

SUPREME COURT OF QUEENSLAND

CITATION: *R v WN* [2005] QCA 359

PARTIES: **R**
v
WN
(applicant)

FILE NO/S: CA No 195 of 2005
DC No 1196 of 2005

DIVISION: Court of Appeal

PROCEEDING: Application for Extension (Sentence)

ORIGINATING COURT: District Court at Brisbane

DELIVERED EX TEMPORE ON: 27 September 2005

DELIVERED AT: Brisbane

HEARING DATE: 27 September 2005

JUDGES: McMurdo P, Keane JA and Douglas J
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 AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PRACTICE: AFTER CRIMINAL APPEAL LEGISLATION - MISCELLANEOUS MATTERS - QUEENSLAND - PROCEDURE - EXTENSION OF TIME, NOTICE OF APPEAL AND ABANDONMENT - where the applicant had pleaded guilty to one count of incest and been sentenced to four and a half years imprisonment to be suspended after 18 months with an operational period of five years - where application for an extension of time had been filed three months after sentencing - whether there was any real prospect that the applicant's sentence would be reduced if an extension of time were granted

R v BAQ [2005] QCA 31; CA No 328 of 2004, 18 February 2005, distinguished
R v Moore [1989] CCA 208; CA No 215 of 1989, 31 August 1989, cited
R v R [1996] QCA 263; CA No 125 of 1996, 9 August 1996,

cited

COUNSEL: The applicant appeared on his own behalf
D L Meredith for the respondent

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

KEANE JA: The applicant seeks an extension of time within which to apply for leave to appeal against sentence.

On 10 May 2005, the applicant was sentenced, on his plea of guilty to one count of incest with his daughter, to four and a half years imprisonment suspended after eighteen months with an operational period of five years. Eight days pre-sentence custody was declared as time served.

The applicant did not seek leave to appeal his sentence until 3 August 2005. The applicant says that this delay occurred because he was not told of his right of appeal until mid-July when he spoke to a fellow inmate about the matter. This explanation for the applicant's delay must be viewed with some scepticism because the applicant has previously brought an appeal before this Court for an earlier offence of incest, that time with his sister, in 1999. See *R v W* [1999] QCA 124; CA No 460 of 1998, 14 April 1999.

In any event, in my opinion, the application for an extension of time should be dismissed on the basis that there is no real prospect that his sentence would be reduced if an extension of time were to be granted.

The offence in question was committed on 15 March 2004. The applicant was, at that time, 51 years of age. The complainant, his daughter, was 22 years of age. At that time, the complainant had been residing with the applicant since 31 December 2003. The complainant and the applicant had only become aware of each other when the complainant obtained the age of 16 years. She had grown up as a ward of the State.

On the day of the offence, when the complainant arrived home, the applicant followed her into the bathroom, kissed her and touched her on the breasts. He then carried her into her bedroom where he had sexual intercourse with her. Afterwards, he told her not to tell anybody what had happened.

The complainant did not want to have intercourse with the applicant but she did not resist him or tell him that she did not want to have sex with him. The complainant suffers from a borderline personality disorder. She had previously been taken to hospital after threatening to harm herself or commit suicide. Two months prior to the offence, she survived a serious drug overdose. Since the offence, the complainant has made several further attempts at suicide.

The applicant suffers from what the learned sentencing judge described as "cognitive and substantial intellectual difficulties". He went to opportunity school until he was 15 years of age. He is, however, capable of being employed and has been in regular employment.

As a result of the applicant's conviction for incest with his then 32 year old sister in 1998, he was placed on a two year good behaviour bond. The applicant's sister and the applicant had been separated from infancy and she was a consenting party to the incest.

Unlike that case, the present case involved an element of exploitation of the complainant who was, because of her psychiatric problems, especially vulnerable. These features put the present case into a distinctly more serious class of incest than cases of incest between freely consenting adults, even though no actual violence was used by the applicant to get his way.

It is submitted for the respondent that in such a case as this where there is also a previous conviction for which the offender was dealt with leniently, the sentence which was imposed was at the bottom of the appropriate range. Reference to the authorities suggests that the circumstances of the cases of incest which come before the Courts are so diverse that it is difficult to speak of "a normal range". See *R v Moore* [1989] CCA 208; CA No 215 of 1989, 31 August 1989 and *R v R* [1996] QCA 263; CA No 125 of 1996, 9 August 1996.

It can be said, however, that no decision of this Court suggests that the sentence which was imposed was, in any way, excessive having regard to the abuse by the applicant of his position as the father of a disturbed young woman who no doubt looked to him for care and protection. In this regard, I

would note that this Court has recently held in *R v BAQ* [2005] QCA 31; CA No 328 of 2004, 18 February 2005 that imprisonment for three years to be suspended after 18 months was appropriate for an isolated incident of attempted incest by a father against his 17 year old daughter that involved no actual penetration. The conduct by the present applicant can only be seen as requiring a greater punishment.

In conclusion, there is no sufficient prospect that the applicant's sentence would be reduced on appeal to warrant the grant of an extension of time in which to make an application for leave to appeal to be made. In my opinion, the application for an extension of time should be refused.

THE PRESIDENT: I agree.

DOUGLAS J: I agree.

THE PRESIDENT: The application for an extension of time is refused.
