SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bolton; Ex parte Attorney-General (Qld)* [2014] QCA 128
PARTIES:	**R** **v** **BOLTON, Garry Arthur** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NOS:	CA No 172 of 2013 SC No 238 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	4 April 2014
JUDGES:	Holmes, Fraser and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the respondent pleaded guilty to four counts of rape, four counts of supplying dangerous drugs with a circumstance of aggravation, one count of possessing a thing used in connection with possessing a dangerous drug and one count of possessing a dangerous drug – where the respondent was sentenced to five years imprisonment for the rape offences, suspended after a period of two years with an operational period of five years – where offences were extremely serious with aggravating features including violation of minors and supply of drugs to them – where the appellant contends that the sentence was rendered unreasonable by the sentencing judge's failure to declare the offences serious violent offences under s 161B of the *Penalties and Sentences Act* 1992 or to make another order effectively postponing the respondent's release – where the prosecutor at first instance advocated for the sentence imposed – whether the sentence was manifestly inadequate

Penalties and Sentences Act 1992 (Qld), s 161B

R v AAD [2008] QCA 4, cited
R v Assurson (2007) 174 A Crim R 78; [2007] QCA 273, extended
R v Bull [2012] QCA 74, considered
R v DBC; ex parte Attorney-General (Qld) [2012] QCA 203, cited
R v Henderson; Ex parte Attorney-General (Qld) [2013] QCA 63, considered
R v Lee [2012] QCA 313;cited
R v Lee [2012] QCA 239, cited
R v M [2003] QCA 443, cited
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, followed

COUNSEL: A W Moynihan QC for the appellant
J J Allen for the respondent

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

[1] **HOLMES JA:** The respondent pleaded guilty to four counts of rape, four counts of supplying dangerous drugs with a circumstance of aggravation, one count of possessing a thing used in connection with possessing a dangerous drug and one count of possessing a dangerous drug. He was sentenced to five years imprisonment, suspended after a period of two years with an operational period of five years, in respect of the rape charges; 18 months imprisonment in respect of each of the supply charges; three months imprisonment in respect of the count of possessing a thing; and six months imprisonment in respect of the count of possessing a dangerous drug.

[2] The appellant appeals the rape sentences as manifestly inadequate because of the sentencing judge's failure to declare the offences serious violent offences (which would require the respondent to serve 80 per cent of those sentences before he became eligible for parole). Alternatively, it was contended that the sentences should have required a longer period than two years to be served in actual custody.

The offences

[3] The offences occurred on Christmas night in 2011. Three girls, D and F, who were 14 years old, and G, aged 13, went at about 11.00 pm to the house that the respondent shared with an adult male friend. (The respondent was known to D as a family friend of some years' duration.) The respondent showed them a tin which he said contained "speed". According to the agreed statement of facts, he went on to say that if he got caught with the substance he would be dead, because he was in a bikie gang, "so the girls did not want to mess with him or them". (There was, as the sentencing judge observed, no evidence that the respondent in fact had any bikie connections.)

[4] The respondent then proceeded to make the girls drinks, mixes of alcohol and soft drink. Later he sat outside on the back stairs talking to D and G. He produced the tin containing speed and asked them if they wanted any; they declined. The respondent

exposed his penis and used a butter knife to put some of the powder onto the end of his penis, instructing D to suck it off. G pushed D's head forward towards the respondent's penis. D took it in her mouth, sucking speed from it for, as she described it, "a couple of seconds".

[5] The respondent repeated the activity of placing the substance on his penis and this time instructed G to suck it off. She refused and pulled away when the respondent tried to put his penis in her mouth. However, as she talked to the other girl, the respondent succeeded in putting his penis in her mouth, putting his hand at the back of her head and pushing her head towards it. According to G, the respondent moved his penis in and out of her mouth "for about two minutes".

