SUPREME COURT OF QUEENSLAND

CITATION:	*R v AU* [2004] QCA 330
PARTIES:	**R** **v** **AU** (appellant/applicant)
FILE NO/S:	CA No 368 of 2003 DC No 281 of 2003 DC No 281A of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Gladstone
DELIVERED ON:	10 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	11 June 2004
JUDGES:	McMurdo P, McPherson JA and Jerrard JA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed;** **2. that the pleas of guilty entered in the District Court on 17 October 2003 on all 25 counts on the ex-officio indictment numbered 281/03 be set aside, the convictions quashed, and new trials be held on the counts on that indictment on which the appellant is either committed for trial or agrees to stand trial on that ex-officio indictment;** **3. that on counts 1, 5, 6, 9 and 12 on the ex-officio indictment numbered 281A/03 the pleas of guilty entered in the District Court on 17 October 2003 be set aside, the convictions quashed, and pleas of not guilty entered, and new trials be held on those counts on which the appellant is committed for trial or agrees to stand trial on that ex-officio indictment;** **4. application for leave to appeal against sentence granted and appeal allowed in respect of counts 2, 3, 4, 7, 8, 10 and 11 on that indictment numbered 281A/03 to the extent that it is recommended that the appellant be considered eligible for post prison community based release after he has served 12 months of that sentence.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL - APPEAL AGAINST CONVICTION RECORDED ON PLEA OF GUILTY – PARTICULAR CASES – where appellant sought to withdraw plea of guilty on appeal – where appellant pleaded guilty to 37 counts of having sexually abused children charged on two separate ex-officio indictments – where no discussion between appellant and his lawyers before appellant pleaded guilty about the allegations relied on by the prosecution on any count charged – where appellant suffering from Parkinson's disease and early onset dementia – where appellant did not know what conduct was alleged against him or what he was admitting by his pleas – whether plea of guilty was free and voluntary – whether failure to set aside plea would result in a miscarriage of justice

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where applicant convicted on ex-officio pleas of guilty to numerous counts of unlawful and indecent dealing with a child – where applicant sentenced to four years imprisonment – where applicant demonstrably affected by dementia – whether sentence manifestly excessive

Meissner v R (1995) 184 CLR 132, applied
R v M [1995] QCA 394; CA No 225 of 1995, 27 July 1995, considered
R v McKenzie [2000] QCA 324; (2000) 113 A Crim R 534, cited
R v M [1999] QCA 118; CA No 445 of 1998, 13 April 1999, considered
R v McKillop; *ex parte A-G* [1997] QCA 283; CA No 263 of 1997, 6 August 1997, considered
R v M; ex parte A-G [1999] QCA 442; [2000] Qd R 543, cited
R v K [1999] QCA 041; CA No 396 of 1998, 24 February 1999, considered

COUNSEL: B W Walker SC, with B W Farr, for the appellant
M J Copley for the respondent

SOLICITORS: Ryan & Bosscher Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with Jerrard JA's reasons for concluding that the pleas of guilty entered on the 12 count indictment 281A/03 concerning the complainant RW to counts 1, 5, 6, 9 and 12 and all pleas of guilty on the 25 count indictment 281/03 concerning complainants BR, DS and RR be set aside.

[2] Material placed before this Court now demonstrates that at the time the appellant pleaded guilty he was suffering from Parkinson's disease and early onset dementia. His mental state required that his lawyers take particular care to ensure that he was capable of making and did make a free and informed choice to plead guilty to all the charges. As Jerrard JA explains, the appellant could not have made an informed choice to plead guilty to the offences on the 25 count indictment when he was unaware of the prosecution case against him on those offences; that is especially so in the light of his mental disabilities. The circumstances set out by Jerrard JA also throw serious doubt upon his informed choice to plead guilty to counts 1, 5, 6, 9 and 12 on the 12 count indictment. A miscarriage of justice has resulted.

[3] I agree with Jerrard JA's reasons for allowing the appeal against sentence.

[4] I agree with the orders proposed by Jerrard JA.

[5] Because of the appellant's age, illness and the time he has already spent in custody, it may not be desirable to pursue the appellant on further trials but this is ultimately a matter for the Director of Public Prosecutions to determine, probably in consultation with the complainants and their families.

[6] **McPHERSON JA:** I have read the reasons for judgment of Jerrard JA in relation to these appeals and applications for leave to appeal. I agree with them and with the orders his Honour proposes.

