SUPREME COURT OF QUEENSLAND

CITATION:	*R v KAJ; Ex parte Attorney-General (Qld)* [2013] QCA 118
PARTIES:	**R** **v** **KAJ** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 240 of 2012 DC No 224 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	21 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	2 May 2013
JUDGES:	Holmes and Fraser JJA and North J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. Set aside the sentence imposed on 4 September 2012 on counts 1 to 6 of the indictment and instead sentence the respondent as follows:** **a. On counts 1 and 2 in the indictment, the respondent is sentenced to imprisonment for a period of seven years.** **b. On counts 3, 4, 5 and 6 in the indictment the respondent is sentenced to imprisonment for a period of four years.** **c. Order that the date upon which the respondent is eligible for parole is fixed as 3 September 2014.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEALS BY CROWN – OTHER MATTERS – where the respondent pleaded guilty to two counts of rape and four counts of indecent dealing with a child under the age of 16 with the aggravating circumstances that the complainant was under the age of

12 and under the respondent's care – where the respondent was sentenced to concurrent terms of five years imprisonment on the two counts of rape and four years imprisonment on the four counts of indecent dealing – where the sentences imposed at first instance were suspended after serving 18 months for an operational period of five years – where the respondent was in a de facto relationship with the complainant's mother at the time of the offences – where the appellant contended that the appropriate head sentence should have been seven and a half to eight years with a parole eligibility date rather than suspension – whether the sentence imposed at first instance was manifestly inadequate

Penalties and Sentences Act 1992 (Qld), s 144(1)

R v BBP [2009] QCA 114, considered
R v KU, ex parte Attorney-General (No 2) [2011] 1 Qd R 439; [2008] QCA 154, considered
R v P [2001] QCA 25, cited

COUNSEL: M R Byrne SC for the appellant
A G Glynn QC for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Philip Bovey and Company Lawyers for the respondent

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and the orders he proposes.

[2] **FRASER JA:** On 4 September 2012 the respondent was convicted on his pleas of guilty and sentenced to concurrent terms of five years imprisonment on two counts of rape and four years imprisonment on four counts of indecent dealing with a child under the age of 16 years. The sentencing judge ordered that each term of imprisonment be suspended after serving two years and six months, for an operational period of five years. The respondent was also convicted on his pleas of guilty but not further punished of summary offences of possession of a controlled drug and self-administration of a controlled drug.

[3] The Attorney-General has appealed against the sentence on the grounds that, first, it was manifestly inadequate and, secondly, the sentencing judge failed to give sufficient weight to the serious nature of the offending and failed to give primary consideration to the safety of children. The contentions in the second ground of appeal were not supported by the sentencing remarks or any evidence. They were perhaps advanced as possible explanations for the suggested manifest inadequacy in the sentence. The real issue is whether the sentence was manifestly inadequate. In that respect the focus must be upon the partially suspended sentence of five years imprisonment for each of the two counts of rape, which reflected the respondent's overall criminality in all of the offending.

Circumstances of the offences and the respondent's personal circumstances

[4] The circumstances of the offences were set out in a schedule of facts which was tendered at the sentence hearing. The respondent was a pharmacist who owned and

managed one pharmacy and part owned another. For about four years before the offences he had been in a de facto relationship with the complainant child's mother. They lived in separate homes but the complainant regularly stayed overnight with her mother and younger brother at the respondent's home and the respondent also stayed overnight at the complainant's home. A relationship of trust was established between the complainant and the respondent. During the period of about three months charged in the indictment the respondent was 50 to 51 years old and the complainant was 11 years old. The respondent sexually assaulted the complainant upon six separate occasions within the charged period. The respondent kissed the complainant on the lips, touched her breasts, put her hand on his penis, licked her vagina, digitally penetrated her vagina, and penetrated her vagina with his penis whilst pushing down on her and causing her pain.

[5] The version reportedly given by the respondent to a psychologist, Dr Fritzon, suggests that the offences occurred in that order, save that Dr Fritzon's report does not refer to the penile rape. The schedule of facts does not refer to the order of offending. The period during which the offences occurred was also not made clear by the evidence at the sentence hearing, but it appears from Dr Fritzon's report that the second and third offences could have occurred on consecutive days a fortnight after the first offence, the fourth offence was reported as occurring about a week after the third offence, and the fifth and sixth offences could have occurred on consecutive days after the fourth offence. The evidence at the sentence hearing did not establish any particular dates for any of the offences so that it is also possible that the offending occurred during a longer period, perhaps as long as the charged period.

