

IN THE COURT OF APPEAL  
SUPREME COURT OF QUEENSLAND

CA No. 326 of 2006

THE QUEEN

v.

MICHAEL TODD ATKINSON  
(Applicant)

Application for extension of time to appeal against conviction  
Applicant's submissions

The application

1. The applicant seeks an extension of time to appeal his conviction before Samios DCJ (“the trial Judge”) at Rockhampton on 25 November 2005. The applicant was convicted of one count of indecent treatment of a child under the age of 16 and under his care (“the offence”) and was sentenced to six months imprisonment. The applicant was granted parole after serving four months in custody; that is, on 24 March 2006.
2. No complaint is made in respect of the penalty imposed as it has been served.

The test for extension of time

3. As pointed out by the respondent’s counsel, the relevant principles are as enunciated in *R v Tait* [1999] 2 Qd R 667<sup>1</sup> at paragraph [5]:

“... The Court will examine whether there is any good reason shown to account for the delay and consider overall whether it is in the interests of justice to grant the extension. This may involve some assessment of whether the appeal seems to be a viable one. It is not to be expected that in all such cases the Court will be able to assess whether the prospective appeal is viable or not, but when it is feasible to do so, the Court will often find it appropriate to make some provisional assessment of the strength of the applicant’s appeal, and take that into account in deciding whether it is a fit case for granting the extension. Other factors include prejudice to the respondent, but in the case of criminal appeals this is not often a live issue. Another factor is the length of the delay, it being much easier to excuse a short than a long delay.”

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<sup>1</sup> As recently adopted in *Kobyvski v Queensland Police Service* [2007] QCA 50 by Mullins J at para [11].

Delay

4. The application for extension was filed by the applicant on 4 December 2006. Thus there has been a delay of approximately 11 months.
5. Although some other documents have been filed by the applicant in this Court, the most orderly explanation for the delay appears in his affidavit of 7 March 2007.
6. It is accepted that the delay has not been short; however, it can in part be explained by his impecunious circumstances and his depressive illness. There is unlikely to be any tangible prejudice to the respondent.

Assessment of the viability of an appeal

7. The applicant's trial was brief and in some respects quite straightforward. There are however two issues that suggest an appeal against conviction is relevantly viable. These are the issues surrounding the lack of particularity in the complainant's allegation insofar as to the date of the offence, and separately the admission of evidence at the trial to demonstrate "the inappropriate sexual interest" in the complainant by the applicant. The two points either alone or in combination demonstrate that an argument that there has been a miscarriage of justice is viable. Brief observations in respect of these two points are made below.

Particulars

8. It is conceded from the outset that trial counsel did not seek formal particulars; nor was any complaint made about this at trial.
9. The Crown case was opened on the basis that the offence was committed at the applicant's house "in Brecknell Street between 30 June 1997 and 11 April 1998" (R14, L40), a period spanning ten months or so. Other than that, the complainant added that she only ever stayed at this house with the complainant on one occasion (R23, L28) and that "it could have been a weekend", possibly a Saturday night (R34, L40).
10. Bearing in mind that there was a significant delay of nearly six years before any complaint was made, this lack of specificity compounded the difficulties for the applicant to properly defend the allegation.

11. It is somewhat trite that an accused is entitled to know sufficient details about the allegation so as not to be embarrassed in his/her defence. A day unknown over a ten month period should have warranted a complaint from the applicant's counsel for more specificity. It is difficult not to be a little sympathetic towards the trial counsel in this matter as he received the brief the day before, after a jury had been empanelled by another counsel (R5 – R10). Nevertheless it made it difficult if not impossible for the applicant to marshal a sensible defence case to meet the allegation in so far as disputing the opportunity for the commission of the offence, which he denied.

Evidence of "inappropriate sexual interest"

12. In addition to the single complaint of indecent dealing, the complainant gave evidence that the applicant, a year or so later, had spoken about the size of his penis and the size of her mother's vagina (R28, L7 – R29, L8). Although the language is a little coarse, it is probably useful to set out her complete allegations in this respect:

"All right. Were there any conversations between the two of you relating to sexual matters? – Michael, yeah, yeah.  
 And what about? – Not particularly just between us. There was one time we were at the Robinson Street house where he's living now. I don't know how it came about but Michael said that I was jealous of him and Mum and he said that he had a six inch dick and that Mum's hole was too big because we wrecked her inside".  
 HIS HONOUR: Miss Spence, would you like a break?—Yes  
 Yes, we'll have a break.

THE COURT ADJOURNED AT 10.45 A.M.  
 THE COURT RESUMED AT 11.02 A.M.

MR WHALLEY: Thank you, you Honour. Now, Amanda, before the break you were telling the Court about a time when the defendant talked to you about matters of a sexual nature. Do you recall how many such conversations took place? – How many sorts of those conversations?

