SUPREME COURT OF QUEENSLAND

CITATION:	*R v AAI* [2009] QCA 253
PARTIES:	**R** **v** **AAI** (applicant)
FILE NO/S:	CA No 96 of 2009 DC No 70 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction & Sentence)
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	1 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	18 August 2009
JUDGES:	McMurdo P, Holmes JA and White J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for an extension of time within which to appeal against conviction and sentence is refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where the applicant pleaded guilty on ex officio indictment to indecent dealing with a child, rape and possession of child exploitation material – where applicant seeks extension of time within which to apply for leave to appeal against conviction and sentence – where application to appeal against conviction and sentence was filed over two years after the time limit under s 671 *Criminal Code* – whether the application for extension of time should be granted *Criminal Code* 1899 (Qld), s 349, s 671 *Meissner v The Queen* (1995) 184 CLR 132; [1995] HCA 41, applied *R v Dickeson; ex parte A-G* [2004] QCA 78, cited *R v Gadaloff* [1999] QCA 286, applied *R v MAN* [2005] QCA 413, distinguished *R v NI* [2007] QCA 442, considered *R v SAR* [2005] QCA 426, considered *R v SAU* [2006] QCA 192, cited

R v Tait [1999] 2 Qd R 667; [1998] QCA 304, considered
R v WAG [2002] QCA 304, distinguished

COUNSEL: The applicant appeared on his own behalf
M B Lehane for the respondent

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

[1] **McMURDO P:** The application for an extension of time to appeal against conviction and sentence should be refused for the reasons given by White J.

[2] **HOLMES JA:** I agree with the reasons of White J and with the order her Honour proposes.

[3] **WHITE J:** The applicant seeks an extension of time within which to obtain the leave of the court to appeal from the sentences imposed upon him and leave to withdraw his pleas of guilty.

[4] By s 671(1) of the *Criminal Code* 1899 (Qld) an applicant for leave to appeal against sentence and/or conviction must give notice of the application within one calendar month of the sentence and/or conviction in the approved manner.

[5] The applicant appears before the court by video link from the corrections facility where he is detained to argue his own case. He pleaded guilty in the District Court at Maroochydore on 26 February 2007 on *ex officio* indictment containing 50 counts of indecent dealing with a child with circumstances of aggravation, 11 counts of digital rape and one count of possession of child exploitation material. There were two complainants.

[6] He was sentenced to five years imprisonment for each of the indecent treatment charges, eight years imprisonment for each rape and five years imprisonment, the maximum penalty, for possession of material, all to be served concurrently with a parole eligibility date of 26 February 2010 to reflect the plea of guilty and his co-operation with the administration of justice.

[7] The applications were filed on 28 April 2009, just over two years beyond the time limited by the *Criminal Code*.

[8] Section 671(3) gives a discretion to the court to extend time. The approach of this court to such an application was discussed in *R v Tait.*[1] The court will examine whether there is any good reason shown to account for the delay and to consider, overall, whether it is in the interests of justice to grant the extension of time. The latter consideration may involve some assessment as to whether the appeal seems to be a viable one. Observations of Williams JA with whom Muir JA agreed in *R v NI,*[2] considering an application to extend time within which to appeal against conviction, are apt:[3]

> "When the Court is considering an application to extend time when almost two years have elapsed since conviction it is appropriate to have regard to overall strength of the evidence against the applicant.

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1 [1999] 2 Qd R 667.
2 [2007] QCA 442.
3 [2007] QCA 442 at [54].

> If the court can conclude that the applicant has not been wrongly convicted, notwithstanding possible errors at trial, it is not in the interests of justice for there to be a further trial. As with the proviso, the test is whether a substantial miscarriage of justice has actually occurred."

[9] In his notice of application for extension of time the applicant states that 10 days after he commenced his sentence he received a letter from his solicitors dated 2 March 2007 to the effect that if he chose to exercise his right to appeal against the sentence he must contact the office of the solicitors within 28 days of the date of the decision. The letter writer added that in the event that the solicitors did not hear from him prior to that time the solicitors would assume that he did not wish to appeal the sentence and his matter would be at an end. The letter writer indicated that:

> "…we consider that the sentence imposed upon you is not manifestly excessive such to warrant an appeal against the conviction and is perhaps more favourable to you in light of the circumstances of the matter/s."

