SUPREME COURT OF QUEENSLAND

CITATION:	*R v ZA; ex parte A-G (Qld)* [2009] QCA 249
PARTIES:	**R** **v** **ZA** (respondent) **EX PARTE ATTORNEY GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 152 of 2009 DC No 216 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	1 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	14 August 2009
JUDGES:	Holmes JA, Mullins and Philippides JJ 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 of nine and a half years for each of the maintaining offences and in lieu thereof impose a sentence of 10 years**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the respondent pleaded guilty to two counts of maintaining an unlawful sexual relationship with a child – where the respondent also pleaded guilty to offences of sodomy with a circumstance of aggravation, indecent treatment of a child with a circumstance of aggravation, indecent treatment of a child and two counts of attempting to procure a young person for carnal knowledge – where the respondent was sentenced to nine and a half years imprisonment on the maintaining counts with lesser concurrent sentences on all other counts – whether declaration should be made under s 163B(3) *Penalties and Sentences Act* 1992 (Qld) – whether the sentence was manifestly inadequate

Penalties and Sentences Act 1992 (Qld), s161B(3)

R v Eveleigh [2003] 1 Qd R 398; [2002] QCA 219, considered
R v Herford (2001) 119 A Crim R 546; [2001] QCA 177, considered
R v McDougall & Collas [2007] 2 Qd R 87; [2006] QCA 365, followed
R v P [2000] QCA 271, considered
R v SAG (2004) 147 A Crim 301; [2004] QCA 286, considered
R v TS [2008] QCA 370, considered

COUNSEL: A W Moynihan SC, with L P Brisick, for the appellant
C Heaton for the respondent

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

[1] **HOLMES JA:** I agree with the reasons of Philippides J and with the orders her Honour proposes.

[2] **MULLINS J:** I agree with Philippides J.

[3] **PHILIPPIDES J:**

The sentence

[4] The respondent was convicted on his plea on 28 May 2009 in respect of 34 sexual offences committed between 1 November 2006 and 1 February 2008. The offences were committed against six boys and consisted of two counts of maintaining an unlawful sexual relationship with a child; two counts of sodomy with a circumstance of aggravation; 21 counts of indecent treatment of a child with a circumstance of aggravation; seven counts of indecent treatment of a child; and two counts of attempting to procure a young person for carnal knowledge.

[5] A sentence of nine and a half years' imprisonment was imposed on the maintaining counts, with lesser concurrent sentences imposed on the other counts. A declaration was made in respect of 479 days of pre-sentence custody.

[6] The respondent was liable to a maximum penalty of life imprisonment on the counts of maintaining and sodomy. On behalf of the appellant, it was submitted that the sentence of nine and a half years, with the respondent being eligible for release on parole after serving four years and nine months, was manifestly inadequate.

Antecedents

[7] The respondent was 48 years old when sentenced, being born on 20 October 1960. He had a criminal history which included two previous convictions for sexual offences against children.

[8] In March 1995 he was imprisoned for 12 months with a recommendation for parole after three months for one count of indecently dealing with a child under the age of

12 and one count of aggravated indecent assault. In February 2001 the respondent was imprisoned for two years with a recommendation for release on parole after serving eight months for an offence of aggravated indecent treatment of a child.

Circumstances of the offences

[9] The circumstances of the offending were the subject of an agreed schedule of facts. Counsel for the respondent accepted that the written submissions of counsel for the appellant relevantly summarised the pertinent facts outlined in the agreed schedule.

[10] The sexual offending occurred over a period when the six boys were variously aged between 10 and 15 years. TW, who was aged 14-15 years, distributed a flyer in his local area advertising that he was looking for work mowing lawns and washing cars. The respondent answered the advertisement and employed him to mow his lawn. He developed a relationship with TW and gained his trust and that of his parents. As a result the respondent was introduced to TW's younger brothers JW, aged 13, and MW, aged 10-11. The boys were allowed to spend unsupervised time, often overnight, at the respondent's house. As a consequence, the respondent was also introduced to the brothers JH, aged 13-14, and ZH, aged 12, and to KN, aged 13, who came to his house with the other boys.

[11] TW and JW were the most frequently and seriously abused. The respondent maintained concurrent unlawful sexual relationships with each boy over a four month period.

[12] In relation to TW, the respondent frequently performed fellatio upon him and masturbated him. On two occasions, the respondent sodomised TW.

[13] In relation to JW, the respondent frequently masturbated in front of him, performed fellatio on him, had the boy fellate him and fellated another boy in JW's presence. On one occasion, the respondent tried to procure JW to carnally know him. JW refused to be involved. On another occasion, he got the boy to insert a vibrator into the boy's own anus and then fellated the boy and masturbated until he ejaculated onto the boy's stomach.

