SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gilles; ex parte A-G* [2000] QCA 503
PARTIES:	**R** **v** **GILLES, Warwick David** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 156 of 2000 DC No 2775 of 1999 DC No 1122 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	12 December 2000
DELIVERED AT:	Brisbane
HEARING DATE:	26 September 2000
JUDGE:	Pincus, McPherson and Thomas JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – OTHER OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – BUGGERY AND INDECENT ASSAULT OR DEALING – PRACTICE AND PROCEDURE – sentences for sodomy and permitting sodomy CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – MISCELLANEOUS MATTERS – PLEA OF GUILTY, CONTRITION AND CO-OPERATION – ASSISTANCE TO AUTHORITIES AND CO-OPERATION – respondent "on the periphery of a paedophile network" – gave assistance to authorities falling within s 13A *Penalties and Sentences Act* 1992 CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT –

SENTENCE – CONCURRENT, CUMULATIVE AND ADDITIONAL SENTENCES, SENTENCES ON ESCAPE AND COMMENCEMENT OF SENTENCE – SENTENCES ON TWO OR MORE COUNTS – nine counts of sexual offences, including four of sodomy and three of permitting sodomy – highest sentence was two years' imprisonment, imposed in respect of six of the s 208 offences – all sentences to be served concurrently and suspended after three months – whether, in fixing sentence for each of the six s 208 offences, sentencing judge entitled to take into consideration that there were eight other offences – whether entitled to consider all offences as part of overall transaction and tailor effective sentence so as to be appropriate punishment for whole episode

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – APPLICATIONS TO INCREASE SENTENCE – OFENCES AGAINST THE PERSON

Criminal Law Amendment Act 1997 (Qld), s 21
Criminal Code (Qld), s 208
Penalties and Sentences Act 1992 (Qld), s 13A

Crofts [1999] 1 Qd R 386, mentioned
Crossley [1999] QCA 223; CA No 477 of 1998, 18 June 1999, mentioned
Dinsdale [2000] HCA 54; 12 October 2000, considered
Fisher (1987) 9 Cr App R (S) 462, considered
Gladstone CA No 26 of 1973, 2 July 1973, considered
H CA No 110 of 1996, 5 June 1996, considered
Kellerman v Pecko [1998] 1 Qd R 419, discussed
Papoulias [1988] VR 858, applied
Patane CA No 246 of 1996, 25 October 1996, followed
R and S, ex parte A-G [1999] QCA 181; CA Nos 390, 391 of 1998, 28 May 1999, mentioned
Smith (1992) 13 Cr App R (S) 247, considered
Tunn CA No 167 of 1994, 20 May 1994, considered
Veslar (1955) 72 WN (NSW) 98, considered

COUNSEL: L J Clare for the appellant
P J Callaghan for the respondent

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

[1] **PINCUS JA:** This is an appeal by the Attorney against a sentence imposed on the respondent on 19 May last. There were nine offences to which the respondent pleaded guilty, all but two of which were offences under s 208(1) of the Code; of

those seven offences, four were of sodomising a person under 18 years and three were of permitting a male person under 18 years of age to sodomise the respondent. In respect of six of the s 208 offences, the judge imposed sentences of two years imprisonment and as to the seventh, 12 months imprisonment. The eighth offence was one of unlawfully and indecently dealing with a child under 16, and the ninth of taking an indecent photograph of a child under 16; a sentence of nine months was imposed for each.

[2] His Honour made all the sentences concurrent and ordered that they be suspended after three months, for a period of 2½ years. The result was that the respondent was released from prison on 19 August 2000, shortly before this appeal was heard.

[3] Section 208 arrived at its present form by the coming into force on 1 July 1997 of s 21 of the *Criminal Law Amendment Act* 1997 (Act No 3 of 1997). Six of the s 208 offences charged were alleged to have been committed on a date between 30 June 1997 and a later specified date, and the seventh offence, also charged under s 208, was alleged to have been committed between 31 August 1998 and a later date; therefore all the s 208 offences were covered by s 208 in its present form, with one reservation: a full stop was added by Act No 82 of 1997. The result was that the maximum penalty for each of the s 208 offences was 14 years. Counsel for the prosecution, under the mistaken impression that the present s 208 had come into force on 5 December 1997, informed the judge that the penalty was seven years; under s 208 in the form substituted by Act No 93 of 1990, that was so with respect to sodomy or permitting sodomy, except where the offence was committed in respect of a child under the age of 16.

