SUPREME COURT OF QUEENSLAND

CITATION:	*R v NR* [2014] QCA 159
PARTIES:	**R** **v** **NR** (applicant)
FILE NO/S:	CA No 72 of 2014 DC No 958 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	17 July 2014
DELIVERED AT:	Brisbane
HEARING DATE:	17 July 2014
JUDGES:	Margaret McMurdo P and Fraser and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for an extension of time refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to maintaining an unlawful sexual relationship with a child – where the applicant was sentenced to four years imprisonment with parole eligibility set at one third of the sentence – where the applicant has filed an application for an extension time within which to appeal against his sentence – whether good reason has been shown to account for the delay in filing his appeal – whether, considering the strength of the proposed appeal, it is in the interests of justice to grant the extension *R v CAQ* [1999] QCA 197, considered *R v T; ex parte Attorney-General (Qld)* [1996] QCA 462, considered *R v Tait* [1999] 2 Qd R 667; [1998] QCA 304, applied
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

MARGARET McMURDO P: Fraser JA will deliver his reasons first.

FRASER JA: On 18 November 2013, the applicant pleaded guilty to maintaining an unlawful sexual relationship with a child. On 3 December 2013 he was sentenced to four years imprisonment with parole eligibility fixed on 30 March 2015 (after one-third of the period of imprisonment, taking into account three days served by the applicant in pre-sentence custody which could not be declared as time served under the sentence).

On 2 April 2014 the applicant filed an application for extension of time within which to appeal. In considering such an application the Court examines whether any good reason has been shown to account for the delay and it considers whether it is in the interests of justice to grant the extension. Where, as in this case, it is feasible to assess whether the prospects of the appeal are viable, the Court may take into account its provisional assessment of the strength of the proposed appeal: *R v Tait* [1999] 2 Qd R 667 at 668.

The applicant's explanation for the delay relies upon the cumulative effect of a series of asserted events: He did not receive a letter setting out the details of his sentence until 16 December 2013; after Legal Aid Queensland advised than an appeal was not appropriate, he sought independent legal advice but did not receive that until late January or February 2014; after he contacted Legal Aid for advice about how to appeal on 23 February 2014 he did not receive the required forms until 24 March 2014; and he waited about two weeks for sentence management staff at the prison to give him help in appealing after he requested it. This explanation is not verified by any evidence and nor is it very satisfactory, but the respondent's opposition to the application for an extension of time is more substantially based in the proposition that the proposed appeal lacks reasonable prospects of success.

The ground of the proposed appeal is that the sentence is manifestly excessive in all the circumstances. That is a difficult contention to establish in circumstances in which the applicant contends that the sentence which should have been imposed was between three and fours years imprisonment wholly suspended after serving between eight and 12 months. The period before parole eligibility ordered by the primary judge, amounting

to about one-third of the total period of imprisonment, was a conventional exercise of the sentencing discretion in circumstances in which the applicant pleaded guilty. Similarly, the provision for parole eligibility rather than suspension was conventional in the context of the nature of this particular offence, the applicant's acknowledgement that he had an extensive criminal history (albeit not one involving violent or sexual offences), and where the applicant does not contend that the sentencing judge was supplied with any persuasive evidence that the applicant had been rehabilitated. In any event, the applicant has not pointed to any error which might justify appellate interference with that discretionary order.

The applicant argued that the sentencing judge imposed the sentence on an incorrect factual basis that the duration of the offence was about four and a half months, between June and October 2009, rather than the much shorter period of between June 2009 and about 13 August 2009 (when, the applicant contends, the child was removed from the place at which he was living with the applicant and the child's mother). The respondent pointed out that the applicant's contention was contrary to the facts which the sentencing judge recited, that the applicant's counsel did not dispute those facts at the sentence hearing, and that the sentencing remarks indicate that there had been some discussion between the applicant's counsel and the prosecutor, resulting in a downgrading of the charges against the applicant. That does make it seem very unlikely that there was any error about the duration of the offending. The applicant has not adduced any evidence of the error for which he contends. In these circumstances, that contention should not be accepted.