[7] **JERRARD JA:** These proceedings are an application for leave to set aside pleas of guilty made on 17 October 2003 by AU in the District Court to 37 charges of having sexually abused children. The charges included one count of sodomy of his eight year old grandson RW, one of maintaining a sexual relationship with that grandson which included the aggravating circumstance of that act of sodomy, five charges of unlawfully and indecently dealing with him, one count of wilfully exposing the child to an indecent act, and two counts of unlawfully permitting himself to be indecently dealt with by the child. Those counts were all charged on one ex-officio indictment.

[8] A second ex-officio indictment charged 25 other counts against three other children. Four charges involved a child RR. One was for rape, one was for unlawful assault, and two were for unlawful and indecent dealing with her when aged under 16. Three charges related to a second child DS, of which two charged unlawful and indecent dealing with her when she was under 12, and one that same offence committed when she was under 16. There were 18 other charges regarding a child BR, of which one was for unlawful and indecent assault, and 17 were for offences of unlawful and indecent dealing with that child when he was aged under 14.

[9] The learned sentencing judge imposed different sentences for the offences admitted by the plea, of which the heaviest were sentences of nine and a half years imprisonment imposed for the offences of sodomy of RW and for maintaining an aggravated sexual relationship with him, and for the offence of rape of RR. The learned judge recommended that AU be eligible to apply for parole after four years; and sentenced him to four years imprisonment on all other counts involving RW, on all counts involving BR, and for the offences of indecently dealing with DS when she was under 12. The learned judge sentenced AU to 12 months imprisonment for the offence of indecently dealing with DS when she was a child under 16, and for the offences other than rape committed on RR. All sentences are to be served

concurrently. AU has also applied for leave to appeal the severity of the sentences imposed on all such convictions which are not set aside, arguing that the sentences were manifestly excessive.

[10] AU argued to have the convictions set aside on the assertion of inadequate representation by his solicitor and barrister, particularised as being that:

- AU was unfit to plead, and relevant medical details were not placed before the learned sentencing judge;
- AU was not advised adequately as to his option to plead not guilty, nor advised as to the court processes in either the Magistrates or District Court, and had no conference with his solicitor prior to the day of sentence to discuss the charges and give instructions;
- neither the solicitor nor barrister discussed with him each of the different charges or the evidence supporting those, prior to his pleas of guilty;
- his solicitor was not present when AU was sentenced and had not attended a conference between the barrister and AU
- the learned sentencing judge was not properly informed of all relevant matters.

He independently complains of the length of the sentence.

[11] AU was born on 23 October 1928 and is approaching 76. He was nearly 75 when sentenced. The offences to which he pleaded guilty involving his grandson RW were all alleged to have occurred in January 1998, when he was 69; those involving DS between 1 January 1957 and 31 December 1960; those involving BR between 31 October 1959 and 31 December 1969; and those involving RR between 1 January 1974 and 30 April 1976. Those latter complainants, all now adults, were children in households in which AU lived as a boarder at different times.

[12] On these applications this court had both affidavit and oral evidence from AU and his daughter Mrs L put before it, and both oral evidence and a report from a forensic psychiatrist, Dr Vlad Todorovic. That evidence was called by the applicant; the respondent led affidavit and oral evidence from the solicitor representing the applicant when he was sentenced, and the barrister who then appeared for him. AU had different representation in these proceedings, and also read affidavits from the solicitor who prepared the applications now considered. The court also had available the appeal record.

The police interview

[13] The considerable body of evidence put before the court establishes the following matters, with many being common ground. On 6 February 1999 RW complained of the behaviour of his grandfather AU, and later, that month AU was questioned by police. He denied allegations then made of improper sexual dealings with his grandson. Those allegations were repeated some years later and on 27 July 2003 police officers investigating the reinvigorated complaint went to AU's home. The latter at first declined to accompany them anywhere for an interview, but eventually went with his son-in-law to a local police station for a tape recorded interview.

[14] He gave answers showing he was orientated and alert, and at first exercised his right not to answer questions. However, when told he would be charged, he acknowledged that some of what had been put to him by the police officers was true, and he was further interviewed. Once again his son-in-law was present. In the second interview he admitted having played with RW's penis and having sucked it, some four years earlier. He admitted having fondled the boy's penis "roundabout four times", those being on separate days, and having sucked the child's penis "a couple of times". He denied having asked the boy to play with AU's penis, or having placed his penis in RW's bottom, and denied having procured RW to suck AU's penis. AU did admit that RW had seen AU's erect penis, that AU had pulled his pants down when with an erect penis, but denied that anything had occurred thereafter.

