Incani v Davis [2008] NTSC 44

PARTIES:	INCANI, Paul Lawrence v DAVIS, Stuart Axtell
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 39/08 (20732904)
DELIVERED:	30 October 2008
HEARING DATES:	15 October 2008
JUDGMENT OF:	MILDREN J
APPEAL FROM:	Court of Summary Jurisdiction

CATCHWORDS:

SENTENCE – Gravity of offence – whether sentence should be fully suspended – sexual offence against child – offender in position of authority – complainant's age – whether aggravating facts proved beyond reasonable doubt – purposes and weight to be given to victim impact statement given orally by child victim – appeal allowed – appellant re-sentenced

Statutes:

Child Protection (Offender Reporting and Registration) Act, s 7, s 37(1), s 91
Criminal Code, s 128, s 128(1)(a), s 128(1)(b), s 128(2)
Sentencing Act, s 5(2)(b), s 43 , s 106B(3), s 106B(9), s 188(b)
Sex Offenders Registration Act 2004 (Vic)

References:

The Shorter Oxford English Dictionary on Historical Principles, 3rd ed, Oxford University Press, 1973

The Macquarie Dictionary, 3rd ed, Macquarie Library, North Ryde, 1997

Citations:

Referred to:

Church v Western Australia (2007) 177 A Crim R 23

Director of Public Prosecutions (Vic) v Ellis (2005) 11 VR 287; (2005) 153 A Crim R 340

Ibbs v The Queen (1987) 163 CLR 447

Kelly v The Queen (2000) 10 NTLR 39

Munungurr v The Queen (1994) 4 NTLR 63

R v Olbrich (1999) 199 CLR 270

Ross v Svikart (1989) 99 FLR 134

VIM v Western Australia (2005) 31 WAR 1

Williams v The Queen (Court of Criminal Appeal (NT), 19 December 1997, unreported)

REPRESENTATION:

Counsel:

Appellant:	R Richter QC and P Elliott
Respondent:	R Coates

Solicitors:

Appellant:	Erskine Rodan & Associates
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID number:	mil08435
Number of pages:	17

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Incani v Davis [2008] NTSC 44
No. JA 39/08 (20732904)

BETWEEN:

PAUL LAWRENCE INCANI
Appellant

AND:

STUART AXTELL DAVIS
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 30 October 2008)

[1] This is an appeal against sentence.

[2] The appellant pleaded guilty to one count of committing an act of gross indecency on a child and that the child was 16 years old, but under the age of 17 years and that the child was in his special care at the time of the act, contrary to s 128(2) of the Criminal Code. The maximum penalty imposed for a breach of that provision is imprisonment for eight years. The learned Magistrate imposed a sentence of imprisonment of 15 months suspended after three months and his Honour backdated the sentence for a period of 10 days to take into account the period that the appellant was held upon remand.

The Facts

[3] The appellant is now a 40 year old male secondary teacher who, at the time of the offence, resided in a Darwin suburb.

[4] The appellant came to know the child whilst tutoring her through a private company. At that time the child was 15 years of age having been born on 31 January 1991. At the time of the offending in May 2007, the child was 16 years old.

[5] The appellant initially provided maths tutoring to the child as part of a small group session at the offices of his employer before commencing private tuition on a one to one basis at the child's home.

[6] On 1 November 2006, the appellant was driving past a bus stop when he saw the child waiting for a bus. He took the view that she looked unhappy and sent her a text message along the lines of "smile, cheer up". The child responded and from then on text messages were sent between them on a regular basis.

[7] In December 2006, the appellant left the Northern Territory to travel interstate for the school holiday period. During this period the appellant and the child engaged in text message conversations of an intimate nature. In January 2007, the appellant went to Tasmania to take up a teaching contract. From then on the appellant and the child continued to engage in text messages of an increasingly intimate nature where sexual matters were discussed. During this period the child also sought the appellant's advice

and instructions on her maths problems. On one occasion the appellant also encouraged the child to send photographs of herself in lingerie to him via her mobile phone. The photographs were sent and subsequently deleted by the child from her telephone. The photographs which were sent were not sexually revealing.

[8] In late May 2007, the appellant returned to the Northern Territory. Sometime during the day of 27 May, the appellant arranged to meet with the child in secrecy at Lake Alexander. He requested the child wear a pair of sunglasses and a hat as a disguise. On being advised by the child that she did not own a hat, the appellant told her that he would provide her with one.

