SUPREME COURT OF QUEENSLAND

CITATION:	*R v E; ex parte A-G (Qld)* [2002] QCA 417
PARTIES:	**R** **v** **E** (respondent/applicant) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant/respondent)
FILE NO/S:	CA No 214 of 2002 CA No 217 of 2002 DC No 938 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld) Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	11 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	19 September 2002
JUDGES:	Williams and Jerrard JJA and Helman J Separate reasons for judgment of each member of the Court; each concurring as to the orders made
ORDERS:	**1. In CA No 214 of 2002:** **(1) Set aside the orders that the respondent serve periods of 2 years and 12 months detention and in lieu thereof order that the respondent serve 4 years detention on each count, such sentences to be served concurrently;** **(2) Further order that the respondent be released from detention after serving 50% of the term;** **(3) Otherwise the orders at first instance on sentence should stand.** **2. In CA No 217 of 2002:** **(1) Application for leave to appeal against sentence dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY

ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – APPLICATIONS TO INCREASE SENTENCE – OFFENCES AGAINST THE PERSON - where respondent sentenced as a juvenile after pleading guilty to two counts of rape, four counts of attempted rape and one of torture – where respondent received two years' detention on the rape counts and 12 months detention on the attempted rape and torture counts – whether the sentence was manifestly inadequate - consideration of *R v A; ex parte A-G (Qld)* [2001] QCA 542 and *R v Roelandts* [2002] QCA 254

Juvenile Justice Act 1992 (Qld), s 4(a), s 188, s 189

R v GDP (1991) 53 A Crim R 112, considered
R v A; ex parte A-G (Qld) [2001] QCA 542, CA 275 of 2001, 28 November 2001, considered
R v B (a child) (1995) 82 A Crim R 234, considered
R v C (a child) (1995) 83 A Crim R 561
R v Roelandts [2002] QCA 254, CA No 63 of 2002, 23 July 2002, considered
R v W; ex parte Attorney-General [2001] Qd R 460, considered

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[1] **WILLIAMS JA:** The respondent was sentenced as a juvenile after pleading guilty to two counts of rape, four counts of attempted rape, and one of torture. The Attorney-General appeals against the sentence of two years detention on the rape counts and twelve months detention on the attempted rape and torture counts (to be served concurrently). The respondent has also sought leave to appeal against the sentences on the ground that they are manifestly excessive.

[2] The complainant was a thirty year old female who has suffered from cerebral palsy since birth. She has had to use a wheelchair for her entire life because she cannot walk unaided. Without the wheelchair she can only move by crawling; she can stand provided that her weight is taken by her upper body on an object such as a bench.

[3] The offences occurred between 6 and 11 March 2001 in a house at Inala. At the time the offences were committed the respondent was aged 16 years and 4 months;

he was born on 10 December 1984. He was sentenced on 28 June 2002 when he was aged approximately 17½ years.

[4] The following is a brief summary of the rape and attempted rape offences as set out in the remarks of the learned sentence judge and the statement of the complainant:

Count 1 – Attempted rape

The respondent tried to have sex with the complainant; he pushed her on her back, forced her legs apart and tried to put his penis in her vagina. He held her wrists above her head. She did not yell out because he had previously hit her and she was terrified of him.

Count 2 – Attempted rape

After the respondent had burned her with cigarettes he tried to have sex with her. He put his penis against her vagina but she resisted and there was no penetration.

Count 3 – Rape

The respondent put his fingers in the complainant's vagina for a few seconds.

Count 4 – Attempted rape

The respondent pushed the complainant onto the floor of the bathroom, forced her legs open, and tried to insert his penis. He was unsuccessful in penetrating her.

Count 5 – Attempted rape

The respondent tried to have sex with the complainant but could not because she was kneeling and struggling to prevent penetration.

Count 6 – Rape

The respondent hit the complainant on the back of the head with his hand, pulled her mouth open, and put his penis in her mouth for a few seconds.