The reference should, of course, have been to the sentence not the conviction. The writer also indicated that the agreed schedule of facts signed by the applicant was included as was the report prepared by Dr Ian Curtis. The applicant was told that should he wish to obtain a copy of the transcript he would need to contact the State Reporting Bureau.

[10] The applicant explains that he had little option but to accept his lawyer's expert opinion and believed they would not help him even if he wished to appeal. He makes reference to the restrictive conditions in the prison which made any attempt to appeal before the expiration of the period almost impossible. He adds as further reasons for not seeking to appeal a reluctance to cause further distress to the family, that he was still in shock as a consequence of being imprisoned, that his access to a telephone was restricted and that he did not have access to a phone book to find another lawyer.

[11] Furthermore, the applicant states that his decision-making ability was for many months greatly affected by him taking a prescription tranquilizer drug which made him compliant during the day and enabled him to sleep at night. He said he continued to take this drug for several months after his incarceration.

[12] The applicant said that he was supplied with a "committal hearing" transcript in June 2008. He is clearly referring to the sentencing hearing. It was provided to him by a law firm acting in a criminal compensation application, presumably against him. He says that only after reading the court transcript and reading the comments made by the sentencing Judge was he "made aware of all of the anomalies and transgressions present, and possible grounds for an appeal".

[13] The applicant explains the year long delay from June 2008 as being taken up researching the criminal law, consulting the prison legal aid lawyer and the official legal visitor and preparing his arguments. He says that he has not been emotionally prepared nor mentally brave enough to self-represent his own appeal earlier. The main reason, he says, why he did not appeal earlier was the additional trauma it could inflict on the main victim of his offences, his step-daughter, but he states that she was killed in a car accident on 3 November 2008.

[14] The applicant's decision not to seek leave to appeal his sentence or to have his pleas of guilty to the rape charges set aside was a considered one. There is good reason for legislative time limits. Curial proceedings must have measurable finality. The delay is lengthy. Even accepting some of the difficulties which will be faced by prisoners seeking to file their own appeals and the other matters raised by the applicant, there are long periods where the applicant could have advanced his application for leave to appeal but chose not to do so. However, even a very long delay may not prove insuperable to an extension of time being granted if it is in the interests of justice to do so.[4]

[15] Because of the delay in bringing this application to extend time the material available to the court is quite limited. All exhibits have been returned to the police. The indictment is not on the court file. If the applicant still has the agreed statement of facts and Dr Curtis's report he has not placed them before the court.

[16] The circumstances of the offending can be understood from a combination of the transcript of the proceedings in the District Court and the sentencing Judge's remarks. All but four of the offences of indecent treatment were against the daughter of his then long-term de facto partner. He accepted her as his adopted step-daughter. The other victim was his 12 year old grand niece. The step-daughter was aged between nine and 12 and the applicant was aged between 57 and 61 during the period covered by the indictment. The offending commenced in mid-2002 and continued for four years, taking place either in the home which the applicant shared with the child's mother or, after he separated from her in late 2004, at his residence during access.

[17] The unusual feature of the offending was that most counts occurred while the step-daughter was asleep or the girls were unaware of being videoed when awake. It can be inferred from the sentencing remarks that one of the agreed facts was that the applicant knew from very early in his relationship with the mother that his step-daughter was an exceptionally heavy sleeper. It was not until a sensational reporting of the case in a local newspaper article that the child was told what had been done to her. She had regarded the applicant as a father figure and loved and trusted him.

[18] The applicant has been diagnosed by Dr Curtis as a paedophile with bizarre sexual fantasies. He installed video cameras in the child's bedroom and in the bathroom and filmed her without her knowledge. He also used a digital camera to photograph her including her genitalia when she was asleep. The video stills and the digital camera photographs together revealed a number of the charged offences showing the applicant touching the child indecently or raping her with his finger. He kept a detailed electronic diary in which he recorded meticulously his actions coloured by what the sentencing Judge described as his "bizarre sexual fantasies" directed against the child. When police accessed the computer they discovered that the applicant had saved approximately 10,000 images of the child extracted from the videos and the photographs taken with the camera. He had deleted many more.

