SUPREME COURT OF QUEENSLAND

CITATION:	*R v NJ* [2008] QCA 331
PARTIES:	**R** **v** **NJ** (applicant/appellant)
FILE NO/S:	CA No 162 of 2008 DC No 24 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	24 October 2008
DELIVERED AT:	Brisbane
HEARING DATE:	25 September 2008
JUDGES:	MacKenzie AJA, Jones and Daubney JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. That the application for leave to appeal be granted** **2. The appeal be allowed** **3. The sentence imposed on 19 June 2008 be set aside and in lieu thereof the applicant be sentenced for a period of four years, such term to be suspended after six months with an operational period of four years**
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 ALLOWED – GENERALLY – where the applicant pleaded guilty to one count of incest and was sentenced to five years imprisonment to be suspended after one year with an operational period of five years – Where the complaint was made 33 years after the commission of the offence – Whether the sentencing Judge had sufficient regard to the length of delay between the commission of the offence and the making of the complaint – Whether the sentencing Judge had sufficient regard to the ill health of the accused – Whether the sentence was manifestly excessive *Penalties and Sentences Act* 1992 (Qld), s 9(6) *R v B* [2000] QCA 42, considered *R v D'Arcy* [2001] QCA 325, considered

R v G [1997] 1 Qd R 484; [1995] QCA 517, considered
R v Guthrie (2002) 135 A Crim R 292; [2002] QCA 509, distinguished
R v Irlam; ex parte A-G *(Qld)* [2002] QCA 235, cited
R v Janz [2008] QCA 55, considered
R v N [1972] QWN 1, considered
R v Pope; ex parte A-G (Qld) [1996] QCA 318, cited

COUNSEL: K Mellifont for the applicant
G Cummings for the respondent

SOLICITORS: Russo Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MACKENZIE AJA:** I agree that the sentencing discretion miscarried in the respects identified by Jones J. I agree with the orders he proposes for the reasons he gives. I only wish to add the following additional comments.

[2] The case has some features seldom found in incest cases. Unlike the more common situation, there is only one isolated act of incest and no suggestion that any other sexual misconduct occurred at any time. Having said that, the seriousness of the individual offence cannot be minimised because, apart from the breach of trust inherent in the offence, the applicant must have known that his daughter who was 14 and a half years old and sexually inexperienced would have been greatly traumatised by what happened.

[3] When the complainant did tell others including her mother after about two and a half years, the applicant responded in a way that accepted that he had done what she had alleged but in words that were capable of the interpretation that he was not displaying contrition. There appeared to be nothing in the family's reaction to his acceptance of the allegations that suggested that the matter would go any further. No complaint was made to the police until late 2003. For reasons that are unexplained in the material before the court, he was not interviewed by the police for over three years after that.

[4] In the 33 years after the offence, the applicant had not been convicted of any offence and had, according to the material tendered at sentence, been a useful member of his community. In a case like this, where the only offending conduct consisted of a single undeniably serious but isolated and perhaps impulsive act, the conventional notion of rehabilitation has little meaning. The applicant had not contested the allegations and had subsequently lived a life consistent with community expectations of behaviour in the intervening years. That was a factor in his favour. I agree with what Jones J has said about the sentencing remarks concerning the matter having taken 33 years to come to finalisation.

[5] The other issue on which I wish to comment is the extent to which the applicant's current medical conditions should be taken into account in sentencing him. I only wish to add to what Jones J has said by referring to the recent discussion of the subject in *R v Janz* [2008] QCA 55, where *R v B* [2000] 111 A Crim R 302; [2000] QCA 42; *R v Pope; ex parte A-G (Qld)* [1996] QCA 318 and *R v Irlam*; ex parte *A-G* (*Qld)* [2002] QCA 235 were cited, to similar effect to what he has said. It may also be noted that the present case is the converse of *R v Guthrie* [2002] QCA 509

where the offender was suffering, at the time of the incident, from the same condition for which he sought sympathetic treatment on sentencing.

[6] **JONES J:** On 19 June 2008 the applicant pleaded guilty to one count of incest and was sentenced to five years imprisonment to be suspended after one year with an operational period of five years. He seeks leave to appeal against this sentence on the ground that it is manifestly excessive.