[5] The circumstances constituting the offence of torture took place over some five days. On the Wednesday the respondent pushed the complainant out of her wheelchair and kicked her on the body while she was on the ground. He then took the wheelchair away and hid it. It would appear that later on that day the respondent was playing with the wheelchair when the man B (who will be referred to subsequently) told the respondent to "hide her wheelchair". Apparently that was done and she did not get it back until the Friday. It would appear that she was only given the wheelchair back that day so that B and the respondent could take her to the bank for the purpose of withdrawing $400. Thereafter the respondent took the wheelchair again and wouldn't let the complainant use it until some time on the Saturday. During the period the complainant was deprived of her wheelchair she could only get about by crawling on the floor.

[6] Then there were a series of incidents on the Thursday which were relied on as particulars of the torture. There were three episodes when the respondent terrorised the complainant with a butcher's knife. On the first occasion he held it against her throat and moved the blade across her throat whilst making menacing demands that

either she kill herself or he would kill her. It was submitted on behalf of the Attorney-General that the action in question was "controlled". The second occasion involved the respondent grabbing the complainant by the left arm and putting the knife against the palm of her left hand cutting it a bit. Later that night the complainant was at the kitchen bench using her arms to hold herself upright. The respondent held a knife above her right foot and then dropped it point first. It hit a toe making a small cut which bled. The respondent said that he "did that on purpose bitch because I want you out of mine and Dad's way". (The reference to "Dad" was to B, who was not in fact the complainant's father.)

[7] According to the complainant's statement, on that Thursday the respondent had kicked her all over the body on a few times throughout the day. In the evening she refers to the respondent burning her with a cigarette while she was in the bedroom. There were six burn marks altogether on her left leg, including two on her inner thigh near her vagina. The complainant also said that he placed the lighted cigarette on her vagina; it was hot and painful, but it was not there long enough to leave a mark.

[8] Throughout the five day period there were other assaults which it is not necessary to particularise further. Many of those assaults were associated with the sexual activity which constituted the attempted rape and rape counts on the indictment. All of those incidents also constituted particulars of the offence of torture.

[9] Of all the offences torture could probably be regarded as the most serious. The complainant was subjected to a terrifying ordeal over a number of days. The attacks on her could only be described as sadistic. No compassion or remorse at all was shown. The fact that there was no completed act of sexual intercourse which would have constituted rape was primarily due to the fact that the respondent could not effect penetration as was his desire. All the incidents were intended to, and did in fact, cause mental torment and stress.

[10] Even after he was charged the respondent showed little remorse and did not recognise the gravity of his conduct. There was a contested committal hearing with full cross-examination of the complainant. The respondent pleaded guilty only after his confession was ruled to be admissible against him. In the circumstances the plea of guilty is not evidence of significant genuine remorse.

[11] So far as the respondent is concerned it has to be said that he was neglected and abused as a child and virtually abandoned by his mother. He was the third eldest of ten children born to his mother. He has never known the identity of his biological father. A Department of Family Services file reveals a number of notifications and substantiated assessments of neglect, with physical and emotional abuse. Apparently his childhood was characterised by physical abuse at the hands of different boyfriends of his mother. He witnessed his mother engaging in sexual acts with men from an early age. His mother told him to leave home when the respondent was aged about thirteen. He started using marijuana in Grade 9 and that led to a drop in his grades at school. He left school in Grade 10. Thereafter the respondent used marijuana and amphetamines regularly up until the commission of the offences in question.

[12] In the weeks prior to the commission of the offences the respondent resided with a Departmental care provider in Brisbane. It appears that as a result of some

argument involving his mother there was an altercation with other persons in that home and in consequence he left and began residing on the streets. Whilst on the streets he met the man B and was invited to reside with him and the complainant (who was then B's girlfriend). The pre-sentence report suggested that that environment was both abusive and drug-affected.

[13] Towards the end of February 2001 B and the complainant commenced living in Inala where B's father and his de facto also resided. The set up in the house was very strange. It appears that B's father and his de facto spent all day and night in the lounge room watching television and did not pay any attention to what was happening in the house. It is not entirely clear when the respondent moved into the house but it would appear from the complainant's statement that it was shortly before the events giving rise to the charges happened. Whilst the incidents constituting the charges were occurring it would appear that B was in the house (along with the other two) but they took no interest in what was happening. B did participate to some extent in the relevant events by, for example, telling the respondent to "hide her wheelchair". It appears that B also assaulted the complainant and got some enjoyment from seeing her crawling around on the dirty floor. On the Thursday B punched the complainant on the right eye giving her a "black eye". The respondent saw the complainant and B having sex at some time on the Thursday and that may have occasioned the respondent's desire to have sexual intercourse with her. Apparently on a number of occasions the respondent said things like "do you love me or hate me?", "I want to marry you" and generally made statements indicating he wanted to have a relationship with her. The complainant did nothing to encourage that.

