SUPREME COURT OF QUEENSLAND

CITATION:	*R v N; ex parte A-G (Qld)* [2003] QCA 391
PARTIES:	**R** **v** **N** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 228 of 2003 DC No 26B of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Maryborough
DELIVERED ON:	12 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	25 August 2003
JUDGES:	McMurdo P, Jerrard JA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Allow the appeal to the extent of deleting the order that the sentence be suspended after six months and ordering instead that it be suspended after the respondent has served 12 months imprisonment**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENCE – where respondent pleaded guilty to unlawful and indecent dealing with a child under 12 who was in his care – where serious breach of trust involved – where nature and number of offences significant – where learned sentencing judge made no reference to respondent's previous convictions for sexual assaults when sentencing – whether too much weight given to mitigating factors CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL – APPLICATIONS TO INCREASE SENTENCE – OFFENCES AGAINST THE PERSON – where respondent

sentenced to two years imprisonment to be suspended after six months with an operational period of three years – where appellant contends that a head sentence of three to three and a half years should have been imposed – where prosecutor at sentence contended that the appropriate head sentence was between 18 months and two years – where this court is limited to imposing a sentence within the range submitted by the prosecutor on sentence save for exceptional circumstances – whether sentence manifestly inadequate

Everett v R (1994) 181 CLR 295, followed
R v B; ex parte A-G (Qld) [1997] 1 Qd R 523, discussed
R v Chambers, Harrison & Fisher; ex parte A-G (Qld) [2002] QCA 534; CA Nos 316, 317 and 318 of 2002, 5 December 2002, referred to
R v G; ex parte A-G (Qld) [1999] QCA 477; CA No 303 of 1999, 16 November 1999, discussed
R v M [1995] QCA 394; CA No 225 of 1995, 27 July 1995, discussed
R v M [1998] QCA 118; CA No 445 of 1998, 13 April 1999, considered
R v P [2001] QCA 130; CA No 4 of 2001, 5 April 2001, considered
R v T; ex parte A-G (Qld) [2001] QCA 398; CA No 18 of 2001, 24 September 2001, discussed
R v Wilde; ex parte A-G (Qld) [2002] QCA 501, CA No 238 of 2002, 15 November 2002, referred to
R v W [2000] QCA 321; CA No 141 of 2000, 8 August 2000, discussed

COUNSEL: C W Heaton for the appellant
S W Zillman for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Morton & Morton for the respondent

[1] **McMURDO P:** The relevant facts and issues are set out in Jerrard JA's reasons, with which I agree.

[2] Mr Heaton, for the appellant, the Attorney-General of Queensland, contends that a sentence of three to three and a half years imprisonment should have been imposed here, with suspension after 12 to 15 months to reflect the plea of guilty and other mitigating factors.

[3] The sentence imposed at first instance of two years imprisonment suspended after six months was manifestly inadequate in light of the serious breach of trust, the number and nature of the offences and the respondent's prior convictions for aggravated assault, (offences of a sexual nature committed upon young girls), albeit in 1981. That does not mean the appellant must be successful because this is, regrettably, another instance where the learned primary judge was led into error because the sentencing range put forward by the prosecution at sentence was too

low.[1] The prosecutor at sentence contended that the appropriate sentence was between 18 months to two years imprisonment with a partial suspension of that sentence. It is self-evident that it is a most unsatisfactory criminal justice system where the prosecutor at sentence submits an appropriate sentencing range, the sentencing judge imposes a penalty within that range and the Attorney-General then appeals against the sentence imposed, with the prosecutor at the appeal contending for a higher range than that put forward by the prosecutor at sentence. So much was recognised by the High Court in *Everett v R*,[2] in its statement of this principle that Courts of Appeal will not ordinarily impose a heavier penalty than that contended for by the prosecution at sentence. This principle may only be departed from in exceptional circumstances.[3]

[4] The serious aspects of this offence, including the age of the girl, the respondent's position of trust, the number and nature of the offences and his prior criminal history, warranted a sentence of three years imprisonment moderated because of the plea of guilty and other mitigating factors with a recommendation for parole after 12 months imprisonment. This is the sentence I would have imposed here but for the submission as to the sentencing range put forward by the prosecutor at sentence. Consistent with the principles discussed in *Everett*, this Court is limited to imposing a sentence within the range contended for by the prosecutor at sentence. As a result, I agree with Jerrard JA that the appeal should be allowed and instead of suspending the sentence after six months imprisonment, order that it be suspended after serving 12 months imprisonment.

