SUPREME COURT OF QUEENSLAND

CITATION:	*R v C; ex parte A-G (Qld)* [2003] QCA 134
PARTIES:	**R** **v** **C** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 400 of 2002 DC No 186 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Mackay
DELIVERED EX TEMPORE ON:	24 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	24 March 2003
JUDGES:	de Jersey CJ, Jerrard JA and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal and set aside the order in respect of count 1 of imprisonment for nine years and the recommendation that post prison community based release be considered after four years** **2. In lieu thereof, order that the respondent be imprisoned for 10 years with a declaration that the respondent has been convicted of a serious violent offence** **3. Confirm the sentences imposed in the District Court on 1 November 2002 in respect of counts 2, 3 and 4**
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 numerous acts of non-consensual sexual intercourse over a two and a half year period – where respondent was complainant's father and sole carer – where respondent pleaded guilty very early *Penalties and Sentences Act* 1992 (Qld), pt 9A

R v G [2000] QCA 70; CA No 218 of 1999, 15 March 2000, considered
R v Herford [2001] QCA 177; CA No 335 of 2001, 11 May 2001, considered
R v K CA No 13 of 1991, 28 March 1991, considered
R v L [1999] QCA 423; CA No 242 of 1999, 7 October 1999, considered
R v M [1999] QCA 344; CA No 219 of 1999, 20 August 1999, considered
R v Myers [2002] QCA 143; CA No 353 of 2002, 19 April 2002, considered
R v R [2000] QCA 279; CA No 126 of 2000, 14 July 2000, considered
R v TWB [2001] QCA 111; CA No 355 of 2000, 22 March 2001, considered
R v Young; ex parte A-G (Qld) [2002] QCA 474; CA No 244 of 2002, 5 November 2002, considered

COUNSEL: M J Copley for the appellant
A W Moynihan for the respondent

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

THE CHIEF JUSTICE: The respondent pleaded guilty to the offence of maintaining a sexual relationship with a child with a circumstance of aggravation. He committed this offence upon his daughter over a two and a half year period while she was aged 13 to 16 years. He was then her sole carer, the mother having departed the domestic situation some time earlier.

The respondent was aged 30 to 33 years. For the offence of maintaining, he was sentenced to nine years' imprisonment with post prison community based release recommended after four years. He separately pleaded guilty to two offences of rape committed within the maintaining period and a third committed about two months after the end of that period. For the rapes he was sentenced to concurrent seven year terms. The Attorney-General appeals.

The respondent had a comparatively minor past criminal history relating mainly to property offences. He had not previously been imprisoned.

The learned Judge rightly described this as an extremely serious case. The offending began when the complainant was 13 years old. It involved multitudinous acts of non-consensual intercourse. The respondent persisted notwithstanding the complainant saying that she did not want to have sex. In most instances he was not physically violent towards her: she submitted out of fear. When she was 14 years old the sexual intercourse developed into acts of oral sex committed by her upon him with the respondent requiring the complainant to swallow the ejaculate. He would also grope about her breasts and insert his fingers into her vagina.

When she was 15 to 16 years old he compelled her to start taking the contraceptive pill. In mid 2002 the respondent committed the first of the rapes charged which was, in fact, an act of sodomy carried out in the early morning. He had been drinking and woke her sodomising her causing her to kick and scream, and then made her commit an act of oral sex upon him.

For the last two offences, the second and third rapes committed in October 2002, the respondent again caused the complainant to commit an act of oral sex upon him, then had sexual intercourse with her and later ejaculated into her mouth. During the intercourse the complainant was crying and the respondent placed a pillow over her head, she says for a couple of minutes. On the following day police interviewed the respondent. He admitted the intercourse but denied the sodomy. He expressed remorse and blamed alcoholism.

His offending has caused the complainant to become socially withdrawn and has destroyed her love for her father. The respondent certainly very early indicated a plea of guilty which was processed through the prosecution and Court system in record time coming to a conclusion very quickly indeed, a circumstance which Mr Moynihan who appeared today for the respondent emphasises.

The particularly serious features of the case are the enormous frequency of the offending over that substantial period of two and a half years, involving literally hundreds of acts of sexual intercourse, including rape as such, although we must not lose sight of the fact that

all of the sexual acts must from the complainant's point of view be regarded as non-consensual. Then there is the circumstance that the respondent was the complainant's natural father, rendering the case more serious than offending by a family friend or relative, and even more significant here, in that he was her sole carer, she lacking the capacity to have resort to the comfort of a mother.

Further there was the extremely intimate nature of the offending, covering a variety of sexual acts, including robbing the complainant of her virginity; and finally the circumstance that the respondent desisted only when the police became involved.

The cases suggest that for roughly comparable offending and after allowing for a plea of guilty a range generally commencing at about the level of 10 years' imprisonment would apply. One must observe, however, that the circumstances of these offences exhibiting infinite variation, one should not be rigidly tied to ranges as such, but flexible enough to give due allowance to significant variations from case to case. Having said that, however, it is in my view difficult to see, in a case generally like this, after allowing for the plea, that one could responsibly proceed below 10 years' imprisonment.

I mention the cases to which counsel for the parties referred. Young, Court of Appeal 244 of 2002 maintained for nine months a sexual relationship with a 12 year old girl including raping her as such. He pleaded guilty. He was violent towards her. The Court of Appeal suggested a range of 10 to 12 years after allowing for the plea. Now, certainly in this case there was not the same level of violence; but on the other hand, this complainant was the respondent's natural daughter and the offending here continued over a much longer period.