[14] A pre-sentence report and psychological report were placed before the sentencing judge and formed part of the record. Those reports indicated that the respondent minimised his criminal activity, had a lack of awareness of the significance of his behaviour, and had limited insight into his offending behaviour. That material suggested that the respondent was "at medium risk of sexually re-offending". The psychological report suggested an ongoing need for supervision and "offence-specific therapy to address his offending behaviour".

[15] The respondent had no prior criminal history, but it is obvious from the foregoing that for a considerable period of time he had been a significant user of illicit drugs.

[16] The learned sentencing judge referred to the fact that the respondent was not coerced into committing the sexual offences, but appeared to be attempting to copy B's conduct. He concluded that the respondent should be held accountable and should accept responsibility for his actions. He concluded there was some remorse reflected in the progress towards rehabilitation made between time of arrest and sentence.

[17] The prosecutor who appeared at sentence submitted that a sentence not including actual detention was appropriate in the circumstances. That submission was properly rejected by the learned sentencing judge who considered that the seriousness of the offences called for the imposition of a period of detention. The learned sentencing judge described the conduct as despicable even for a sixteen year old with a deprived background; given the time span for the torture and the sexual offences he considered a period of detention was the only appropriate option.

[18] On behalf of the Attorney-General it was submitted that "the term of two years' detention is grossly merciful". A perusal of comparable sentences satisfies me that the sentence imposed was inadequate and did not properly reflect the degree of criminality in the offences.

[19] There are a number of cases where juveniles have received sentences in the range three to five years detention for a single episode of rape without any gratuitous violence being involved. It is sufficient to refer to the recent case of *R v A; ex parte A-G (Qld)* [2001] QCA 542. There a sixteen year old was initially sentenced for the offence of raping his grandmother to twelve months' detention with an immediate release order requiring participation in a rehabilitative program. No conviction was recorded. This court on appeal recorded a conviction and ordered the offender to serve four years detention to be released after serving 50% of that term.

[20] The decision in *Roelandts* [2002] QCA 254 is also instructive. There a 31 year old man was sentenced to three years imprisonment with a declaration he had been convicted of a serious violent offence for acts of torture committed on his 30 year old fiancée. The torture there involved punching, ordering her to leave the home, throwing her to the floor, dragging her up by the hair, pursuing her as she ran from the house, repeatedly threatening her, driving her into bushland and asking her whether she wanted to die, pushing her face into a puddle of water and placing a towel around her neck and pulling it tightly. The incidents occurred over a shorter period of time than was involved here and in some ways were less menacing and invasive. The Court of Appeal stated that the appropriate starting point was eight to ten years imprisonment reduced to six years for the plea of guilty. That sentence shows that twelve months detention for the offence of torture in this case was grossly inadequate.

[21] Overall the sentences imposed here failed to reflect the gravity of the offences committed. Further, the sentences imposed failed to recognise the ongoing need that the respondent has for supervision if he is to be rehabilitated. There were indications whilst the respondent was in care between arrest and sentence that there were some prospects of rehabilitation. If he can be kept off illicit drugs there appears to be a chance that he could become a worthwhile member of society.

[22] In my view the sentence should be structured so that there is a period after actual detention during which the respondent would be under appropriate supervision and where there would be a constraint upon him reverting to drug use or offending behaviour.

[23] Taking into account the provisions of the *Juvenile Justice Act* 1992 (the Act), the comparable sentences, and the fact that this is an appeal by the Attorney-General I am of the view that the sentences imposed at first instance should be set aside, save that the recording of convictions and the recommendation for therapy should stand. With respect to each of the counts on the indictment the respondent should be sentenced to serve four years detention with an order that he be released from detention after serving 50% of that term. The sentences should be served concurrently.

[24] Given the age of the respondent, the length of detention, and the desirability of his being under suspension for a significant period after release from detention there are

special circumstances for purposes of s 188 of the Act justifying release after serving 50% of detention. A fixed release order pursuant to s 189 would undoubtedly provide for supervision and have as a condition that no offences be committed during the operation of the order.