[15] He identified the part of the house in which the sexual behaviour with RW had taken place, and that it had occurred towards the end of a period in which the boy's mother (AU's daughter) and RW had been living with him. He also acknowledged having been questioned some years earlier by the police about the same matters, and having then falsely denied the allegation.

[16] A transcript of the interview with the police on 27 July 2003 shows that AU was arrested on 11 charges involving RW that day, and each charge was explained to him and the circumstances alleged to constitute that charge. AU was recorded agreeing that that had happened. His son-in-law heard his confessions to fondling his grandson's penis and sucking it. The son-in-law told his wife, Mrs L, of the fact of those confessions and she asked AU about his making those statements; AU did not acknowledge to her that he had admitted that conduct. Mrs L's evidence on appeal made clear that she did not believe her father had committed any of the offences alleged against him involving RW or the other three complainants. Her rationale was that AU had not offended against her, her siblings, or her children, and that the complainants were lying. She believed that her sister – RW's mother – had beaten RW to force him to renew his complaint.

[17] Mrs L's evidence included her belief that AU did not realise he had been charged on 27 July 2003 with the commission of sexual offences, but the transcript of the interview shows that he understood that quite clearly. Mrs L's protectiveness of her elderly father has not resulted in his always being completely frank with her.

Dealings with the solicitor

[18] On or about 30 July 2003 AU and Mrs L attended the office of a solicitor, who was well experienced in criminal law in this State, and to whom Mrs L supplied the Bench Charge Sheets for the then 11 counts involving RW. At that stage those counts did not include one count of maintaining a sexual relationship. The solicitor completed an application for legal aid for AU, specifying and describing the offences then charged, and conducted a short interview with AU. It was common ground the solicitor told AU that they were very serious offences and that if he was guilty he would be sent to jail. AU also agreed, as the solicitor swore, that the solicitor asked him if he intended to plead guilty or not guilty. AU denied the response the solicitor described, namely that AU had said that "well, I did it so I suppose I am guilty", and that he had then responded "yes" to a further question as to whether he wanted to plead guilty to each charge. Having heard evidence from the solicitor, AU, and Mrs L, I much prefer and accept the solicitor's account. It

was relevant to the solicitor's task to find out AU's intentions about a plea, and all of the solicitor's subsequent conduct in the matter is consistent only with the solicitor having been told that day that AU would plead guilty to all the charges.

[19] The solicitor's evidence was that he had then endeavoured to explain the various avenues by which a plea of "guilty" could be entered, including the process of a committal hearing or the alternative process of an ex-officio indictment. He had recommended the latter course, as one saving the complainant child from giving evidence and likely therefore to mitigate AU's sentence of imprisonment, and the solicitor thought his audience understood him.

[20] On 14 August 2003 the charges came on for mention in the Magistrates Court. The solicitor, AU, and Mrs L were all there. The solicitor informed the Magistrate that he had instructions AU would plead "guilty" by way of an ex-officio indictment, and the charges were accordingly adjourned in the Magistrates Court to 30 October 2003, for mention. The solicitor in the meantime had taken steps to obtain a document from the police described as the "QP9" regarding those then 11 charges, that document being one prepared as a matter of course by the Queensland Police Service, in which the factual circumstances of the various offences are summarised, together with a description of AU's responses when questioned and his criminal history. There was also a brief historical description of how the complaints came to police attention. That document would have been received soon after 14 August 2003.

[21] On 18 August 2003 AU was charged with the 25 further offences on the complaints of RR, DS, and BR. He declined to be interviewed by the police about those matters and accordingly did not have the particulars of the allegations put to him. Mrs L rang the solicitor and told him that AU was now charged with more offences involving other children. Although she denied having said so, I accept that she did say to the solicitor that she wanted those charges "all dealt with together at the one time". The solicitor understood that to mean AU would be pleading guilty to all of those charges as well, although that was not what Mrs L had said. The solicitor asked for the QP9's for those charges from the police as well, on the assumption there would be pleas of guilty.