[9] When they met at Lake Alexander, the appellant provided the child with a black baseball cap to wear. He also gave her a pewter necklace on a black string as a present.

[10] The appellant and the victim both laid down, presumably on the grassed area, and commenced kissing. The appellant lay fully clothed on top of the child and commenced rubbing her intimately on her pubic region through her clothing and caressed her breasts. He then began to “dry hump” the child by grinding his pelvic area into hers. The appellant requested the child to manipulate his nipples with her tongue. She complied with this request. Sometime later he encouraged the child to change out of her clothing into her swimming costume in front of him. After swimming in the lake together, the appellant encouraged the child to lie on his naked back whilst they dried

off in the sun. He then encouraged the child to remove her bikini top and lay back against his back.

[11] The appellant then rolled over and lay facing the child at which time he caressed her naked breasts and rubbed her clitoris through her bikini bottoms. When the appellant was interrupted by the sound of children's voices nearby, the child replaced her clothing. Thereafter they spent the remainder of the day at the lake.

[12] Following his return to Darwin, the appellant had continued to provide home tutoring services to the child. These sessions took place at the child's residence at least twice a week until some time prior to 29 July when the child's mother discovered that the appellant had been conducting an inappropriate relationship with her daughter and sent him an email advising him that he was no longer to have any further contact with the child. However, the appellant and the child continued to communicate by SMS text messages and emails until 19 September 2007, when the child advised her school teacher of the relationship and the matter was reported to the authorities.

[13] At 8.30 am on Wednesday 5 December 2007, the appellant was arrested by police. The appellant was offered an opportunity to participate in an electronic record of interview but the appellant exercised his right to silence. He was later charged and remanded in custody where he spent 10

days prior to being granted bail with reporting conditions. The appellant has no prior convictions.

Ground 5 – The learned Magistrate erred in his treatment of the child's victim impact statement

[14] At the sentencing hearing the child read a prepared victim impact statement which was presented in very dramatic and emotional terms. The victim impact statement was permitted to be read out by the learned Magistrate in accordance with s 106B(3) of the Sentencing Act. No application was made by counsel for the appellant to cross examine the child in accordance with s 106B(9) of the Act. This is not surprising. In my experience this is never done for obvious reasons.

[15] No appeal point is raised in relation to the admissibility of the victim impact statement. Nevertheless, it should be borne in mind that victim impact statements may serve more than one purpose. The primary purpose of a victim impact statement is to inform the court of the harm suffered by the victim as a result of the offending. But, sometimes a victim impact statement may serve a secondary purpose, namely, to provide a cathartic effect, particularly where the victim impact statement is given orally by the victim. As Mr Coates readily conceded, the victim impact statement in this case served both of those purposes. In such cases it can sometimes cause difficulties for the sentencer whose task it is to take into account the harm suffered by the victim as a result of the offence, pursuant to s 5(2)(b) of the Sentencing Act.

[16] The emotional language of the victim impact statement indicates that the feelings of pain experienced by the victim are deeply felt, but is also an indication of exaggeration.

[17] It was submitted by counsel for the appellant that the consequences claimed by the victim are out of all proportion to the offence to which the appellant had pleaded guilty. It was submitted that the true explanation for the severity of the consequences was the fact that the relationship which existed between the appellant and the victim had broken up.

[18] Counsel for the respondent referred me to the judgment of Wheeler JA in *Church v Western Australia*[1] where her Honour said:

> "Leaving aside risks such as possible pregnancy or disease, which are significant in their impact on persons of any age, unwise sexual conduct may result in effects upon relationships with others, may cause a person to become the subject of gossip and innuendo, and may lead to some distortion of a person's attitude to sexual relationships in general. In a more mature person, such matters are unlikely to have the same significance as they would for a teenager."

[19] It was submitted by Mr Coates that the break down of the relationship was the inevitable result of the offending. To some extent this is so, but it was a relationship which, in any event, could not have lasted. The fact is that the relationship did survive the offending for some time as they continued to communicate via text messages until the matter came to the attention of the authorities. Nevertheless, I accept that the offending was one of the causes of the breakdown of the relationship.

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[1] *Church v Western Australia* (2007) 177 A Crim R 23 at 25, para 7

[20] Mr Coates also referred me to some observations made by the Court of Appeal of the Supreme Court of Western Australia in *VIM v Western Australia*[2] where the Court (Wheeler and Roberts–Smith JJA and Miller AJA) said[3]:

> "In the light of those experiences, courts now understand much more clearly the destructive effect of all such offending (whether accompanied by overt violence or not) upon a child's capacity to trust others and to form relationships, and upon the child's sense of self-worth. Particularly in cases of frequent or prolonged abuse, an inability to form adult relationships, or an inability to maintain them, exaggerated doubts and fears in relation to the parenting of the complainant's own children, and disrupted schooling which adversely affects the complainant's future educational and employment prospects, are very common. Also frequently encountered in such cases are drug or alcohol abuse, self-harm, and attempted suicide."