M [1999] 344, Court of Appeal 219 of 1999 pleaded guilty not to maintaining but to four rapes of his adopted daughter over a period while she was aged 13 to 16 years. He had been violent towards her. He was imprisoned for 10 years. It is important to note that that was not a maintaining case.

K, Court of Appeal 13 of 1991 concerned an uncle's regular intercourse over four years with a niece from when she was seven years old. He was described as having debauched

her. Fifteen years imprisonment was upheld. I would regard that as a more serious case than this, especially because of the younger age of the victim.

G, Court of Appeal 218 of 1999 was convicted after trial and imprisoned for 10 years for four instances of rape of a 16 year old stepdaughter. While he went to trial, the extent of this offending was on a vastly more substantial scale, and G fell to be sentenced without regard to Part 9A of the Penalties and Sentences Act.

Counsel for the respondent relied particularly on these five cases. Herford, 2001 Queensland Court of Appeal 177 pleaded guilty to various offences, including maintaining, concerning three young boys. He ended up being sentenced to nine and a half years' imprisonment, reduced from 11 because of the pleas of guilty. That offending occurred over 18 months, here two and a half years, but was otherwise of lesser extent than here and further, of course, as I have said a number of times already, in this case it is significant that the respondent exploited his own daughter of whom he was sole carer.

Myers, Court of Appeal 353 of 2002 was convicted after trial of maintaining and five rapes. He was sentenced to 11 years. The complainant there was nine to 10 years old. Again that offending occurred over a substantially lesser period than here, about eight months. That respondent apparently was not in robust health.

TWB, Court of Appeal 355 of 2000 pleaded guilty to maintaining in respect of a five to nine year old son and a five to seven year old stepson and was sentenced to seven years' imprisonment with parole recommended after three, which would appear to me somewhat on the light side. The offending, which did not include sodomy, occurred every two to three months over about five years and ceased before the police investigation commenced, unlike here. Here I again emphasise the offending was on a vaster scale and of even more serious character. TWB furthermore had cooperated extensively with the authorities.

In R, Court of Appeal 126 of 2000, the Court dealt with pleas of guilty to maintaining a sexual relationship with a girl aged between nine and 11 years over a two and a half year period. The effective sentence was 11 years. Serious similar prior offending was

a complicating factor, but the Court did refer to a sentencing range for offending committed in similar circumstances of 10 to 12 years.

L, Court of Appeal 242 of 1999 was sentenced on appeal to 11 years of which he would have to serve 80 per cent, having pleaded guilty to maintaining over a two and a half year period in relation to his stepson aged nine to twelve years. It included nine instances of sodomy. He had a significant prior criminal history for similar offending.

The learned Judge said that count 1 would ordinarily attract a sentence of 10 to 12 years to be reduced in this case because of three features. First because none of the offending "involved a significant or indeed any real violence". Second, because of the respondent's apparent remorse and third because of the great speed with which the matter had been brought to a conclusion in Court.

The Judge reduced the head sentence to nine years but then allowed further credit as reflected in his recommendation that post prison community based release be considered after the serving of four years rather than four and a half years' imprisonment as in the ordinary course.

As to the Judge's reference to the absence of violence, I accept the point made for the appellant that there was apparently no violence over and above that necessary to achieve intercourse simply because there was no need for it. The complainant was submitting to the respondent because he was her father. Certainly no threats were made about the consequences of telling others, but presumably because the respondent felt secure in his position of authority over the complainant. It should not be overlooked, however, that the complainant did not willingly succumb to her father's depredations, and kicked and screamed and cried in certain situations, and was on one occasion subjected to a pillow being placed over her head to quell her objections.

That being so it can hardly be said that there was no significant violence.

In light of what I have said earlier and not wishing to be unduly prescriptive about ranges, I would nevertheless assert 10 years' imprisonment would mark the lowest level at which one could appropriately sentence for this offending where there has been a plea of guilty.

There was no warrant for going lower as it were. In fact, the Judge went not only to nine years as the head sentence, but through his recommendation contemplated the granting of parole after four years, which if permitted could be seen as translating in the ordinary course to an eight year head sentence.

On an Attorney-General's appeal this Court would customarily be circumspect about increasing a nine year sentence to one of 10 years absent other considerations. But here a 10 year sentence, carrying the consequential automatic requirement that 80 per cent be served, is a penalty on a substantially different scale from a nine year sentence absent a declaration, and the Court should not baulk at such an increase should it be persuaded of clear error - as I believe to be the case here.

What distinguishes this case in particular, as I said at the outset, is the great frequency of the offending over a substantial period, offending, frankly of vast proportion, the offending including rape as such but properly regarded as non-consensual in its entirety; and in addition the significant circumstance that the complainant was the respondent's own daughter, he being her sole carer.

When proper weight is given to those features in particular, in context, I would regard a sentence of nine years' imprisonment, with the prospect of parole after only four, as grossly disproportionate to the gravity of the offending.

I would make the following orders.

1. Allow the appeal and set aside the order in respect of count 1 of imprisonment for nine years and the recommendation that post prison community based release be considered after four years.

2. In lieu thereof order that the respondent be imprisoned for 10 years with a declaration that the respondent has been convicted of a serious violent offence.

3. Confirm the sentences imposed in the District Court on 1st November 2002 in respect of counts 2, 3 and 4.

JERRARD JA: In the circumstances emphasised in the judgment just delivered by the Chief Justice I respectively agree with the reasons for judgment and his proposed orders.

WHITE J: I agree also.

THE CHIEF JUSTICE: The orders are as I have indicated.