SUPREME COURT OF QUEENSLAND

CITATION:	*R v DAM* [2005] QCA 364
PARTIES:	**R** **v** **DAM** (applicant)
FILE NO/S:	CA No 189 of 2005 DC No 2648 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court
DELIVERED ON:	30 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	26 August 2005
JUDGES:	McMurdo P, Jerrard JA and Fryberg J 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 AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - APPLICATIONS TO REDUCE SENTENCE - WHEN REFUSED - PARTICULAR OFFENCES - OFFENCES AGAINST THE PERSON - SEXUAL OFFENCES - applicant convicted after plea of guilty to ex officio indictment containing one count of indecent dealing with a child under 16 who is a lineal descendant - sentenced to three months imprisonment to be followed by 18 months probation - complainant applicant's daughter - isolated incident - full admissions voluntarily given to police - 42 years old at sentence - no criminal history - genuine remorse shown - co-operation with Salvation Army counselling service to complete a risk assessment - indicated willingness to participate in a sex offender treatment programme - whether sentencing judge acted on a wrong principle by imposing a custodial sentence - whether sentence manifestly excessive *R v H; ex parte A-G (Qld)* [2001] QCA 262; CA No 57 of 2001, 9 July 2001, cited

R v Jackson; ex parte A-G (Qld) [2001] QCA 445; CA No 206 of 2001, 16 October 2001, cited
R v T [2000] QCA 282; (2000) 113 A Crim R 439, cited

COUNSEL: A W Moynihan for applicant
M J Copley for respondent

SOLICITORS: Legal Aid Queensland for applicant
Director of Public Prosecutions (Queensland) for respondent

[1] **McMURDO P:** The applicant pleaded guilty in the District Court to one count of indecent dealing with a child under 16 who is a lineal descendant. He was sentenced to three months imprisonment to be followed by 18 months probation. He applies for leave to appeal against his sentence contending both that the sentencing discretion miscarried because the judge acted on a wrong principle and that the sentence is manifestly excessive.

[2] The applicant was 42 years old when he offended and has no prior criminal history. He pleaded guilty to an ex officio indictment. The circumstances of his offending were as follows. On one occasion between April and October 2001 he massaged his 12 year old natural daughter after a ballet lesson. As she lay on her stomach he inappropriately massaged her bottom, vagina and breasts under her clothes for about two minutes.

[3] The complainant, who was 14 years old at sentence, was interviewed by police on 9 December 2004. Her version of events did not disclose the commission of any offence. A few days later the applicant voluntarily attended the police station, apparently because of the deterioration in his relationship with his father-in-law over the applicant's behaviour the subject of the charge. The applicant made full admissions to the isolated incident constituting the offence. He said the girl was wearing shorts and a top when he massaged her, making skin contact on her breasts, bottom and vagina. He said he had been molested as a child. His co-operation with the administration of justice was significant and suggested genuine remorse.

[4] No victim impact statement was tendered from the child but the prosecutor tendered a victim impact statement prepared by the child's grandfather (the applicant's father-in-law) who described himself as the child's guardian. The victim impact statement suggested that the applicant's offending had had a serious effect on the girl but that she seemed to be improving. Defence counsel stated that whilst his client was remorseful and did not wish to challenge the victim impact statement, the applicant did not accept all the facts stated in it. The extent of that dispute was not resolved but it does not seem the learned sentencing judge placed any particular weight on the victim impact statement.

[5] The prosecutor at sentence conceded that the applicant's offending was at the lower end of seriousness for this type of offence but remained a significant breach of a father's trust. He contended that a term of actual imprisonment was required.

[6] The applicant's counsel at sentence stated that the applicant was and remains married to the complainant's mother who is supportive of him. They have seven children aged from 14 (the complainant child) to two years of age. The applicant has a very good work history as a truck driver and has been in his present employment since 2000. He was sexually molested by an uncle when he was

10 years old and later by a camp worker at a school camp. He was genuinely concerned and remorseful that he had behaved in this way to his daughter. He thought that by pleading guilty and accepting responsibility he could in some way make amends to her. He is an active member of his local church where he has been living since he was charged with this offence. He has supervised access to all his children other than the complainant. A number of impressive references were tendered on his behalf. On 11 and 18 July 2005 on the recommendation of the Department of Communities (Child Safety) he attended the Salvation Army counselling service to complete a risk assessment. A letter from that service confirmed that he had been fully co-operative and that his risk of reoffending would be further reduced if he were to engage in a sex offender treatment programme; the applicant has indicated his willingness to participate in that programme conducted by the Salvation Army.

[7] Defence counsel conceded that a prison sentence was open but urged the judge to impose a non-custodial sentence because of the exceptional circumstances. Whilst discussing this submission with defence counsel his Honour observed that in cases of this sort where the matter was prosecuted a sentencing judge was "… bound by the cases that have come through in recent years which suggests that a period of imprisonment is to be served unless there's unusual circumstances". Defence counsel referred the judge to *R v T*;[1] *R v H; ex parte A-G (Qld)*[2] and *R v Jackson; ex parte A-G (Qld)*.[3]

[8] The learned judge's recorded sentencing remarks commence as follows.

