SUPREME COURT OF QUEENSLAND

CITATION:	*R v P; ex parte A-G* [2002] QCA 421
PARTIES:	**R** **v** **P** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 172 of 2002 DC No 1205 of 2002 DC No 1206 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Sentence by A-G (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EXTEMPORE ON:	10 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	10 October 2002
JUDGES:	McMurdo P, McPherson JA and Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Appeal allowed.** **Vary the sentence imposed at first instance by deleting the order that the sentence be wholly suspended and instead order that the sentence be suspended after the respondent has served four months' imprisonment. Sentence imposed at first instance otherwise confirmed.** **A bench warrant to issue for the arrest of the respondent and lie in the Registry for one week before issue.**
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 by own plea of 21 counts of indecent treatment of child under 12 and 3 counts of indecent treatment of a child under 17 – where

respondent sentenced to 2 years imprisonment wholly suspended with an operational period of three years on all offences – whether sentence manifestly inadequate in the circumstances – where authorities support a term of actual imprisonment

Juvenile Justice Act 1992 (Qld) s 107B

Everett v R; Phillips v R (1994) 181 CLR 295, referred to
R v CCC [2001] QCA 39, CA No 364 of 2000, 15 February 2001, considered
R v J; ex parte A-G [2001] QCA, CA No 5 of 2001, 1 June 2001, considered
R v G; ex parte A-G [1999] QCA 477; CA No 303 of 1999, 16 November 1999, referred to

COUNSEL: M J Copley for the appellant
P S Hardcastle for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Hemming & Hart for the respondent

THE PRESIDENT: The respondent pleaded guilty to 21 counts of indecent treatment of girls under 12 and three counts of indecent treatment of girls under 17. The charges were contained in two indictments spanning the period from May 1970 until December 1976, although the pleas were accepted on the basis that the offences occurred before the respondent left the family home when he was 18 years old in December 1973.

The respondent was sentenced to two years' imprisonment wholly suspended with an operational period of three years on all offences. The appellant, the Attorney-General of Queensland, contends that this sentence was manifestly inadequate in that it failed to reflect the gravity of the offences, failed to take into account general deterrence and that the sentencing Judge gave too much weight to mitigating factors.

The respondent was the eldest in his family born on 3 October 1955. The offences were committed upon his younger sisters born in 1959 and twins born in 1962 and the youngest born in 1966. One offence was also committed upon his sisters' friend who was born in 1962. The offences commenced in 1970 with the eldest sister when she was 11 years of age and the respondent was 15. The respondent and his sister were playing cards in his bedroom whilst

lying on the bed under a blanket. He rubbed his erect penis up and down against the skin of her thighs whilst he held his arm over her holding her in position. She felt uncomfortable and tried to move away but he pulled her back and continued his behaviour. She firmly pushed him away and saw his exposed erect penis.

Later in 1970 he commenced a series of offences in respect of another sister born in 1962. She was then aged eight, in grade 3 at school, and he was about 15. One evening he came into her room, picked her up, took her to his room and told her to be quiet. He undressed her completely and got under the bedcovers with her. He rubbed her vagina and caused her pain. He again told her to be quiet again. He moved on top of her into the conventional sexual position and rubbed his penis on her thigh and in the area of her vagina squeezing her legs together so that his penis was between her upper thighs and vagina and he continued to do this until ejaculation. This behaviour was repeated on a number of the complainants and was described by the Prosecutor at sentence as intercrural sex.

In 1972, when this complainant was about 10, he took her into the shower. Their difference in size made it impossible for her to resist him. He was already naked and he removed her clothing from below the waist. He kept the shower running apparently to cover the noise. He gruffly told her to lie on towels on the floor on her side facing the wall. She understood she had no choice. He lay beside her and bent his leg up and over hers and rubbed her vagina with his hand. He then rubbed his penis up and down between her upper thighs and vagina until he ejaculated.

Later that year he enticed her into his bedroom, offering her chocolates. He very quickly shut the door and demanded she suck on his erect penis. She refused. He then told her to lie on the couch. When she did not comply, he dragged her to the couch and removed her shorts and underpants. Her face was pressed to the back of the couch and the respondent lay behind her. Her vagina was fully exposed and he rubbed her vagina and rubbed his penis in the vicinity of her vagina until ejaculation. He told her not to tell or there would be big trouble.