[6] The complainant disclosed the respondent's offending to her mother at the end of the charged period in early February 2011. When the complainant was interviewed by police she became extremely distressed while making disclosures. A medical examination at a hospital revealed trauma to the child's vagina which was consistent with her disclosures. A victim impact statement by the complainant's mother given shortly before the sentence hearing refers to adverse effects upon the complainant as well as upon the complainant's brother and mother. (At the sentence hearing the respondent's counsel acknowledged that further adverse effects upon the complainant might be anticipated to arise as she matures.)

[7] The summary offences related to two suicide attempts by the respondent. The day after the complainant disclosed the offences to her mother, the respondent took a large number of morphine tablets in an attempt to kill himself. Five days later, the complainant's mother found the respondent comatose after he had again attempted suicide by taking morphine tablets. She called an ambulance and attempted to resuscitate the respondent until the ambulance arrived. The respondent had taken the morphine tablets from one of his pharmacies.

[8] On 2 March 2011 the respondent declined to be interviewed after receiving legal advice. A few weeks later the complainant's mother recorded a conversation with the respondent in which he admitted to sexually offending against the complainant. The respondent's counsel told the sentencing judge that after the respondent was charged on 2 March 2011, he made admissions to the complainant's mother on 26 March to all of the offending conduct except for the penile penetration, and that on 28 June the respondent's solicitor wrote on instructions to the police prosecution service advising that, with the exception of one fact, the respondent admitted all of the child's allegations. The complainant was never required for cross-examination.

[9] In Dr Fritzon's November 2011 report she expressed the opinions that the respondent was at a low risk of reoffending, that items which elevated the risk included major mental illness, suicidal/homicidal ideation, relationship problems, and "escalation in frequency/severity". She considered that the first two items were presently risk factors for the respondent but were not so at the time of the offences, that those factors possibly could reoccur in the future, and that they should be monitored as part of the respondent's treatment plan. Dr Fritzon considered that the respondent did not possess any of the major risk factors that were associated with sexual recidivism, but on other hand the respondent had limited insight into the factors that contributed to his offences. He had a significant depressive illness and suicidal ideation. There was a serious risk that imprisonment would have a significant adverse effect on the respondent's mental health. She thought that the risk would grow "exponentially" with the length of the sentence but that the respondent was resigned to a prison sentence and believed that to be appropriate. Dr Fritzon reported that the respondent stated that he was deeply ashamed of his offences and his actions betrayed the complainant and her mother.

[10] Shortly before the sentence hearing in September 2012 a report was prepared by another psychologist, Dr Madsen, which referred to the respondent having attended five treatment sessions. Initially the respondent had described symptoms which Dr Madsen considered to be consistent with major depression but his mood had improved over the course of sessions. Dr Madsen considered that by the end of the therapy the respondent was not depressed. He was by then appropriately remorseful, displayed a high level of personal insight into his "offending pathway" and could articulate risk management strategies to manage future risks. Dr Madsen expressed opinions that the respondent was likely to be identified as being a low risk for future offending because he had no previous sexual offending history or general criminal history and that the offence appeared to have been the result of a "confluence of interpersonal, intra-personal, and contextual factors at a specific time."

Sentencing judge's remarks

[11] The sentencing judge remarked that the victim impact statement showed that the complainant's mother was consumed with grief and anger as a result of the respondent's sexual abuse of the complainant, and that the complainant and her brother were no doubt adversely affected by the offending. The sentencing judge summarised the circumstances of the offences and the respondent's personal circumstances including the absence of any previous criminal history. The sentencing judge accepted that the respondent was remorseful, and that his shame and remorse were indicated by his two suicide attempts. The sentencing judge referred to the respondent's co-operation with the prosecutorial authorities, his early plea of guilty, the consequence that the complainant would not be required for cross-examination, and the circumstance in the respondent's favour that he had obtained counselling from professional counsellors on the recommendation of Dr Fritzon.

[12] The sentencing judge found that the respondent had been deeply depressed, that there was a serious risk that imprisonment would have a significant adverse affect on the respondent's mental health and the risk would grow exponentially with the length of any sentence imposed, and that the respondent's acceptance that he should be punished by imprisonment pointed to wholehearted remorse and that he was "well on the way to rehabilitation". The sentencing judge accepted a submission

from the respondent that he had "significant rehabilitation" and that the psychological assessment suggested that he was at a low risk of like offending. The sentencing judge referred also to the support of the respondent by the two children of his marriage and others. The respondent did not oppose his proposed deregistration as a pharmacist by the Pharmacy Board as a result of the drug offences.