> "I find some of those authorities a little difficult to reconcile with the present attitudes of the Court in these matters. Would you just stand up for a short time? I take into consideration in this case that you came forward and went to the police, explained what had happened, and that you have had made significant efforts to make sure that such conduct does not occur again. I'm also satisfied that this has created difficulties within the family.
>
> I have to look at imposing a sentence which will deter such conduct, not only for you, it would seem. I can rest assured from your efforts that it is unlikely to occur again, but I also have to take into account the effects that any sentence I impose has upon other members of the public.
>
> Taking all those factors into account, in my view, a short term of imprisonment is the only appropriate penalty, to be followed by probation. … "

[9] His Honour then imposed a sentence of three months imprisonment followed by 18 months probation.

[10] The applicant through his counsel contends that the judge erred either in believing he had no discretion to impose a non-custodial sentence in the circumstances or failed to give adequate weight to the mitigating circumstances and placed too much weight on the need for general deterrence.

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1 [2000] QCA 282; (2000) 113 A Crim R 439.
2 [2001] QCA 262; CA No 57 of 2001, 9 July 2001.
3 [2001] QCA 445; CA No 206 of 2001, 16 October 2001.

[11] It seems likely that the first sentence of the recorded sentencing remarks set out above was not intended to be part of the sentencing remarks but was rather an observation made by the judge in response to defence counsel's final submission. The sentence appears to have been wrongly included in the sentencing remarks. His Honour's earlier observations to defence counsel[4] indicated that his Honour well understood that a sentence of imprisonment was ordinarily imposed in cases of this kind although it was not mandated where there were unusual or special circumstances. His Honour's sentencing remarks suggest that he appreciated the mitigating factors in this case but was also concerned about the need for general deterrence. I am confident that his Honour well understood that a discretion existed in appropriately special circumstances to impose a non-custodial sentence but determined that, despite the mitigating circumstances, the imposition of a short term of imprisonment followed by probation was preferable.

[12] Although the offence was not the most serious of its type it was a grave breach of parental trust. It is to the applicant's credit that he made admissions and co-operated fully with the administration of justice. The offence could not have been proven without his admissions. He pleaded guilty at an early stage and appears to be genuinely remorseful and making efforts to address his perversion. He had no prior convictions and in other ways has been a responsible citizen. For my part, I would have more confidence in the truth of the judge's observations that the applicant was unlikely to reoffend if the applicant had already completed a sexual offender treatment programme and if there were persuasive expert reports to that effect. Nevertheless the references tendered on his behalf at sentence and his stated remorse and willingness to complete such a course suggest that his prospects of rehabilitation are at least promising.

[13] The special facts of this case may well have allowed the sentencing judge to impose a carefully structured non-custodial sentence such as a three year period of probation with a special condition that he participate in a sexual offender treatment programme or a period of imprisonment ordered to be served by way of an intensive correction order during which he participated in such a programme. The sentence imposed of three months actual imprisonment followed by 18 months probation is, however, in no way manifestly excessive.

[14] I would refuse the application for leave to appeal against sentence.

[15] **JERRARD JA**: In this application I have read the President’s reasons for judgment and the order proposed by Her Honour, and respectfully agree with those.

[16] **FRYBERG J:** I agree with the President that the sentencing judge did not err in his analysis of the nature of the discretion reposed in him.

[17] I also agree that the authorities show that in cases of indecent dealing, a sentence involving some time in actual custody is ordinarily imposed. Such a sentence is not mandatory, but any departure from the ordinary course must be justified by the facts of the particular case.

[18] The evidence before the sentencing judge had some unusual features. They hinted at the existence of facts which might have made the case exceptional. Unfortunately for the applicant the evidence did not in my judgment go far enough.

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4 Set out at [7] of these Reasons.

[19] The evidence hinted that the applicant might have been the victim of some malice from within the family. It hinted at the possibility that no serious harm was suffered by the victim. It hinted at other possibilities. If the hints were correct, the circumstances were indeed unusual. But the applicant did not give oral evidence. He did not try to demonstrate the dynamics within the family both at the time of the offence and at the time of sentencing. He did not call evidence as to the condition of the victim (there was no victim impact statement from her and she had not mentioned the offence to police when interviewed two years after the offence at the age of 14). His wife, to whom he remained married and who still supported him, gave no evidence. Apart from stating that he did not accept everything in it, he did not challenge the so-called victim impact statement made by his father-in-law[5], who was said to want to take the victim overseas. The evidence was left in the state of some uncertainty.

[20] The applicant was, of course, in a dilemma. He ran the risk that by calling evidence, he might be accused of not demonstrating remorse. However if he wished to demonstrate that this was indeed an unusual case, that was a risk he had to take. Unusual facts cannot simply be asserted (unless admitted by the other side). There needs to be evidence.

[21] On the evidence available I am not convinced that this case fell within that unusual class. That being so it cannot be said that the sentence imposed was manifestly excessive. Consequently the application should be dismissed.

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[5] I have some doubt whether a grandfather is a member of the immediate family of the actual victim so as to be within the extended definition of that word in the *Criminal Offence Victims Act 1995*.