SUPREME COURT OF QUEENSLAND

CITATION:	*R v D* [2003] QCA 347
PARTIES:	**R** **v** **D** (appellant)
FILE NO/S:	CA No 42 of 2003 DC 518 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	15 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	2 June 2003
JUDGES:	McMurdo P, Davies JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against conviction dismissed** **2. Leave to appeal against sentence granted** **3. Appeal against sentence allowed** **4. Sentence imposed set aside only to the extent of removing each declaration that the appellant was convicted of a serious violent offence and by substituting a period of four and a half years imprisonment for the six years imprisonment imposed with regard to count one on the indictment**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where appellant convicted on one count of sexual assault, one count of indecent treatment of a child under the age of 12 years, and one count of attempted sexual assault with a circumstance of aggravation – where trial judge allowed passages from appellant's record of interview with police to be admitted at trial – whether trial judge should have exercised discretion to exclude propensity evidence CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW

TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – where appellant convicted on three counts and acquitted on one count – where appellant gave conflicting answers in record of interview with police – whether verdicts were unsafe and unsatisfactory

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – FACTUAL BASIS FOR SENTENCE – where appellant sentenced to six years imprisonment on count one, two years imprisonment on count two, and four years imprisonment on count three – where appellant declared to be convicted of a serious violent offence in respect of each conviction – where no finding the appellant had been convicted of an offence of serious violence or an offence resulting in serious harm to another person – whether sentence manifestly excessive

Criminal Code 1899 (Qld), s 592A, s 352
Evidence Act 1977 (Qld), s 93A
Penalties and Sentences Act 1992 (Qld), Part 9A
Police Powers and Responsibilities Act 2000 (Qld), s 251

Crampton v The Queen (2000) 206 CLR 161, considered
Dinsdale v The Queen (2000) 202 CLR 321, cited
Harriman v The Queen (1989) 167 CLR 590, cited
Hoch v The Queen (1988) 165 CLR 292, cited
Jones v The Queen (1997) 191 CLR 439, cited
MacKenzie v The Queen (1996) 190 CLR 348, cited
R v A [2000] QCA 520, CA No 118 at 2000, 19 December 2000, cited
R v Bielefeld [2002] QCA 369, CA No 159 of 2002, 19 September 2002, considered
R v Foy, ex parte Attorney-General [2001] QCA 209, CA No 21 of 2001, 31 May 2001, considered
Pfennig v R (1995) 182 CLR 461, considered
Suresh v The Queen (1998) 153 ALR 145, cited

COUNSEL: K McGinness for the appellant
P F Rutledge for the respondent

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

[1] **McMURDO P:** I agree with Atkinson J that the appeal against conviction should be dismissed. As her Honour demonstrates in her reasons, it was open to the jury on the admissible evidence before them to be satisfied beyond reasonable doubt of the guilt of the appellant.[1]

[2] I also agree with her Honour, subject to the following qualification, that the learned primary judge did not err in the exercise of her discretion in refusing to exclude passages in the appellant's record of interview. That qualification relates to the following passage towards the end of the appellant's record of interview:

> "CONST FOLPP: [Indistinct] said there have been times before that we haven't spoken about that, um, you have spoken to little kids at school and tried to get them to talk to you? – Yeah.
>
> Can you remember times like that? – Oh, yeah, I just remember [indistinct] this ----
>
> We won't talk about that tonight? – Yeah.
>
> It's [indistinct] late now? – Yes, I just talking to them and ----
>
> Yeah, alright. We'll talk about that another time, I think. – Mmm."

[3] This conversation had no probative value and was prejudicial in that it was capable of sowing in the jury's mind the possibility that the appellant tried to speak to small children at schools on other occasions, without amounting to evidence of that. It was irrelevant and should have been excluded. This inadmissible evidence was of no weight and could not have affected the jury verdict. A reasonable jury properly instructed and considering only the admissible evidence would inevitably have convicted the appellant. Despite this error, I would dismiss the appeal.[2]

[4] I also agree with Atkinson J that the effective sentence imposed here of six years imprisonment with a declaration that the appellant has been convicted of a serious violent offence was in all the circumstance manifestly excessive and that an effective sentence of four and a half years imprisonment without a declaration should be substituted.

