SUPREME COURT OF QUEENSLAND

CITATION:	*R v Waerea; ex parte A-G (Qld)* [2003] QCA 20
PARTIES:	**R** **v** **WAEREA, Nathan William White** (appellant/respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (respondent/appellant)
FILE NO/S:	CA No 287 of 2002 CA No 307 of 2002 SC No 156 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Sentence appeal by A-G (Qld)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	30 January 2003
JUDGES:	de Jersey CJ, Williams JA and Cullinane J Separate reasons for judgment of each member of the Court; each concurring as to the orders made
ORDERS:	**1. In Appeal No 287 of 2002: Dismiss the appeal against conviction** **2. In Appeal No 307 of 2002: Allow the appeal of the Honourable the Attorney-General, set aside the penalty of imprisonment of three years, and in lieu order that the respondent be imprisoned for five years**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where acquittal on other count – where inconsistencies in complainant's evidence – where complainant's account corroborated 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 disparity in age between respondent and complainant – where complainant intellectually impaired and vulnerable through consumption of alcohol – where respondent knew of complainant's vulnerability

Criminal Code (Qld), s 215(4)

MFA v R [2002] HCA 53, applied
R v P [1998] 2 Qd R 191, distinguished
R v S [2002] QCA 141; CA No 352 of 2001, considered
R v T; ex parte A-G [2002] QCA 132; CA No 30 of 2002, considered

COUNSEL: K M McGinness for the appellant in CA No 287 of 2002 and for the respondent in CA No 307 of 2002
R G Martin for the respondent in CA No 287 of 2002 and for the appellant in Appeal No 307 of 2002

SOLICITORS: Legal Aid Queensland for the appellant in CA No 287 of 2002 and for the respondent in CA No 307 of 2002
Director of Public Prosecutions (Queensland) for the respondent in CA No 287 of 2002 and for the appellant in CA No 307 of 2002

[1] **de JERSEY CJ:** The appellant was convicted by a jury of unlawful carnal knowledge with a circumstance of aggravation in that the complainant was under his care, and sentenced to three years imprisonment. He was acquitted on a related charge of supplying cannabis to a minor.

[2] The relevant events occurred between October and November 1999. The complainant was then 13 years of age, and the appellant 51. As the appellant appreciated, the complainant was intellectually impaired consequent upon a car accident which had occurred when she was an infant. Her mother was killed in that accident. Her father was a taxi driver. When her father worked, the appellant and his partner sometimes looked after the complainant. On this occasion, as was alleged, the appellant gave the complainant cannabis in a pipe, which she proceeded to smoke, followed by some alcohol. She became intoxicated and vomited. While the complainant lay on her back on a mattress in the annexe to the appellant's caravan, the appellant lay on top of the complainant and inserted his penis into her vagina. The complainant gave her account of the events to the police in a recorded interview on 19th and 20th October 2000. A medical examination of the complainant carried out in November 2000 showed that her hymen was intact, which was not necessarily inconsistent with penile penetration.

[3] The appellant gave evidence to the effect that the complainant was drinking alcohol, became intoxicated and vomited. The appellant remonstrated with her over the drinking. The appellant smoked cannabis that evening but said that he gave none to the complainant. The appellant denied having had sexual intercourse with the complainant.

[4] The complainant's account was potentially corroborated by the evidence of one Steward, a friend of the appellant. Mr Steward's evidence was that while he was

visiting the appellant one day, the appellant told him that he had something shocking or disturbing to tell him. The appellant leant forward, and beckoned Mr Steward to do likewise. The appellant then said that a while ago, he gave the complainant "a couple of cones and a couple of drinks and got in her". At the time of this conversation, the appellant and Mr Steward were drinking beer and had smoked cannabis (an aspect to which I again refer below), but Mr Steward said that he was aware of what was going on. The appellant gave evidence denying having told Mr Steward that he gave the complainant cannabis, and said that any conversation with Mr Steward was to the effect that he got stuck into the complainant, in the sense of upbraiding her, in relation to her drinking.