[7] His offending occurred during the Christmas/New Year period of 1974/5, more than 33 years ago. The applicant and the complainant, his natural daughter then 14 years old, had been at a swimming hole on the family property at Greenbank with other members of the family. When the others returned to the home, the applicant and the complainant lagged behind. Whilst they were walking back to the house, the applicant pulled down her pants and said he wanted to show her something. He pulled out his penis, pushed the complainant to the ground and had sexual intercourse with her. He withdrew his penis and ejaculated on the grass to the side of her body. She had had no prior sexual experience. She said she felt soreness within the vaginal area for several days afterwards but apparently had no other physical injury. The applicant told her not to tell her mother.

[8] The complainant maintained her silence over this offence for the next 2 and a half years until leaving the family home to reside elsewhere. She first told a friend and then at her friend's urging told her mother. Both of them immediately confronted the applicant who admitted his offending not only to his wife but also to other members of the family.

[9] According to the complainant when initially confronted by her and her mother, the applicant responded in an offhand way by saying, "So what if I did". Whether that comment truly reflects the level of the applicant's remorse may be open to question but it has coloured the complainant's memory of the event. She was hurt also by the fact that her mother returned to live with the applicant after separating for only three days. Her mother and the applicant later divorced. The complainant returned to the former family home to live with her mother for a period after the complainant's first son was born but it seemed their relationship was never fully restored. The complainant maintained what seems to have been cordial contact with the applicant over 30 years prior to her making her complaint to the police on 11 December 2003.

[10] For some reason, as yet unexplained, the police did not contact the applicant about the matter until 24 January 2007. He readily admitted his offending to the police which meant it was never likely that the complainant would ever be required to give evidence.

[11] The complainant maintains she was severely traumatised by this event. She has had throughout her life, a troubled existence which is contributed to by her suffering from a bipolar disorder for which she has had psychiatric treatment and counselling over a long period of time. She has married and continues to live with her husband and a son of that marriage.

[12] Also what is not explained is why the complainant delayed her reporting of this crime for 33 years when she claims to have been so traumatised by it. This delay has had serious consequences for both the complainant and the applicant. For the

applicant, he has had to live with the uncertainty of whether his daughter who, it seems, has never forgiven him would ever complain to the police. Despite that continuing threat he appears to have led a productive life by being constantly in work and not having committed any further offences. He tendered at the sentence hearing a number of certificates attesting to his valuable contributions to the community.

[13] The making of the complaint occurred at a time when the applicant was suffering from a number of debilitating health issues. The report of Dr Kerr shows that the applicant has renal and prostate problems which require his use of a catheter. At present the catheter has to be changed four times a day. The applicant also suffers from Parkinson's disease which prevents him undertaking this delicate task. The condition also involves almost complete inability to write, changes in voice and facial expression, bradykinesia, muscle rigidity, hesitant gait and postural instability. He suffers from bowel cancer for which he has been treated with chemotherapy. He requires ongoing treatment. He has recently been diagnosed as having a left Baker's cyst and thrombus in the left saphenous vein. This condition requires him to take anti-coagulants necessitating regular blood tests. The impact on his life can be summed up by saying that he is unable to get out of bed without assistance, he is unable to shower on his own or to dress himself. Generally he is unable to care for himself. As a consequence it is unlikely that he could live in an ordinary gaol environment and will therefore have to spend the whole of his period of incarceration in a hospital or high care setting.

[14] At the sentence hearing counsel for the prosecution submitted for a head sentence in the order of five to six years imprisonment though he referred to some cases which suggested that the range may go as low as four years for this offending. Counsel for the applicant there submitted the head sentence of four years would be sufficient since there was no requirement for personal deterrence and questions of rehabilitation did not arise. He submitted that having regard to the matters of mitigation and the applicant's poor health that any sentence should be suspended after six months imprisonment.

[15] On appeal there was significant dispute between the parties as to the appropriate range of penalty for cases of incest which occurred on one occasion with a teenage daughter. The cases that were referred to the learned primary judge suggested a range of four to six years imprisonment. These cases were, *R v G*[1]*; R v C*[2]*; R v L; ex parte Attorney-General*[3]*;* and *R v B*[4].