[19] The child eventually discovered the cameras but she was persuaded by the applicant not to take the matter further by threatening that he would commit suicide. He continued to offend. Ultimately members of the family became aware of what had had happened and he agreed to seek psychiatric help at the Nambour Hospital and police were notified.

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[4] *R v Tait* [1999] 2 Qd R 667 at 668; *R v NI* [2007] QCA 442 per Williams JA at [3].

[20] The applicant's grounds of appeal should he be granted leave are numerous. Many are directed to the conduct of his legal advisors. He complains that his guilty pleas to the 11 rape charges were improperly obtained because they were induced by pressure and threats of additional rape charges being laid if he did not plead. The transcript of proceedings shows that he was represented by two counsel, one very experienced in criminal defence work. Counsel indicated to the court that the applicant had signed instructions indicating his wish to enter a plea of guilty in relation to each of the charges on the indictment and was content to be arraigned in the short form.

[21] When the applicant was asked by the associate had he read each of the counts contained in the indictment, he answered "Yes, I have". When asked did he understand fully the contents of each of the counts contained in the indictment, he answered "Yes I have". When asked had he the opportunity of discussing each of those counts with his counsel, he answered "Yes". When asked had he received advice from his counsel in respect of each of those counts, he answered "Yes". He agreed to plead to the counts in the indictment without each separate count being read individually to him. He then pleaded "Guilty" and said, in response to being called upon by the associate, that he had nothing to say.

[22] It is the pleas to the rape charges that concern the applicant. He wishes to have them set aside on the ground that the photographic evidence does not support those offences and the language used by him in his diary is not to be taken literally. The applicant, apparently, struggles with the concept of rape by digital penetration making reference to the female anatomy and by how much, if at all, his finger penetrated the complainant. Section 349 of the *Criminal Code* provides that:

> "(1) Any person who rapes another person is guilty of a crime.
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> …
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> (2) A person rapes another person if –
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> (a) the person has carnal knowledge with or of the other person without the other person's consent; or
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> (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or
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> (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
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> …"

[23] In his written submissions the applicant says:

> "The entire evidence used by the prosecution was my computer diary. It clearly describes in detail…no aggravation, no threats, no violence, no penetration, no pain, no anguish, not even the slightest discomfort enough to wake her up. It also describes not only my bizarre thoughts but my feelings not to hurt her and other relevant facts relevant to my benefit during sentencing. All of which were 'conveniently' omitted by the prosecution because they counteracted and confused their charges."

The sentencing Judge had a folder containing a print out of the diary which he had read several days before sentence.

[24] The applicant maintains that he had indicated initially that he would fight the single rape charge with which he was originally charged but could not challenge 11 charges apparently selected at random. He was induced to plead guilty, he says, to avoid trauma to the victims and family and, since he was not disputing the indecent treatment charges, he was told he should accept the rape charges and would get "only an extra six months".

[25] Having pleaded guilty to the charges against him the applicant requires leave of the court to withdraw his pleas to those charges that he now contests and the onus lies on him to establish that a miscarriage of justice took place when the court accepted and acted on his pleas by convicting him at the hearing on 26 February 2007.[5]

[26] In *Meissner v The Queen*[6] Brennan, Toohey and McHugh JJ said:[7]

> "A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty. An inducement to plead guilty does not necessarily have a tendency to pervert the course of justice, for the inducement may be offered simply to assist the person charged to make a free choice in that person's own interests. A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea."

[27] In *Gadaloff* the Court noted that because the law regards a plea of guilty made by a person in possession of all the facts and intending to plead guilty as "the most cogent admission that can be made",[8] it is necessary that a miscarriage of justice be demonstrated before leave is granted to withdraw such a plea.

[28] The applicant contends that improper pressure was brought to bear upon him as well as a failure to explain and analyse the evidence supporting the charge of rape. In *Meissner,* Brennan, Toohey and McHugh JJ noted:[9]

> "Argument or advice that merely seeks to persuade the accused to plead guilty is not improper conduct for this purpose, no matter how strongly the argument or advice is put. Reasoned argument or advice does not involve the use of improper means and does not have the tendency to prevent the accused from making a free and voluntary choice concerning his or her plea to the charge."