[5] The appellant has appealed on the ground that the conviction is unsafe and unsatisfactory. As well as pointing to arguably unsatisfactory inconsistencies and deficiencies within the complainant's evidence, the appellant contends that the differential verdicts are inconsistent. The submission was that the acquittal on the count of supplying cannabis meant that the jury doubted the complainant's credibility, and that that should have led to their rejecting her evidence on the unlawful carnal knowledge count as well.

[6] There is a basis on which the jury could rationally have differentiated between the verdicts it reached on the two counts. That rests in the jury's not having been satisfied beyond reasonable doubt that what the complainant smoked, allegedly supplied by the appellant, was cannabis. There was no evidence that the complainant was an experienced user of cannabis. When challenged about the alleged supply, the complainant said in her evidence: "Well, if he didn't, right, give me Mary Jane, then what else could he have given me?" (She was using the expression "Mary Jane" to refer to cannabis.) The complainant described the pipe used as like "those old men use when they smoke tobacco or something". The complainant said that what she smoked made her sick, but not light-headed or relaxed. Failing to reach the requisite degree of satisfaction that what the complainant smoked was cannabis would not necessarily have meant such a general rejection of her creditworthiness as to warrant also acquitting on the count of unlawful carnal knowledge. See *MFA v R* [2002] HCA 53.

[7] The jury may have doubted Mr Steward's account of the admission, so far as it concerned the supply of "cones", because of the appellant's evidence denying having said that he gave the complainant cannabis.

[8] The appellant relies additionally on suggested weaknesses in the complainant's account, particularly, the absence of evidence of fresh complaint, the complainant's state of intoxication at the relevant time, her inability to give detailed evidence as to how the penis was inserted into the vagina, or indeed as to whether penetration occurred by the penis or otherwise, and various inconsistencies and shifts within her evidence. Those points were not unreasonably made, although the quality of evidence can be expected to vary from case to case in situations like this, and one should not be unduly critical, bearing in mind that these events occurred some two to three years previously, when the complainant was only 13 years of age, and in view of the nature of the events. There is another important consideration, and that is there being the potentially strong corroboration of the complainant's claim in the comparatively independent evidence of Mr Steward.

[9] Having reviewed the case in the context of the particular criticisms raised on behalf of the appellant, I am not satisfied that after "making full allowances for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted" (*Jones v R* (1997) 191 CLR 439, 451). This is not a case where on the whole of the evidence, a reasonable jury should have entertained a reasonable doubt (*M v R* (1994) 181 CLR 487, 493).

[10] I would dismiss the appeal against conviction.

[11] The Honourable the Attorney-General appeals against the three year sentence imposed on the ground of its manifest inadequacy. The learned sentencing Judge referred to the respondent's prior criminal history, and took the view that, because it was drug related, it had no significance for the sentencing process before her. The Judge referred also to the circumstance that during the trial, the respondent's two young children were taken into care by the Department of Family Services, rendering the respondent's overall loss the more severe. On the other hand, the Judge referred to the continuing adverse impact on the complainant. Her Honour properly referred also to the respondent's breach of the trust reposed in him. She mentioned her view that the respondent's consumption of cannabis that evening must have clouded his judgement. I observe that that should however have no mitigating effect on penalty.

[12] Her Honour was referred to *R v T; ex parte A-G* [2002] QCA 132. The Court of Appeal there increased to three years imprisonment the penalty imposed on a 43 year old man who pleaded guilty to two counts of indecent dealing and two counts of unlawful carnal knowledge with a 12 year old girl in his care. While substantially more extensive offending was involved in that case, as Byrne J suggested, the three years imposed on appeal should be regarded as reflecting "a measure of moderation". Further, the penalty was imposed following pleas of guilty, not as here a trial which the complainant unsurprisingly found arduous. Also there was not present in *R v T; ex parte A-G* a feature which renders this respondent's offending especially reprehensible, that is, his awareness that the child in his care and whom he exploited was intellectually impaired. Allowing for those points of similarity and difference, the three years imposed in *R v T; ex parte A-G* would in my view translate to a sentence of approximately five years imprisonment as appropriate here.

