SUPREME COURT OF QUEENSLAND

CITATION:	*R v Conway; ex parte A-G (Qld)* [2002] QCA 507
PARTIES:	**R** **v** **CONWAY, Michael Francis** **(**respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 215 of 2002 DC No 1075 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	22 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	12 November 2002
JUDGES:	de Jersey CJ, Williams JA and Mullins J Separate reasons for judgment of each member of the court; each concurring as to the orders made
ORDER:	**The sentences imposed at first instance should be set aside and in lieu thereof the following sentences be imposed to date from 20 June 2002:** **1. Order that the respondent serve the whole of the 12 month term of imprisonment imposed and suspended on 16 February 1996;** **2. On each of the counts of dealing on the indictment of 18 April 2002 record convictions and order that the respondent be imprisoned for a period of two years and on the count of maintaining a sexual relationship with a child order that a conviction be recorded and the respondent be sentenced to serve a term of five years' imprisonment;** **3. Order that the sentences for the offences on the indictment of 18 April 2002 be served concurrently, but cumulative upon the serving of the 12 month period of the earlier suspended sentence;** **4. Declare that the respondent was held in pre-sentence custody between 15 July 2001 and 20**

June 2002, a total period of 340 days, and that is declared to be imprisonment already served under the sentence for the offences on the indictment of 18 April 2002;

5. **Order that the respondent be eligible to apply for post-prison community based release after serving two years of the sentence imposed with respect to the offences on the indictment of 18 April 2002.**

CATCHWORDS: CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – MISCELLANEOUS MATTERS – OFFENCE COMMITTED WHILE ON BAIL OR PROBATION AND EFFECT OF BREACH OF PROBATION – where respondent previously sentenced to 12 months' imprisonment wholly suspended for a period of two years for indecent dealing with a circumstance of aggravation – where respondent pleaded guilty to further offences committed during the operational period of the suspended sentence and sentenced to five years' imprisonment – whether learned sentencing judge erred in ordering that the sentence of 12 months for the earlier offences be served concurrently with the sentences imposed for the later offences

Penalties & Sentences Act 1992 (Qld), s 146

R v Melano, ex parte Attorney-General [1995] 2 Qd R 186, considered

COUNSEL: C W Heaton for the appellant
A J Moynihan for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Legal Aid Queensland for the respondent

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Williams JA. I agree with those reasons, and with the orders His Honour proposes.

[2] **WILLIAMS JA:** This is an appeal by the Attorney-General against sentences imposed upon the respondent consequent upon his pleading guilty to a series of sexual offences involving his step-daughter. The respondent pleaded guilty to:

(a) a charge of maintaining between 31 December 1995 and 8 May 2001 an unlawful sexual relationship with a child under the age of 12 years, he being an adult, in the course of which relationship he permitted himself to be indecently dealt with by the child who was under his care;

(b) three counts of indecent treatment of a child under the age of 12 years – the relevant dates being between the 31st day of December 1995 and 31st August 1996. On one of those counts it was alleged as a circumstance of aggravation that the child was under his care; and

(c) three counts of indecent treatment of a child under the age of 16 – the relevant dates being between 31st December 1997 and 1 July 1998.

[3] The sentences imposed on 20 June 2002 were as follows:

(i) On the maintaining count – five years imprisonment;
(ii) On all other counts – two years imprisonment.

[4] It was ordered that those sentences be served concurrently, and it was declared that in relation to those seven counts the respondent had been in pre-sentence custody for a total of 340 days between 15 July 2001 and 20 June 2002. That period was declared to be imprisonment already served under the sentence with respect to those offences.

[5] The respondent had previously been sentenced on 16 February 1996 to 12 months imprisonment wholly suspended for a period of two years, conditional upon the respondent not committing during that period any offence punishable by imprisonment. That sentence was imposed with respect to four charges of indecent dealing with a child under the age of 12 years with a circumstance of aggravation, such offences having been committed between 29 January 1995 and 22 July 1995. The complainant with respect to those offences was the same complainant in the seven counts on which he was sentenced on 20 June 2002.

