SUPREME COURT OF QUEENSLAND

CITATION:	*R v V; ex parte A-G (Qld)*[2003] QCA 21
PARTIES:	**R** **v** **V** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 382 of 2002 DC No 1753 of 2002 DC No 2150 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District 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 order made
ORDER:	**Appeal against sentence dismissed**
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 DECENCY AND MORALITY – where respondent convicted of incest and given suspended sentence – where respondent re-offended soon after imposition of suspended sentence with respect to same complainant – where respondent intellectually impaired - whether sentencing judge gave too much weight to mitigating factors – whether respondent should serve suspended imprisonment *Penalties and Sentences Act* 1992 (Qld), s 147 *R v Bowen* [1997] 2 Qd R 379, followed *R v Howe; ex parte Attorney-General* [1994] 2 Qd R 307, considered

COUNSEL: R G Martin for the appellant
J D Griffiths for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Smith and Associates for the respondent

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Williams JA and Cullinane J. I agree that the appeal should be dismissed for those reasons.

[2] **WILLIAMS JA:** Facts relevant to this matter are set out in the reasons for judgment of Cullinane J. I agree with his reasons and only wish to add some brief observations.

[3] It is not without significance that on sentencing the respondent with respect to the incest charges the learned sentencing judge said: "Penetration may well have been at a minimum level …". It would appear that the earlier offences, though serious, did not have some of the aggravating features frequently associated with crimes of that kind.

[4] The problems facing a sentencing judge when determining to what extent a suspended sentence should be activated are often complex. This case highlights that. An unusual combination of circumstances may well justify acting in a particular way which would not constitute a precedent for other cases. This is such a case. The respondent's intellectual impairment has relevance not only to the issue of culpability, but also to his capacity to respond to the requirements of the prison system. The material does suggest that he may well be incapable of completing some of the prison programmes treated as a condition precedent to release. It would appear, for example, that he can gain more benefit from treatment and counselling outside the prison system.

[5] The consequence of the orders the subject of the appeal is that the respondent has served a period of imprisonment of three months. There is still an operational period of three years relevant after release during which time the respondent must not commit further offences.

[6] Given the unusual features of this case I am not persuaded that there has been any error by the sentencing judge such as would warrant this court interfering on an Attorney's appeal.

[7] I agree with the proposed order.

[8] **CULLINANE J:** The appellant, the Attorney-General, appeals against the claimed inadequacy of a sentence imposed by the District Court upon the respondent in proceedings in respect of a breach of a suspended sentence.

[9] In October 1999, the respondent pleaded guilty to two counts of incest committed on 25 and 27 November 1998. The complainant was the respondent's younger sister and was at the time aged 14. The respondent was born on 21 November 1981.

[10] The learned sentencing judge at that time imposed in respect of one of the counts of incest a sentence of three years imprisonment to be suspended forthwith and fixed an operational period of five years. In respect of the other count of incest he made a probation order for a period of three years subject to certain conditions, one of which was that the respondent reside at a place and with a person approved by a community services officer, the second of which was that he have contact with the complainant only in the presence or hearing of some adult and the third was that he should undergo counselling by Dr Rosevear, a medical practitioner who had seen the respondent, or by some other medical practitioner.

[11] On 24 October 2002, the respondent again appeared before the District Court having been charged with a number of offences in respect of the same complainant. He was convicted after trial of one of those, namely that between 1 February 2000 and 31 April 2000 he unlawfully and indecently dealt with that complainant.

[12] By this time the respondent was 18 and the complainant 15.

[13] The conduct of the respondent which constituted this offence was his touching of the complainant's breasts through her clothing. When the complainant made her objection to this known, the respondent desisted immediately.

[14] It will be noted the offence was committed only a short time after the suspended sentence was imposed.

[15] When dealing with the respondent in respect of the suspended sentence imposed in October 1999, the court ordered that he serve three months of the three years suspended imprisonment. It is in relation to this order that the appellant appeals. At the same time the respondent was ordered to serve three months imprisonment for the offence committed in early 2000. Both terms were to be served concurrently.

[16] The appellant contends that to invoke only three months of the three years suspended imprisonment tends to subvert the purpose of a suspended sentence.