[13] Her Honour was referred also to *R v S* [2002] QCA 141. The respondent in that case was sentenced to five years imprisonment with a recommendation for parole after two years. He pleaded guilty to 32 offences of a sexual nature committed upon three young children, at times when he was aged between 40 and into his 50's. That respondent was a foster parent to the children. Davies JA described the penalty imposed as between the lower end and the middle of the range, suggesting to me that the range was probably taken to extend to six to seven years, in the context of pleas of guilty. There were particular features of that case which led to the court's declining to interfere on the Attorney's appeal, circumstances stated with some emphasis by Davies JA: the respondent's "complete confession to the police about these and other offences about which, had he not confessed, there may never have been any evidence to convict him", the confession following immediately upon his wife's confronting him; and the circumstance that the respondent "exhibited genuine remorse…(had) an excellent prognosis for recovery…(and was) most unlikely to reoffend". Those features are not present here.

[14] The relevant maximum penalty was life imprisonment. See s 215(4) of the *Criminal Code*. The maximum penalties provided for by that section were substantially increased in 1997, a matter to which Philippides J referred in *R v T; ex parte A-G*, amounting to a legislative signal to which sentencing courts must be astute.

[15] Allowing for the large indeed grotesque disparity in age between this respondent and the complainant, the substantial breach of trust involved in his offence, the circumstance that he opportunistically took advantage of a child rendered vulnerable by the consumption of alcohol, his knowledge that the child he was exploiting was intellectually impaired, and the continuing adverse effect upon her, a sentence of five years imprisonment was warranted in the context of the cases referred to Her Honour. In view of the respondent's having taken the matter to trial, there was no particular basis for extending leniency, including no ground for recommending early parole.

[16] We were however urged to go substantially beyond a sentence at that level, on the basis that the case was comparable with rape. Rape could have been charged (with unlawful carnal knowledge available as an alternative verdict) but was not. The issue of lack of consent was not addressed in the evidence at the trial or in the submissions made to the learned Judge upon sentencing. The Crown took the approach before Her Honour of comparing the case with *R v T; ex parte A-G* and *R v S*, not cases of rape. Where the Crown has charged unlawful carnal knowledge, albeit with a circumstance of aggravation, in circumstances where it could have charged rape, it would obviously be inappropriate upon conviction for the lesser charge that the court proceed to sentence on the basis of the more serious offence, especially where the issue of lack of consent was not the subject of investigation in the proceedings. Proceeding in that conservative way is consistent with *R v D* [1996] 1 Qd R 363.

[17] We were asked to proceed on the basis discussed in *R v P* [1998] 2 Qd R 191, where the court dealt with imprisonment for very serious incest, sentencing comparably with terms imposed for rape. It must be noted that in *P*, the circumstances were vastly more serious than here, including threatened and actual violence, a 10 year span of offending, pregnancy etc; and further, specific evidence that the complainant at no time willingly consented, because of fear of violent reprisals, was not there disputed by the respondent. *P* was a very different case which would afford no warrant for lifting the applicable range here to the level for which Counsel for the Attorney, by reference to the rape cases, contended. Had the issue of non-consent been distinctly raised at this trial, by means of evidence, and properly explored, then following conviction, had the Judge been satisfied of the absence of consent, she would in my view have been entitled – and obliged – to take that into account on sentencing. But this case did not proceed in that way.

[18] I would allow the appeal of the Honourable the Attorney-General, set aside the penalty of imprisonment of three years, and in lieu order that the respondent be imprisoned for five years.

[19] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment prepared by the Chief Justice and I agree generally with all that he has said and with the orders proposed.

[20] In my view it was reasonably open to the jury to accept the evidence of Steward as corroborating that of the plaintiff with respect to the offence of carnal knowledge.

[21] Steward's evidence-in-chief was that on an occasion when he and Waerea were drinking beer and smoking some cones of marijuana Waerea said to him that he had "something shocking" or "something disturbing" to tell him. He then went on to say that either the "other day" or "a while ago": "I gave L a couple of cones and couple of drinks and got in her".