[6] As the operational period for that suspended sentence ran until 15 February 1998 at least some of the offences to which the appellant pleaded guilty on 20 June 2002 occurred within that operational period. The learned sentencing judge found that at least the maintaining charge constituted a breach of the operational period provisions and that was not challenged on appeal. Indeed the material suggested that within a very short time after being sentenced on 16 February 1996 the respondent resumed his illicit relationship with his step-daughter.

[7] In consequence s 146 of the *Penalties & Sentences Act* 1992 was called into play. The District Court judge on sentencing the respondent on 20 June 2002 acted under s 147 of that Act and ordered that the respondent serve the whole of the suspended period of imprisonment. He concluded, and this has not been challenged, that there was no good reason for concluding that it would be unjust to make such an order. However, he ordered that the term of 12 months imprisonment be served concurrently with the sentences imposed for the later offences.

[8] The Attorney-General has appealed, primarily contending that the learned sentencing judge erred in the exercise of his discretion in not ordering that the 12 months term of imprisonment (the suspended sentence) be cumulative with the sentences imposed on the seven subsequent charges. The contention of the respondent is that a sentence of five years imprisonment reflects the overall criminality of all the respondent's criminal behaviour involving the complainant. It was, in consequence, the submission of counsel for the respondent that, particularly bearing in mind the approach outlined in *R v Melano, ex parte Attorney-General* [1995] 2 Qd R 186, there was no basis for this court interfering with the sentences on an Attorney's appeal.

[9] As already noted the complainant was the respondent's step-daughter. She was aged between 10 and 13 years old when most of the offending occurred. The charges on the indictment before the learned sentencing judge related to incidents which commenced almost immediately after the respondent was released on a suspended sentence for indecently treating the same girl. At least some of the relevant misconduct constituting the seven subsequent charges occurred during the operational period of that sentence. The conduct in question comprised touching the complainant on the outside of her vagina on a number of occasions, touching the complainant's breasts on a number of occasions, digitally penetrating the

complainant's vagina, procuring the complainant to perform oral sex upon the respondent (on at least one occasion he ejaculated into her mouth), and performing oral sex upon the complainant on a couple of occasions.

[10] The last count on the indictment related to an offence which occurred in mid-1998 when the parties were residing at Caboolture. The complainant was then aged 12 to 13 years. The respondent woke the complainant from her sleep, exposed his penis to her and had her perform oral sex on him. The complainant's mother entered the room and saw what was happening; she put a stop to it. Thereafter the parties lived apart, but the respondent visited the complainant and her mother from time to time. During that period a number of incidents occurred where the respondent made the complainant take her clothes off and he masturbated in front of her.

[11] The complainant was not a willing participant in any of the offences; she was scared of the respondent (who was violent towards her mother) and merely passively complied with his demands. In his record of interview the respondent asserted that all the conduct was consensual on the part of the complainant.

[12] Investigating police secretly taped conversations in which the respondent admitted some of the alleged offending behaviour. There was in consequence a strong case against him, and he ultimately made admissions in his record of interview. He was cooperative with the police; the arresting officer described the degree of cooperation as being of "a high level".

[13] There was an early indication that there would be a plea of guilty, but sentence was delayed whilst a report from a psychologist was obtained.

[14] Apart from the earlier conviction with respect to the same complainant, the respondent had a moderate criminal history; of most significance were a number of breaches of a domestic violence order involving the complainant's mother.

[15] Based on comparable sentences put to the sentencing judge and this court a head sentence of five years' imprisonment for the offences on the indictment was clearly within range. Indeed there was no challenge to it by counsel for the respondent in this court.

[16] After dealing with matters relevant to sentence for the offences on the indictment, counsel for the prosecution before the sentencing judge went on to say:

> "Finally, your Honour, I would ask you to consider activating the suspended period of imprisonment. … the prisoner's plea of guilty [to the maintaining offence] is an acceptance by him that there was a continuing sexual relationship between him and the complainant and that does extend from before the operational period of the suspended period until after the operational period of the suspended sentence".