[16] In *R v G*, the offender was convicted after trial of one count of incest of his 12 year old daughter with the jury not being able to agree in respect of two further counts. He was sentenced to six years imprisonment. The complaint was first made some 10 years after the event. The conduct was made worse for the complainant by the complicity of her mother in allowing it to happen. The crime was treated as an isolated offending but regarded as particularly "callous and shameful" because of the force used. The Court of Appeal in that case considered the offending in each of *R v C* and in *R v L*.

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1 [1997] 1 QdR 484
2 Court of Appeal 309/1995
3 [1966] 2 QdR 63
4 [2000] QCA 42

[17] In *R v C* there was one act of incest on a 14 year old daughter occurring 16 years previously. The daughter fell pregnant as a consequence. The offender also pleaded guilty to an attempted incest and indecent dealing of his daughter.

[18] In *R* v *L*, the Attorney-General appealed against a sentence of six years imprisonment for each of 10 counts of indecent dealing and three years imprisonment for each of 11 counts of sodomy on a boy whilst aged between 7-11 years. The offending occurred approximately 30 years before sentencing. The primary judge recommended a parole release after nine months. The Court of Appeal varied the sentence to the extent of removing the recommendation for parole release. The Court of Appeal noted (at p 66) two circumstances in which lengthy delay between the commission of the offence and sentence should result in mitigation. The first is where an offender – "is left in a state of uncertainty caused by the failure to prosecute the case more quickly… The rationale for mitigation in these cases is analogous for which, in jurisdictions where a right to trial is constitutionally or legislatively guaranteed, proceedings may be stayed because of such delay...The second is where the time between commission of the offence and sentence is sufficient to enable the court to see that the offender has become rehabilitated or that the rehabilitation process has made good progress."

[19] In *R v B*, the offender committed incest on his 14 year old intellectually impaired daughter on two occasions. His offending came to the knowledge of the authorities some 20 years after its occurrence. By this time the offender had developed physical disabilities including severe complaint of emphysema. As a consequence he was unable to do much more than sit around at home, leading a rather isolated existence. He was in constant need of oxygen in order to offset the illness. He was sentenced to six years imprisonment with parole eligibility after two years. McPherson JA took what has been described by counsel before us as a "rather robust approach" to dealing with an offender so afflicted. McPherson JA said:-

> "The real question, and the focus of serious concern in this case, is the fact that the applicant's present state of health is very poor indeed. He suffers from emphysema, and the prognosis is that he will probably live for only about another two years. His Honour took account of this fact and also the applicant's pleas of guilty by recommending parole after two years.
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> In *Pope* (unreported, Court of Appeal Qld, No 271 of 1996, 30 august 1996) it was said that the ill health of an offender is a factor tending to mitigate punishment when it appears that it will impose a greater burden on the offender than on others, or when there is a serious risk that imprisonment will have a gravely adverse effect on his health.
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> It may seem, and no doubt is, a rather callous and heartless to say so, but, apart from the loss of personal liberty necessarily involved in the imprisonment of the applicant, it does not appear to me that the applicant will be much worse off in prison than he is now at home…
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> It will no doubt be expensive to look after his needs in detention, but the Crown naturally and rightly faces that prospect with resignation if not equanimity."

Whilst as a general statement it is correct to say that an offender should not be relieved entirely of the consequence of his offending by reason of poor health, the degree of disability and the increased risk that the conditions in gaol might have on

the offender's health are relevant considerations. The applicant is in a far more parlous position than was the offender in *R v B* and the demands of his care impose much greater responsibilities and cost on the Corrective Service authorities.