[14] In relation to both boys, the offending occurred on the nights that their parents permitted them to sleep over at the respondent's house. The respondent cultivated the boys by permitting them to view adult and child pornography on his computer.

[15] In relation to their brother MW, the respondent exposed the boy to indecent computer material on one occasion. On two occasions he rubbed the boy's backside with his hand. On two other occasions the respondent performed fellatio on him. He also allowed the boy to masturbate him on one occasion.

[16] JH visited the respondent's house on three occasions. On each the respondent showed him indecent material on his computer, including films involving bestiality.

[17] ZH only visited the respondent's house on one occasion. On that visit one of the other boys kicked him in the groin. The respondent took the boy's pants off and fondled his testicles.

[18] KN performed oral sex on the respondent on one occasion shortly after TW had done so. The acts of oral sex were performed in JW's presence. On another

occasion the respondent showed KN film on his computer of adults engaged in sex acts. Then the respondent tried to procure KN to carnally know him. He sucked KN's penis and had KN masturbate himself.

Submissions at sentence

[19] Before the sentencing judge the Crown Prosecutor below submitted that the appropriate sentence range was between 11 and 14 years imprisonment and that, if a sentence under 10 years was imposed, a declaration that the offence was a serious violent offence should be made under s 161B(3) of the *Penalties and Sentences Act* 1992 (Qld). The respondent's counsel urged a sentence of 9 and a half years with no order as to parole and no serious violence offence declaration.

[20] A comparative referred to by both counsel was that of *R v Herford* [2001] QCA 177; (2001) 119 A Crim R 546. Herford pleaded to 23 offences committed against three boys over a period of 18 months. The most serious of the offences concerned one count of maintaining a sexual relationship with P, a child under the age of 16, with circumstances of aggravation in that during the course of the relationship the offender sodomised P, and that P was under his care. There were also four counts of sodomy against P in circumstances of aggravation, that P was under his care, ten counts of indecent dealing with P, five counts of indecent dealing with H (a child under 16 and a person under the offenders care), one count of unlawfully and indecently assaulting H, and two counts of indecent dealing with F, a child under the age of 16. The sexual offending occurring in circumstances where each of the three boys had adolescent problems and was introduced to the applicant as a person with whom problems could be discussed. Similar accounts were given by P and H. Each would go to the house of the applicant, talk and drink alcohol. Generally that would be followed by sexual activity.

[21] In respect of the maintaining offence against P, a sentence of 10 and a half years' imprisonment was imposed with the consequence that the applicant was statutorily deemed to be convicted of a serious violent offence. The offences against P, who was aged 14-15, occurred over a 12 month period, with the majority of the offending occurring within the first six months. Herford, who was 53-55 over the relevant period, had no prior criminal history. He made no admissions and three complainant boys were cross-examined at committal, although it is not clear from the record what was put to them on that occasion. However, he entered a late plea.

[22] Williams JA, with whom the other members of the Court agreed, noted, as relevant considerations, the duration of the offending, that there was no question of violence and that the offender did not go out of his way to solicit the boys. He held that the sentencing Judge had erred in determining that a sentence of 12 years was the appropriate sentence before any discounting of the mitigating factors and considered that the starting point before any discount for the plea of guilty was no greater than 11 years. The sentence was thus reduced from 10 and a half to nine and a half years' imprisonment to account for the offender's plea and prior good history, with no s 161B(3) declaration being made. McMurdo P, in concurring, stated, "after taking into account the applicant's late plea of guilty and his prior good history a sentence of nine and a half years imprisonment was appropriate. Neither the applicant nor respondent suggest this case warrants a declaration under s 161B(3) of the Act. The age of the complainant boys (between 13 and 15) and the absence of threats or violence in the commission of the offences leads me to agree with that assessment."

[23] The learned sentencing judge was also referred to *R v SAG* [2004] QCA 286, where Jerrard JA, with whom the other members of the court agreed, examined a number of appellate decisions concerning offenders convicted of sexual offences against both a single child victim and multiple victims. In reviewing those cases, his Honour listed the "significant matters substantially increasing a sentence for an offence of maintaining a sexual relationship". These included the age of the child when the relationship thereafter maintained first began, the duration of the relationship and whether there was a parental or protective relationship, if penile rape occurred during the course of the relationship, if there was unlawful carnal knowledge of the victim and if so whether that occurred over a prolonged period. Also relevant was whether actual physical violence was used by the offender or whether other manipulation or coercion occurred, such as emotional blackmail.