[5] I agree with the orders proposed by Atkinson J.

[6] **DAVIES JA:** I agree with the reasons for judgment of Atkinson J and with the orders she proposes.

[7] **ATKINSON J:** The appellant was arraigned in the District Court in Cairns on four counts. Count 1 was that on 14 November 2001 at Cairns he unlawfully and indecently assaulted D. Count 2 was that on the same date at Cairns, the appellant wilfully and unlawfully exposed R, a child under the age of 16 years, to an indecent act by him and that the child, R, was under the age of 12 years. Count 3 on the indictment charged him that on the same date at Cairns he wilfully and unlawfully

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1 *MFA v The Queen* (2002) 77 ALJR 139; *M v The Queen* (1994) 181 CLR 487, 493-494; *Jones v The Queen* (1997) 191 CLR 439.

2 Section 668E(1A) *Criminal Code*; *Firster v R* (2001) 76 ALJR 291; *Conway v R* (2002) 76 ALJR 358, [6] and [38].

exposed T, a child under the age of 16 years, to an indecent act by him and the child was under the age of 12 years. Count 4 charged him that on 18 November 2001 at Cairns he attempted to unlawfully and indecently assault S and, during the offence, he was armed with a dangerous weapon.

[8] The appellant was convicted on 24 January 2003 after a trial on one count of sexual assault (count 1), one count of indecent treatment of a child under the age of 12 years (count 2), and one count of attempted sexual assault with a circumstance of aggravation (count 4). He was acquitted on one count of indecent treatment of a child under the age of 12 years (count 3). He was sentenced to six years imprisonment on count 1; two years imprisonment on count 2; and four years imprisonment on count 4. Each sentence was to be served concurrently. He was declared to be convicted of three serious violent offences and was ordered to report his name and address to police for 20 years following his release. A declaration as to pre-sentence custody of 431 days was made.

[9] On 9 December 2002, the learned trial judge conducted a pre-trial hearing pursuant to s 592A of the *Criminal Code* in order to determine whether or not the video tape of a police record of interview with the appellant should be admitted into evidence. Her Honour heard evidence from the appellant and from Terry Murray, who was the co-ordinator of the local justice elders' programme of the Ngadjon Aboriginal Corporation and who was present as a support person during the interview. Mr Murray gave evidence that he told the appellant that he did not have to speak to the police or answer any questions. He said he was fairly sure that he had advised the appellant of his right to have a solicitor present. Mr Murray was very experienced at being a support person for other Indigenous people during police interviews and was entirely independent of the police.

[10] After hearing that evidence and evidence from a number of the investigating police officers, as well as considering medical evidence, her Honour determined, in a comprehensive and carefully reasoned ruling, that the appellant had voluntarily and willingly taken part in the formal interview and that he was not overborne or induced to give answers to questions. Her Honour also held that there was no reason to exercise any discretion to exclude the record of interview on the ground it would be unfair to the defendant. She was correctly critical of the investigating police officer's failure to comply with s 251 of the *Police Powers and Responsibilities Act* and weighed that matter in determining whether or not to exercise her discretion to exclude the interview. In her reasons, her Honour showed not only her understanding of the statute and common law relevant to the question of the exclusion of evidence on discretionary grounds, but also a sophisticated understanding of the matters particular to an Indigenous person such as the appellant who was a Torres Strait Islander.

[11] These matters include[3] the need to be aware of and on guard against gratuitous concurrence; the need to ensure the accused was not just informed, but actually

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[3] See the Anunga Guidelines from *R v Anunga* (1976) 11 ALR 412; Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts* (2002) Chapters 5.5 and 7.5; Eades, D., *Aboriginal English and the Law* (1992) Qld Law Society at 79; Goldflam R, 'Silence in Court! Problems and Prospects in Aboriginal Legal Interpreting' in *Australian Journal of Law and Society* (1997) 13 at 23; 'Aboriginal and Torres Strait Islander People and the Law' in *Cross-Cultural Communication in Law Seminar Guide* (1993) at 20-21; Eades D, *Aboriginal English and the Courts* (2000) Qld

understood, that he or she was free to exercise his or her rights including the right to silence; respect for long silences during interviews; the presence of, and opportunity to confer separately with, an Indigenous support person; and the notification of a representative of a legal aid organisation of the person's custody[4]. The appellant wisely abandoned the ground of appeal that her Honour erred in allowing the record of interview into evidence.