Finally, the applicant argued that comparable sentencing decisions indicate that his sentence is manifestly excessive. Dealing with this argument and the relevant cases requires some reference to the circumstances of the offences and the applicant's personal circumstances, which may be extracted from the sentencing remarks. The applicant had been in a relationship with the complainant child's mother when the child was about seven years old. The applicant again came into contact with the complainant's mother and

committed the offence when the child was between 10 and 11 years old. The complainant referred to the applicant as her father during the offending period. No penetrative acts were alleged. The unlawful sexual relationship involved the applicant touching and rubbing the complainant's genitalia, as well as genital to genital contact in simulated intercourse. There were some occasions of that simulated sexual intercourse and the other sexual acts occurred almost daily. The sentencing judge found that the applicant engaged in the sexual offending in breach of trust and that it had a significant impact upon the child. The applicant entered a plea of guilty, accepted responsibility for the offending, and quickly communicated that acceptance of responsibility to his legal representative when the matter came before the Court for a pre-recording of the evidence of the complainant child; it was for those reasons that the sentencing judge considered that parole eligibility after the expiry of one third of the imprisonment was appropriate. The applicant was 40 and 41 years old at the time of the offence and he was 45 years old when he was sentenced. As mentioned earlier, he acknowledged that he had an extensive criminal history, which did not include any sexual offences or offences of violence.

The applicant contended that a more serious level of offending in *R v CAQ* [1999] QCA 197, a case which was cited to the sentencing judge, suggests his sentence is excessive. In *CAQ*, the Court refused an application for leave to appeal against a sentence of three and a half years imprisonment with parole eligibility after 15 months for one count of maintaining a sexual relationship with a child under the age of 12 years at a time when the child was under his care, and a concurrent sentence of one year imprisonment for an offence of wilfully exposing the child to an indecent video tape. There was a similar age disparity between that child and that offender; that offender was 51 years old when the unlawful sexual relationship commenced and the child was aged between 10 and 11 at the time of the offences. CAQ's offending was less frequent than the applicant's offending (CAQ touched the child on about 15 occasions in all), the duration of CAQ's offending was similar to the duration of the applicant's offending (CAQ's offending occurred over about five or six months), and the nature of CAQ's offending was less serious or at least no more serious than the applicant's offending (CAQ touched the complainant on her

breasts and in the vicinity of her vulva, sometimes under her clothing and sometimes on her clothing; CAQ twice placed the child's hand on his penis and the prosecution alleged one incident in which CAQ lay on top of or knelt between the legs of the naked child). Otherwise the circumstances of the offending were similar. CAQ's personal circumstances were more favourable, in that he had no relevant prior convictions, it was thought to be possibly significant that the offences occurred shortly after the death of his partner and before he had effected a complete reconciliation with his wife, and there was some psychiatric evidence capable of offering a partial explanation of the offending.

Overall, the applicant's offending was more serious and his personal circumstances less favourable than in *CAQ*. The sentence of three and a half years imprisonment with parole eligibility after 15 months in *CAQ* suggests that the applicant's sentence was within the sentencing discretion.

The applicant cited *R v DIM*, a District Court matter where a sentence of two years imprisonment wholly suspended after 14 months was imposed. That a more lenient sentence was imposed in a different case in the District Court does not indicate that the applicant's sentence was manifestly excessive.

In a third case cited by the applicant, *R v T; ex-parte Attorney-General (Qld)* [1996] QCA 462, the Court refused an Attorney-General's appeal against the sentence of three years imprisonment suspended after three months for one count of maintaining an unlawful sexual relationship with a child under 16 years (with a concurrent sentence of three years probation for several indecent dealing offences). The complainant in *R v T* was only five years old but T had no criminal history and had taken extensive steps to cooperate with the police and undergo rehabilitation. The Court described his mitigating factors as "about as substantial as one could find in a case such as this" and held that T's sentence was not manifestly inadequate, but noted that it was "at the lowest level" of permissible sentences. *R v T* does not indicate that the applicant's sentence was outside the sentencing discretion, especially given the applicant's much less favourable personal circumstances than those in the *R v T*.

The applicant has not shown that his proposed appeal has reasonable prospects of succeeding. In these circumstances it is not in the interests of justice to extend the time for applying for leave to appeal. The application should be refused.

MARGARET McMURDO P: I agree.

MORRISON JA: I also agree.

MARGARET McMURDO P: The order is the application for an extension of time is refused. Thank you.