When this complainant was about 11, the respondent came into the bathroom whilst she was showering and demanded that she face the wall and again had intercrural sex with her. On another occasion he touched this complainant under her nightie on her vagina when they were watching TV. On yet another occasion he forced her into the toilet, stripped her lower clothing, fondled her vagina and had intercrural sex. He again told her not to tell anybody. Similar behaviour was repeated in the bathroom on yet another occasion when she was cleaning her teeth. At this time she was 12 years old and the respondent 18. On another occasion before her 13th birthday the respondent dragged her from the laundry to the bedroom and indecently dealt with her in his by now customary manner.

The offences involving the youngest sister commenced soon after her 7th birthday when the respondent carried her to the toilet, pulled her pants down, told her to lie down and face the wall in a forceful voice and rubbed his penis between her upper thighs near her vagina until ejaculation. He cleaned them both and told her not to tell anybody. Similar behaviour was repeated on two further occasions. The respondent was about 18 when these offences occurred.

The fourth incident involving the youngest sister involved the respondent forcing her to masturbate herself at his direction. Her older sisters entered the room and she complained to them. They were then protective of her whenever the respondent was present. The respondent required her to comply with his demands for intercrural sex on two further occasions.

When an 11 year old friend of the sisters was visiting, the respondent persuaded her to go into a bedroom and lifted her by the waist so that her bottom was near his face. He pulled her dress up under her waist and fondled her genitals inside her underpants pressing his groin against her bottom. He stopped his behaviour when he heard his sister's voice. He told her not to tell anyone or she would get into trouble.

The respondent committed a further eight offences upon another sister, commencing when she was eight and he was about 15. The first offence involved him touching and rubbing the

complainant's vagina with his finger and placing his penis in the area of the vagina. The second offence involved similar behaviour in his bedroom. He committed another similar offence in his parents' bedroom. When he was interrupted he told the complainant to get dressed and hide under the bed.

On the next occasion the complainant was nine years old and asleep on her bed when the respondent took her into his bed, placed her on the top bunk, removed her clothes, touched her vagina and again rubbed his penis in the vicinity of her vagina. He next repeated this behaviour in the bathroom when the complainant was having a shower. He told her not to tell anyone.

He committed a similar offence when the complainant was 10 years old and he was 17 or 18 during the Christmas school vacation in the respondent's bedroom. The respondent committed the next offence in a similar manner when the complainant was in the shower and was aged about 11.

The final offence involving this complainant occurred in the bathroom during the summer school holidays when the complainant was 11 and the respondent about 18. He again fondled her vagina and told her not to tell anyone.

The matter was not investigated by police until recently. Some of the complainants phoned the respondent and he made admissions in the course of those recorded telephone calls. He was not interviewed by police in a formal record of interview. Only one of the five complainants was required to give evidence at committal. The respondent pleaded guilty at the committal in respect of matters involving all other complainants. After negotiations between the Prosecutor and defence the respondent pleaded guilty to the charges in the two indictments.

Victim impact statements from two of the sisters were tendered. One sister, in particular, has been deeply traumatised by the respondent's offending. It is plain that his behaviour has had an enormous detrimental effect on the lives of all the victims, but especially his second youngest sister.

The respondent was 46 years old at sentence. He currently resides with his wife and three of their five children. His wife is supportive of him and her handwritten letter explaining her support for him and her compassion and concern for the complainants was tendered at sentence.

The respondent has no relevant criminal convictions. In 1974 he was convicted of some petty stealing offences for which he was given light fines in the Southport Magistrates Court. He has not committed any further offences. He left school at 18 years of age and married when he was 19. He and his wife have raised five children. He has become a successful businessman. A number of references were tendered at the sentence from a priest, a senior pastor, and friends and business associates attesting to his genuine remorse, reform and present good-standing in the community.

Psychiatrist, Dr Peter Fama, reported that the respondent was, himself, the victim of sexual abuse, having been molested by an older cousin whilst visiting the cousin's family. Later the respondent was sexually molested whilst a boarder at school. Dr Fama opined that such experiences may have suggested to the respondent's young mind that sexual conduct with others was to some degree permissible as part of his development. There was now no evidence of ongoing sexual deviation. The respondent has had a developmental abnormality that he has subsequently overcome.

The respondent expressed his remorse through his barrister at sentence and claimed to realise the anguish that he has put his family and sisters through. It was also emphasised at the sentence and in this Court that the respondent has been actively involved in service clubs and in raising money for charities and community projects.