[21] Those comments have to be read in context. The appellant in that case had been indicted on 44 counts of sexual abuse against two complainants and had been ultimately convicted on 24 counts mostly of very serious sexual offences. Not all the consequences referred to in *VIM's* case were claimed by the child in this particular case, but I do note that she complained of sleep deprivation, migraine and cluster headaches, dizziness, nausea, panic attacks, vomiting, self-loathing, isolation from her friends, a sense of rage and that it affected her schooling. I do not think it would be unfair to attribute these consequences to the offending.

[22] The appellant submitted that the learned sentencing Magistrate erred in his treatment of the complainant's victim impact statement in that the learned

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[2] *VIM v Western Australia* (2005) 31 WAR 1
[3] *VIM v Western Australia* (2005) 31 WAR 1 at 58–59, para 291

sentencing Magistrate noted that "the offence has had an ongoing impact on the complainant". It was submitted that the victim impact statement could not be used without differentiating the harm suffered as a result of the offending from the harm suffered as a result of the appellant's and the complainant's relationship and its ultimate cessation. It was submitted that the victim impact statement revealed that the complainant was deeply unhappy with the appellant, but does not, with some exceptions, reveal any harm attributable to the offending. It was submitted that the learned Magistrate could not make a finding based on the victim impact statement that the offence has had an ongoing impact on the complainant.

[23] I do not accept this submission. In my opinion, the consequences which I have noted are all properly attributable to the offending, albeit that the offending has exacerbated the kind of reaction one would normally expect with the end of a romantic relationship, even of a non-sexual kind, between a teenager and a much older man.

[24] Where consequences are said to flow from an offence which are so out of the ordinary as to aggravate the offending, and the victim impact statement is not supported by independent evidence such as medical evidence, the Court must remember that the Crown must prove any aggravating circumstance beyond reasonable doubt in accordance with the decision of the High Court in *R v Olbrich*[4]. Absence of proper proof may cause the Court to entertain a reasonable doubt about an aspect or some aspects of a

[4] *R v Olbrich* (1999) 199 CLR 270

victim impact statement. Usually a court will be astute to ensure that exaggerated complaints in victim impact statements which are not supported in this way will not be given full weight in the absence of proper proof.

[25] With that said, the consequences claimed by the victim in this case, stripped of the rhetoric and allowing for the fact that the consequences are an exacerbation of the inevitable, are not so unusual as to require the Court to seek further proof. I do not think that the learned Magistrate erred. I would dismiss this ground of appeal.

Ground 4 – Error in relation to the use made of the appellant's plea of guilty

[26] During the course of the sentencing hearing, the learned Magistrate indicated to counsel that he considered that it was a late indication of a plea and that he may hold it against the appellant. It was submitted during the course of the plea hearing by counsel for the appellant that the plea was at the earliest opportunity. Counsel for the appellant explained to the learned Magistrate the circumstances under which the plea arose. It is common ground between the counsel on the hearing of the appeal that the plea was at the earliest opportunity.

[27] In his sentencing remarks the learned Magistrate referred to the plea and accepted that by his plea the appellant had saved the Crown and the community expense and that his plea was evidence of remorse.

[28] His Honour did not indicate specifically the discount which he allowed for the plea as recommended by the Court of Criminal Appeal in *Kelly v The Queen*[5]. However, the failure to mention this is not a sentencing error. This ground of appeal is not made out.

Ground 2 – The learned Magistrate erred in finding that the appellant engaged in a planned and sustained seduction of the complainant and that the offending was not spur of the moment or opportunistic

[29] The learned Magistrate found that:

> "This was a planned and sustained seduction by a mature adult of a young lady. The facts have it that that which happened on 27 May 2007 was not something that on the spur of the moment, was not something could be said to be committed in an opportunistic way by the defendant, was not something that was incidental to an innocent arrangements. To suggest otherwise is fanciful in my view. There was nothing innocent about asking the girl to arrive in a disguise, for example."

[30] Subsequently the learned Magistrate said:

> "In this case there was evidence of gradual persuasion over quite some time which I have categorised as a planned and sustained seduction, which in my view does aggravate the matter."