Deane J said:[10]

> "Thus, for example, a degree of pressure which would be quite legitimate if exerted by an accused's own lawyer acting solely in the accused's interests [e.g. in a 'plea bargaining' or 'sentencing

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5 *R v Gadaloff* [1999] QCA 286 at [4].
6 (1995) 184 CLR 132.
7 (1995) 184 CLR 132 at 141.
8 [1999] QCA 286 at [5], referring to *Sagiv v The Queen* (1986) 22 A Crim R 73 at 81.
9 (1995) 184 CLR 132 at 143.
10 (1995) 184 CLR 132 at 149.

> indication' situation] may be completely unacceptable if exerted by a stranger acting for a collateral and selfish purpose of his or her own."

[29] Similarly, Dawson J noted:[11]

> "It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."

[30] Nothing that the applicant has submitted either in writing or in his oral submissions to the court are persuasive that his pleas of guilty involved a miscarriage of justice or were attended by such unfairness as to warrant him the opportunity to be permitted to withdraw his pleas of guilty to the rape charges. He made an informed decision on legal advice to plead guilty in respect of charges that appeared supported by the evidence. The application for an extension of time within which to obtain leave to withdraw his pleas of guilty to the rape charges should be refused.

[31] The applicant is concerned that the sentencing Judge did not sufficiently take into account that no violence was used against the victims. His Honour expressly distinguished the more serious cases to which he was referred by counsel, rejecting similarities with, for example, *R v BAY*[12] and *R v SAS*.[13] The applicant finds the articulation by his Honour that he had not encountered such a case in all his years on the bench so no similar comparable case could be found as an admission of incompetence.[14] The sexual abuse of a child for four years recorded photographically and in an electronic diary while she slept is unusual. For example, the photographs apparently show the applicant having sex with an inflatable doll with a photograph of the child's face pasted on to the face of the doll. The facts also include that he took some fluid, including ejaculate from his penis, and placed it inside the genitals of the child. The sentencing Judge rejected the prosecutor's submission in seeking a sentence of 10 to 12 years that the digital rape carried out by the applicant was as serious as penile rape.

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11 (1995) 184 CLR 132 at 157.

12 [2005] QCA 427.

13 [2005] QCA 442.

14 In his written submissions the applicant wrote, "(he also mentions during the first part of the preceding [sic] 'I could never understand these difficult cases') Yet after this admission he sentenced me without consultations with a more experienced court. (Not enough time to expand)." A perusal of the transcript at p 18, where his Honour is recorded as making the statement complained of, reveals that his Honour was discussing with the applicant's counsel where the applicant's remorse for what he had done to the children ended and concern for his own situation began. His Honour went on to observe that remorse was not something that could be compartmentalised and that "the most important thing is the … plea of guilty."

[32] One of the girls was self-harming as a result of the revelations while the step-daughter at 13 was struggling to deal with the gross invasion of her person over four years.

[33] The court, appropriately, referred to a number of cases dealing with maintaining a sexual relationship and the indecent dealing cases for some guidance as to the appropriate range where no violence was involved.

[34] The applicant's counsel submitted below for a sentence similar to that in *R v SAU*[15] where eight years imprisonment with a recommendation for eligibility for parole after three years was imposed in respect of one count of maintaining a sexual relationship for two years with a circumstance of aggravation being incestuous carnal knowledge. The applicant's conduct in *SAU* involved showing the child pornographic films, touching her vaginal area and masturbating her and himself, using a vibrator on her, making her perform fellatio on him and ultimately engaging in regular penetrative intercourse for a period of about 12 months.