[5] **JERRARD JA:** On 3rd June 2003 N pleaded guilty to four offences, three of which consisted of his having unlawfully and indecently dealt with a child under the age of 12 years whom he had in his care, with the other being the offence of unlawfully procuring that child to commit an indecent act when under his care. He was sentenced to two years imprisonment, and the learned sentencing judge ordered that that sentence be suspended after six months for an operational period of three years. The Attorney-General has appealed to this court pursuant to s 669A of the *Criminal Code* (Qld) and has submitted that that sentence was manifestly inadequate because:

- it failed to reflect adequately the gravity of the offence generally and in this case in particular;
- it failed to take sufficiently into account the aspect of general deterrence; and
- the learned sentencing judge gave too much weight to factors going to mitigation.

The offences

[6] The child victim of these offences was born on 16 October 1987, and the four counts to which the respondent pleaded guilty (counts 2-5) all alleged that the offending behaviour occurred between the first day of February 1996 and the first day of January 1998. The learned sentencing judge was briefly and erroneously led to the view that this was a thirty month period of offending (AR 11) but that was

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1 See, for example, *R v Chambers, Harrison & Fisher; ex p Attorney-General of Queensland* [2002] QCA 534; CA Nos 316-318 of 2002, 5 December 2002; *R v Wilde; ex p Attorney-General* [2002] QCA 501; CA No 238 of 2002, 15 November 2002.

2 (1994) 181 CLR 295, 302-303.

3 *R v Wilton* (1981) 28 SASR 362, 367-369, approved in *Everett*, supra.

soon corrected (AR 13). The indictment covers the period when the child was between eight and a half and ten and a half years old. Her mother had entrusted her to the care of the respondent's wife, while the complainant child's mother was at her place of employment. This is how the child came to be in the respondent's home, and in which the child befriended the respondent's daughter Jessica.

[7] Neither the indictment nor the description of the offences provided to the learned sentencing judge identify when within that two-year period the four offences were committed. The relevance of this is that the maximum sentence for offences of this nature committed upon a child under the age of 12 years was increased from 10 years to 14 years imprisonment by Act No 3 of 1997, which came into force on 1 July 1997 and thus towards the latter end of the period alleged in the indictment.

[8] The offending behaviour in the first count (count 2), consisted of the respondent having induced the child to enter his bedroom and his then placing his penis around her mouth area "and so forth"[4]. He desisted when he heard his wife calling out. The next count also described behaviour occurring in his bedroom and occurring when the child had called the residence to see if Jessica was at home. The respondent answered the phone, told the child it was "all right" for her to come around, and the complainant did. When the child arrived, only the prisoner was home and Jessica was not. She returned soon after. In between, the respondent took advantage of the child attending in response to his misdescription of Jessica's whereabouts, and offended by rubbing his penis against the child's vulva.

[9] The next count related to an incident when the complainant child stayed over one night and the complainant picked the child up from where she was lying in a tent the respondent was sharing with Jessica and the complainant in his backyard. He moved the complainant child backwards and forwards on top of him, he having ensured their groin areas were in contact. Both were clothed.

[10] The last matter occurred when the complainant child came to visit Jessica who once again was not home; the respondent entered the room, removed the child's underwear and committed cunnilingus upon her. One feature of his conduct described by the prosecution, but not identified as occurring on any particular occasion, was that the respondent had told the child that "what they were doing was love" and "there was some mention of a girls' home."[5] It is not clear quite what that meant.