[31] At the sentencing hearing, the prosecution made no submission that the offence was aggravated in the manner found by the learned Magistrate.

[5] *Kelly v The Queen* (2000) 10 NTLR 39

[32] The primary meaning of the word "seduce" is to induce a woman to surrender her chastity[6] or to induce her to have sexual intercourse[7]. The facts do not show that there was a seduction in either sense.

[33] Further, to induce or to persuade suggests that the female is either not interested or at least disinterested so that inducement or persuasion is necessary. Nor could his behaviour properly be described as "grooming"[8]. The facts in this case suggest nothing other than willingness on the part of the child who was as romantically involved with the appellant as he was with her. There is no evidence of any threats, inducements, promises, rebuffs or other indicia. This may be contrasted with the observation made by Wheeler JA in *Church v Western Australia*[9] where her Honour remarked:

> "that there was nothing to suggest to any rational person that the complainant had invited the appellant to engage in the offending, or that she had any way indicated consent or interest in sexual behaviour with him."

[34] In order for a conclusion to be arrived at that the offending was of this character there needed to be proof beyond reasonable doubt in accordance with the principles enunciated by the High Court in *R v Olbrich*[10].

[35] Mr Coates did not seek to support the learned Magistrate's decision on this point, but submitted that it did not really matter because the learned Magistrate was correct in rejecting the submission that the offending was

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[6] *The Shorter Oxford English Dictionary on Historical Principles*, 3rd ed, Oxford University Press, 1973, p 1927
[7] *The Macquarie Dictionary*, 3rd ed, Macquarie Library, North Ryde, 1997, p 1922
[8] See *Church v Western Australia* (2007) 177 A Crim R 23 at 26, para 10
[9] *Church v Western Australia* (2007) 177 A Crim R 23 at 26, para 11
[10] *R v Olbrich* (1999) 199 CLR 270 at 281, para 27

not a spur of the moment or opportunistic one. Even if there had been some planning by the appellant, I do not accept that the finding of the learned Magistrate that there was a gradual and planned seduction over a long period of time can be characterised as unimportant. I would therefore allow the appeal on this ground.

[36] Another difficulty is whether or not the facts warranted a rejection of the submission and a finding that the offending was not opportunistic. As this was raised in mitigation, for such a finding to be made in the appellant's favour, the appellant needed to establish this on the balance of probabilities[11]. Unquestionably, the facts demonstrate that the appellant was very much in love with the child and wanted to meet her in a semi-private fashion albeit in a public place because he was in love with her. The fact that he suggested that she wear a disguise does not necessarily lead to the inference that he planned to commit an offence. It is also consistent with the possibility that, because they were going to meet in a public place, he did not want her to be recognised, because he must have known that the relationship was foolish and improper. However, it was not illegal. Perhaps he hoped that when they met there would be some opportunity to express their love, but it is another matter entirely to infer that he must have intended to step across the threshold into an area forbidden by law. If that had been his intention I would have expected him to have arranged for them to meet in a much more secluded setting.

[11] *R v Olbrich* (1999) 199 CLR 270 at 281, para 27

[37] The way this was handled in the court below is also of some significance. Counsel for the appellant submitted that it was a spontaneous matter arising out of the fact that they were both pleased to see each other after he had been away in Tasmania for several months and that the offence occurred on the spur of the moment. There was no indication by the learned Magistrate that he did not accept that submission and the Crown did not seek to be heard in relation to it. Counsel for the appellant was therefore entitled to assume that the submission had been accepted. Unless the learned Magistrate was of the opinion that the submission passed the bounds of a reasonable possibility, (and I note that the learned Magistrate rejected the submission observing that it was fanciful), the proper course to have been followed if the learned Magistrate did not accept the submission was to have asked the prosecutor first. The prosecutor may have said that the Crown accepted that this was an opportunistic offence. If so that would ordinarily have been the end of the matter. Alternatively, the Crown may have taken a neutral position or may have embraced the position taken by his Honour. In that case his Honour should have indicated that he still was of the same mind as he had indicated previously and given the appellant an opportunity to call evidence[12].

[38] However, I do not consider that the submission was fanciful. The learned Magistrate's rejection of the submission was clearly founded upon his erroneous finding that the appellant had planned a sustained seduction of the

[12] *Ross v Svikart* (1989) 99 FLR 134 at 138–139; *Mununguri v The Queen* (1994) 4 NTLR 63 at 73–74; *Williams v The Queen* (Court of Criminal Appeal (NT), 19 December 1997, unreported) at 7–8

child. I think that the facts enable an inference to be drawn that the appellant had not formed an intention to commit a criminal offence at any time prior to when he and the child actually met at Lake Alexander. I would therefore allow the appeal on this ground as well.