[13] The sentencing judge referred to *R v BBP*[1] in which Chesterman JA cited the statement in *R v KU*[2] that the sentencing range for the rape of a 10 year old girl was between five and eight years imprisonment "after allowing for an early plea of guilty … for an adult whose offence did not involve actual or threatened violence or breach of trust…". After referring to the prosecutor's submission that the appropriate range was between six and eight years imprisonment, the sentencing judge observed that "of course with the recognition of your plea, normally a plea will result in a determination that the person will probably only serve about one-third or less in circumstances of the sentence imposed." The sentencing judge noted that the present case did involve a breach of trust, but that the child was older, at almost 12 years of age, that this was a particularly early plea of guilty, and that the respondent's actions showed that rehabilitation had been "significantly undertaken, so that one may confidently expect that counselling and other significant resources will be employed on his release of imprisonment." The sentencing judge referred to the respondent's remorse and observed that the head sentence would be five years, but "you will be imprisoned for almost a year longer than you would have been if I applied the normal tariff."

Consideration

[14] Some arguments were advanced for the Attorney-General which worked backwards from the pre-suspension period of two and a half years in an attempt to demonstrate that the appropriate head sentence should have been seven and a half to eight years. That is not a legitimate exercise. The sentencing judge appropriately adopted an integrated approach to the sentence. It was also submitted for the Attorney-General that, in finding that there was a serious risk that imprisonment would have a significant adverse affect on the respondent's mental health, the sentencing judge overlooked Dr Madsen's opinion that by the time of that report the respondent no longer suffered from the depression reported by Dr Fritzon about nine months earlier. There is no ground for thinking that the sentencing judge did overlook Dr Madsen's report. It remained open to the sentencing judge to consider that the respondent remained at risk of suffering in his mental health as a result of imprisonment. Another submission for the Attorney-General was that the sentencing judge wrongly thought that there was a prima facie rule that a convicted person who has pleaded guilty should be required to serve no more than about one-third of the term of imprisonment. There is no such rule although it is a common sentencing practice in this State to reflect a plea of guilty and other mitigating circumstances by ordering parole release or parole eligibility (whichever is applicable in the particular case) after about one-third of the term of imprisonment. The sentencing remarks do not convey that there is any rule or prima facie rule to that effect, and the structure of the sentence itself demonstrates that the sentencing judge appreciated that the minimum period required to be served in actual custody was to be fixed in the exercise of the sentencing discretion.

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1 [2009] QCA 114.

2 [2011] 1 Qd R 439 at [158].

[15] The Attorney-General submitted that the psychologists' opinions about the respondent's rehabilitation were expressed in qualified terms and that Dr Fritzon's report was based upon an incorrect appreciation of the nature and extent of the respondent's offending. That is so. The most serious of the offences to which the respondent pleaded guilty was penile/vaginal rape, but that conduct was not mentioned in Dr Fritzon's report of the respondent's description of the nature of his offending. Furthermore, Dr Fritzon remarked in her report that the respondent stated that if the complainant had not disclosed the offending, he would likely have continued but that "it would have been hard to progress beyond the point that the offences had already gone to, and still hold onto the belief that [the complainant] was asleep." That statement could not be thought to have been reasonable on any view of the admitted circumstances and it is significant as further evidence that Dr Fritzon did not take the respondent's most serious offence into account in formulating her opinions. The opinions expressed by the psychologists did not justify a view that the respondent's rehabilitation was complete or would not be assisted by future supervision of the kind which would be provided on parole.

[16] That conclusion may not itself justify interference in the sentence because, although the sentencing judge did not advert to the factual error underlying Dr Fritzon's report, it is not clear that her Honour based the sentence upon an unduly optimistic view about the respondent's rehabilitation. However the conclusion is relevant in considering the Attorney-General's main submission in the appeal, which was that the sentence was made manifestly inadequate by undue leniency in one or more of the head sentence, the period of actual custody before suspension, and suspension being ordered instead of parole eligibility.