[17] When in October 1999 the applicant was dealt with it is plain that the learned sentencing judge took into account evidence that the respondent suffers some degree of intellectual impairment and it would appear there was some lack of understanding on his part of the inappropriateness of the relationship with a younger female.

[18] Under s 147 of the *Penalties & Sentences Act* 1992 a court, when dealing with a person in respect of suspended imprisonment has three options open to it. Only two of these are relevant here, namely whether the respondent should serve the whole or part only of the suspended imprisonment. A court is obliged to sentence a person to serve the whole of the suspended imprisonment unless it would be unjust to do so. It is the appellant's primary contention that this is what should have been ordered here.

[19] The considerations relevant to this issue are contained in s 147(3). The learned sentencing judge took the view that there were a number of reasons why it would be unjust to require the respondent to serve the whole of the suspended imprisonment. Indeed, his Honour said that it was appropriate that the period be "in your case unusually and indeed exceptionally short".

[20] The factors to which his Honour referred can be summarised as follows:

(a) the intellectual impairment to which reference has already been made;

(b) the respondent's employment with an employer providing in effect work in a sheltered workshop where the respondent has been employed for a number of years and the likelihood that if he lost that employment (as would occur if he was absent in prison for any significant time) it would be difficult to obtain any other employment;

(c) the concerns expressed by a psychologist about the vulnerability of the respondent in a prison environment and the difficulty that the respondent because of his intellectual impairment would have in coping with prison;

(d) the fact that if the respondent was required to serve the full term of imprisonment imposed in 1999 he would not be eligible to be released on parole;

(e) the respondent had been receiving counselling from a psychologist for a long time (he had been seen on some 67 occasions) and the psychologist was of the view that there had been some maturing in the respondent's social relationships although some concerns still remained.

[21] No doubt highly relevant to his Honour's conclusions in this regard was the nature of the conduct constituting the count of indecent treatment. It was plainly conduct of a much lesser order of wrong doing than the earlier conduct. Section 147(3)(a)(i) and (ii) require a court to have regard to the nature of the subsequent offence and the proportion between the culpability of the offender for that offence and the consequence of activating the whole of the suspended sentence.

[22] In addition to these matters, his Honour thought that if the respondent was required to serve the whole of the period of imprisonment there would be apparently no consideration allowed for the circumstance that he pleaded guilty on that occasion and cooperated with the police in making a full confession.

[23] It is difficult to see why this would be so. In fixing upon the sentence of suspended imprisonment, the learned sentencing judge at that time undoubtedly took into account the plea of guilty and any cooperation of the respondent and such a sentence necessarily carried with it, because of the terms of the legislation, the jeopardy to which the respondent exposed himself when he committed the subsequent offence. This is an integral part of the sentence of suspended imprisonment which was imposed and which took into account the factors to which I have just referred.

[24] It is, of course, clear that the court is not entitled to revisit the earlier sentence when dealing with someone in respect of the suspended imprisonment. See *R v Bowen* [1997] 2 Qd R 379.

[25] Whilst it is, in my view, then correct to say that his Honour erred in principle in relation to the matter just mentioned, the various other factors to which his Honour referred are relevant and important matters tending to support the conclusion that it would unjust to require the respondent to serve the whole of the suspended

imprisonment and militating in favour of the imposition of a shorter rather than a longer term of imprisonment.

[26] To say this is not to overlook the seriousness of the respondent's conduct in offending by committing a sexual offence against the complainant so soon after he was sentenced to the terms of suspended imprisonment for the offences of incest.

[27] The respondent was released approximately a week before the hearing of the appeal, having completed his sentence of three months. The fact that he has now served that sentence is not without relevance on this appeal. See *R v Howe*; *ex parte Attorney-General*.[1]

[28] In my view there are particular features of this case which justify the conclusion that the imposition of the whole of the three years of the suspended sentence would be unjust and which justified the imposition of a relatively small part of the suspended imprisonment. Whether the matter is to be approached upon the basis that this Court has to consider the matter of sentence afresh because his Honour acted upon a wrong principle or the issue is whether the sentence imposed fell outside of the range of a sound sentencing discretion, I am not persuaded that the circumstances of this case require the imposition of a longer term of imprisonment than the three months imposed. Accordingly, I would dismiss the appeal.

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1 [1994] 2 QdR 307.