[17] There followed some debate as to which of the matters charged on the indictment occurred within the operational period, and counsel for the prosecution went on to say:

> "The point may be moot in any event if your Honour feels that you would impose a concurrent – impose the suspended sentence concurrently, because it really, in that case, wouldn't make a lot of difference to the overall sentence."

In the light of that the learned sentencing judge said:

> "Because whether I make the sentence concurrent or not I would still have to determine whether there has been an actual breach."

[18] Subsequently, as already noted, the learned sentencing judge expressly found that "there were sufficient acts within the period of the suspended sentence … to warrant a finding that it was committed during the operational period."

[19] It appears from the transcript that counsel for the prosecution at first instance did not expressly ask that the suspended sentence and the sentence imposed with respect to the offences on the indictment be made cumulative, but there was no concession by him that the sentences should be made concurrent. At most there was a recognition that the learned sentencing judge had the power to make those sentences concurrent.

[20] In a number of cases this court has considered the factors which should be taken into account in determining how to activate a suspended sentence; *R v Aksu* [2000] QCA 337 is a recent example of such a case. Given that no submission was made on the respondent's behalf that there was good reason for concluding that it would unjust to require the respondent to serve the whole of the term of the suspended sentence, the only issue was whether that term should be made cumulative with or concurrent with the term of five years imposed with respect to the charges on the indictment.

[21] Whether or not the suspended sentence should be made cumulative with the other sentence imposed will always be a matter to be determined by the circumstances of the particular case. It is difficult, if not impossible, to lay down clear guidelines as to when it would be appropriate to make the sentences cumulative.

[22] The material in the present case clearly discloses that the imposition of the suspended sentence in 1996 did not deter the respondent from his predatory conduct in any way. He carried on committing sexual offences upon the complainant, who was then still under 12 years, as if his earlier conduct had not been discovered and dealt with by the courts. The continuation of his conduct amounted to a blatant disregard of the court's order and the complainant's rights. To use the vernacular, it could be said that he snubbed his nose at the criminal justice system. By suspending the sentence the court extended leniency to the respondent, but he regarded that as a licence to continue his criminal conduct.

[23] In those circumstances the only appropriate order for the court to make once the offending during the operational period was established, was to order that the term of the suspended sentence be cumulative upon the sentences imposed for the subsequent offending. The learned sentencing judge erred in not so ordering.

[24] Given the facts of this case it could not be said that by making the sentences cumulative the total sentence was out of proportion to the overall criminality of the respondent's behaviour. That is particularly so if, as submitted by counsel for the Attorney, there is a recommendation that the respondent be eligible to apply for parole after serving two years of the five year sentence. As the respondent has not responded appropriately to the leniency of a suspended sentence in the past, the sentence should be tempered now by providing for parole where there would be a greater degree of supervision of his activities upon release.

[25] In order to give effect to what has been said in these reasons, the sentences imposed at first instance should be set aside and in lieu thereof the following sentences be imposed to date from 20 June 2002:

(1) Order that the respondent serve the whole of the 12 month term of imprisonment imposed and suspended on 16 February 1996;

(2) On each of the counts of indecent dealing on the indictment of 18 April 2002 record convictions and order that the respondent be imprisoned for a period of two years and on the count of maintaining a sexual relationship with a child order that a conviction be recorded and the respondent be sentenced to serve a term of five years' imprisonment;

(3) Order that the sentences for the offences on the indictment of 18 April 2002 be served concurrently, but cumulative upon the serving of the 12 month period of the earlier suspended sentence;

(4) Declare that the respondent was held in pre-sentence custody between 15 July 2001 and 20 June 2002, a total period of 340 days, and that is declared to be imprisonment already served under the sentence for the offences on the indictment of 18 April 2002;

(5) Order that the respondent be eligible to apply for post-prison community based release after serving two years of the sentence imposed with respect to the offences on the indictment of 18 April 2002.

[26] **MULLINS J:** I agree with the reasons of and the orders proposed by Williams JA.