SUPREME COURT OF QUEENSLAND

CITATION:	*R v B; ex parte A-G* [2002] QCA 308
PARTIES:	**R** **v** **B** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 141 of 2002 DC No 162 of 2002 DC No 164 of 2001 DC No 165 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	23 August 2002
DELIVERED AT:	Brisbane
HEARING DATE:	6 August 2002
JUDGES:	McPherson and Williams JJA and Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal.** **2. Set aside the sentence imposed on Count 4 and substitute a sentence of two years imprisonment, to be served cumulatively on the sentences imposed on 8 June 2001.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – APPLICATIONS TO INCREASE SENTENCE – OFFENCES AGAINST THE PERSON – where respondent convicted of one count of carnal knowledge with a circumstance of aggravation, six counts of indecent dealing and one count of deprivation of liberty – where Attorney-General appeals against sentences imposed CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR

OTHER CROWN LAW OFFICER – APPLICATIONS TO INCREASE SENTENCE – OFFENCES AGAINST THE PERSON – whether trial judge erred in the exercise of the sentencing discretion – whether the sentences adequately reflected the offences before the court, considering existing convictions for like offences and mitigating factors – whether the totality principle applied

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – APPLICATIONS TO INCREASE SENTENCE – OFFENCES AGAINST THE PERSON – whether trial judge erred in attaching excessive weight to psychiatric reports detailing the effects of injuries previously suffered by respondent

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – APPLICATIONS TO INCREASE SENTENCE – OFFENCES AGAINST THE PERSON – whether the appellant has demonstrated manifest inadequacy in the sentence, supporting an inference that there was error

R v F [1996] QCA 490; CA No 418 of 1996, 6 December 1996, considered
R v Rossi (1988) 142 LSJS 451, applied
R v T [2002] QCA 132; CA No 30 of 2002, 12 April 2002, followed

COUNSEL: R G Martin for the appellant
S Cousins for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Primrose Couper Cronin Rudkin for the respondent

[1] **McPHERSON JA:** I agree with the reasons of Holmes J. The appeal should be allowed and the sentence imposed on count 4 should be increased to imprisonment for 2 years.

[2] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Holmes J, and there is nothing I wish to add thereto. The order should be as proposed therein.

[3] **HOLMES J:** The Attorney-General appeals against sentences imposed on the respondent in respect of one count of carnal knowledge with a circumstance of aggravation, six counts of indecent dealing and one count of deprivation of liberty.

[4] In respect of the count of unlawful carnal knowledge the respondent was sentenced to 12 twelve months imprisonment, and in respect of each of the indecent dealing and deprivation of liberty charges to six months imprisonment, all to be served

concurrently, but cumulative upon a three year sentence for rape imposed on 8 June 2001. The learned sentencing judge made a recommendation for consideration for post prison community-based release from 7 June 2003 (halfway through the total sentence period). He also made a declaration in terms of s 19 of the *Criminal Law Amendment Act* 1945 requiring the respondent to report his address to police for a period of five years.

[5] The respondent was aged between 37 and 40 years at the time of the offences. He had some minor criminal history of dishonesty and had been sentenced to wholly suspended sentences of 9 months and 3 months respectively in 2000, but had not until the rape conviction been convicted of any offence of a sexual nature. The offences the subject of this appeal were committed against three different complainants. The first of the complainants was 15 at the time of an offence of indecent dealing which occurred between December 1995 and January 1996. She was visiting the respondent's house with a friend. While purporting to scratch her back, the respondent placed his hands on her breasts under her clothing for a period of some two seconds before she moved away. The second complainant was 14 at the time offences were committed against her between December 1995 and January 1996, and was again a visitor to the respondent's house. She was scratching his back when he touched her with his right hand in the vaginal area, initially on the outside of her underpants and then underneath. The incident took less than a minute. He then scratched her back and touched the side of her breasts, desisting when she told him to stop. On a third occasion, the same complainant was travelling with the respondent's family and was in a motel swimming pool when he came up to her and touched her on the breast, placing his hand inside her swimwear.

[6] The most serious offences were committed, in April 1998, against the third complainant. She was 15 and, as a friend of the respondent's step-daughter, was staying at his house. In the first of the instances involving her, the respondent tickled her while she was watching television and then grabbed her, through her clothing, on the breast. A couple of days later the respondent pulled her hands behind her back, placed handcuffs, which he used in the course of his security business, on her wrists, and told his step-daughter to sit on her legs. While that was happening he lifted the complainant's top and sucked on her left breast for about 10 seconds. He then stopped and took the handcuffs off.