Re-sentence

[39] The maximum penalty imposed by the Legislature for an offence of this kind is imprisonment for eight years. However, the same maximum penalty applies whether the offence is caused by committing an act of gross indecency or whether the offence is committed by an adult who has had sexual intercourse with such a child.

[40] It is clear that the maximum penalty prescribed by s 128 was reserved for the worst type of case falling within s 128(1)(a) and is not an appropriate penalty for the worst type of case falling within s 128(1)(b)[13].

[41] The offending that objectively was very much at the lower end of the scale. There were no aggravating features present such as the use of force, threats of force, or a pattern of attempts at persuasion or pressure[14]. Sexual intercourse (whether in the form in which those words are commonly understood or in the form of its extended meaning under the Criminal Code) did not occur. The facts indicate that the child was a willing participant. On the other hand there were the consequences to the victim as previously indicated and they must properly be taken in account.

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[13] See *Ibbs v The Queen* (1987) 163 CLR 447 at 451–452
[14] *Church v Western Australia* (2007) 177 A Crim R 23 at 26, paras 10–11

[42] So far as the appellant is concerned, he had no prior convictions and he was a person of positive good character, who on the evidence was unlikely to re-offend. His referees who know him well indicated that he has no history of being attracted to young females. One of his referees was a lecturer in psychology who had known the appellant for over 20 years. He was regarded by his referees as respectful of women, kind, compassionate, generous, helpful and nurturing with a passion and commitment to learning and teaching.

[43] As a result of the conviction in this case he will lose any hope of employment in his chosen career. That is clearly a relevant circumstance[15].

[44] As a result of his conviction for this offence and the sentence of imprisonment which must be imposed because of s 188(b) of the Sentencing Act, the appellant is a Territory reportable offender under s 7 of the Child Protection (Offender Reporting and Registration) Act. He will retain that status for eight years (s 37(1)). Under s 91 he will be prohibited from engaging in employment as a teacher of children, or being engaged in child-related employment. The appellant is now living in Victoria. He will be required under the Sex Offenders Registration Act 2004 (Vic) to register under that Act as well and will be subject to similar obligations and restrictions in that State. The fact that he is subject to the reporting conditions of this legislation is not ordinarily relevant, the only exception

[15] See *Director of Public Prosecutions (Vic) v Ellis* (2005) 11 VR 287 at 294, para 17; (2005) 153 A Crim R 340 at 347, para 17

being where the reporting conditions operate with unusual severity upon a particular offender[16]. There is nothing to indicate that here.

[45] His plea of guilty was made at the earliest opportunity and as the learned Magistrate accepted, this was an indication of his remorse. His plea of guilty also meant that the victim was not required to give evidence and subject herself to cross-examination. In my opinion, the appellant was entitled to a discount in the order of 30 per cent of the head sentence which otherwise should have been imposed for his plea of guilty and remorse. It is also relevant to whether or not the sentence should be partially suspended.

[46] Other factors to be borne in mind are the disparity in ages between the offender and the victim in this case and the breach of trust involved. Of course in all such cases there will be a breach of trust because of the nature of the relationship which is inherent in the offending and which makes the offending criminal.

[47] I agree also with the learned Magistrate that there needs to be a head sentence which will indicate the Court's denunciation of the conduct involved.

[48] Having regard to the fact that appellant is unlikely to reoffend and has already spent 10 days in custody, I think it will be sufficient if I impose a sentence of imprisonment for nine months, suspended forthwith, the

[16] *Director of Public Prosecutions (Vic) v Ellis* (2005) 11 VR 287 at 293–294, para 16; (2005) 153 A Crim R 340 at 347, para 16

sentence to be backdated by 10 days to allow for the period of time that the appellant had already been in custody. I would fix a period of 12 months as the period during which the appellant must not re-offend if he is avoid the consequences of s 43 of the Sentencing Act.

Orders

[49] The formal orders of the Court are that the appeal is allowed and the sentence imposed by the learned Magistrate is quashed. In lieu thereof the appellant is sentenced to a term of imprisonment for nine months suspended forthwith. The sentence is backdated for a period of 10 days to take into account the period of time already spent in custody. The operative period of the suspension is 12 months calculated from today.
