SUPREME COURT OF QUEENSLAND

CITATION:	*R v Thompson; ex parte A-G (Qld)* [2003] QCA 200
PARTIES:	**R** **v** **THOMPSON, Ian Raymond** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 44 of 2003 DC No 3088 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	16 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	7 May 2003
JUDGES:	de Jersey CJ, Williams JA and Holmes J Separate reasons for judgment of each member of the Court, de Jersey CJ and Williams JA concurring as to the orders made, Holmes J dissenting
ORDERS:	**1. That the appeal be allowed** **2. That the sentence of five years imprisonment in respect of count five, suspended after 18 months for an operational period of five years, be set aside** **3. That in lieu thereof, the respondent be imprisoned for six years, with a recommendation for eligibility for post-prison community-based release after two and a half years** **4. That the sentences imposed in the District Court on 24 January 2003 be otherwise confirmed**
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 respondent administered drugs to all complainants, and indecently assaulted two complainants while under influence of drugs – where prosecutor did not demur when judge indicated

proposed sentence – where respondent abused professional and personal trust in relation to two complainants – whether sentence manifestly inadequate

Criminal Code (Qld), s 317, s 337(1)(a)

R v Brown [1991] CA No 218 of 1990, 7 March 1991, considered
R v Robertson [1997] QCA 63; CA No 399 of 1996, 4 April 1997; (1997) 91 A Crim R 388, considered
R v W [1998] QCA 68; CA No 473 of 1997, 24 April 1998, considered

COUNSEL: M J Copley for the appellant
R Hanson SC, with A J Kimmins, for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Price and Roobottom Solicitors for the respondent

[1] **de JERSEY CJ:** The Honourable the Attorney-General appeals, on the ground of manifest inadequacy, against an effective sentence of five years imprisonment suspended after 18 months for five years, imposed following the respondent's pleas of guilty to six charges, three of causing complainants to take a noxious thing with intent to disable (s 317 *Criminal Code*) and three of unlawful and indecent assault (s 337(1)(a)). The relevant maximum penalties were at the time life imprisonment and 10 years imprisonment respectively. For each of the indecent assaults, the respondent was sentenced to two years imprisonment, and for the s 317 offences, terms of two years, four years and five years. The respondent intimated an intention to plead guilty in circumstances where a full committal had taken place, and an application to sever particular charges from the indictment had been carried through: allowance for the pleas of guilty was nevertheless warranted.

[2] At the time of the offending, the respondent was a 41-42 year old dentist with no prior criminal history. I will refer to the complainants as A, B and C. A and B were brothers, and C was a friend of A. The complainants were aged 20-21 years. The respondent befriended A. He performed dental work upon A during the year 1999 and into 2000. The respondent's friendship with A extended to the point of the respondent's purchasing a motor vehicle for A in October 1999, and A's living rent-free in the respondent's home. A introduced B and C to the respondent. The respondent performed dental work on both A and B, and administered drugs which induced prolonged unconsciousness. This occurred at the respondent's home. He also administered drugs to C, but not associated with rendering dental services. While complainants A and C were under the influence of the drugs, the respondent indecently assaulted them. At the time, the respondent was himself misusing medication.

[3] The circumstances of the particular offences may be stated briefly as follows.

Count two (indecent assault)

[4] On a date between 31 December 1999 and 7 June 2000, the respondent carried out a dental procedure on A, then aged 21 years. A awoke the following morning in the

respondent's home. At the time A remembered waking, or at some earlier point of time, A found the respondent, who was naked, holding A's feet in a raised position.

Counts five and six (s 317, indecent assault)

[5] On a date between 6 June 2000 and 11 June 2000, A was kept by the respondent under the influence of a drug for about four days. During this period the respondent indecently assaulted A. A's girlfriend visited the house and saw the respondent leaving the room in which the complainant lay unconscious. The respondent was seen tying up the drawstring of his trousers. Following the events in counts five and six, A was hospitalised: a large number of needle marks were seen on his body.

Count one (s 317)

[6] During a dental procedure the respondent performed on B, then aged 20 years, on a date between 29 November 1999 and 4 December 1999, the respondent administered an anaesthetic. He later administered further drugs. B awoke three or four days later at the respondent's home. Subsequent blood analysis revealed the presence of benzodiazepine metabolites. When B's girlfriend visited the home looking for B, the respondent told her he did not know where B was. No act of indecency was allegedly committed on this complainant.