Yes? – That was the main one that I remember but he -----  
 Where were you when that conversation took place? – Robinson Street, 95 Robinson Street, North Rockhampton.

And how old were you at the time, approximately? – I was a bit older then, I think it could have been 15, around 15.

And I am just going to ask you to tell the Court what was said in that conversation as you recall it? – I don't know how the conversation came about but Michael said that he had a six inch dick and that I was jealous of him and Mum because he reckons that I wanted him and then he spoke about the size of my mother's vagina was too big and that from having us children it wrecked her inside and that she should have an operation to have it made me smaller.

Prior to the incident in Brecknall Street, is it your evidence that no similar conversations similar to that had taken place? – No". (R28, L7 – R29, L8)

13. It seems from the reason for the brief adjournment that this evidence was surrounded with a high degree of emotion.
14. This evidence had been foreshadowed by the Crown prosecutor in his opening of the Crown case (R16, L20 – 30). No objection was made to its reception. However it is difficult, if not impossible, to see the forensic advantage for the applicant having this evidence admitted into evidence. See *R v BCC* [2006] QCA 435 at para [16].
15. The trial judge gave the following direction in respect of it:
- “In addition to the evidence of the complainant concerning the offence set out in the indictment, you heard evidence about what she says the defendant said about his penis and her mother’s vagina. You can use that evidence for one purpose only. If you accept that evidence, it shows, the prosecution says, the inappropriate sexual interest in Amanda by the defendant thus placing the alleged evidence in its proper context.
- You should have regard to that evidence, not the subject of the charge, only if you find it reliable. If you accept it, you must not use it to conclude that the defendant is someone who has a tendency to commit the type of offence with which he is charged. So it would be quite wrong for you to reason you were satisfied he spoke that way therefore it is likely that he committed the offence.
- Remember that evidence comes before you only for the limited purpose mentioned above and before you could find the defendant guilty of the charge, you must be satisfied beyond reasonable doubt, that the charge has been proved by evidence relating to the charge. If you do not accept the complainant’s evidence relating to the words used by the defendant, take that into account when considering her evidence relating to the alleged events, the subject of the charge before you” (Summing-up p10, L10 – p11, L2).
16. This evidence, it is submitted, should not have been admitted. Firstly, the alleged conversation is said to have taken place sometime between 14 and 21 months after the primary incident. Secondly, it is not evidence that suggests that the applicant had a “sexual interest” in the complainant or that places the alleged indecent dealing in any context at all. All it did was quite prejudicially paint the applicant as a coarse and offensive person. The complainant infers that it was not said to her in private.<sup>2</sup> It was of no real assistance in determining the “proper context” of the charge brought; which, it seems, was alleged to have been an opportunistic and isolated incident – the complainant had not at any stage suggested that the applicant had manipulated the situation in any respect to create the opportunity, indeed she stated that she stayed with him on that night because she wanted to (R22, L30-34).

<sup>2</sup> “Not particularly just between us” R28, L10.

17. Moreover, the trial judge's direction was one that is recommended in the Benchbook for "uncharged acts". The alleged conversation was not an uncharged act at all. It was not even an act. In that sense the direction was perhaps a valiant attempt to address the unfair prejudice associated with the evidence. However, his Honour does not attempt to make the obvious and necessary comment about the significant gap in time between the alleged incident and the time the comment is said to have been made. Moreover, the direction did not make the distinction that was identified in *R v BCC* [2006] 435 at para [19] viz., "the jury would have had to be satisfied that, on the facts of the case", that the uttering of the words "had a sexual rather than" some other "connotation before they could make use of it for the purpose for which it was admitted". As in *BCC* the direction here clearly did not do that such that:

"If the jury applied it literally, they may have been left with the impression that they only had to be satisfied that the incident happened rather than that it was of a nature that enhanced the prosecution allegation that the offence charged occurred".

18. This evidence would never have passed the high threshold of it having a strong degree of probative force in relation to a fact in issue that outweighs its prejudicial effect: *Phillips v The Queen* (2006) 158 A Crim R 431 at 236 paragraph [79], *Gipp v The Queen* (1998) 194 CLR 106 per Gaudron at 112-113 paragraphs [10]-[13], Kirby J at 156 paragraph [141] and Callinan J at 164 paragraph [174].

19. These observations are made in a case which could not be said to have been an overwhelming Crown case. Indeed, it was a wholly uncorroborated allegation made nearly six years after the incident allegedly occurred.

20. These matters suggest that an appeal is at least viable. It is respectfully submitted that they bear further examination at an appeal, and notwithstanding the lengthy delay, the absence of any real prejudice to the Crown militates in favour of granting leave to extend time to appeal.

A. Boe

BOE LAWYERS  
9 March 2007