[12] Two grounds of appeal were argued. The first was that the learned trial judge erred in ruling that certain passages in the appellant's record of interview should remain as evidence before the jury (ground 3). At the commencement of the trial, counsel for the appellant objected to two passages in the record of interview. On appeal, the appellant argued that the learned trial judge erred in ruling that those, and other passages to which no objection had been taken at trial, should remain as evidence before the jury. These passages were characterised on appeal as being about a general propensity to sexually abuse young girls, think sexual and bad thoughts about touching young girls and other highly prejudicial matters.

[13] The second ground of appeal was that the convictions were unreasonable having regard to the whole of the evidence (ground 4). Ground 4 related to specific matters about the record of interview as well as other aspects of the evidence. The appellant submitted that the cumulative effect of the following matters rendered the verdict unsafe and unsatisfactory:

(a) Failure of the child complainant, child witness and a teacher to identify the appellant from photoboards;
(b) The appellant's conflicting answers during the record of interview;
(c) The appellant's obvious attempt to guess answers to questions;
(d) The appellant's version in relation to the events concerning D (count 1) varied significantly from that given by the complainant;
(e) The appellant's version in relation to R (count 2) varied significantly from that given by the complainant;
(f) The acquittal on count 3 where the reliability of the evidence was of a similar standard.

[14] In order to understand the passages to which objection is taken, and the other objections to the record of interview found in ground 4, it is necessary to understand the structure of the record of interview, its place in the investigation of these offences and its relevance on the appellant's trial. The other matters raised by ground 4 are most appropriately seen in this context.

[15] At the trial, it was not disputed that each of the offences, the subjects of counts 1, 2, 3 and 4 took place. None of the complainant children, whose evidence was given on videotape pursuant to s 93A of the *Evidence Act*, was required for cross-examination. The defendant's case was that it was not he who committed the offences. None of the complainants had been able to identify the appellant as her assailant from photo boards prepared by police. This evidence was before the jury

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Department of Justice; and Criminal Justice Commission Qld, 'Aboriginal Witnesses in Qld's Criminal Courts' in *Australian Indigenous Law Reporter* (1996) 1 (4).

4 *Police Powers and Responsibilities Act* 2000 s 251.

and was a matter properly to be taken account of by them in determining whether they were satisfied beyond reasonable doubt that the appellant committed any or all of the offences.

[16] The appellant was, however, one of a number of men who answered the general description given by the children and by adult witnesses. After receiving information which placed him in the vicinity at the relevant time, the police sought to interview him once they had located him in Atherton.

[17] The prosecution case was significantly advanced by way of admissions made by the appellant in the record of interview, conducted on 22 November 2001 which, as the trial judge found, was engaged in voluntarily by the appellant. While there was other supporting evidence, without those admissions the appellant could not have been convicted of any of the counts on the indictment. At the trial, the appellant continued to assert, in evidence given by him, that he was detained against his will and was threatened and intimidated by police officers before the interview was videotaped and was told, before the interview commenced, details of the confessions that the police said they required him to make. As I have already mentioned, this complaint was not made on appeal.