The Crown submission below

[11] Counsel for the prosecution suggested to the sentencing judge that an appropriate head sentence in this case would be in the order of 18 months to two years, and that the plea of guilty could be reflected in a suspension of that sentence after a period of actual imprisonment. The sentence imposed was consistent with that recommendation and indeed at the higher end. This court has recently held in *R v Wilde*[6], and repeated in *R v Chambers*[7], that the submissions of counsel for the Crown do not constrain this court where the Crown's contention as to the level of

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4 AR 10
5 AR 11
6 *R v Wilde; ex parte A-G (Qld)* [2002] QCA 501
7 *R v Chambers, Harrison and Fisher; ex parte A-G (Qld)* [2002] QCA 534

appropriate penalty is much too lenient[8], or manifestly too low.[9] That approach by this court is necessary to avoid compounding error, but appropriate respect for the approach to appeals against sentence by an Attorney-General, described in the judgment in *Everett v R* (1994) 181 CLR 295 at 300 and 307, requires that this court be satisfied that is has clearly been demonstrated on such an appeal that the Crown's recommendations were manifestly too low.

Increases in the maximum penalty

[12] In appeals where offences of this nature are involved the matter is complicated by the fact of increases over time in the maximum penalty applicable to such offending behaviour. From 1 July 1975 onwards the maximum penalty provided was seven years imprisonment in respect of offences committed on a child under 14 years of age, and five years imprisonment for offences committed on a child under 16 years of age. By Act No 17 of 1989 the maximum penalty for offending against children under 12, or lineal descendants, or in the offender's guardianship or care (all circumstances of aggravation) was increased from seven to 10 years, with the penalty otherwise available being a maximum of five years imprisonment. This meant that in respect of children aged 12 and 13, in respect of whom offences were committed with no circumstances of aggravation, the maximum penalty was actually reduced from seven to five years.

[13] Act No 3 of 1997 which came into force on 1 July 1997 increased the maximum penalty from 10 to 14 years imprisonment, where offences were committed with the described circumstances of aggravation. The maximum available penalty in respect of other children was increased from five to 10 years. Act No 3 of 2003 in force from 1 May 2003 has increased the maximum penalty for offences committed with those circumstances of aggravation to 20 years; and in respect of other children from 10 to 14 years. The material placed before the sentencing judge and this court does not clearly demonstrate that at least some offending behaviour by N occurred after the increased penalties relevant to him took effect on 1 July 1997.

The result of those increases

[14] Between 1988 and mid-2003 the legislature has increased the maximum penalty for offending against children of this complainant's age (and in the respondent's care) from seven to 20 years, a near three-fold increase. The maximum sentence for offending against children where there is no circumstance of aggravation has likewise almost trebled, from five to 14 years.[10]

[15] An example of a sentence considered by this court when the maximum penalty was seven years imprisonment was in *R v T* [2001] QCA 398. That offender had been sentenced on 27 April 2001, following a trial in which he was convicted of six counts of indecent dealing with his stepdaughter, those offences being committed in 1983-1984, over a two year period in which the complainant child was aged from eight to 10. The offending behaviour included digital vaginal penetration, touching of the vulva, inducing the child to masturbate T, and his lying on top of the child

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8 *R v Wilde* [at 31]

9 *Chambers* at page 7

10 In *R v G; ex parte A-G (Qld)* [1999] QCA 477 this court remarked at [23] that an increase in the maximum penalty considered by the judge will ordinarily lead to an increase in the appropriate sentence (citing *Law* (1985) 84 A Crim R 142 at 144)

and rubbing his penis in her vulval area. He demonstrated no remorse in a trial in which he denied committing any offences; and this court upheld an appeal against the sentence of 18 months imprisonment wholly suspended, and imposed instead an order that that 18 months imprisonment be suspended after six months, for an operational period of three years.

[16] Another judgment of this court, in respect of offences committed when the maximum penalty was seven years imprisonment, is the decision in *R v G; ex parte A-G (Qld)* [1999] QCA 477. G had pleaded guilty to nine charges of indecent dealing with children both of whom were his nieces. One was aged six and seven when offended against in the years between September 1977 and September 1978, and the other was offended against during two separate periods, the first during 1980 and the second during 1983. She was aged seven when the offending behaviour ended. Because it preceded the increased penalties provided by Act No 17 of 1989, his conduct rendered him liable to a maximum seven year term.