The maximum penalty applicable to any of these offences at the time of their commission was not more than five years. As many of the offences were committed when the respondent was a child, s 107B, *Juvenile Justice Act* 1992 (Qld) means that in respect of those offences the respondent could not be ordered to serve more than two years' imprisonment because he could

not have been detained for longer than two years had he been sentenced as a child at the time the offences occurred.

A number of these offences, however, occurred after the respondent turned 17 years of age.

The learned sentencing Judge had the difficult task of sentencing a 46 year old man for offences committed upon his sisters and another when he was aged between 14 and 18 years. The offences were committed when the respondent was a very youthful first offender. There are, however, obvious serious aspects to the offending. There were five victims and the offences were committed over a substantial period of time. He used a degree of force and coercion and the position of his authority in the family as the older brother to commit these offences. The impact of his offending behaviour on the lives of at least one of the complainants has been devastating. Ordinarily, perpetrators of sexual offences like these will be required to serve a term of imprisonment. But for the respondent's youth at the time of the commission of the offences, a substantial term of imprisonment would be required. His youth, his subsequent rehabilitation, his cooperation, remorse and pleas of guilty are all factors which mitigate his sentence.

Some guidance in this difficult sentencing task can be gleaned from prior decisions of this Court. In *R v. CCC* [2001] QCA 39, CA No 364 of 2000, 15 February 2001 the applicant was unsuccessful in claiming his sentence of 12 months' imprisonment suspended after three months was manifestly excessive. In that case the 43 year old offender pleaded guilty to 21 counts of indecent dealing with six boys when he was aged between 13 and 16 years. In that case, unlike here, the applicant had subsequent offences, although not for sexual offences, and the Court noted that he could not be seen to be a completely rehabilitated person. All his offending, however, occurred when he was a juvenile, whilst the respondent here committed further offences when he was 17 and 18.

The fact that this respondent committed a number of these offences after turning 17 also distinguishes this case from *R v. J, ex parte Attorney-General* [2001] QCA 216, CA No 5 of 2001, 1 June 2001.

The learned sentencing Judge was not referred to the case of *R v. G, ex parte Attorney-General* [1999] QCA 477, CA No 303 of 1999, 16 November 1999 which is comparable to this case although there are some important differences. G was sentenced to a wholly suspended two and a half year term of imprisonment for nine counts of indecent dealing. The conduct included simulated intercourse and digital vaginal penetration and forcing the girls to masturbate him. The girls were aged four to five and six to seven years of age. Some of the offences were committed when G was a child and others when he was 18 or 19 and 21 or 22. The Court allowed the Attorney-General's appeal and required the respondent to serve four months of the two and a half year term of imprisonment before suspension. The Court recognised the significant mitigating factors, including the length of time since the offences occurred, the respondent's complete rehabilitation, his lack of any criminal record and that a sentence of actual imprisonment would be likely to disrupt his family and livelihood. However, because of the serious nature of the sexual acts, the number of offences, their callousness, the lengthy period of offending, the tender age of the victims and psychological consequences, the Court required a period of actual imprisonment to be served.

Whilst no decisions are precisely comparable, *G*, in my view, strongly supports the appellant's contentions. Despite the reluctance to interfere on an Attorney's appeal, especially where this will involve incarcerating a respondent who is currently at liberty (see *Everett v R*, *Phillips v R* (1994) 181 CLR 295), I am persuaded that interference is warranted in this case and that the respondent must serve a term of actual imprisonment because of the serious nature of these offences, despite the many mitigating factors in his favour.

I would allow the appeal and vary the sentence imposed at first instance by deleting the order that the sentence be wholly suspended and instead ordering that the sentence be suspended after the respondent has served four months' imprisonment. I would otherwise confirm the sentence imposed at first instance. I would also order that a bench warrant issue for the arrest of the respondent.

McPHERSON JA: I agree.

HOLMES J: I agree.

THE PRESIDENT: That is the order of the Court.

MR HARDCASTLE: Your Honour, could I ask that the-----

THE PRESIDENT: Do you want the bench warrant to lie in the Registry for-----

MR HARDCASTLE; For a week, your Honour.

THE PRESIDENT: Do you have any problem with that?

MR COPLEY: No, your Honours.

THE PRESIDENT: Yes, the orders are as I have proposed and a further order is that the bench warrant will lie in the Registry for one week before issue.