Dealings with the barrister

[22] The solicitor briefed a barrister who was equally experienced in the practice of criminal law, and whom the solicitor had previously instructed. They had developed a working practice successfully followed up till then, in which the solicitor did not take specific written instructions on charges to which a client would be pleading guilty and on which that barrister would represent the client in court. This was because, to the solicitor's knowledge, the barrister preferred to confer with the client himself and obtain the information about the charges and the client which the barrister considered relevant and appropriate to place before the sentencing court. Knowledge of the barrister's preference had led to the solicitor seeing little point in each of them independently obtaining instructions on the same charges. Accordingly, the solicitor briefed the barrister with the QP9's for all the offences then charged by the police (11 involving RW and 25 involving the other three complainants), and arranged a conference between AU and the barrister, without the solicitor himself having ever discussed any of the charges at all with AU, or the information in any of the QP9's, and without actually asking AU himself whether

he would be pleading guilty to the other 25 charges. The barrister's instructions were to represent AU on his plea to all charges.

[23] A conference with the barrister was on 13 October 2003, at the solicitor's office. Although the solicitor was not present, AU and Mrs L were. The barrister had a general conversation with AU about his personal life, learning where AU had worked, the fact that he had four children although he had never married, and the like. The barrister did not discuss the specific allegations recorded in the respective QP9's in respect of each charge, or identify with AU just how many charges he faced, or discuss the separate charges. The barrister could recall about that conference that AU obviously knew that he had been charged with sexual offences against the four complainants, and that the charges included a charge of rape and one of sodomy, and knew that those were the most serious charges. The barrister recalled that AU also understood that a number of the offences were alleged in respect of children who were now adults. The barrister's recollection was that AU had made it clear during the conference that he had done what the prosecution alleged, and wanted to plead "guilty" to all matters; but conceded in cross-examination that that may have been conveyed by AU simply nodding to matters asked or stated to him by the barrister. What counsel could recall was that, to his own considerable surprise, the allegation of sodomy was specifically mentioned in conference and not disputed by AU.

[24] The barrister could remember having expressed his own opinion to AU and Mrs L, namely that the barrister fully agreed with the decision he understood AU had already made, and confirmed to the barrister, to plead guilty; and the barrister told AU that doing that by way of an ex-officio indictment would significantly reduce the penalty AU would receive. That advice was based partly on the barrister's survey of the allegations contained in the QP9 documents, and partly on his forensic experience. It is clear he was expressing honestly held opinions, on the reasonably made assumption that AU had already instructed the solicitor that he would plead guilty to all charges.

[25] On the appeal Mrs L's understanding of that conference, as recounted by her, was that the barrister had said AU had no choice but to plead guilty, which could well be her honest recollection of the barrister's frank advice. AU, while agreeing that the conference took place, said he could not remember what had occurred. I think it likely he was unwilling to articulate guilt or discuss the offences in his daughter's presence during the conference. I accept the barrister's evidence that he understood AU was admitting his guilt on all charges, but what was conveyed to the barrister was conveyed without any discussion of the specific allegations made by the four complainants in support of the specific charges, and perhaps conveyed by gesture or silence. There was a considerable capacity for incorrect assumption by all parties at that conference.

[26] On 16 October 2003 AU and Mrs L attended at the District Court. They waited all day but his sentence did not come on for hearing. During the day he signed written instructions to plead guilty, but the precedent used by the solicitor did not identify either the number of indictments, or the charges. The next day he did plead guilty.

[27] The ex-officio indictments were signed by the prosecutor on 16 October 2003 and probably prepared on that date. The prosecutor had added a 12th charge to those involving RW as a complainant, namely the count of maintaining a sexual

relationship. Neither the solicitor nor the barrister took AU through the specific counts on the indictment when it was supplied by the Crown, apparently on 16 October 2003, and it was common ground on the appeal that AU did not know that such a charge had been laid against him until he pleaded guilty to it the next day. No one explained to him what that charge meant, or that it carried a maximum penalty of imprisonment for life.

The sentence proceedings

[28] While at court on the morning of 17 October 2003, AU's barrister explained, perhaps briefly, a procedure available under s 597C(2) of the Criminal Code permitting a plea to one count to be treated as a plea to a specified number of similar counts on the same indictment. The conversation resulted in the barrister's understanding that AU had agreed he would enter a "global" plea to a significant number of similar charges, whereas AU's recollection was that he had agreed to do as his barrister suggested, whatever that was, in pleading guilty.

