SUPREME COURT OF QUEENSLAND

CITATION:	*R v KT; ex parte A-G (Qld)* [2007] QCA 340
PARTIES:	**R** **v** **KT** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 231 of 2007 DC No 407 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	15 October 2007
DELIVERED AT:	Brisbane
HEARING DATE:	15 October 2007
JUDGES:	de Jersey CJ, Keane JA and Dutney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed** **2. Set aside the penalties imposed in the District Court, and in lieu thereof order in respect of each count that the respondent be imprisoned for 12 months, to be served concurrently. Suspend terms after six months, for an operational period of two years. Declaration as to five days' pre-sentence custody to remain in place.**
CATCHWORDS:	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 – OFFENCES AGAINST THE PERSON – where respondent convicted of two counts of indecent treatment of a child under 16 with a circumstance of aggravation – where respondent sentenced to nine months' imprisonment suspended after two months – where complainant eight years old and respondent 58 years old – where respondent a friend of complainant's family – where sentencing Judge considered

	that offence would not significantly damage complainant, and took into account respondent's military and public service and health issues – whether sufficient weight given to community denunciation and general deterrence – whether denunciation through media publicity should affect term imposed by Court – whether sentence manifestly inadequate
	R v L; ex parte A-G (Qld) [1998] QCA 468; CA No 373 of 1998, 3 December 1998, considered *R v Moffat* [2003] QCA 95; CA No 439 of 2002, 11 March 2003, considered *R v W* [2000] QCA 321; CA No 141 of 2000, 8 August 2000, distinguished
COUNSEL:	M J Copley for the appellant P Callaghan SC for the respondent
SOLICITORS:	Director of Public Prosecutions (Queensland) for the appellant Gilshenan & Luton Lawyers for the respondent

THE CHIEF JUSTICE: The Attorney-General appeals against concurrent of nine months' imprisonment suspended after two months for an operational period of two years imposed in respect of two counts of the indecent treatment of a child under 16, with the circumstance of aggravation that the child was under 12. In fact, the child was a boy of eight, and the respondent was then a 58-year old man.

The respondent was a friend of the complainant's family. He stayed at their house at B for a few days in June 2005, in the course of which he slept in the complainant's bedroom. On the first night of the visit, the respondent touched the complainant in the genital or anal area. The respondent touched the complainant's penis and anal area the following night as well. The respondent desisted when the complainant made it clear that the advances were unwelcome.

In early July, the complainant refused to look at some photographs which the respondent had sent to his mother, and said that the respondent was "like Michael Jackson". The complainant told his mother about the respondent's conduct some days later. The respondent was convicted after a trial, and he was acquitted on a third count. He had no prior criminal history.

The learned sentence Judge described the offending as "opportunistic" and "at the low end" of the scale. He said there was really no evidence that the offending had, to the point of sentencing, caused significant damage to the complainant; that the complainant's parents had felt betrayed by the respondent's conduct; that the respondent had served the country in the armed forces and at local government level, and that some health issues were also to be considered.

The Crown Prosecutor had sought a sentence of around 12 months' imprisonment with a not insubstantial part of that term to be served. That position advanced for the Crown gained support from a number of previous decisions. In R v Moffat [2003] QCA 95, for example, a sentence of 12 months' imprisonment imposed after a trial was varied on the appeal to the extent that the 12 months term was subjected to an order that the offender be released after serving six months.

In that case, the offender had indecently dealt with a girl of 10 by rubbing her stomach, up her thigh, and the top of her vagina. The rubbing of the vagina occurred twice, but on the one occasion. He was 53 years of age when the offence occurred. He had no prior convictions and a good work record. Those offences, like these, were committed impulsively and the Court proceeded on the basis there was no real evidence of any significant adverse consequence to the child.

The touching of the vagina there was on the outside of the clothing, and of considerable significance is the circumstance that the maximum penalty for that offence was then 14 years' imprisonment. The maximum penalty applicable here was 20 years' imprisonment - a legislative signal to which sentencing Courts must be astute. Then, there is R v L; ex parte A-G (Qld) [1998] QCA 468, where the Court of Appeal set aside sentences imposed for two offences of indecent dealing with a child under 12. The Court imposed a term of 12 months' imprisonment suspended after three months for an operational period of two years.

Again, significantly, those sentences were imposed when the relevant maximum penalty was only 10 years' imprisonment. Also, that offender had pleaded guilty. The complainant was a 10-year old boy, and the offender, a 38-year old friend of the complainant's family. The first occasion there involved the rubbing of the boy's penis on the outside of his underpants and the second, some months later, involved the

offender touching the boy's penis, again, on the outside of his clothing.

He had no criminal history. He also had performed a substantial amount of voluntary community work and had apparently been ostracised by members of his local community. There was in that case, significantly, a threat of retaliation if the boy revealed the offences. Mr Callaghan referred to R v W [2000] QCA 321. There are three features of that case which, in my view, warrant its distinction here this morning.

The first was the age of the offender - 69 - which the Court of Appeal described as elderly. This respondent was 58 years of age at the time of sentencing. Second, the Court was concerned that this elderly respondent may have been required to serve all of the 12 months' term of imprisonment imposed in the sentencing Court. The way they put it was as follows:

> "Particularly as one cannot entirely discount the possibility that the appellant could serve all or a substantial part of the 12 months, the conclusion at which we have arrived is that the sentence should be altered."