Counts three and four (s 317, indecent assault)

[7] The respondent committed these offences, upon the complainant C then aged 21 years, on 5 March 2000. C was not a patient of the respondent. C had been out with A and others. He went to the respondent's home with A. C accepted a drink to which the respondent had added a drug. It adversely affected C from shortly after consumption in the early morning until about 9.00pm that day. At one point, C awoke to see the respondent wiping his (C's) stomach and pubic area. C also noticed that he was wearing boxer shorts which were not his own.

[8] In consequence of the administration of the drugs, A and B needed medical treatment, although B refused it. In his victim impact statement, A spoke of severe depression leading to suicidal thoughts, sleeping difficulties, headaches and memory loss. His marriage engagement had ended, he no longer trusted friends as he used to, and he felt responsible for what had happened to B and C. C said that as a result of the ingestion of the drugs, he was sick for three days. He spoke of suffering frequently from nightmares. He had developed a fear of dentists, had distanced himself from friends, changed his social practices, and was uncomfortable around homosexual men and felt dirty.

[9] The learned sentencing Judge observed the respondent's offending involved "systematic and sustained application of drugs with a context, in relation to two of the complainants, of sexual assaults on them." He noted the aggravating feature of the respondent's breach of professional trust in relation to two of the complainants, A and B. He moderated the sentence he imposed to allow for the respondent's pleas of guilty, and the circumstance that the respondent had been deregistered as a dentist and would never again practise in a profession which was important to him and in which he had displayed considerable accomplishment.

[10] In his submissions to the learned Judge, the Crown Prosecutor emphasized the difficulty of identifying and presenting truly comparable cases. That position is hardly surprising given the bizarre nature of this offending. The Prosecutor submitted that the respondent ought to be imprisoned for a period "in the order of six years," saying that if there was a range, that would "sit within it." The Prosecutor agreed that that penalty could be moderated to reflect the respondent's loss of his professional career and his pleas of guilty.

[11] On the other hand, defence counsel submitted for five years imprisonment suspended after six to 12 months. When the Judge indicated that he was intending to sentence the respondent to five years suspended after 18 months, in the course of defence counsel's submissions, the Crown Prosecutor did not then or subsequently demur. But acknowledging the way the sentencing process proceeds, that should not now assume any particular significance to the disposition of the appeal. I should add that the Judge did not invite any further submission from the Prosecutor (not to suggest His Honour should have), so that the Prosecutor's failure to submit further is unremarkable.

[12] Of course the position taken by the Prosecutor before the sentencing Judge carries significance, but it should not for reasons expressed on other occasions be regarded as controlling this court's approach if the court is otherwise convinced of clear error.

[13] Some limited assistance may be gained from *Robertson* (1997) 91 A Crim R 388. Following appeal, he was sentenced to four years imprisonment for administering a stupefying drug and committing an indecent assault. That prisoner and his victim were flight attendants, and the prisoner administered a drug, probably rohypnol, through the medium of a drink. The Court of Appeal was there influenced by the important circumstance that although the offence was charged under s 316 of the *Criminal Code*, for which (as in the case of s 317) the maximum penalty is life imprisonment, the prisoner could have been charged under s 218(1)(c), under which the maximum penalty was then seven years imprisonment; and that the Prosecutor had "accepted that it was appropriate in setting a penalty to have regard to the lower maximum penalty" (p 397). No such position was taken by the Crown here. In reducing the six years imprisonment imposed below to four years imprisonment, the Court of Appeal there said it was proceeding "not without some hesitation" (p 397). While it was true that that prisoner was sentenced following trial, he had offended only once and against only one complainant, and he occupied no position of professional trust towards his victim. In my view, the sentence imposed in *Robertson* would suggest a substantially higher penalty as appropriate here, where there was multiple offending, and the Judge was proceeding in context of a maximum penalty of life imprisonment.

[14] The especially serious features of this case are the involvement of as many as three complainants; the respondent's abuse of his professional and personal trust in relation to A and B; the respondent's abhorrent and dangerous behaviour in maintaining A and B in drugged states for prolonged periods; the respondent's grave misuse of his medical knowledge and his otherwise lawful access to dangerous drugs for his own sexual gratification; the circumstance that the respondent's treatment of C, with whom there was no professional relationship, was opportunistic and predatory; and the age difference between the respondent and the complainants, even allowing for their being young adults, and against the background of the respondent's professional status.

[15] As the heading to s 317 shows, the essence of the offence of drugging with intent to disable is malice, although that need not be established specifically – it would be drawn from the intent to disable. In this case, the respondent has, in acting nefariously, utilized his professional expertise for an obviously wrong purpose, exploiting victims comparatively powerless – indeed, while unconscious, because of his conduct bereft of power. The repugnancy of that misuse of a professional position itself warrants the imposition of a plainly deterrent penalty, not achieved here by orders which necessitate the respondent's remaining in prison for no more than 18 months.