[17] It provided serious examples of this variety of offending behaviour. Both his victims were just little girls. Both offences involving one niece resulted in whatever he did to her causing her to feel vaginal pain, and the other niece described various offences of digital vaginal penetration, her being required to masturbate him, cunnilingus of her, his persisting in endeavours to have her commit fellatio on him, and his rubbing his penis against her vulva. Following an appeal by the Attorney-General this court increased the sentences imposed from one of two and a half years imprisonment, entirely suspended for four years, to one of two and a half years imprisonment to be suspended after G had served four months of that term.

[18] The next relevant decision of this court in respect of a then seven year maximum penalty is the decision in *R v W* [2000] QCA 321. In that matter the court heard an appeal by W after he was convicted, following a trial, on three counts of having indecently dealt with a then six to eight year old child. The offences were committed over a two year period ending on 31 December 1985. W was the grandfather of his victim and aged 69 when sentenced. This court reduced the 12 months imprisonment originally ordered to a sentence of six months imprisonment on each of the three counts, to be suspended after two months with an operational period of two years. The relevant offending behaviour had consisted of his rubbing his victim on her vulva both inside and outside her pants, but with no penetration or any other variety of abuse.

[19] The sentence imposed in the matter considered in *R v B; ex parte A-G (Qld)* [1996] QCA 92 appears consistent with those other sentences, because of the matters of mitigation in that case. B had pleaded guilty to six offences of indecently dealing with a child in the period 1 May 1988 to 30 July 1990. The child victim increased in age from 10 to 12 years during that period, and the increase in maximum penalties provided by Act No 17 of 1989 meant that the maximum penalty for such offending behaviour increased from seven to 10 years during the period in which he offended. Like many such offenders he had no prior convictions, and matters taken into account by this court is his favour as mitigating his offending were that he was a person of unusually low intelligence who had been overcome by remorse for his actions, which remorse had led to his attempting suicide, and then seeking both psychiatric and extensive psychological treatment. His offending behaviour had included his performing cunnilingus on his victim, persuading her to commit fellatio on him, and digital vaginal penetration. This court did not disturb a sentence of six

months imprisonment and three years probation, but described the sentence imposed as a light one. The reason it was not increased was the personal circumstances of the offender referred to in the judgment.

[20] In *R v M* [1995] QCA 394, this court did not disturb a sentence of three years imprisonment with a recommendation that that applicant be eligible for parole after 12 months. M had pleaded guilty to seven counts of having indecently dealt with his stepdaughter, then aged eight, in mid 1994. The maximum penalty was 10 years imprisonment. He offended when his wife was absent from the family home on three separate occasions. Three separate offences were committed on each of the first two occasions, and one on the last. His offending behaviour included having the child touch and suck his penis, his likewise touching and licking her genitals, and his rubbing his erect penis against her crutch area and ejaculating over her body. He confessed his offences to the police after admitting them to the child's mother, and soon after attempted suicide. He had received some counselling by the time he was sentenced and was considered to be remorseful. That three year sentence with the parole recommendation is consistent with the maximum ten year penalty then applicable.

[21] A decision of this court which considered offending behaviour committed at the same time as that of N can be found in *R v M* [1998] QCA 118. That offender pleaded guilty to three counts of indecently dealing with his then 10 year old daughter, and one further count of permitting himself to be indecently dealt with by her. His offending behaviour included his rubbing the child's vulva, his inducing the child to perform fellatio upon him, his having the child masturbate him, and digital vaginal penetration. His offending behaviour, which occurred between 1 July 1996 and 30 July 1997, occurred over a period in which the maximum available penalty was increased from 10 to 14 years. The judgment of this court, in which his sentence of four years imprisonment originally imposed was reduced to one of three years imprisonment with parole recommended after 15 months, recorded a submission on the applicant's behalf that ordinarily in such a case the range of sentence was between two to three years; with a recommendation for parole after 12 months. The judgment does not expressly approve that submission but the sentence imposed is consistent with it. Judged by that sentence, the two years imprisonment ordered here is at the bottom end of the appropriate range. That case provides a useful comparison because of the date of the offences; and because that offender engaged in vaginal penetration which would now be classed as rape, whereas N did not.