That led to the reduction to six months' imprisonment suspended after two. The third distinguishing feature in relation to W is the substantially different maximum penalty then applicable. It was only seven years' imprisonment, by contrast with the 20 years which applied here.

That is a very important point of distinction, and as I said before, sentencing Courts must be astute to those legislative signals. That last circumstance in particular renders R v W of no great continuing utility to the sentencing process in this State.

There is no question, but the learned sentencing Judge's reasons are carefully presented, and Mr Callaghan has emphasised that it's not possible to identify any particular error in the way the Judge expressed himself. In the end, I think the issue is, however, whether the Judge was, in effect, overborne, by the respondent's past public service in particular, out of due recognition of the need to record public denunciation - and to do so strongly - for this sort of behaviour.

It must not be forgotten that this complainant was only eight years of age at the time of this offending, and what the respondent did - as found by the jury - involved betrayal of trust, other matters apart. The essence of the Judge's reasoning appears at page 64 of the record. I think it throws up a number of queries.

First, the Judge proceeded on the basis that when sentencing, the then-10-year old complainant - eight years of age at the time of the offences - would likely not significant damage. He left open the possibility that he

may, but the underlying assumption is that he would not. I doubt that is an available assumption in a case like this.

Second, the respondent's unfortunate experience in the Voyager disaster has no relevance by way of mitigating his responsibility for the consequences of this offending. There was no evidence that it rendered him vulnerable to the point where he may have had reduced capacity to resist this sort of temptation, for example.

Third, the respondent's contribution to local government was publicly important; but in the end, it was salaried employment. In my view, it is comparably no more relevant to sentencing than what we call a good employment history - that is, as relevant to rehabilitation and personal deterrence. Of course, it is not wise to exclude particular matters as of no relevance. But I would, for my part, say that the public orientation of the employment to which I have just referred does not in the end - in this process - carry any great relevance.

Fourth, the respondent's health issues to which the learned Judge referred were substantially irrelevant. None was beyond the wit or capacity of a modern correctional facility. What was ignored, in my view, in setting the two month period to be served in particular, were these issues: the importance of community denunciation; the importance of securing general deterrence - the moderateness of the nine-month head term, in the context especially of the fact that

the matter went to trial and was not the subject of pleas of guilty.

Mr Callaghan, by means of an affidavit by Mr Cranny, filed by leave today, referred to the publicity which followed the respondents being convicted in the areas in which he had carried out his local government employment, and the area where he resided. No doubt it caused him discomfort at least. But it must be said that the reporting contained in the copy material exhibited to that affidavit was of a matter-of-fact character: it was not prurient, it was not over the top.

Mr Callaghan submitted that the level of denunciation effected through that publicity meant that the level of denunciation to be reflected by the Court in the sentencing process was less. I note that the issue of shaming arose also in the case of L to which I referred earlier. I do not consider that the effects of the publicity brought to our attention here should substantially affect the term to be imposed here, should the Court be inclined to interfere.

It is the community denunciation to be signalled by the sentences of the Court which should predominate, at least, in cases like this: not expressions of concern publicly expressed through media organisations. I am not saying that they are irrelevant to the process of sentencing, but it is the denunciation signalled by the Court, as put by Justice Keane earlier, as an organ of the State, which to my mind,

in the context of the Penalties and Sentences Act 1992 (Qld), should at least predominate.

The affidavit of Mr Cranny refers also to the dependency of the respondent's father upon the respondent, although that was not pushed by Mr Callaghan today, and it was a matter put before the sentencing Judge, as appears at page 57 of the record. It was not a matter, regrettable as it may be for the father, which should have assumed any great significance in the sentencing process.

Finally, through the last document exhibited to the affidavit, reliance is placed now, should the Court re-sentence, on the effect of the respondent's conviction on negotiations in relation to a claim arising out of the Voyager disaster. The letter is dated the 15th of October 2007 and records some observations by another solicitor.

I would think that any relevance or significance attaching to those matters is minimal. In the end, there is no suggestion that if the respondent has legal rights in the matter, they are prejudiced. They are matters which he could ultimately, if so disposed, pursue through the legal process.

I am satisfied that the sentences imposed in this case were manifestly inadequate, particularly for their failure to signal clearly through the Court the community's denunciation of this sort of criminal conduct. The age

disparity between the respondent and the complainant is of particularly serious character, as of course confirmed by the circumstance of aggravation which attends the charges.

I would allow the appeal, set aside the penalties imposed in the District Court, and in lieu thereof order in respect of each count that the respondent be imprisoned for 12 months, the terms to be served concurrently. I would suspend those terms after six months for an operational period of two years in each case. The declaration as to the five days' presentence custody is to remain in place. I consider the suspension is appropriate in circumstances where as here, there is no material likelihood of the respondent's re-offending.

KEANE JA: I agree with the reasons of the Chief Justice and the orders proposed by his Honour.

DUTNEY J: I agree also.

THE CHIEF JUSTICE: Those are the orders.