[7] A couple of days later the complainant spent an evening drinking bourbon with the respondent and his step-daughter to the point of fairly severe intoxication. She went to bed and to sleep, but woke to feel the respondent unclipping her track pants and pulling her underpants to one side. She was facing away from him and pretended to be asleep; in her words, "I knew what was going on, but I was drunk and I wanted to see what he would do". He penetrated her vagina with his penis and ejaculated. Because of difficulties in rebutting a s 24 defence, the Crown in respect of this incident accepted a plea of guilty to unlawful carnal knowledge with a circumstance of aggravation (that the complainant was at the time under the respondent's care).

[8] As already indicated, the respondent was at the time of sentence serving a three year sentence for rape of his step-daughter as well as a nine month sentence of imprisonment for indecent dealing with her. Those sentences were imposed, after his conviction by a jury, by the same judge at first instance here. His remarks on the earlier occasion were tendered. They show that the indecent dealing incident involved his having massaged his step-daughter's breasts over 40 to 50 seconds.

The rape involved, according to his Honour's remarks, minimal penetration; but it occurred after the respondent had applied pressure to his step-daughter's throat causing her difficulty in breathing.

[9] It is clear that the learned sentencing judge took into account on that occasion a number of the same mitigating factors as in the present case. They included the fact that the respondent had suffered severe burns as a volunteer fireman, resulting, in the view of the psychiatrists, Drs Reddan and Fama, who had examined him, in his suffering from post-traumatic stress disorder. His Honour accepted that the effects of his injuries affected the respondent's judgment when he committed the offences the subject of appeal here, and were also likely to make imprisonment more difficult for him. He took into account, too, the effects of the respondent's imprisonment on his family, financially and emotionally. Two of his children had physical disabilities and one was experiencing some adverse psychological consequences from her father's imprisonment. The learned judge also took into account the fact that the respondent had had to be placed in isolation in prison, having been threatened because of matters involving his brother. And, of course, he gave the respondent credit for remorse manifested by a plea of guilty, obviating any need for cross-examination of the complainants.

[10] Mr Martin for the Crown argued firstly, that error could be detected in his Honour's exercise of the sentencing discretion when the total sentence of four years imposed in respect of the earlier rape and the offences now the subject of appeal was considered. That sentence did not, he submitted, reflect the criminality of the offences taken together. He pointed by way of a comparable sentence to the decision of this court in *R v F*[1]. In that case a head sentence of eight and a half years imprisonment for rape, with lesser concurrent sentences being imposed for six counts of indecent dealing with a child under sixteen years and four counts of wilful exposure to indecent material, was upheld.

[11] Mr Martin also contended that the learned sentencing judge had attached too much weight to the effects of the respondent's injuries, given the opinion of Dr Reddan that if the complainants of whose allegations she was informed were credible, the behaviour suggested predatory and opportunistic seeking of victims, and Dr Fama's diagnosis of heterosexual paedophilia. As well, too much weight had been given to the adverse consequences of imprisonment on the respondent's family. There may, he suggested, have been a "double counting" of mitigating factors resulting in too low a sentence.

[12] The argument that one should detect error in the relative lowness of the combined sentences seems to me to come dangerously close to a submission that the totality principle requires an increase of the sentences to reflect the overall criminality of the respondent's behaviour, not only in committing the present offences, but in committing the earlier rape. But the whole point of the principle is to ensure that the aggregation of individual sentences is not overwhelming.[2] To apply it here to

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1 Unreported, CA 418/96; 6 December 1996.

2 "There is a principle of sentencing known as the principle of totality, which enables a court to mitigate what strict justice would otherwise indicate, where the total effect of the sentence is merited by the individual crimes become so crushing as to call for the merciful intervention of the court by way of reducing the total effect" per King CJ in *R v Rossi*, unreported Court of Criminal Appeal of SA; 20 April 1988 applied in *Kelly v The Queen* (1992) 33 FCR 536 at 541 and cited by McHugh J in *Postiglione v The Queen* (1997) 189 CLR 295 at 308.

opposite effect, that is to say, to ensure that the aggregation is sufficiently punitive, would amount to allowing a de facto appeal against the original sentence. The proper approach on this appeal is to consider whether the sentences adequately reflected the gravity of the offences before the court, taken in the context of the existing convictions for rape and indecent dealing, and allowing for mitigating factors; and then to consider against the light of the existing sentences on which they were made cumulative, whether any reduction to meet the totality principle was required.