[4] The prosecutor also informed the judge that the Crown conceded, as to the complainant in offences 1 to 6, that the respondent "did not know of his exact age as being under 16". That complainant was born on 4 October 1981. Under the terms of s 208, as it was at relevant times, the question whether the complainant was or was not under 16 years of age was of no relevance.

[5] There is nothing in the record to indicate that the error made, in informing the judge that the maximum penalty in respect of the first six counts was seven years, was corrected; further it appears that counsel's statement about the maximum penalty applied to the seventh count also. I have found no correction in the submissions which were made, in camera, in reliance on s 13A of the *Penalties and Sentences Act* 1992. But counsel for the respondent then discussed the matter with the primary judge on the basis that the relevant age was 18 years (not 16 years). That might have, but apparently did not, bring to light the error which the prosecution had made.

[6] There were three complainants, A, B and C. On the dates given in the indictment, A who was born on 4 October 1981 must have been 15 years of age at the date of each of the offences committed against him. As to the remaining s 208 offence, the complainant B was 17 years of age, and as to offences 8 and 9 (the unlawful and indecent dealing and taking an indecent photograph) the complainant C was 15 or almost 15 when the offences were committed.

[7] It appears to have been common ground that complainant A had homosexual tendencies when the respondent was introduced to him; it was, however, said that he had never engaged in sodomy before his encounters with the respondent. The

second complainant, B in relation to whom there was one charge of sodomy, said in effect that he consented to being sodomised as an inducement to the respondent to allow the complainant to stay at the respondent's house. That assertion was not disputed by counsel for the respondent who appeared below. In relation to the third complainant, C the indecent assault was towards the minor end of the scale of seriousness, as such things go, as was the taking of the photograph.

[8] The judge made some allowance for co-operation falling within s 13A of the *Penalties and Sentences Act* 1992. The respondent was born on 4 March 1966 and so was in his early 30's when the offences were committed. He was said by the Crown to be "on the periphery of a paedophile network" and that was common ground; however this facilitated his giving assistance to police, a mitigating factor.

[9] We were referred to *Tunn* (CA No 167 of 1994, 20 May 1994); there the complainant was about 16 years of age when the three offences – one of sodomy and two of permitting sodomy – were committed. A very light sentence was imposed, but it does not appear to me that the circumstances are sufficiently similar to the present to make the case of much use; the complainant was, and had been for some substantial time, a male prostitute when the offences were committed. A case which is rather closer to the present circumstances is *H* (CA No 110 of 1996, 5 June 1996).

[10] There were important differences, favourable to the present respondent, between the circumstances of *H's* case and this. At the relevant time the applicable penalty for sodomy or permitting sodomy, where the complainant was under the age of 16 years, was 14 years. However, if the child in question was under the care of the offender the penalty became life; and that was the case in relation to both *H* complainants. The principal complainant was said to be about 15½ years at the time of the offences. H had a bad record for similar previous conduct. There were in all three counts of sodomy and a number of other counts of sexual misbehaviour with the complainant just mentioned and another child. The sentence was 12 years imprisonment.

[11] By comparison with *H*, the respondent had in his favour principally that the penalty for the offence there was life, not 14 years as in the present case, and H's record of previous similar behaviour. Nevertheless the contrast between a two year sentence suspended after three months and one of 12 years is striking.