[25] The application by the respondent for leave to appeal against sentence should be refused.

[26] The orders of the court should be:

CA 214 of 2002

1. Set aside the orders that the respondent serve periods of 2 years and 12 months detention and in lieu thereof order that the respondent serve 4 years detention on each count, such sentences to be served concurrently.
2. Further order that the respondent be released from detention after serving 50% of the term.
3. Otherwise the orders at first instance on sentence should stand.

CA 217 of 2002

1. Application for leave to appeal against sentence dismissed.

[27] **JERRARD JA:** In this matter I have read with respect the judgments in draft of Williams JA, and Helman J, both of whom are judges of considerable experience in sentencing both adult and juvenile offenders, and in determining appeals against sentences imposed. With that in mind I add the following observations.

[28] The circumstances of this juvenile's offending were very serious, and demonstrated a complete disregard for the effects of his conduct on his victim, and an incapacity to grasp what she was experiencing. Other features of his life may explain that.

[29] These include that on the information provided to the learned sentencing judge and to this court, he has had a turbulent and conflictual relationship with his mother, characterised by neglect and physical abuse. His life seems to have been largely devoid of examples of any consistent affection shown to him or concern for him. Not long before committing these offences he was living on the streets. He calls a man "Dad" with whom he had lived for a very short time before committing these offences, and there is no evidence in any of the material of his having any long association with that man.

[30] One of the most disturbing features of his continuing cruelty to the helpless complainant is that it seems quite clear he actually wanted to have some sort of relationship with her. This is the complainant's own opinion, and consistent with what the juvenile said to police officers interviewing him about his behaviour. This was what he said:

> "I just wanted her and me to be like – be – become as someone".

When asked to clarify, he added.

> "I wanted to go out with her, in a kind of like, way".

His counsel's submissions to the learned sentencing judge were that the instructions to herself, and to her instructing solicitor, were that the juvenile actually liked the complainant.

[31] Other information placed before the learned sentencing judge, in the documents forming the pre-sentence report, included the description that the offender's responses to various tests administered by psychologists at the Griffith Adolescent Forensic Assessment and Treatment Centre show that on the whole, he demonstrated a lack of sexual knowledge, and none of the five risk factors in the sexual drive/preoccupation scale. He reported never masturbating.

[32] At the time of committing these offences he was living in a household in which there seemed to have been never less than two adults present, often three, and sometimes four. None are described as involving themselves in any affectionate way with the juvenile, or in any way which attempted to stop his continuing abuse of the complainant victim. Instead, he describes the man he called "Dad" kicking and hitting him daily, and the complainant also described being hit at least twice by that same man, her ex de facto partner, with whom she was attempting a reconciliation at that time.

[33] The evidence before the learned sentencing judge demonstrated that the offending juvenile was actually responding at the time of sentence to the better quality care he had been receiving in the 15 months between the date of offence and the date of sentence. He had been living in a supervised farm environment, and was described as often aggressive, and often acting out violently while continuing to use drugs when first going into care at that rehabilitation centre. The information provided to the sentencing judge was that that behaviour seemed to have settled completely, and drug abuse had ceased for at least six months prior to the date of sentence. Additionally, he was attending school and doing very well.

[34] This matter is one of those which would present any sentencing judge with hard choices. The principles with respect to sentencing juvenile offenders are both established by the *Juvenile Justice Act* 1992 (Qld), and discussed and declared in, inter alia, appellate level decisions. These include the observations in this court in *R v W; ex parte Attorney-General* [2000] 1 Qd R 460 at 463, where this court wrote that the first of the general principles set out in the *Juvenile Justice Act* (s 4(a)) requires the court to pay attention to protection of the community from offenders. That judgment reminds of the need for consideration of matters of general deterrence when sentencing juveniles, and I consider it is consistent with the observations of Gleeson CJ when then sitting on the Court of Criminal Appeal, New South Wales in *CST* (unreported judgment of 12 October 1989), when His Honour accepted a submission that:

> "In sentencing young people …the consideration of general deterrence is not as important as it would be in the case of sentencing an adult and considerations of rehabilitation should always be regarded as very important indeed".[1]

[35] In *GDP*[2] the New South Wales Court of Criminal Appeal advised both that considerations of general deterrence should not be ignored completely when sentencing young offenders, and that rehabilitation be the primary aim (said there in relation to an offender who was then 16 when being sentenced).