[18] The interview with the police was electronically recorded by videotape, which was before the jury, and a significant portion of which has been viewed by this court. Senior Constable Henwood, who was the principal investigating officer, was primarily responsible for questioning the appellant, who was accompanied by Mr Murray. Senior Constable Henwood's questioning was conducted in a careful, structured and non-threatening manner. She first ensured that the appellant understood his rights and then ascertained his level of education and background. Having satisfied herself that he was able to, and in fact did, understand her questions, that he understood that he had the right not to answer any questions, and was not under the influence of alcohol or drugs, she questioned the appellant about the offence which was the subject of the first count on the indictment: that he sexually assaulted a 7 year old girl, D, at a primary school in Cairns on the previous Wednesday. He gave responsive answers to non-leading questions which were capable of amounting to admissions to that offence. He admitted to touching D on the vagina but did not initially admit that he had inserted his finger into her vagina as she alleged. When her story was put to him, he agreed that he had done so, while holding her so that she could not escape. His actions caused a slight tear to her genital area. He later explained the discrepancy between his story and that of the complainant by saying that he had waited to see if she would not say anything about it. The variation in the versions between D and the appellant is readily explicable by the appellant's general reluctance to truthfully disclose the details, including the most egregious details, of what he had done.

[19] The appellant said that after D got away, he tried to follow her and then talked to some other girls who were playing. When he asked them to sit with and play with him, they ran off and told someone. He said he had wanted to play with them and touch them sexually. He then said he talked to a teacher. He then said he talked to some girls at a shop but was unable to give any details of where the shop was or what kind of shop it was. These passages in the record of interview were objected to on appeal but not at the trial of the matter.

[20] The appellant was then questioned in relation to the offence which was the subject of the second count on the indictment, that is indecent treatment of R, an 11 year old girl, later on the same afternoon near a dance school not far from the school. He confessed to having "bad thoughts" about this girl. He admitted exposing himself to her. He said he tried to stiffen his penis and to see if she would "touch or swallow it". He gave a description of her height and the length of her hair but was unable to describe the colour of her skin. He then confessed, albeit in a somewhat confused way, that he had "bad thoughts" about "dark girls and white girls" as well as tall and short ones. This passage was also the subject of an objection on appeal although not at the trial. After some more questioning about the second offence, he gave answers which were partly inconsistent with his earlier answers.

[21] The jury was entitled to take the view that either he could not clearly remember all the details of particular offences, that he was mixing memory with his own sexual fantasies, that he was trying to minimise his responsibility, and that his self-serving answers were unreliable, or that his inconsistent answers rendered his admissions unreliable. A jury is entitled to convict on admissions made even in an interview in which an accused gives prevaricating, self-serving, untruthful or even contradictory answers. This inconsistency does not compel the jury to entertain a reasonable doubt as to the reliability of the admissions.

[22] The appellant was then questioned about the offence which constituted count 3 on the indictment. At first, he made no admissions and said he was just talking to T. He specifically denied showing her his penis, although he subsequently admitted it. He said he jumped into the car in which she was sitting and touched her. He then gave some internally contradictory answers and told the police he was just guessing. In view of the unsatisfactory nature of this portion of the interview and other evidence which cast doubt on whether he had the opportunity to commit this offence, it is hardly surprising that the jury acquitted him on this count.

[23] He was then questioned about the offence which was the subject of count 4 which occurred on the previous Sunday, 19 November 2001. After considerable prompting about the place that the incident occurred, he admitted to frightening S with a knife and wanting to touch her on the breasts and vagina. After she ran away, he was concerned that she might tell someone. The version he gave of this offence was substantially similar to that given by S.

[24] After some general questions about what he was wearing and the knife, he was asked about the "bad thoughts" he had. He admitted to strong sexual feelings about children. This passage was objected to both at the trial and on appeal.

[25] He was asked about his movements between Atherton and Cairns. At the end of the interview, Constable Folpp, who was assisting Senior Constable Henwood, enquired of the appellant, in a passage to which objection is taken, whether there had been other times than those they had spoken about, where he had spoken to children at school. The appellant agreed that there were but the detective told him they would not discuss them on that occasion. The detectives finally confirmed with him that he had taken part in the interview voluntarily.

[26] The failure of witnesses to identify the appellant from photo boards was before the jury. The jury was entitled to view the inconsistent answers given by the appellant as consistent with his guilt. The evidence with regard to count 3, where he

apparently tried to guess answers in the record of interview, was not nearly so reliable as the evidence relevant to the other counts. It can readily be seen that none of the factors which are enumerated in ground 4 whether considered singly or cumulatively render the verdict unsafe or unsatisfactory, or the convictions unreasonable.