[12] Sodomy was once a capital offence, but it seems clear that with the passage of the years more tolerant attitudes have developed. An illustration is the decision of the Queensland Court of Criminal Appeal in an Attorney's appeal in relation to the sentence of one with the famous name *William Ewart Gladstone* (CA No 26 of 1973, 2 July 1973). There a middle-aged man with no criminal record was given probation for having had carnal knowledge of a boy aged 13. The Court of Criminal Appeal unanimously rejected an Attorney's appeal against sentence emphasising that the offender was "under the influence, to some extent anyway, of alcohol" and that the sodomy was consensual. This may be contrasted with the five year sentence imposed on a man where the sodomy was on his consenting mistress: *Veslar* (1955) 72 WN (NSW) 98; the sentence was on appeal reduced to 18 months. I note that in *Fisher* (1987) 9 Cr App R (S) 462, the victim was a 15 year old boy and the offender a teacher at the school he attended. Fisher was

sentenced to three years imprisonment but that was reduced to two years on appeal. In *Smith* (1992) 13 Cr App R (S) 247, the offender had committed sodomy with a youth aged 17 and then with an adult in the youth's presence. The offender was said to be in the habit of picking up young men late at night after finishing work, taking them home, "initially for a bed for the night, and then, as it happened in this case, to go on to abuse them in this way" (249). The sentence was 18 months and that was not criticised by the court.

[13] A difficulty in discussing the matter is that the judge made an allowance for the respondent's co-operation and the basis on which that matter was considered appears from a hearing in camera, which I have read. But taking that co-operation into account, together with the pleas of guilty and the absence of any prior offences, it is nevertheless my own view that the sentence was inadequate. No doubt opinions in the community differ on the question of the extent to which the law should protect adolescents from mature men who wish to engage in sodomy with them; but the legislature has expressed its will on this issue.

[14] There were as I have mentioned nine sentences, the highest being two years, which was the sentence imposed for each of six s 208 offences. It remains uncertain whether, in fixing the sentence for each of those six s 208 offences, the judge was entitled to take into account that there were eight other offences. The question is usefully discussed in [s 650.145] of Judge Carter's work. I would add to the references there given mention of the President's judgments in *Crossley* [1999] QCA 223; CA No 477 of 1998, 18 June 1999, par 11, and in *R and S, ex parte A-G* [1999] QCA 181; CA Nos 390, 391 of 1998, 28 May 1999. In *Papoulias* [1988] VR 858, where the applicant was sentenced to seven years imprisonment on each of four counts of trafficking in heroin, it was argued that the judge had failed "to consider each offence separately and to make a proper evaluation of the relative gravity of each" (865). The court responded:

> "What [the judge] did, and was entitled to do, was to consider all the offences as part of an overall transaction during a short period engaged in as part of the applicant's business. Having done so, he was well entitled to tailor the effective sentence to impose an *appropriate punishment for the total episode*". (865) (emphasis added)

Daily, courts in Queensland act on this basis. If, for example, an offender comes up for sentence on a number of breaking and entering offences of a similar character, the court will commonly impose a sentence on each which reflects the criminality of all; what the court does not do is to impose the proper sentence for offence A as if it were a sole offence, then for offence B as if it were a sole offence, and so on.

[15] But Dowsett J has said of *Papoulias*:

> "I am by no means convinced that either the sentencing judge or the Full Court intended to imply that any one sentence had been inflated beyond that which would have been appropriate had the offence in question stood alone" – *Kellerman v Pecko* [1998] 1 Qd R 419 at 424.

Leaving aside, perhaps, the case in which –

> " ... where two offences are capable of being seen as part of one criminal operation, it will be appropriate to take the second into

> account as a circumstance of aggravation in dealing with the first" (*Kellerman* at 428) -

Dowsett J accepted, as I understand his Honour's reasons, the view that no one sentence can be "inflated beyond that which would have been appropriate had the offence in question stood alone".

[16] In my opinion, if this is correct, then much current sentencing is unlawful; where courts have to sentence offenders for a series of offences not greatly separated in time, it is routine not to impose cumulative sentences, but to fix a sentence appropriate to the total criminality and impose it either for the worst of the offences, or for all of them indiscriminately. The propriety of this practice was accepted in *Patane* (CA No 246 of 1996, 25 October 1996 (p 8)) referred to in Judge Carter's book; that work also suggests that *Crofts* [1999] 1 Qd R 386 decides to the contrary, but Crofts appears to deal with a rather different point.

[17] Although the question was not argued in *Patane*, I follow the view of the law which was accepted there and consider the present case on the basis that the judge, in imposing concurrent sentences for all these offences, should have fixed the highest sentence at a level appropriate for the total criminality – i.e. should have fixed, for each of some or all of the most serious sodomy offences, a penalty appropriate for all the sodomy offences as well as for the two s 210 offences. The only alternative, to reach a proper sentence, would have been to make some of the sentences cumulative.