[6] G pulled F outside and the respondent informed the girl that he and the others wanted her to have some speed. He performed the activity of putting some of the substance on his penis and G told F to suck it off. When F refused, G performed the act. The respondent put more speed on his penis and told F it was her turn; if she did not comply she would have to leave the house. He stood in front of her. G pulled F's hands away from her face, took her by the hair and pushed her head so that the respondent was able to put his penis in F's mouth. G then let go and the respondent held F's head. F was not sure how much of his penis entered her mouth; she pushed him away and went inside the house. She considered telling his flatmate what had happened but decided against it, recalling the respondent's earlier statement about being in a bikie gang.

[7] The girls later spoke to the police, and urine samples were taken from D and F the following day. They returned positive results for amphetamine and methylamphetamine.

[8] The respondent participated in a field interview with police the following day, and in a formal interview some days later. He said that he had drunk a great deal on Christmas Day; his recall of the relevant events was limited to the girls' being present at his house. A set of scales and some cannabis seeds were found on a search of his house; he admitted to having used the scales to weigh methylamphetamine. The seeds and scales were, respectively, the subjects of the charges of possessing dangerous drugs and possessing a thing.

The sentence hearing

[9] The parents of D and G provided victim impact statements to the court, referring to their daughters' emotional withdrawal and upset after the events. Their relationships with their families were significantly affected. D had harmed herself and withdrawn from her family; the prosecutor acknowledged, however, that there were also "other issues" affecting her. G's parents were said to have separated as a result of the incident.

[10] The respondent was 46 years old when he committed the offences. His criminal history was limited to a summary offence of soliciting for prostitution, for which he was fined, some five years earlier. The Crown prosecutor submitted that the plea of guilty was a late one; it had been made on the morning on which a pre-trial hearing of the evidence of the three girls was listed. He identified the significant features of the case accurately and fairly. The aggravating features of the offending were that there were three children involved; there was an age difference of some 32 years between the respondent and the girls; a schedule 1 drug had been supplied to them, and for "at least one" of them, it was her first experience with it. The offences had been committed although there was another adult in the house, and one of the girls had been deterred from complaining to him by the respondent's statement about involvement with a bikie gang. The respondent had abused the trust between him and D's family,

and the offences had profoundly affected her family and G's. On the other hand, there was no threat to induce the sex acts themselves and no violence, and only one episode was involved.

[11] It was submitted that a five year head sentence would be appropriate; previous cases in which higher sentences had been involved usually involved penile penetration of the vagina. It was appropriate that a date for parole eligibility or, alternatively, suspension of the sentence should be set at two years. The Crown had no submission to make as to which of those was appropriate, but did not cavil with the notion of a suspended sentence, in light of the respondent's lack of previous convictions and his age. The fact that alcohol was involved in the conduct was not a mitigating factor, but did suggest that a parole requirement was not critical.

[12] Counsel for the respondent departed from the Crown's submissions only to the extent of proposing that the sentence of imprisonment should be suspended after a third (20 months) rather than after two years. The respondent was employed as a truck driver and had worked as a driver of various types of vehicles ever since leaving school. He was married, but separated on amicable terms from his wife, with whom he had three children, one still at school**.** The conduct involved in the offences was completely out of character for him.

The sentencing judge's remarks

[13] The sentencing judge set out in detail what the offences entailed. They were extremely serious: the violation of the girls was aggravated by the feature of a mature man's administration of a schedule 1 drug to minors. It could be accepted that the conduct was out of character; the respondent had no relevant previous convictions and was a hard-working member of the community. There was no evidence that he in fact had any bikie associates, and the sentencing judge proceeded on the basis that his claim in that regard was a boast.

[14] His Honour took into account that the respondent was remorseful and had pleaded guilty, but it was not an early plea. The sentence for fellatio against a minor would ordinarily be in the range of three to four years imprisonment, but the present case was aggravated by the facts that the supply of a schedule 1 drug was involved; that the acts were committed against three girls, not one; and that one set of offences involved the exploitation of a friendly relationship with D and her family. The effects of the offences on the girls and their families were a further significant factor in fixing the term of imprisonment. The sentences arrived at were those necessary to punish the respondent and denounce his conduct. His Honour noted that the suspended term of imprisonment could be activated if the respondent committed another offence punishable by imprisonment within the period of five years.