[16] In my view, a sentence which provides for the respondent's release after only 18 months imprisonment did not appropriately reflect the goals of general deterrence (the respondent was not himself likely to re-offend similarly) and punishment in particular, and was therefore manifestly inadequate for offending of this gravity. The respondent should have been sentenced in such a way as to require his serving at least two and a half years actual incarceration. I consider a sentence of up to seven years imprisonment to have been warranted, and a court could have been justified in recommending parole after three years in a case of this gravity. But having regard to the moderation traditionally characteristic of the court's approach on an Attorney's appeal, I would now impose six years imprisonment, with a recommendation to be added for eligibility for post-prison community based release after two and a half years. An effective sentence of five years imprisonment suspended after 18 months is so substantially below that level, as to justify correction on this Attorney's appeal.

[17] I would order:

1. that the appeal be allowed;
2. that the sentence of five years imprisonment imposed in respect of count five, suspended after 18 months for an operational period of five years, be set aside;
3. that in lieu thereof, the respondent be imprisoned for six years, with a recommendation for eligibility for post-prison community based release after two and a half years;
4. that the sentences imposed in the District Court on 24 January 2003 be otherwise confirmed.

[18] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of the Chief Justice, and there is nothing I can usefully add. I agree with the orders proposed therein.

[19] **HOLMES J:** I would not disturb this sentence.

[20] The appellant did not seek to advance the appeal on the ground of any discernible error in the learned sentencing judge’s exercise of discretion, and it was not suggested that there was any exceptional circumstance to the appeal, for example by way of a need to alter an existing sentencing range. Rather, the appellant relied solely on what was said to be the manifest inadequacy of the sentence as demonstrating that an error of principle must have occurred.

The offences

[21] I adopt gratefully the Chief Justice's outline of the circumstances of the offences. I will, however, add some observations and advert to some features which might properly have led the learned sentencing judge to arrive at the sentence he imposed. There were, in effect, two sets of offences, involving three counts of indecent assaults and three counts of administering a noxious thing with intent to disable (which I will, for the sake of convenience, refer to as the "drugging offences"). Firstly, it seems to me that the offences of indecent assault were correctly described by the respondent's counsel as at the minor end of the range of such offences. The first indecent assault in respect of the complainant A (using the Chief Justice's system of identification) involved a very limited physical contact - the holding of A's feet. The essence of the indecency was the respondent's nakedness at the time, rather than anything done to A. In the other of the counts of indecent assault involving A, the assault was entirely unparticularised by the Crown. In those circumstances it would be impermissible to proceed other than on the basis put by the defence: that it was minor and involved no direct touching of the genitalia.

[22] The remaining indecent assault, on C, entailed the respondent using a washer to wipe C's stomach and the top of his pubic area in a context in which C was sweating and the respondent had also wiped his brow, neck and chest. Again the actual physical contact was not of grave proportions. In the case of both complainants, of course, the assaults gain considerably in seriousness from the fact that each was under the influence of the medication administered by the respondent at the time. But allowing for that, it seems to me that a sentence of two years' imprisonment for each of the assaults was patently not inadequate.

[23] The context of the drugging offences bears some further examination. B was found to have benzodiazepine metabolites in his system, and it seems probable that that or a similar sedative was also administered to the other complainants. It seems to have produced in them a state which fluctuated between unconsciousness and varying degrees of semi-consciousness. An aggravating feature of the drugging of A and B is that it involved a breach of professional trust, but there are some other features that should be noted. Each of A and B was, in the first instance, the subject of a legitimate and properly performed dental procedure. The essence of the Crown case was that, while the sedation in the first instance was proper, the offence lay in the administration of further sedatives to maintain the complainants in an unconscious or semi-conscious state.

[24] A feature of concern properly put by the Crown on sentence was that when B was at the respondent's house, under the effects of sedation, the respondent told B's girlfriend that he did not know where he was. These matters put by the defence and not challenged by the Crown were also to be taken into account: it had been pre-arranged before the dental procedure that B would stay at the respondent's premises; and during the period there, while under sedation, he left the premises on at least two occasions, once to go to a shopping mall and at another point to have coffee. It was plainly not a situation of abduction or confinement. Similarly, it was said by defence counsel, and not challenged, that all of the complainants left the premises from time to time during their period of sedation; and of course A was resident there.

[25] The circumstances of the sedation of C were markedly different. In his case the drug was administered not in connection with any dental procedure, but in a drink, after he had had a night out drinking. The respondent offered an explanation of thinking

it a good idea to enable him to sleep to overcome the adverse effects of the previous night, and the sedation in this case lasted only the day. The fact remains, of course, that the drug was given to the complainant without his knowledge or consent.

