

SUPREME COURT OF QUEENSLAND

CITATION: *R v Atkinson* [2007] QCA 68

PARTIES: **R**
v
ATKINSON, Michael Todd
(applicant)

FILE NO/S: CA No 326 of 2006
DC No 188 of 2004

DIVISION: Court of Appeal

PROCEEDING: Application for Extension (Conviction)

ORIGINATING COURT: District Court at Rockhampton

DELIVERED EX
TEPMORE ON: 9 March 2007

DELIVERED AT: Brisbane

HEARING DATE: 9 March 2007

JUDGES: Williams and Keane JJA and Muir J
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **Application refused**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL-PRACTICE AND
PROCEDURE – QUEENSLAND – TIME FOR APPEAL
EXTENSION OF TIME – WHEN REFUSED – where
applicant was convicted on one count of indecent treatment
of a child under 16 and under his care – where sentenced to
six months imprisonment – where applicant did not pursue an
appeal until after his sentence was served – whether there was
a good reason for delay – whether appeal would have good
prospects of success – whether interests of justice require the
granting of an extension
R v Tait [1999] 2 Qd R 667; [\[1998\] QCA 304](#), CA No 210 of
1998, 6 October 1998, applied

COUNSEL: A Boe (*sol*) for the appellant
D R MacKenzie for the respondent

SOLICITORS: Boe Lawyers for the appellant
Direction of Public Prosecutions (Queensland) for the
respondent

WILLIAMS JA: The applicant was tried in the District Court at Rockhampton on the 25th of November 2005 on one count of indecent treatment of a child under 16 and under his care. The offence was alleged to have occurred between 29 June 1997 and 12 April 1998. He was found guilty and sentenced to six months' imprisonment on 25 November 2005.

He says in an affidavit that he was advised by his barrister that he had good prospects of success on appeal but was advised by his solicitor not to appeal until after he had served his sentence because on appeal the sentence could be increased. He in fact served his sentence and was released in about March 2006.

On release he saw his trial solicitor and had discussions about an appeal. Thereafter, over approximately six months he saw a number of other solicitors who gave advice with respect to his position.

He claims that it was not until October 2006 that a solicitor informed him of the 28 day time limit for lodging an appeal. He still did nothing for a further two months. It was not until the 4th of December 2006 that an application for an extension of time was lodged.

It should also be noted that in about September 2006 a criminal compensation claim had been foreshadowed.

The applicant's affidavit also discloses that he had been under medical treatment for depression and other illnesses from about April 2006.

None of that material satisfies me that the applicant has established good reason for the delay in not lodging the application until December 2006. Mr Boe, who appeared for him on the hearing of this application, submitted that it was more important for the Court to consider the viability of an appeal if an extension of time was granted. In that regard it should be noted that the applicant gave evidence at the trial denying the commission of the offence and called evidence in support of his defence. That evidence included a suggested motive for the complainant making a false complaint. Notwithstanding those matters the jury convicted.

One can also ask if a retrial was ordered what would the applicant gain. He has already served his time and he would still have convictions for other sexual offences against his name.

In particular Mr Boe relied, in support of his submissions, on two points: firstly, the lack of particularity in the offence; and secondly that inadmissible evidence was admitted before the jury. So far as lack of particularity is concerned it appears to be the fact that the complainant was only at the applicant's residence on one occasion during the period and in consequence there could have been little doubt as to the

occasion in question. Further, no point was taken at the trial as to want of particularity.

In the course of the complainant giving evidence it was elicited that approximately 14 months after the event giving rise to the charge the applicant discussed with her the size of his penis and the size of his wife's vagina. That evidence was said to be evidence of inappropriate sexual interest by the applicant in the complainant.

The learned trial judge dealt with that in the summing-up as if it was an uncharged act. That strictly would not be so but it is clear that he told the jury that it had no relevance other than possibly indicating the relationship between the applicant and the complainant.

In the whole context of the trial it was not a major issue and the admissibility of that evidence does not, particularly after this lapse of time, indicate that any appeal would have good prospects of success.

Further, applying the test laid down by this Court in *R v Tait* [1999] 2 QdR 667, in my view it has not been established that it is in the interests of justice to grant an extension of time.

In all these circumstances this is not a fit case in which to grant an extension of time and the application should be refused.

KEANE JA: I agree.

MUIR J: I agree.

WILLIAMS JA: The order of the Court is the application is refused.