[27] What of the passages in the record of interview to which objection was taken in ground 3 of the appeal? The questions to be determined are whether these passages are admissible and if so, whether the learned trial judge ought nevertheless have exercised her discretion to exclude them. The appellant submitted that the problem with such evidence is the danger that the jury might reason that because the appellant was a person who admitted to "bad thoughts" about girls, he was the person who committed these offences. The potential for such flawed reasoning was described by the High Court in *Pfennig v R*[5] as follows:

> "Propensity evidence (including evidence of bad disposition and prior criminality) has always been treated as evidence which has or is likely to have a prejudicial effect in the sense explained. That is because the ordinary person naturally (a) thinks that a person who has an established propensity whenever opportunity arises has therefore yielded to the propensity in the circumstances of the particular case and (b) may ignore the possibility that persons of like propensity may have done the act complained of."

This passage relied upon by the appellant is relevant to the question of the discretion to exclude evidence rather than whether or not it is admissible.

[28] The brief exchange at the end of the interview about whether he had spoken to the children at the school on other occasions, did not reveal any evidence of his state of mind or other offences and was therefore neutral. A suitable direction was given by the trial judge when this evidence was introduced as to the limited use that could be made of it. The direction was repeated by her Honour in her summing-up referring clearly to both parts of the interview objected to at the trial. The directions given were sound in law and appropriate in the circumstances.

[29] The other parts of the interview which were objected to at the trial or on appeal, were all admissible as evidence of his state of mind on the occasions when the Crown alleged he was engaged in sexual offending against children. They explained why he did what the Crown alleged he did and made it much more likely that he committed the offences alleged against him. It supported the prosecution case that it was the appellant, rather than some other person, who committed these offences.[6] In addition, it was admissible as part of the *res gestae* of the offending behaviour.[7]

[30] This evidence was also admissible to rebut the defence case before the jury that he was coerced into making the admissions and only repeated what he had been told to say by the police about the offences. By expanding on his sexual attraction to young girls, he revealed his reasons for offending – which did not sit comfortably

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5 (1995) 182 CLR 461 at 488.

6 *Hoch v The Queen* (1988) 165 CLR 292 at 295; *Pfennig v The Queen* (1995) 182 CLR 461 at 487; *Harriman v The Queen* (1989) 167 CLR 590 at 594

7 *Harriman v The Queen* (supra) at 599, 628*; R v A* [2000] QCA 520, CA No 118 of 2000, 19 December 2000 at [122].

with his evidence at the trial as to how the admissions were made. It ran counter to the suggestion that his was a mechanical repetition or a mis-remembered regurgitation, which was untrue, of events in which he had not taken part.

[31] It was argued that notwithstanding their admissibility, these passages should have been excluded in the exercise of the judge's discretion as they were highly inflammatory and would lead a jury to convict, not on the basis of the cogency of the evidence, but rather because of their concern that he had committed offences of a similar kind, if not these offences, and that he was likely to continue to commit offences. That such an argument has no validity in this case is clearly demonstrated by the verdicts[8]. If that were the basis of the verdicts of guilty, there would have been no reason for the jury to convict on counts 1, 2 and 4 and acquit on count 3. The only distinction between the counts was the cogency of the evidence. The passages objected to at the trial were part of the highly cogent, admissible evidence against the appellant which the jury was entitled to consider. There was no error in the judge's exercise of the discretion not to exclude the passages to which objection was taken at trial.