[29] The appeal record records that AU was first arraigned on the count of maintaining a sexual relationship with RW, and entered a plea of guilty; then on the count of rape of RR, and entered a plea of guilty; and then one plea of guilty was entered in the effect of all other counts. The learned sentencing judge took that plea only after first inquiring from AU whether he had "been through" each such count with his lawyers, and understood each, and wished to enter one plea to all remaining counts. The judge's questions are recorded, but not any verbal response by AU, other than the answer "guilty" to a final question, which was "and what is that plea?" The record suggests AU made non-verbal, affirmative, responses to the judge's earlier questions.

[30] Thereafter counsel for the prosecution presented the facts on which the prosecution relied, those presumably coming from statements supplied by the complainants (or else the QP9's), and during that process the learned sentencing judge took particular care to ensure that the allegations of each complainant's respective age corresponded with the age the complainant would have been, judging by the dates alleged in the charge. That resulted in AU actually being re-arraigned on a number of the specific counts against both DS and RR, and he was later re-arraigned all over again on each of the complaints involving RR, because the indictment as originally drafted had omitted to allege a place where those offences occurred. AU had ample opportunity to understand that he was pleading guilty.

[31] The matters advanced in mitigation of penalty by his barrister included the submission that AU simply could not give an explanation for his conduct. That submission is reflected in a hand written note of the conference held with the barrister on 13 October 2003, which I thought was plainly a genuine contemporaneous note, and that fact was unchallenged. The barrister had obviously wanted instructions from AU as to why he committed the offences to which he would plead guilty. The barrister also put before the court other information about AU, including that he had been a good father and good "working man", who understood he was going to prison.

[32] I think it likely that AU and his daughter were both surprised by the length of the sentence imposed. They both now contend that they had understood AU had attended on each of 16 October and 17 October to plead "not guilty" and have a

trial, but that contention each makes is simply unsupportable. AU repeatedly entered pleas of guilty that morning, and there was a lunch adjournment in which both he and Mrs L had a full opportunity to assert that the proceedings had gone very much differently to their expectations, had that been the fact.

AU's mental state

[33] Since being sentenced AU has been assessed by a Dr Iacovella on 5 December 2003, and by Dr Todorovic on 20 May 2004 and 3 June 2004. Dr Iacovella diagnosed the existence of a significant cognitive impairment as at 5 December 2003, with the result of a Mini Mental State Examination (MMSE) being 17/30, whereas it had been 29/30 when measured on 3 October 2003. As at the latter date there was no significant impairment. The evidence on the appeal from Dr Todorovic was that if the assessment of 3 October was accurate, somewhere between 25/30 and 29/30 would have been expected on 17 October 2003, and the assessment on 6 December 2003 might be inaccurate. Those MMSE results do not suggest AU had any relevant impairment in mid October 2003.

[34] Whether or not there was deliberate underachievement in December 2003, there was no challenge to Dr Todorovic's evidence that as at May and June 2004 moderate dementia was present in AU, as well as moderate to severe Parkinson's disease. That description accorded with AU's presentation on the appeal in which, allowing for some exaggeration to advance his own interests, he was nevertheless obviously adversely affected with a degree of dementia. Its existence accords with the report from a Dr McGree, presented to the learned sentencing judge (dated 14 October 2003) which advised that AU was suffering from Parkinson's Disease, for which the prognosis was uncertain, and which could either progress slowly or else "poorly and rapidly…to a vegetative state". The medical evidence put before this court suggests the latter is happening.

AU's grounds for complaint

[35] Turning to the applicant's specific grounds of complaint that inadequate representation should lead to the pleas being set aside, senior counsel representing him on the appeal did not press the contention that AU had been unfit to plead in October 2003, nor that relevant medical details had not been put before the learned judge. Clearly they were. In respect of the next complaint, AU had said he would plead guilty to the charges then laid in respect of RW when first speaking with his solicitor, and a trial was never an option which he contemplated regarding those charges. His barrister did put the information relevant to the pleas entered before the learned sentencing judge, and the fact that the solicitor was not personally present on 16 October was irrelevant to any miscarriage of justice.