Mitigating features

[26] I have dealt with some of the features of the offences. I turn now to the mitigating features of the case which influenced his Honour in deciding to suspend the sentence after eighteen months. The respondent was a first-time offender, being sentenced at the age of 44. He had previously been of high standing in the dental profession, and the learned sentencing judge accepted that his profession had been his life. The offences had caused his deregistration as a dentist, without any prospect of reinstatement, and the loss of his practice and livelihood.

[27] The reports of a psychologist and psychiatrist tendered on the respondent's behalf revealed that he suffered from a schizoid personality disorder which caused him great difficulty in his attempts at relationships with others. That difficulty, allied with intense loneliness and a desperation for closeness, had caused him to breach proper boundaries, although it was not likely that he would re-offend in a similar way. At the time of the offences the respondent was taking what the learned sentencing judge described as a "cocktail of prescribed drugs" which he accepted may have impaired his judgment. His Honour referred also to the respondent's attempts at counselling and rehabilitation. He took into account the timely plea of guilty; and it is to be noted in relation to one of the indecent assaults, that given the prosecution's inability to particularise it, it seems most improbable that it could have proceeded in the absence of a guilty plea.

Other considerations

[28] There was, I think, considerable risk for any sentencing judge, in dealing with both the indecent assault and drugging offences, of being influenced by the possibility that something much worse had happened while the complainants were under sedation than was actually charged. Certainly the uncertainty which the complainants must suffer from as to what actually occurred while they were drugged, and their difficulties in coming to terms with that situation, were things to be taken into account in imposing sentence for the drugging offences; but it was also essential that the respondent not be sentenced for something which was not alleged against him. Importantly, he was not charged with drugging the complainants in order to sexually assault them (indeed there was no allegation of indecent assault in relation to B). Logically the fact that two of the complainants were in a state of sedation when indecently assaulted was in each of those cases an aggravating feature of the indecent assault, not of the drugging, which was not alleged to have been brought about for that purpose.

The comparable sentences relied on by the Crown

[29] The absence of any intent to drug in order to commit the offence of indecent assault seems to me a significant point of distinction from *Robertson*[1], which was relied on by the Attorney-General. The appellant there was charged with administering a stupefying drug under s 316 of the *Criminal Code*. An element of that offence is the

---

1 (1997) 91 A Crim R 388.

intent to commit an indictable offence; in that case, to indecently assault. The distinguishing features of *Robertson* which might tend to suggest a lower sentence were: that only one complainant was involved, that no position of trust was involved, and that reference was made to the possibility, which existed at that time, of charging the appellant in that case under s 218(1)(c), which carried a maximum penalty of seven years imprisonment. On the other hand, there was no mitigating factor of remorse exhibited by a plea of guilty; it had weighed strongly in the sentencing judge's considerations that the complainant was left alone and unconscious and at risk of suffocating in her own vomit; and of course, as already noted, the stupefying drug was administered for the specific purpose of committing an offence. On the whole it seems to me that, if anything, *Robertson* suggests the appropriateness of the sentence imposed by the learned sentencing judge in this case.

[30] At sentence, the Crown prosecutor placed before the learned sentencing judge another Court of Appeal authority in relation to a s 316 charge where the indictable offence was indecent assault, *W*[2]. It was not referred to in this court. In R v. *W* the appellant had been convicted of one count of having, with intent to commit an indictable offence, namely indecent dealing with a child under the age of 12 years, administered to the complainant stupefying drugs and two counts of indecent dealing. He was sentenced to six years imprisonment. The appellant had given his 10 year old stepdaughter a drink with alcohol and tablets of some type in order to stupefy her. He had blindfolded the child, pushed a vibrator in and out of her mouth and then substituted his penis in her mouth. He followed this by taking her underclothing off and, as the trial judge described it, "interfered with her in the genital area". The remaining count of indecent dealing involved digital penetration of her vagina. The appellant, although he had some convictions for dishonesty, had not previously been imprisoned.

[31] The Court of Appeal seems, so far as can be discerned from the authorities to which it referred, to have considered the indecent assault offences as of greater significance than the administration of the stupefying drug. But it reached the conclusion that the sentence of six years imprisonment was "indefensible": "Giving full weight to the fact that there was a breach of trust involved, in our opinion the proper sentence should have been substantially less than that imposed. We would reduce it to a period of three years and six months".

