaculation. The complainant complied with the applicant's sexual requests throughout the period of the offending. She subsequently said that she felt some pressure because of his position within the family and his age. (He was aged 46 to 47 at the time of the offending, and 49 at sentence.)

[10] The sentencing judge recognised that he had to fashion a sentence which would provide just punishment, personal and general deterrence, and give expression to the community's denunciation of such conduct. His Honour rightly regarded the offending as a gross breach of trust.

[11] His Honour paid cautious regard to her victim impact statement and concluded that the complainant had been left with having to cope with guilt and self-doubt and being in need of counselling. He did not err in his use of the victim impact statement. He expressly acknowledged that such statements have to be treated with some caution because the information contained in them is generally untested in the court. The matters that he relied upon were matters which were, as he observed, almost an inevitable result of the applicant's conduct. In addition to the conclusions he drew from the victim impact statement, his Honour observed that the complainant said the incident had torn the families apart and created feelings of hatred and resentment especially towards her.

[12] His Honour regarded the plea of guilty as a timely one. He described it as having been –

> "...made in sufficient time for the complainant child to be released from the trauma of having to relive [the applicant's] predatory conduct against her by having a detailed conference with the Crown Prosecutor."

He said that, had it not been for that, he would not have given him the full benefit of the discount on sentence. Having regard to the contents of the agreed statement of facts, the applicant's conduct was properly characterised as "predatory" rather than "opportunistic".

[13] Under the *Penalties and Sentences Act* 1992 (Qld), a sentencing judge must take account of a plea of guilty,[2] although there is no prescription as to the manner in which he or she must take it into account. It is common to do so by fixing parole eligibility at one-third of the head sentence.

[14] The plea was indicative of a willingness to cooperate with the administration of justice and may well have been indicative of remorse. It is not clear what the applicant meant by his submission that the guilty plea saved not one but two young people from the trauma of detailed interviews with the prosecutor. Nor is it clear what he meant when he submitted that extended family members had been saved from the trauma of giving evidence on his behalf to contest certain matters.

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[2] See s 13.

[15] The sentencing judge did not err in the way he dealt with the plea.

[16] The applicant had no previous criminal convictions. His Honour noted that he had had a grade 11 education and that he had worked essentially full-time in various industries, more particularly in the coal industry and transport industry, throughout his adult life.

[17] I turn then to the comparable sentences which were cited.

[18] The applicant relied upon *Cunningham*.[3] There the offender pleaded guilty to one count of maintaining and five counts of indecent treatment of a child under 16. The offending occurred over approximately two months. He was sentenced to 18 months imprisonment for the maintaining and one count of indecent treatment, and two years imprisonment for four further counts of indecent treatment. His application for leave to appeal against sentence was refused. The conduct did not involve intercourse and was objectively less serious than that in the present case. Moreover, it extended over a shorter period.

[19] The applicant also relied on two decisions of the District Court – *Holland*[4] and *Davies*[5]. Those sentences were imposed for offending which occurred at times when the maximum penalty was seven years and 14 years respectively. It is now life imprisonment. This increase is indicative of the legislature's intention that this type of offending be viewed more seriously and that accordingly more severe penalties be imposed for it.

[20] The applicant also referred to newspaper reports of other decisions, not all of them even of Queensland Courts. They are not of assistance in the determination of this application.

[21] The respondent has referred to four decisions – *Walden*,[6] *Myers*,[7] *SAU*[8] and *W*.[9] These cases all involved relatively short relationships with post-pubescent girls and at least one instance of intercourse.

[22] In *Walden* the offender was charged with one count of maintaining and 12 separate counts of rape. The matter went to trial, and the trial judge directed the jury to return verdicts of not guilty on eight of the rape counts, and to consider in respect of three of the remaining rape counts alternative charges of unlawful carnal knowledge, and in the case of the remaining rape count an alternative charge of indecent dealing with a child under 16. The maintaining extended over at least two months. The complainant was a 13 year old girl. There was no familial relationship between the offender and the complainant, although he knew that she was being prostituted by her parents. The conduct involved sexual intercourse to ejaculation with her three or four times a week at a motel. An application for leave to appeal against the head sentence of six years was refused.

[23] In *Myers* the complainant went to trial on one count of maintaining, and was found guilty. The complainant was aged 12 to 14 years, and she was the step-daughter of

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3 *R v Cunningham* [2009] QCA 289.
4 *R v Holland* [1995] QDC (10 October 1995).
5 *R v Davies* [1998] QDC (11 December 1998).
6 *R v Walden* [2010] QCA 13.
7 *R v Myers* [2009] QCA 14.
8 *R v SAU* [2006] QCA 192.
9 *R v W* [1998] QCA 343.

the offender. The maintaining extended over 12 to 18 months. The conduct involved regular fellatio to ejaculation, digital penetration of the complainant, forced masturbation of the applicant, licking of the complainant's genitals, attempted intercourse. An application for leave to appeal against the head sentence of five years was refused.

[24] In *SAU* the offender pleaded guilty to one count of maintaining with the aggravating circumstance of incestuous carnal knowledge. The complainant, who was the offender's daughter, was aged 14 when the offending began and almost 16 when it came to an end after about two years. The conduct involved the offender showing her pornographic movies, touching her vaginal area and masturbating her and himself, using a vibrator on her, having her perform oral sex on him, and ultimately engaging in regular penetrative intercourse over a period of about 12 months. He was sentenced to eight years imprisonment with a recommendation for parole after three years. An application for leave to appeal against sentence was refused.

[25] In *W* the offender pleaded guilty to one count of maintaining with a circumstance of aggravation, three counts of unlawful carnal knowledge of a female under 16 with a circumstance of aggravation and three counts of wilfully exposing a child to an indecent act with a circumstance of aggravation. The complainant was a 13 year old girl. The offender was like her "God-father" – she referred to him and his then *de facto* as uncle and aunt. The maintaining occurred over a period of four and a half months. The offender admitted to 15 occasions of improper conduct with the complainant in the presence of his *de facto*, and a further four occasions when he had sex with her in the absence of the *de facto*. He was sentenced to seven years imprisonment for the maintaining and the unlawful carnal knowledge and four years imprisonment for the wilful exposure of a child to an indecent act. There was a recommendation for parole after three years. He sought leave to appeal against his sentence. Leave was granted and the sentence was varied to the extent of reducing the time he would have to serve before becoming eligible for release on parole to two years.

[26] As counsel for the respondent submitted, the sentence imposed in the present case sits comfortably with those considered by this Court in those four cases.

[27] In all of the circumstances of this case, the sentence imposed was not manifestly excessive.

[28] It follows that the application for an extension of time should be refused.