[35] A more useful case is *R v Dickeson; ex parte A-G*[16] where the applicant pleaded on *ex officio* indictment to two counts of maintaining a sexual relationship with a child under 16 with a circumstance of aggravation, one count of indecent treatment of a child under 12 and one count of possession of child abuse computer games. The offender was sentenced to 10 years imprisonment on the maintaining charges, five years for the indecent treatment and one year for possessing child abuse computer games. The Attorney-General appealed seeking a sentence of 15 years. The applicant cross-applied against the excessiveness of the sentence. The child victims were aged between six and eight years old. Police located stored material of the little girls and the applicant engaged in sexual acts, including partial vaginal intercourse and fellatio, as well as other indecent activities. The images showed both children performing for the camera, happy, laughing and acting in a seductive manner. There was no physical violence and they were not physically injured. They were groomed and corrupted. Not surprisingly, in that case, too, the sentencing judge noted that none of the numerous cases said to be comparable were completely on point. Like *Dickeson*, the case against the applicant was overwhelming – the evidence consisting of material which he had himself prepared, including the photographic images and the diary.

[36] The applicant particularly relies upon *R v WAG*[17] as indicating a more appropriate penalty. The applicant in that case pleaded guilty to two counts of unlawfully and indecently dealing with a girl under the age of 12 years. He was sentenced to six months imprisonment and probation for two years with a counselling condition. At the time of the offences the applicant was in a de facto relationship with the complainant's mother. The child was nine years of age and the complaint was not made to the police until over two years after the offences had occurred. The first offence occurred when the applicant was lying on a bean bag while the complainant's mother played a PlayStation. While he lay there the complainant pressed her vaginal area against his hand. This continued for five to 10 minutes until he moved his hand away. He told investigating police that he knew that what he was doing was wrong and that he could get into trouble for it. The second offence occurred some time later when the complainant child approached him and

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15 [2006] QCA 192.
16 [2004] QCA 78.
17 [2002] QCA 304.

asked him to rub her vagina in the same way as he had in the first incident. The applicant said that he did so on the outside of her pants for about a minute during which time the complaint was pushing her vaginal area against his hand. The applicant subsequently left the relationship and said that one motivating factor was to extricate himself from the situation which he did not know how to handle. He subsequently told the mother of the complainant what had happened between him and the girl. He co-operated in the investigation by giving a record of interview, consenting to a full hand up committal and notifying that he would plead guilty at an early stage. The application for leave to appeal against sentence was refused.

[37] In *WAG* the level of offending was confined to two opportunistic offences quite unlike the prolonged and invasive conduct of this applicant.

[38] Another decision to which the applicant makes reference is *R v MAN*.[18] That case had no similarities to the present. An 18 year old young man was taken into the home by the mother of a quite dysfunctional family which included twin girls a few years younger who were sexually experienced and who enthusiastically competed for the offender's sexual favours and with whom they each had two children. The relationships were quite open.

[39] The applicant also mentioned *R v SAR*[19] in his outline. The offender in that case confessed of his own volition 12 years after offending sexually against two young step-daughters, including two counts of sodomy, counts of indecent treatment and one count of maintaining a sexual relationship over a six year period. He pleaded guilty on *ex officio* indictment. His sentence of eight years imprisonment on the sodomy counts and maintaining count with a recommendation for parole after three years was reduced on appeal to seven years with a recommendation after two and a half years. The applicant would no doubt contend that his is a relatively less serious case than that of *SAR*. The surrendering of himself to the police and his subsequent rehabilitation in the intervening years was a feature which operated to reduce his sentence from eight years to seven.

[40] Other submissions raised by the applicant encompass his criticism of the present law of rape extending to digital penetration and are not relevant to sentence. The applicant demonstrated before the Court little insight into the gravity of his offending or understanding of its effect on his victims. In searching for an appropriate sentence the applicant has not demonstrated that the sentencing Judge fell into error in imposing the sentences that he did. To have imposed the maximum sentence for the offence of possession of child exploitation material given the number and kind of images was not manifestly excessive. Accordingly, the prospects of success were leave to be granted are very poor.

[41] The explanation for the delay in seeking leave to appeal against sentence is not compelling and, together with the unlikely prospects of success were leave to be granted, dictate that this court should refuse the application for an extension of time within which to seek leave to appeal against sentence.

Orders

[42] The application for an extension of time within which to appeal against conviction and sentence is refused.

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[18] [2005] QCA 413.

[19] [2005] QCA 426.