[36] What is significant is that there was no discussion between AU and either of his lawyers about the allegations relied on by the prosecution for any count, that AU had no advice he was charged with maintaining a sexual relationship with RW until he was arraigned, and that he would have learnt of the facts the prosecution alleged as the basis of each of the 25 counts on the second indictment only when the prosecutor put those before the learned sentencing judge, after AU had pleaded. They may have been entirely accurate allegations describing acts which he did commit and clearly remembered committing, or did not wish to challenge, but whatever the position it should have been established to the satisfaction of his legal

advisors before he pleaded guilty. Those legal advisors had not been supplied with any statement taken from any of the four complainants. In those circumstances AU did not know what conduct he was actually admitting by his various pleas of guilty, however entered, to those 25 counts. He had no opportunity to digest what count 1 on the other indictment charged, that being the count of maintaining.

[37] In *Meissner v R* (1995) 184 CLR 132 the judgments in the High Court all emphasise the importance in the administration of justice that a plea of guilty be made in the exercise of a free choice; and the joint judgment of Brennan, Toohey and McHugh JJ stresses that that be a free choice in the interest of the person entering the plea.[1] The onus rests on a person seeking to set aside a plea of guilty to establish that its acceptance, or the court acting upon it, has resulted in a miscarriage of justice.[2] I am satisfied AU has discharged that onus in respect of all counts on the 25 count indictment, because he did not know what conduct was alleged against him or what he was admitting by his pleas. That could have been very different conduct from whatever offending behaviour he remembered engaging in with those complainants. He knew he was charged with (mostly) sexual offences committed against all three, and that one count was of rape, but that knowledge is different from the exercise of a freely made choice to admit facts he knew were alleged.

[38] One of the prime objects of the ordinary processes of the criminal law of this State is that of informing a person who has been charged of particulars of the charge and the facts alleged. Those processes include a committal hearing where statements of potential witnesses are provided; or an ex-officio procedure in which the provision of the QP9's to the person charged is insisted upon in the court in which AU pleaded guilty, as a means of the prosecution ensuring that the person charged knows the principal allegations. The objects of that system of criminal justice are frustrated and defeated when those particulars or facts alleged are not conveyed to the person charged before he or she pleads guilty. A plea of guilty entered in those circumstances misleads the court as to its worth as an admission of guilt freely made, in the sense explained in the joint judgment in *Meissner v R* at 143. Whether or not AU committed all of those offences which the pleas purportedly admitted, convictions based on those pleas to the 25 counts on the longer indictment should be set aside.

[39] I consider the same applies to count 1 on the shorter indictment, the charge of maintaining a sexual relationship with RW. AU knew the facts on which that charge was actually based, those having been described to him by the investigating police, but not that the charge was based on those facts. He had never been shown the indictment and would not have known that charge had been laid. Whether 74 years old or 34 years old, he could only make a free choice about pleading guilty or not guilty to that charge, which alleged a sexual relationship occurring over a comparatively short period of perhaps four days, if told about it. I consider that plea likewise misled the sentencing court as to the applicant's knowledge of what he was conceding against himself by entering it.

[40] I would also set aside the conviction on the count of sodomy, count 9. AU denied committing that offence to the police, and denied committing it when cross-examined on the appeal. When pleas to so many other offences were entered

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1 At 141

2 See *McKenzie* (2000) 113 A Crim R 534 at 541

without AU's knowing exactly what was being admitted, I am persuaded that it is unsafe to act on pleas by AU except to offences he has confessed to other than by those pleas. I am satisfied he confessed to the police to performing fellatio on his grandson on at least two occasions, and counts 3, 7, and 11 charged those matters. He also confessed to the police to indecently dealing with his grandson's penis on up to four occasions, and those are charged as counts 2, 4, and 10. Thus on counts 2, 3, 4, 7, 10, and 11 AU had admitted the charged conduct to the police, can safely be understood as having told his solicitor he "did it", and intended to plead guilty rather than challenge the accusation on trial. The appellant failed to satisfy the onus of showing why those pleas should not have been acted upon.

[41] He did not admit to the police that he had told RW to touch AU's penis (counts 6 and 12), or masturbated himself in the boy's presence (count 5), and I consider the evidence shows sufficient uncertainty as to whether he intended to admit that conduct by pleas to those counts to justify setting those pleas aside. That is because absent any other circumstance, it may be unfairly inaccurate to assume that AU meant to admit to his solicitor the commission of any greater number of acts than he admitted to the police.

[42] That leaves count 8 of that indictment, an accusation that AU caused RW to perform fellatio on AU. AU denied doing that to the police, but told this court when cross-examined that he "thought" that he had gotten his grandson to do that. In those circumstances no miscarriage of justice is shown by accepting the plea of guilty to count 8. AU made a sufficient admission of committing that offence for it to be safe to rely on the plea as an intended acknowledgement, freely made, that he was guilty.