The appellant's contentions on appeal

[15] The appellant submitted that the sentence imposed was manifestly inadequate because it was plainly unreasonable and unjust. No issue was taken with the head sentence of five years imprisonment; it was the failure to declare the rape offences as serious violent offences pursuant to s 161B of the *Penalties and Sentences Act* 1992 which rendered it unreasonable. In oral submissions, counsel for the appellant also advanced the failure to require some (unspecified) longer period to be served in actual custody as an alternative basis for considering the sentence unreasonable.

[16] The appellant relied on this passage from *R v McDougall and Collas*:[1]

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[1] [2007] 2 Qd R 87.

> "The considerations which may lead a sentencing judge to conclude that there is good reason to postpone the date of eligibility for parole will usually be concerned with circumstances which aggravate the offence in a way which suggests that the protection of the public or adequate punishment requires a longer period in actual custody before eligibility for parole than would otherwise be required by the Act having regard to the term of imprisonment imposed. In that way, the exercise of the discretion will usually reflect an appreciation by the sentencing judge that the offence is a more than usually serious, or violent, example of the offence in question and, so, outside 'the norm' for that type of offence."[2]
> (Footnotes omitted)

It was submitted that the sentencing judge must have failed to appreciate the extraordinary nature of the offending, which was outside the norm because it involved three children, a group activity, and a schedule 1 drug.

[17] Counsel for the appellant referred the court to four cases said to serve as "yardsticks" for sentencing in cases of rape by digital or oral penetration of a child. They were, *R v M*;[3] *R v (Douglas) Lee*;[4] *R v AAD*;[5] and *R v Bull*.[6] The *Lee* case, *R v AAD* and *R v M* involved rape of six and seven year old children, in *AAD* and *Lee* by digital penetration, and in *M* by the appellant's putting his penis in the seven year old boy's mouth. The sentences imposed ranged between three and four years. No parole eligibility date was set for the appellant in *AAD* when he was re-sentenced on appeal, so he would have had to serve half his sentence. That course may have been taken because although that appellant had pleaded guilty at first instance, he had sought, unsuccessfully, to withdraw that plea.

[18] The complainant in the fourth case, *Bull*, was 12 years old. She had been left in the care of the appellant, who was her mother's de facto partner at the time, while she was ill and unable to attend school. He had forced the child to suck his penis until he ejaculated in her mouth. Having been convicted after a trial, he was sentenced to five years' imprisonment. That sentence was set aside on appeal and a sentence of three years and six months imprisonment with parole eligibility half-way was substituted.

[19] A fifth case, *R v (Martin) Lee*,[7] involved a different form of rape, and was referred to because it involved the supply of alcohol and cannabis to a minor. The 48 year old appellant had raped a 15 year old girl with whom he had been left alone in his apartment. She had been drinking and smoking cannabis with him. The appellant pushed her on to a couch and removed her trousers. Ignoring her protests, he penetrated her vagina with his penis; a second and separate attempt at forcible penetration of her was unsuccessful. That appellant had a long criminal history for minor assault and drug offences. A sentence of six years' imprisonment, imposed on his conviction after a trial, was not disturbed on appeal.

Discussion

[20] The appellant faced the obstacle that the prosecutor at first instance had not suggested that the factual background warranted the making of a serious violent offence declaration.

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2 At 97.
3 [2003] QCA 443.
4 [2012] QCA 313.
5 [2008] QCA 4.
6 [2012] QCA 74.
7 [2012] QCA 239.