[20] On appeal Ms Mellifont, counsel for the applicant, drew attention to the fact that in each of these cases referred to which the learned primary judge, the offending was much more serious than that of the applicant. Thus, she submits that his Honour's acceptance of five years being within the appropriate range was misconceived. Ms Mellifont, showing commendable industry, undertook a detailed survey of cases involving single counts of incest on a teenage daughter to further submit that the correct range for the applicant's offending was between 3-4 years imprisonment. She identified the following cases:-

> Head sentence of **3 years imprisonment**
> *R v B*; ex parte Attorney-General Court of Appeal 300/1984
> *R v HAQ* [2008] QCA 234
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> **3 ½ years imprisonment**
> *R v N* [1972] QWN 1
> *R v T* [1999] QCA 330
> *R v L* [1995] QCA 250
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> **4 years imprisonment**
> *R v Re* Court of Appeal 125/1996
>
> **5 years imprisonment**
> *R v Kl* Court of Appeal 450/1995
> *R v C* Court of Appeal 342/1985
> *R v D* Court of Appeal 106/1990

[21] These cases were contrasted with the cases referred to by the learned primary judge as identified above. It is not necessary to analyse each of these cases but rather I propose to refer to two cases where the Court undertook a review of relevant penalties. In *R v N* the nearest sentence in time to the applicant's offending, the Full Court undertook a review of punishments in cases of incest over a 10 year period. They noted during this period that "the sentences have usually varied between two years and eight years. The longest sentences almost invariably related to very young children". That case concerned incest committed on an 18 year old daughter over a 12 month period. The sentence of 7 and a half years imprisonment with hard labour was set aside for one of 3 and a half years imprisonment with hard labour.

[22] In *R v R* the offender pleaded guilty on an ex officio indictment to four counts of indecent dealing with circumstances of aggravation and one count of incest. The incest occurred when the child was 11 years of age and involved having sexual intercourse with her in a bedroom which lasted for only a few minutes. The offender voluntarily removed himself from the family home before being charged. He immediately attended upon a psychiatrist for treatment then showed remorse by voluntarily going to the police and making admissions before any complaint was made. The Court of Appeal undertook a review of some of the cases which are again relied upon before this Court. In the upshot the sentence of five years imprisonment was set aside and a sentence of four years imprisonment with a recommendation for parole after 12 months was substituted in lieu. Although the mitigating factor of the offender's admission was more significant than in the

present case his offending was worse and was perpetrated on a daughter at a much younger age. The applicant contends that guidance should be taken from this case rather than those used by the learned primary judge.

[23] The respondent contends that the learned primary judge fixed a head sentence within range. Mr Cummings of counsel referred to *R v WN*[5] where Keane JA said that "reference to the authorities suggest that the circumstances of cases of incest are so diverse that it is difficult to speak of a "normal range"." In that case an offender had committed incest on his 22 year old daughter and was sentenced to 4 and a half years imprisonment to be suspended after 18 months with an operational period of five years. An application for an extension of time within which to appeal was dismissed on the grounds that there was no sufficient prospect that the sentence would be reduced.

[24] The prosecution relied particularly on the case of *R v L*[6] as one which shows a similar level of culpability to the present case. That was a case not of incest but of maintaining a sexual relationship over a nine month period including one isolated offence of incest. The complainant was, at that time, 15 years of age. The offender was sentenced to four years imprisonment with eligibility for parole after serving 15 months. The penalty was not disturbed but in the course of his reasons Jerrard JA suggested that for an offence of maintaining a range of 5-6 years imprisonment was appropriate. The circumstances of that case shows much worse offending than the circumstances with which we are concerned.

[25] The prosecution contends that the list of cases set out in the Schedule simply shows the breadth of the sentencing discretion but does not show error on the part of the sentencing judge in this instance.

[26] Offences of incest occur in circumstances of considerable diversity both in terms of the act itself and the consequences for victim and perpetrator. Cases might be classified by reference to the age of the complainant, the number of acts of incest, whether the act is isolated or part of a continuum of sexual abuse. They may be classified by the degree of force used or the adverse physical and emotional consequences for the complainant and the intellectual capacities of either party. The range of penalty for offending must necessarily be somewhat arbitrary. What is clear however is that the cases referred to the learned primary judge in this instance each described offending which was more serious than that of the applicant. Without having the balancing effect of cases of equivalent or lesser offending the approach to the head sentence in my view has caused his Honour's discretion to miscarry and has resulted in the imposition of a head sentence which is too high.