[32] Her Honour would, for the same reasons, have been entitled to reach the same conclusions with regard to the passages in the record of interview to which no specific objection was taken at trial. The appellant faces the additional difficulty that it is sought to raise objection to various passages for the first time on appeal. This court quite properly adopts a cautious approach to appellate intervention when no objection has been raised at trial. As Gleeson CJ observed in *Crampton v The Queen* [9]:

> "[15] First, there is what was referred to by L'Heureux-Dubé J in the Supreme Court of Canada as 'the overarching societal interest in the finality of litigation in criminal matters' when she said:
> 'Were there to be no limits on the issues that may be raised on appeal, such finality would become an illusion. Both the Crown and the defence would face uncertainty, as counsel for both sides, having discovered that the strategy adopted at trial did not result in the desired or expected verdict, devised new approaches. Costs would escalate and the resolution of criminal matters could be spread out over years in the most routine cases.'
> [16] Secondly, it is common for appellants in criminal appeals to retain counsel different from the counsel who (by hypothesis, unsuccessfully) conducted the trial. This increases the tendency to look for a new approach to the case, and carries the danger that trial by jury will come to be regarded as a preliminary skirmish in a battle destined to reach finality before a group of appellate judges.
> [17] Thirdly, it is usually difficult, and frequently impossible, for a court of appeal to know why trial counsel did, or failed to do, something in the conduct of the case. Decisions as to the conduct of a trial are often based upon confidential information, and an appreciation of tactical considerations, that may never be available to an appellate court. The material upon which a judge, either at trial or on appeal, may form an opinion as to the wisdom of a course taken by counsel can be dangerously inadequate, and, when it is, the judge

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8 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367.

9 (2001) 206 CLR 161 at 172-173; see also *Suresh v The Queen* (1998) 72 ALJR 774, 781.

> may have no way of knowing that. Ordinarily, a barrister knows more about the strengths and weaknesses of his or her client's position than will appear to a judge, whose knowledge of the case is largely confined to the evidence.
> [18] Fourthly, as a general rule, litigants are bound by the conduct of their counsel. This principle, which is an aspect of the adversarial system, forms part of the practical content of the idea of justice as applied to the outcome of a particular case. For that reason, courts have been cautious in expounding the circumstances in which an appellant will be permitted to blame trial counsel for what is said to be a miscarriage of justice."

[33] The passages in the record of interview which were objected to, whether at the trial or on appeal, were admissible and the judge did not err in the exercise of her discretion not to exclude the two passages objected to at the trial. Nor is there any reason that the passages objected to on appeal should have been excluded.

[34] In my view, it was open to the jury on the admissible evidence before them to be satisfied beyond reasonable doubt of the guilt of the appellant.[10] It follows that both grounds of appeal must fail.

Appeal against sentence

[35] The appellant was a 27 year old man who was 26 at the time of the offences. He was sentenced to six years imprisonment in relation to count 1 and two years and four years imprisonment respectively in relation to counts 2 and 4. Each offence was declared to be a serious violent offence. Such a declaration can only be made under Part 9A of the *Penalties and Sentences Act* 1992 where:

> (1) the offender was convicted on an indictment of an offence against a provision mentioned in the schedule[11] and sentenced to 10 or more years imprisonment for the offence (s 161A(a));
> (2) the offender was convicted on an indictment of an offence against a provision mentioned in the schedule 5 and sentenced to five or more, but less than 10, years imprisonment for the offence (s 161A(b); s 161B(3));
> (3) the offender was convicted on an indictment of an offence that involved the use, counselling or procuring the use, or conspiring or attempting to use, *serious violence* against another person or that resulted in *serious harm* to another person and was sentenced to a term of imprisonment for the offence (emphasis added) (s 161A(b); s 161B(4).

[36] In the first of those three circumstances, the making of a declaration is mandatory whereas in the latter two, the making of the declaration is discretionary. The discretion found in s 161B(4) did not arise in this case because the judge made no finding that the appellant was convicted of an offence that involved the use of serious violence against another person or that resulted in serious harm to another

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10 *Jones v The Queen* (1997) 191 CLR 439 at 493.

11 or of counselling or procuring the commission of, or attempting or conspiring to commit an offence against a provision mentioned in the Schedule.

person. A finding of one of these facts is a pre-condition of the exercise of the discretion to declare the offender to have been convicted of a serious violent offence where the term of imprisonment is less than five years. The declaration with regard to counts 2 and 4 therefore can not stand.