[13] So far as the Crown contends that the sentencing judge failed to give sufficient weight to the psychiatric reports, I think there is weight in the defence contention that the reports were obtained in a different context – considering whether the respondent was fit for trial or had a s27 defence – and were based on a very different range of allegations from that before the court on sentence. They were bound, therefore, to be of limited assistance to the learned sentencing judge. In so far as the psychiatrists' conclusions were based on allegations of sexual misconduct pre-dating the burn injuries to the respondent, they relied on material not before the court. The existence of those conclusions could not, therefore, preclude his Honour from accepting that the injuries may have affected the respondent's judgment when he committed the offences. Nor do I think any error is shown in his Honour's taking into account the same mitigating factors as had been considered on the rape sentence. This was a separate sentencing occasion; inevitably the offences had to be considered in the light of factors personal to the respondent, which, unsurprisingly, were much the same.

[14] In sum, this is not, in my view, a case in which the appellant has been able to point to specific error in his Honour's reasons. It follows that the Crown is left with the task of demonstrating manifest inadequacy in the sentence to support an inference that there was error. The six months sentences imposed in respect of the offences other than the unlawful carnal knowledge count were plainly adequate. None of the individual offences was at the more serious end of the scale, and each was relatively fleeting. The real issue is whether a sentence of one year for the offence of carnal knowledge was adequate.

[15] In April of this year this Court delivered its decision in *R v T*[3], upholding an Attorney-General's appeal against a sentence of two years imprisonment, with a recommendation for parole after eight months, imposed on two counts of unlawful carnal knowledge with a circumstance of aggravation. In lieu of that sentence, a sentence of three years imprisonment without recommendation for parole was substituted. There were circumstances in that case which made it more serious than the present, foremost amongst which were the fact that the complainant was only 12 years old, and there were two incidents of sexual intercourse with her separated in time by a couple of months.

[16] The offender in *T* was of a similar age to the respondent in this case, and had pleaded guilty after a full hand up committal without cross-examination. The reasons for allowing the appeal, succinctly identified in the judgment of McPherson JA, were: the disparity in ages between the complainant and the respondent; the repetition of the offence; the fact that when the offences were committed the complaint was under the respondent's care, having a "sleepover" with his own

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3 [2002] QCA 132; CA No 30 of 2002, 12 April 2002.

daughter; and the sharp increase in the maximum penalty for the offence effected by legislation in 1997[4]. That amendment increased the maximum penalty for unlawful carnal knowledge where the offender has the complainant under his care from 14 years to life imprisonment. As Philippides J observed in her judgment in *T*

> "The legislature has thus substantially increased the maximum penalty for this offence, which seeks to protect children from being exploited especially in circumstances involving a breach of a relationship of trust, which arises, as is the case here, where the offender has the care of the complainant".[5]

[17] *T* must be regarded as an important guide to sentencing for unlawful carnal knowledge with a circumstance of aggravation, being the first, and as far as we were informed, only, appellate consideration of the effect of the 1997 increase in penalty. All of the factors outlined by McPherson JA in *T*, apart from the feature of repetition of the specific offence, exist in the present case. Of further significance here is the fact that the respondent had encouraged the complainant to drink rum, had provided her upon her request with bourbon, and had presided over the drinking session in which she and his step-daughter engaged, which led to her becoming heavily intoxicated. And has already been noted, the offence of carnal knowledge committed against her must be considered in a context in which the respondent had already been convicted of rape and indecent dealing, in that case involving his step-daughter. Taking all those circumstances into account, and with the assistance of *T* as a guide to the appropriate exercise of sentencing discretion in such cases, I would conclude that a proper sentence was of the order of the two years contended for by the appellant.

[18] Considering such a sentence in the light of the totality principle cannot assist the respondent. By no stretch of the imagination can it be said that an effective sentence of five years, for the array of offences of rape, carnal knowledge, indecent dealing and deprivation of liberty of which the respondent has been convicted by verdict and by plea, goes beyond "an appropriate measure of the total criminality involved."[6] I am, in short, convinced that the sentence on the carnal knowledge count is manifestly inadequate, demonstrating error which justifies allowing the Attorney-General's appeal.

[19] I would substitute a sentence of two years imprisonment on the count of unlawful carnal knowledge, to be served cumulatively on the sentences imposed on 8 June 2001. There is nothing to be achieved by a recommendation at the halfway point, and I would make none.

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4 [2002] QCA 132; CA No 30 of 2002, 12 April 2002 at [1].

5 [2002] QCA 132; CA No 30 of 2002, 12 April 2002 132 at [22].

6 *Postiglione v The Queen* (1997) 189 CLR 295 at 308.