[22] The last matter to which the court was referred was the sentence in *R v P* [2001] QCA 130, imposed in respect of offending behaviour against two different children. That offender had pleaded guilty to two counts of indecently dealing with one then 13 year old stepdaughter, and to eight further counts of indecently dealing with a second stepdaughter, who was aged nine and 10 when offended against. The latter offending behaviour occurred between July 1998 and 7 February 1999, and thus rendered P liable to a maximum of 14 years imprisonment (the offending against the elder stepdaughter occurred between March 1996 and January 1997).

[23] That offender's behaviour against the elder child included his bringing her vulva area into contact with his erect penis in a bath, and his later massaging her breasts. His conduct in respect of the younger child included his rubbing her vulval area in

the shower, bringing his penis into contact with her vulval area, and his having her masturbate him. No vaginal penetration occurred.

[24] The sentencing remarks of this court included the observation that the range of appropriate penalties for such cases extended from about 18 months to three years imprisonment, and the court upheld a sentence of two years imprisonment. Two members remarked that a lighter sentence might properly have been imposed. Those remarks do not strongly reflect the increase in the maximum penalty which had by then occurred, but may reflect the lesser level of abuse which was demonstrated there.

[25] Like the applicant in *R v P*, N did not extend his abusive behaviour to any form of vaginal penetration of his victim. He committed most other forms of abuse, including contact between his penis and her vulva. His conduct involved both a breach of trust, and on one occasion his deceiving the victim into entering his house whereupon abuse occurred. She was quite defenceless against his adult manipulation, and her victim impact statement and one from her mother each show the extremely adverse effect upon the child that his conduct has had. She has been suicidal.

[26] It is difficult to discern any consistent upward movement of sentences imposed by this court in the judgments described herein for offences of this kind, and which is consistent with the increase legislated for. This may well be explained by the fact that sentencing judges and this court are each asked on occasions to impose sentences in respect of behaviour which occurred quite a few years earlier. Even so, the range of appropriate sentences described in *R v P* presents a check upon an upward movement which might otherwise have been expected.

[27] The appropriate sentence in this case is certainly one every bit as severe as the two years imposed in *R v P*. Unlike that offender N does have relevant previous convictions, admittedly a long time ago. This is for two convictions on 4 August 1981 for offences of aggravated assault in which his conduct included touching both a seven and an eight year old girl on the upper leg and vulval area. All touching was on the outside of their clothing.

[28] The learned judge made no reference when sentencing to those prior convictions, which are relevant in that they must decrease any expectation that leniency rather than a deterrent penalty will assist N in rehabilitation and to avoid re-offending. To that extent, the learned judge gave no weight to a matter which had some relevance. Whether because of that or not, the sentence imposed appears at the lower end of the range previously declared or described as available, and in addition N got the benefit of a relatively early suspension. This was despite his pleas of guilty being made after the start of a trial in which he was then charged with the offence of maintaining a sexual relationship with his victim, which charge the prosecution withdrew after he entered his pleas of guilty. I consider that a more appropriate penalty would have been one of at least two and a half years imprisonment, with parole recommended after N had served perhaps 12 months of that term. In light of the submissions by the Crown made to the learned trial judge, and the fact that the maximum penalty for this respondent's conduct may have been 10 years rather than 14, it is appropriate to limit amendment of this sentence, which does appear manifestly inadequate, to deleting the order that the sentence be suspended after six months and ordering instead that it be suspended after serving 12 months.

[29] **PHILIPPIDES J:** I agree with the reasons of Jerrard JA and the further reasons of the President and with the order proposed.