[37] With regard to count 1 on the indictment, it is critical to the proper sentence to focus on the actual offence of which the appellant was convicted. He was charged under s 352 of the *Criminal Code* with unlawfully and indecently assaulting D. The maximum penalty of imprisonment for such an offence is 10 years imprisonment. Significantly, he was not charged with the offence of rape under s 349(2)(b), where a person is guilty of rape if he or she penetrates the vulva, vagina or anus of another person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent. The maximum penalty for such a crime is life imprisonment. However, the appellant fell to be sentenced only on the offence for which he had been convicted not one on which he could have been convicted had he had been charged with it.[12] Had he been found guilty of rape, the sentence imposed on count 1 could not have been regarded as excessive.

[38] The appellant was found guilty after a trial and was therefore not entitled to any mitigation of sentence for a plea of guilty. The child complainants were, however, spared the ordeal of giving evidence. Evidence tendered during the sentencing submissions showed that they had nevertheless been subject to the distress of preparation for giving evidence. The victim impact statements which revealed this information also gave a graphic insight into the terrible suffering of these children and their families as a result of these offences.

[39] There were a number of other factors relevant to the appropriate punishment to be imposed in this case. The appellant offended against a number of young girls, one of whom was only seven years old. They were in familiar environments in places where they and their parents were entitled to feel safe and to be safe from such gross, frightening offending. The offending was predatory and count 4 involved the threat of a knife. The first offence was, as the learned sentencing judge observed, the most serious, involving as it did, the appellant's restraining the child and penetrating her genital area with his finger. That resulted in a tear to her genital area, fortunately, as the sentencing judge found, not physically very serious but nevertheless very distressing and discomforting to the child.

[40] The appellant had previously offended in 1996 for armed robbery. He was sentenced to 200 hours community service and no conviction was recorded, reflecting his relatively minor role in this offence. In June 1998, he was convicted on one count of indecent treatment of a child under 16 and sentenced to nine months imprisonment. This offence occurred when the appellant was 22 years of age when his young cousin got into bed with him at a party. The indecent treatment occurred when he pressed his penis against her clothed posterior region. Although this was a sexual offence, it was quite minor in nature.

[41] There are no truly comparable sentences which delineate the appropriate sentencing range. The learned sentencing judge was referred to *R v Bielefeld*[13]. The offences committed in that case were significantly more serious than in the present case.

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12 cf *R v De Simoni* (1981) 147 CLR 393.

13 [2002] QCA 369, CA No 159 of 2002, 19 September 2002.

Bielefield abducted a young girl and took her into bushland where he committed the offences of sodomy as well as unlawful and indecent assault (which involved digital penetration). The mitigating factors were that he pleaded guilty and only offended against one person.

[42] On the other hand, the appellant's counsel referred to the sentence imposed by this court on an appeal by the Attorney-General in *R v Foy*[14]. In that case, a sentence of four and a half years imprisonment was imposed. That sentence was moderated by the fact that it was imposed on an Attorney's appeal where the court tends to sentence at the lower end of the appropriate sentencing range[15]. On that appeal, the appellant had contended for a sentence of between four and five years. The sentence was also ameliorated by Foy's plea of guilty. However, the offending was more serious involving as it did more children. Foy had an extensive criminal record for similar offences.

[43] It would appear, taking all the relevant factors into account in this case, that a more appropriate sentence on count 1 would have been one of four and a half years imprisonment and that therefore the sentence imposed of six years imprisonment with a declaration that the appellant had been convicted of a serious violent offence was manifestly excessive.

[44] I would therefore dismiss the appeal against conviction; grant leave to appeal against sentence; allow the appeal against sentence; set aside the sentence imposed only to the extent of removing each declaration that the appellant was convicted of a serious violent offence and by substituting a period of four and a half years imprisonment for the six years imprisonment imposed with regard to count one on the indictment.

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14 *ex parte Attorney-General* [2001] QCA 209, CA No 21 of 2001, 31 May 2001.

15 *Dinsdale v The Queen* (2000) 202 CLR 321 at 330 [26], 341 [62].