To the contrary, he acknowledged the appropriateness of suspension of the sentence after two years. As in *R v Assurson*,[8] the defence was thus not afforded any opportunity to make submissions on the subject of whether there was any factual basis for a serious violent offence declaration or other order effectively postponing his release. In the ordinary course, the Crown will be held to the position it has taken at first instance.[9]

[21] Counsel for the appellant here acknowledged the difficulty inherent in a Crown appeal where the sentence imposed was that advocated for by the prosecutor. He adverted to a passage from this court's judgment in *R v Henderson; Ex parte Attorney-General (Qld)*:[10]

> "It is only in an exceptional case that this Court will intervene to increase a sentence to a level higher than that sought by the prosecutor at first instance. Usually a party is bound by his conduct of a case at first instance. However, the ultimate responsibility for the imposition of an appropriate sentence rests with the sentencing judge rather than the prosecutor, and this Court will intervene where the sentencing judge failed to appreciate the seriousness of the offending or it is necessary to maintain public confidence in the administration of justice."[11] (Citations omitted)

[22] It could not be – and indeed it was not – suggested that the sentencing judge in the present case did not recognise the seriousness of the offending. He expressly described it as "very serious" and articulated all the reasons that was so. As to whether the sentence imposed leads to any different conclusion, or could cause any loss of public confidence, it was acknowledged that his Honour's exercise of sentencing discretion by imposing a head sentence of five years for the rape offences was appropriate. The cases cited by the appellant, which all, excepting the *(Martin) Lee* case, involved lower sentences, do not suggest otherwise.

[23] Those cases did not, as the present one does, involve sexual activity with a number of young persons at once, or the administration of a drug, but they had other aggravating features. Three of them involved very young children. Four involved abuse of trust by a person in a parental role. In *(Douglas) Lee*, *AAD* and *Bull*, the offender was the de facto partner of the child's mother, and in *M* he was the boy's natural father. The remaining offender in *(Martin) Lee* had an extensive criminal history, although not for sexual offending, and committed penile vaginal rape on his intoxicated victim. *AAD* had a criminal history which included prior convictions for indecent assault, rape and the unlawful wounding of his de facto wife. Only in *AAD* was there arguably any delay of the usual point for release from custody - in that case to half-way, in circumstances where the appellant had sought to withdraw his plea of guilty. The cases may, as the appellant contends, provide a yardstick for sentencing, but they provide no indication that some different course should have been taken in this case.

[24] The exercise of the discretion as to whether to make a serious violent offence declaration (or to otherwise postpone the non-custodial component of the sentence) is not a separate or distinct step in sentencing, but part of "the conclusion of the process of arriving at a just sentence"[12]. In the present case, the features of the number of girls involved and the administration of the drug did take the offending out of the norm, one

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8 (2007) 174 A Crim R 78.

9 See, for example, the discussion in *R v DBC; ex parte A-G (Qld)* [2012] QCA 203.

10 [2013] QCA 63.

11 At [51].

12 *R v McDougall and Collas* at 95.

relevant consideration in the exercise of the s 161B (3) discretion. But there was also a powerful consideration against making a serious violent offence declaration, or otherwise extending the custodial part of the sentence. At the age of 47, the respondent had no criminal history of any significance and was in other respects a contributing member of the community. There was no basis for supposing that there was any greater than usual need for deterrence or for community protection in his case. There was, in my view, nothing untoward in the way the sentencing judge exercised his discretion, nor, for that matter, in the approach of the prosecutor at first instance.

Conclusion

[25] Taking into account all the circumstances, it cannot properly be said that the sentencing judge's decision to suspend the sentence four months after the one-third mark was unreasonable. Nor, correspondingly, was the failure to extend the custodial portion of the sentence period (either by the making of a serious violent offence declaration or by the imposition of some longer than usual non-parole period) unreasonable. The resulting sentence was not manifestly inadequate.

[26] I would dismiss the appeal.

[27] **FRASER JA:** I agree with the reasons for judgment of Holmes JA and the order proposed by her Honour.

[28] **GOTTERSON JA:** I agree with the order proposed by Holmes JA and with the reasons given by her Honour.