[27] The applicant suggests there is a further source of error by reason of the learned primary judge using the effect of delay as a factor against him. The following passage appears in his Honour's reasons:-

> "I take account of the fact that it was a single count of incest, that it occurred when your daughter was 14 and a half, it took her virginity, it has had a significant and drastic effect on her life, it has been awaiting being dealt with, one might say, for 33 years, **and I balance**

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5 [2005] QCA 359

6 [2002] QCA 268

> **that against the positive things** in respect of mitigation which I have outlined." (Record p 20/58)

[28] The applicant submits that the use of delay of such length in this way is impermissible, particularly when the responsibility for the delay rested with the complainant. The prosecution contends that delay of itself is not a mitigating factor unless there has been demonstrated remorse and rehabilitation. The prosecution asserts that neither had been shown in this instance, referring particularly to the complainant's allegation about the applicant's response when first confronted.

[29] In my view there is ample evidence of the applicant's remorse arising from his admission to the family, his acceptance by the family thereafter, his ongoing relationship with the complainant and his response when finally approached by the police. The delay has meant that he has had to face charges when he was less capable physically and mentally to cope with the consequences. In *R v D'Arcy*[7] Chesterman J said (at para [162]):-

> "Lapse of time itself is not a reason for extending leniency towards an offender, particularly in cases of sexual offences involving a breach of trust or abuse of position… Where, however, the delay has given rise to circumstances which would make it unfair not to reduce the sentence, or where during the time between offence and prosecution the offender has become rehabilitated it is appropriate to mitigate the punishment".

The applicant has, since his offending, apparently led a constructive life and contributed to the community. All of which suggests some rehabilitative process. See also *R v CC*[8]. In the circumstances of this case I regard the delay as a significant mitigating factor. As a result, its use as an aggravating factor indicates that the sentencing discretion has miscarried.

[30] As a consequence of both these errors, the applicant now requires to be re-sentenced for his offending having regard to the provisions of s 9(6) of the *Penalties and Sentences Act* 1992. The circumstances of the applicant's offending has been described above and particularly the fact that the complainant was 14 and a half years of age at the time of the offence. There was no physical harm to the complainant apart from some vaginal soreness, though it is acknowledged that the offending had a significant effect on the complainant's emotional wellbeing. The applicant is now 78 years of age, he has had no prior convictions. He is a man of good character with a good work history and has contributed to the community. Personal deterrence is not an issue. The applicant has, in my view, demonstrated remorse, both when initially confronted by the complainant and by his wife and more particularly by his response to the police investigation. Having regard to similar cases with this level of offending a head sentence would properly fall within the range of 3 to 4 years. I would choose the upper end of that range.

[31] Having regard to all the circumstances of this case, particularly the applicant's early plea of guilty when his offending was finally reported to the authorities and his co-

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7 [2001] QCA 325

8 [2004] QCA 187

operation with them and the impact on him of that action being delayed for 33 years despite his admission when confronted suggests to me that early suspension of the sentence was called for in this case.

[32] Ordinarily the provision for suspending the sentence after 12 months would appear to be a significant concession and not be open to attack as resulting in an overall sentence being manifestly excessive. However, in the unique circumstances of this case and particularly the gross disability which the applicant bears, the sentence in my view ought to be further moderated. But for his imprisonment, he most probably would have had a permanent catheter in place. The delay in undertaking this procedure has significant ongoing difficulties for him. It seems that this relieving procedure will only be undertaken on his release from gaol and the return to his pre-sentence medical advisors. Additional material supplied after the hearing of the appeal suggests that prisoners may have access to private medical practitioners and private medical treatment at their own expense. That expense would include associated costs such as transport, cost of corrective services officers escorting the prisoner and as well would require the approval of the Chief Executive or delegate before it could be undertaken. Arrangements have been made for the applicant to have a further urology review but there has been no response to this request. Whilst it has been observed that the applicant remains mobile whilst in prison there are a number of features about his physical limitations and his need for ongoing treatment which suggests that consideration must be given to an earlier than normal suspension of his term of imprisonment.

[33] To take account of all of these features I would order that the term of imprisonment be suspended after six months with an operational period of four years. I would therefore order –

1. That the application for leave to appeal be granted.
2. The appeal be allowed.
3. That the sentence imposed on 19 June 2008 be set aside and in lieu thereof the applicant be sentenced for a period of four years, such term to be suspended after six months with an operational period of four years.

[34] **DAUBNEY J**: I respectfully agree with the reasons for judgment of Jones J, and with the orders he proposes.