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1 Cited in the judgment of Gleeson CJ, Samuels JA and Mathews J in *GDP* (1991) 53 A Crim R 112 at 116.

2 See note 1

[36] The analysis of the relationship of rehabilitation of an individual juvenile offender and protection of the community was put slightly differently by the West Australian Court of Criminal Appeal in *C (a child)* (1995) 83 A Crim R 561 in that matter Pidgeon J wrote (at 564) that:

> "In a Childrens' Court, deterrence plays a different role. The prime factor is rehabilitation, which would temper deterrence to a degree. As the principles are completely different, I do not consider the correct answer can be reached by commencing with an adult tariff and then discounting it."

Much the same view was expressed by Wallwork J, who cited in his judgment earlier observations of the WA Court of Criminal Appeal in *B (a child)* (1995) 82 A Crim R 234 at 244 where that court wrote:

> "It is fallacious to regard the rehabilitation of an individual offender as a consideration separate and apart from, and somehow inimical to the protection of the public. The two things are intrinsically connected. The criminal justice system aims to rehabilitate offenders (particularly young offenders), because rehabilitation removes the danger to the public from one if its (previously) errant members."

[37] What I think those citations demonstrate is that courts sentencing juvenile offenders are instructed by both the statutory commands in the *Juvenile Justice Act,* and the shared wisdom of other experienced judges, to have as a principal object the rehabilitation if possible of the juvenile offender while the offender is still a juvenile. Nevertheless, courts are not to overlook the fact that the protection of members of the community from the infliction of harm can be achieved not only by the means of rehabilitation of the individual causing that harm in the past, but also by sentences having a generally deterrent effect in the community.

[38] The matters placed before the learned sentencing judge showed that rehabilitation of this juvenile was being demonstrated at the time of sentence. However, the judge was also supplied with reports demonstrating that that offender had not much insight into his own conduct, nor much remorse. He was still prone to blame the victim for the fact that he behaved so terribly with her. He was still assessed as a medium level risk of reoffending.

[39] The sentence proposed by both prosecution and defence submissions to the learned judge was that the judge should impose a mixture of orders. These would include sentences for three years probation on the two offences of rape; and five years detention on the offence of torture, accompanied by an order immediately suspending that sentence on the operation of an immediate release order. Had those sentences been imposed, the juvenile would have been subject to a three month rehabilitation program under that immediate release order, and thereafter been under both the supervision of probation and the deterrent effect of a suspended detention order. That order may have had desired rehabilitative effect, and I consider it was a responsible suggestion to put before the sentencing judge. The risks involved in imposing that sentence would be that the period of intensive correction might not be nearly long enough for a person assessed as a medium level risk of reoffending, and who had offended so insightlessly.

[40] The sentences actually imposed by the learned judge provided for a level of general deterrence and were accompanied by a strong recommendation that the offender

continue to receive specific therapy whilst in detention relating to drug abuse, anger management, and sexuality and intimacy issues. The learned judge had been told that that counselling was available at the Youth Detention Centre.

[41] The learned sentencing judge considered a considerable number of other and prior sentences imposed on juvenile and adult offenders, and the provisions of the *Juvenile Justice Act*. I do not think it can be said the learned judge demonstrably acted on any wrong principle, nor that the sentence imposed was a manifestly excessive one. It can be said that it was a sentence of limited duration, leaving relatively little time after release from detention for an offender who was in clear need of guidance and help from decent adult people.

[42] The sentence to be imposed by this court will provide for a far longer period in which, as a condition of release, actual supervision of the offender can be provided. Because both the sentences to be imposed by this court, and the sentence originally proposed to the learned sentencing judge, would each have had the effect of a longer period of supervision for this offender, I think each of those two varieties of sentences would actually satisfy more of the needs this offender has, than does the sentence actually imposed. The sentence to be imposed contains a far greater element of both general and individual deterrence than that originally proposed, and while I repeat that I consider that proposition a very responsible suggestion, I think it did carry the risk I have described. Accordingly, I agree with the proposed orders of Williams JA and Helman J.

[43] **HELMAN J:** I agree with the orders proposed by Williams JA and with his reasons.