[43] I would therefore uphold the convictions on counts 2, 3, 4, 7, 8, 10, and 11 on the 12 count indictment numbered 281A/03, and set aside all other convictions incurred on 17 October 2003, and set aside the sentences of nine and a half years imprisonment, four years imprisonment, and 12 months imprisonment imposed on the convictions set aside.

[44] That leaves the issue of whether the four year sentence imposed on the convictions which still stand is manifestly excessive. The applicant referred this court to the decisions in *R v M* [1995] QCA 394, *R v K* [1999] QCA 041, and *R v M; ex parte A-G* [2000] Qd R 543. The respondent referred us as well to *R v M* [1999] QCA 118, and *R v McKillop*; *ex parte A-G* [1997] QCA 283. In each of *R v M* [1995] QCA 394 and *R v M* [1999] QCA 118 head sentences of three years imprisonment were imposed, with recommendations for parole after 15 and 12 months respectively. In *R v M* [1995] QCA 394 that offender had pleaded guilty to four counts of sexual abuse of his 10 year old daughter, committed over a period of one to two months, involving his rubbing her genitals, procuring her to masturbate him and perform oral sex upon him, and digitally penetrating her. He had no previous convictions. In *R v M* [1999] QCA 118 that offender pleaded guilty to seven counts of indecent treatment of his eight year old stepdaughter, principally consisting of the performance of oral sex upon each other, and touching of each other's genitals. The respondent director makes a point that in each of those cases the then maximum applicable penalty was 10 years imprisonment, whereas now it is 14.

[45] In *R v K* that offender, who was 74 when sentenced, pleaded to seven counts of unlawful and indecent dealing with two different complainant children, committed

over a period of some years. His conduct did involve digital penetration, and injury to one complainant's genitals caused by his penis. The offences were described as a "fairly serious but a very old series of offences of sexual interference with two girls by a man of advanced age with some health problems"; a sentence of three years imprisonment with parole recommended after 12 months was upheld. In *R v M; ex parte A-G* that offender was sentenced by this court to 18 months imprisonment with parole recommended after six months for two offences of indecently dealing with his eight year old daughter.

[46] In the matter of *McKillop*, relied on by the Director, this court imposed a term of four years and six months imprisonment with parole recommended after 18 months, on an offender who pleaded guilty to one offence of indecent dealing and one of depravation of liberty. That offender had a substantial history, not of sexual offences, and had lured a child into his home and subjected her to a protracted and violent assault. It involved digital penetration. I consider his offending conduct and antecedents more serious than AU's was, although his offending was less protracted. The maximum available penalty for indecent dealing at the time of his sentence was 10 years, not 14.

[47] I consider that the increase in the maximum penalty means that an examination of those other sentences shows that the sentence of four years imprisonment imposed for sexually abusing AU's grandson over a number of days was at the high end of the available range, but not manifestly excessive. However, because there were pleas of guilty entered by way of an ex-officio indictment, and because the applicant is now demonstrably affected by dementia, there must be a recommendation for release on parole; and it is appropriate that that be after 12 months.

[48] The formal order of the court will include an order for a new trial in respect of the counts on which the pleas of guilty have been set aside. There have been no committal proceedings held for those charges and it will be a matter for the Director of Public Prosecutions and the Commissioner of Police as to whether any ultimate purpose is served by bringing proceedings against a defendant about whom there will be a genuine question as to his fitness to plead.

[49] I would order:

- Appeal allowed;
- that the pleas of guilty entered in the District Court on 17 October 2003 on all 25 counts on the ex-officio indictment numbered 281/03 be set aside, the convictions quashed, and new trials be held on the counts on that indictment on which the appellant is either committed for trial or agrees to stand trial on that ex-officio indictment;
- that on counts 1, 5, 6, 9 and 12 on the ex-officio indictment numbered 281A/03 the pleas of guilty entered in the District Court on 17 October 2003 be set aside, the convictions quashed, and pleas of not guilty entered, and new trials be held on those counts on which the appellant is committed for trial or agrees to stand trial on that ex-officio indictment;
- application for leave to appeal against sentence granted and appeal allowed in respect of counts 2, 3, 4, 7, 8, 10 and 11 on that indictment numbered 281A/03 to

the extent that it is recommended that the appellant be considered eligible for post prison community based release after he has served 12 months of that sentence.