[22] The following exchanges then occurred during defence counsel's cross-examination of Steward:

> "What I'm suggesting to you is that Mr Waerea said to you something along the lines that he wasn't happy with L because she'd hoed into some Passion Pop that he bought for himself and got drunk?- … No.
>
> Something along those lines, and that he'd got into her about it, that is meaning that he got angry at her about it?- … No. …
>
> I'm suggesting to you that he said to you that he got into her, meaning not what you have thought it to mean …?- … Well, in the first part of the sentence on my paragraph it says, "I gave her two cones and a couple of beers". You know, if – he gave her. Then why would he be saying, "I got in her".
>
> …
>
> I'm suggesting to you that the tone of the conversation was that she had taken some of his drinks and he got stuck into her about it. That's what I'm suggesting to you? … No.

[23] Waerea gave evidence, but no reference was made to the conversation with Steward in evidence-in-chief. Relevantly he denied having sexual intercourse with the complainant at the material time.

[24] The prosecutor however took up the issue of that conversation during his cross-examination; the following relevant exchanges occurred:

> "I suggest that you gave her a cone of cannabis to smoke? … No, I didn't.
>
> You certainly told Lloyd Steward that you did that, didn't you? … I didn't tell Lloyd Steward that at all.
>
> …
>
> Well, you have certainly spoken to Lloyd Steward …? … Yes.
>
> … about events that night, didn't you? … Yes.
>
> You raised it. You raised that with him? … Not about sex with L, no.

> You raised the events of that night with him? … The events of drinking, yes.
>
> …
>
> You hadn't raised it with her father? … No.
>
> Why did you raise it with Steward? … It was just a conversation. I was very annoyed with her and I didn't know what to do, either tell her father or let her tell her father himself.
>
> …
>
> Isn't it the case that this conversation with Steward occurred out the front of your caravan? … Yes, it did.
>
> …
>
> You told Steward you wanted to tell him something? … Yes, I did.
>
> And it was in confidence, it was one of those conversations you had because Sally was away? … Oh, no. I would have said it in front of Sally anyway.
>
> …
>
> You told him it was pretty shocking? … Yes, it was shocking.
>
> And you told him you'd given L some cones? … No, I didn't tell him that.
>
> And some drinks? … No, I did not tell him that.
>
> And you got in it (sic)? … Yes, I got in her. I got in her by me saying, "Leave the f'ing thing alone, otherwise I'm going" – I couldn't hit her because that's against the law. You can't go hitting kids. I'm not – that's not my nature. That's how I put it".

[25] A reasonable jury was entitled to conclude from those passages that in a conversation with Steward the words "I got in her" were used by Waerea, and once that was accepted then the jury was entitled to conclude that those words meant that he had sexual intercourse with her. Waerea's attempts to explain away the use of the words as meaning that he remonstrated with her could well have been regarded by the jury as implausible.

[26] In all the circumstances, notwithstanding the jury finding Waerea not guilty of supplying cannabis to a minor, the verdict of guilty on the carnal knowledge charge was not unsafe and unsatisfactory. The verdict was not unreasonable and was not unsupported by evidence. The conviction must stand.

[27] So far as the Attorney's appeal on sentence is concerned I have reached the conclusion that a sentence of three years imprisonment was, in all the

circumstances, manifestly inadequate. If the only aggravating factors were the age difference between Waerea and the complainant, and the fact that the girl was in his care at the material time, a sentence of three years imprisonment would arguably be within range. When one adds in the consideration that the complainant girl was, to the knowledge of Waerea, intellectually impaired the sentence imposed cannot be justified. It is in Waerea's favour that the offence occurred on only one occasion; that distinguishes the situation here from that which pertains in many cases of this type which come before the courts. But against that Waerea pleaded not guilty and is therefore not entitled to the discount which is frequently present in sentences imposed in comparable factual situations. In all the circumstances I do not consider the sentence of five years imprisonment proposed by the Chief Justice to be unreasonable.

[28] I agree with the orders proposed by the Chief Justice.

[29] **CULLINANE J:** I agree with the reasons of the Chief Justice in this matter and the orders he proposes.