[18] The limited scope of the Attorney's appeal against sentence was re-emphasised by the High Court in *Dinsdale* [2000] HCA 54, 12 October 2000. There the judgment of Gleeson CJ and Haynes J included the following:

> "8. The Court of Criminal Appeal acknowledged at the start of the reasons of Murray J (with which the other members of the court agreed) that it must search for error of principle which caused the discretion of the sentencing judge to miscarry".

Although the same reasons recognise that manifest inadequacy is a legitimate ground of appeal, the outcome of *Dinsdale* illustrates, were illustration needed, how circumspect this Court is required to be in considering an Attorney's attack on sentence. A factor against raising the sentence here is that the state of the authorities makes it difficult to assert that the primary judge's conclusion departed from a recognised standard or range. There is also the difficulty, referred to above, of determining the weight which should be attached to the co-operation disclosed by the documents in the file, which are not in the record. Although in my opinion the sentence was too low, it does not appear to me to be a case in which this Court would be justified in increasing it, on an Attorney's appeal. I would therefore dismiss the appeal.

[19] **McPHERSON JA**: I agree with what Pincus JA has written about this appeal by the Attorney-General against sentence. In particular, I am firmly of the view that it has long been the practice, when confronted by a series of offences of the same or a similar kind, for judges to impose a sentence on one count, chosen sometimes at random, that reflects the totality of the criminal conduct disclosed by all of the offending conduct considered in combination, and to impose relatively nominal sentences in respect of other offences in the series. It is, of course, not impermissible to approach the sentencing process by assigning specific lesser

sentences to each of the offences and then accumulating them. Few judges, in my experience, follow that course in circumstances of the kind described, and doing so probably only enhances the potential for error.

[20] Here there may, as Pincus JA has pointed out, have been a case for making some of the sentences cumulative; but his Honour's failure to do so does not in my opinion amount to an error of principle in the present case. In that respect, I share the impression of Pincus JA that the "upshot" sentence imposed on the respondent was probably inadequate. The difficulty in determining that to be so is, however, that we do not know details of the assistance or co-operation provided by the respondent and, without it, it is difficult to be confident that the level at which the head sentence or sentences were pitched was or is such as to justify intervention by this Court in an appeal of this kind.

[21] I would dismiss the appeal for the reasons given by Pincus JA.

[22] **THOMAS JA:** I agree with the reasons of Pincus JA. My only reservation is perhaps in respect of the degree to which these sentences must be regarded, in Pincus JA's phrase, as "too low".

[23] The circumstances included co-operation given by the respondent to the authorities which was extensive and valuable. It justified a substantial reduction from the sentences that would otherwise have been appropriate. It is not appropriate to particularise the co-operation but it is enough to say that the sentence under appeal is consistent with a starting point of the order of three years imprisonment which has been abated for the respondent's co-operation and pleas.

[24] The review of cases undertaken by Pincus JA shows no clear pattern of sentencing in offences of the present kind, a fact which has probably been contributed to by changes in legislation and in societal attitudes towards the commission of sodomy. Whilst it is no longer an offence between consenting adults, the attitude of society seems to have hardened in relation to the sexual corruption of persons below prescribed ages, various ages now being prescribed as the age below which sexual activity of various kinds is prohibited. Certainly no clear pattern has yet emerged in relation to appropriate sentences for conduct of this kind with youths aged respectively 14, 15 and 17. The evidence suggests that each of them was already to some extent corrupted. But the act of sodomy was said to be the first such act experienced by the 15 year old, and the circumstances in relation to the 17 year old reveal that the respondent took advantage of a person in acute need of accommodation.

[25] Doing the best I can on the basis of past cases I am inclined to think that a starting point of three years or upwards would have been appropriate in the present case. When the co-operation to which reference has been made is taken into account, I am unable to say that the sentence imposed by the learned sentencing judge is necessarily so far out of range that it should be increased upon appeal by the Attorney-General.

[26] I therefore agree with the order proposed by Pincus JA.