[32] In his written submissions, counsel for the appellant referred to another s 316 case, *Brown*[3], as supporting his contention that the appropriate sentencing range here was between seven and eight years; but on the hearing of the appeal he wisely abandoned reliance on that case. If *Brown* is of assistance it is only, in my view, as serving to reinforce the conclusion that the sentence imposed here was within a proper exercise of discretion. Brown was convicted after trial of one count of administering a stupefying drug to facilitate the commission of an indictable offence and one count of indecent dealing with a girl under the age of 14 years in his care. He had drugged a 12-year old, whose care he had on a weekend outing, and engaged in penetrative sex with her. (It is difficult to understand why he was not charged with rape). He had previously been convicted of similar offences against girls under the age of 16. The court upheld sentences of eight years imprisonment in respect of

---

2 Unreported, Court of Appeal, 24 April 1998.

3 Unreported, Court of Criminal Appeal, 7 March 1991.

the count of administering a stupefying drug and five years imprisonment on the count of indecent dealing.

No error is shown

[33] If the appellate decisions on sentencing under s 316 of the Code offer any guide here, they lead, in my view, inexorably to the conclusion that the head sentence of five years imposed in this case was not manifestly inadequate. If they are put to one side as not directly on point, there exists no clear range in respect of offences of the kind committed by the respondent, and one cannot readily assert that the learned sentencing judge's sentence departed from any recognised standard.

[34] If the sentence is to be considered without the benefit of comparable cases, is it so obviously wrong as to warrant interference? It is trite to say that the sentencing judge had a discretion; but the existence of that discretion must be given more than lip service. It must be acknowledged, firstly that there was a range of possibilities open to him which included the lenient and the severe; and secondly, that there is no one correct view as to what the limits of that range were. The point made by McHugh J in *Everett*[4] is apposite:

> "Defining the limits of the range of appropriate sentences with respect to a particular offence is a difficult task. What is the range in a particular case is a question on which reasonable minds may differ."

[35] And it is important, too, to remember that while this court's discretion to vary the sentence is unfettered, there are considerations relevant to the exercise of that discretion: that an appeal by the Attorney-General amounts to putting the respondent in a situation of double jeopardy[5]; that the sentencing judge having seen the accused "is uniquely well placed … to exercise a discretion"[6] and, more generally, the need for circumspection on an Attorney's appeal.[7]

[36] Nothing, in my view, has been pointed to which shows that the head sentence of five years was outside any recognised range, or was inherently and obviously untenable. Suspension after 18 months was generous, but ample justification for that approach can be found in the many mitigating features of the case. In short, I do not think, taking all the circumstances to which I have referred into account, that the appellant has demonstrated that the sentence here was one which could not have been imposed within the proper exercise of a sentencing discretion, as distinct from one which might be the subject of disagreement.

The Crown's obligation to respond in the sentencing process

[37] There is a matter not directly relevant to my reasons which I wish to mention. It was submitted by counsel for the respondent that the Crown should be bound by its conduct on sentencing. The learned Crown prosecutor had raised no objection when

---

4 (1994) 181 CLR 295 at 306.

5 *R v Melano; ex parte Attorney-General* [1995] 2 Qd R 186 at 195; *R v Everett and Phillips* (1994) 181 CLR 295 at 305; *Dinsdale v The Queen* (2000) 202 CLR 321 per Kirby J at 341; *Malvaso v The Queen* (1989) 168 CLR 227 per Deane J and McHugh J at p 324; *Clarke* (1996) 85 A Crim R 114 at 116.

6 *Osmond; Ex parte A-G* [1987] 1 Qd R 429 at 438, cited in *Sheppard* (1995) 77 A Crim R 139 at 146.

7 See, eg, *R v Gilles; ex parte Attorney-General of Queensland* [2002] 1 Qd R 404 at 408.

> the sentencing judge indicated that he had in mind a sentence such as was imposed. I should say firstly, that the prosecutor's submission as to a sentence of six years imprisonment being within an appropriate range appears to me entirely correct; and, as will be apparent from my reasons, I similarly view the sentence in fact imposed as within an appropriate sentencing range. But had that not been the case, I would not regard the Crown prosecutor's conduct as disentitling the appellant from advancing the submission that the sentence of five years' imprisonment, suspended after 18 months, was inadequate, in circumstances where the prosecutor had already contended for six years as the appropriate sentence, and had pointed out that the option of suspension would thus be excluded. It does not seem to me that it was incumbent on him to advance the submission once more when the learned judge indicated that he was persuaded otherwise. It might have been different if the prospect of a lesser sentence and suspension had been raised for the first time in his Honour's remarks; but the prosecutor had already addressed that question, and nothing was to be gained by repetition.

Conclusion

[38] For the reasons I have given I would dismiss the appeal.