[17] The term of five years was too short. Contrary to the respondent's argument and in light of the analysis in *R v KU*, the extent and objective seriousness of the respondent's overall offending, and the breaches of trust in that offending, the sentencing range did not extend to a sentence as lenient as a partially suspended term of five years imprisonment. The respondent argued that *R v KU* was a worse case because the offenders in that case committed their offences in company and they had criminal records, but those features were not taken into account in the court's indication of a range of five to eight years imprisonment for the rape of a 10 year old girl which did not involve a breach of trust. In relation to the element of acting in company, the court subsequently observed that "in cases of the rape of a girl of 10 years of age by an adult offender acting in company where no violence is used or threatened and where there is not the aggravating feature of a breach of trust, a proper sentence might range up to 11 years imprisonment after a trial, depending on the consequences of the offence for the victim." In this case, unlike in *R v KU*, the respondent's offences did involve a breach of trust and he committed those offences, including two counts of rape, on six separate occasions.

[18] It was also submitted for the respondent that there were constant references in *KU* to the age of the complainant and that this highlighted the significance of the fact that the complainant in this case was about two years older than the ten year old complainant in *KU*. In cases of this kind the age of the complainant is certainly a relevant consideration, but in *KU* the sentencing decisions to which the court referred in formulating the sentencing range included cases in which the complainant was a year or two older than 10. For example, the court referred to *R v P*,[3] in which the offender was convicted after a trial of having sexual intercourse

[3] [2001] QCA 25.

with his 12 year old step-daughter on one occasion when her mother was out shopping. He had no prior convictions. He had threatened to harm the complainant or her mother if she complained. The court refused an application for an extension of time to apply for leave to appeal against the sentence of eight years imprisonment on the ground that the sentence was not manifestly excessive having regard to the complainant's age and the relationship of trust.[4]

[19] In *R v BBP*,[5] the court refused an application for leave to appeal against a sentence after a trial of eight years imprisonment for rape and three years imprisonment for indecent dealing. The complainant was the offender's 10 year old niece. The offender took the child from her own bedroom to the bedroom he was occupying in the house and secured her silence by threatening that she would get into trouble if she complained. The complainant pushed the offender away after he had commenced sexual intercourse. The offender then compelled the complainant to masturbate his penis. Those offences, like the respondent's offence, involved breaches of trust. Contrary to a submission made for the respondent, the court did not find that the sentence was near the top of the sentencing range. Rather, McMurdo P and Keane JA agreed with Chesterman JA's conclusion that the range extended beyond eight years imprisonment so that the sentence, although substantial, was not manifestly excessive.

[20] The Attorney-General emphasised that *R v BBP* concerned one occasion upon which the offender committed one count of rape and one count of indecent dealing, whereas the respondent was sentenced for two counts of rape and four counts of indecent dealing committed on separate occasions. It was submitted for the respondent that the younger age of the complainant and the offender's threat made the offending in *R v BBP* no less egregious than the respondent's offending. Those were aggravating circumstances, but the respondent's overall criminality was worse in light of the number of offences he committed and the fact that he committed them over a period on six separate occasions.

[21] *R v BBP* decided only that the sentence of eight years imprisonment in that case was not manifestly excessive. Nor does *R v KU* prescribe an inflexible range of sentences for all cases of the general nature described in it: see *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520 at 535. However those decisions and the analyses in them confirm my view that the sentence imposed upon the respondent was manifestly inadequate to meet the objective circumstances of his offending. That is so even taking into account the combination of mitigating circumstances, notably including the respondent's early pleas of guilty, his remorse, his risks of mental illness in prison, and his apparently good prospects of rehabilitation. Those circumstances do, however, justify an early parole eligibility date. Suspension is not an option in a sentence of imprisonment exceeding five years: *Penalties and Sentences Act* 1992, s 144(1).

[22] I consider that the appropriate sentence is seven years imprisonment with parole eligibility after two years.

Proposed orders

[23] I would make the following orders:

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4 See [2011] 1 Qd R 439 at [162].

5 [2009] QCA 114.

(a) Appeal allowed.

(b) Set aside the sentence imposed on 4 September 2012 on counts 1 to 6 of the indictment and instead sentence the respondent as follows:

(i) On counts 1 and 2 in the indictment, the respondent is sentenced to imprisonment for a period of seven years.

(ii) On counts 3, 4, 5 and 6 in the indictment the respondent is sentenced to imprisonment for a period of four years.

(iii) Order that the date upon which the respondent is eligible for parole is fixed as 3 September 2014.

[24] **NORTH J:** I agree with the reasons of Fraser JA and the orders he proposes.