Submissions on appeal

[24] On behalf of the appellant it was contended that the sentence imposed was manifestly inadequate in that it failed to give sufficient weight to the serious nature of the offence, general and personal deterrence and, in particular, to protecting the community, bearing in mind that the respondent was a mature man with a history of sexual offending against children, who maintained a sexual relationship with two children and sexually abused another four. Counsel argued that that the head sentence should have been no less than 12 years' imprisonment and, alternatively, that if the head sentence imposed was considered to be within exercise of the sentencing discretion, that the learned sentencing judge erred in not declaring a serious violent offence.

[25] In making that submission, counsel relied on *R v TS* [2008] QCA 370, where Mackenzie AJA, with whom Fraser JA and Daubney J agreed, said at [39]:

> "Analysis of numerous authorities has been conducted in some detail in cases such as *R v SAG* and *R v BAY* [2005] QCA 427. Repetitive analysis of them is unnecessary. The cases generally and others particularly referred to by counsel, some of which were pleas of guilty and some of which involved a late plea or a plea of not guilty, reveal a diversity of outcomes, but generally between 10 to 15 years. That reinforces what de Jersey CJ said in *R v C; ex parte A-G (Qld)*, previously referred to."

[26] Counsel for the appellant submitted that the present case exhibited many of the aggravating features referred to in *SAG*. The respondent committed offences against multiple victims, who were relatively young, they were groomed, the respondent was in a "protective relationship", he sodomised one child and procured another to place a dildo in his own anus and he did not take any precautions to avoid the transmission of any sexually transmitted disease to the children. An exacerbating factor was the respondent's previous convictions for sexually abusing children.

[27] Counsel for the appellant argued that *Herford* was a less serious case than the present, in that only three children were involved with the youngest aged 13 and the offender maintained a relationship with only one boy and had no criminal history.

[28] Counsel for the appellant also referred to *R v P* [2000] QCA 271, in support of the submission that the sentence imposed in the present case was manifestly inadequate.

That case concerned a 60 year old man, who pleaded to offences of sodomy and four counts of indecent dealing, committed upon a boy who was aged 10 over a period of about two months. P had abused a position of trust he enjoyed with the boy's mother and had two previous convictions for sodomy offences. He received a sentence of nine years' imprisonment with a declaration that the offence was a serious violent offence for the sodomy, which was upheld on appeal. It was submitted by counsel for the appellant that, even though the sodomy in that case was committed upon a boy who was younger than the boy sodomised in the present case, the overall offending committed by P was less serious, because he only abused one boy and the period involved was two months. It was contended that, notwithstanding the greater criminality in the present case, and the fact that the head sentence imposed was six months longer than that imposed on P, given the declaration made in *P*, the respondent would be eligible for parole at a time substantially earlier than P.

[29] Counsel for the respondent, in contending that the sentence imposed was not manifestly inadequate, pointed to the absence of violence or threats of violence in the offending. It was also said that the respondent was essentially a family friend who permitted the complainants to visit him and on occasions to stay at this home, but that he was not a parent or in a 'protective relationship' with the complainants. As such, it was submitted that the aggravating feature of offending being committed by a person to whom the victim ought to have been able to turn to for support, was not present.

[30] Counsel for the respondent also referred to the observations of Jerrard JA in *SAG* that relevant considerations in mitigating the appropriate penalty included "conduct showing remorse, such as the offender voluntarily approaching the authorities, or seeking help for all the family; co-operation with investigating bodies, admissions of offending, co-operating with the administration of justice, and sparing the victims from any contested hearing." In the respondent's case, counsel pointed to the respondent's cooperation with police and his admissions, including admissions to offences about which the police would otherwise have been unaware (as they had not been recalled by the complainants). Additionally, counsel pointed to the fact that the victims were not put through the trauma of having to recount the offending in court and that the plea of guilty was indicated sufficiently early that the victims did not have the anticipation of giving evidence up to the eve of the trial. The respondent also submitted through his counsel that he has insight into his offending behaviour and the need to avoid the future risk of offending. The respondent admitted that his sexual urges remain and indicated a willingness to undertake treatment designed to reduce the risk of further offending.

[31] In relation to the case of *Herford*, counsel for the respondent submitted that while the objective circumstances of the offending in the present case could be said to involve some more aggravating features, the offending persisted over a significantly shorter period and there were more compelling mitigating features including that the respondent made admissions, whereas Herford had entered a late plea and the complainants were cross-examined at committal. To be weighed against that submission however is the respondent's prior criminal history.

[32] In relation to the issue of a serious violent offence declaration it was contended that the serious features of the offending were met by the imposition of a significant term of imprisonment and that the absence of concerning psychological features, and the absence of the use of violence, along with remorse and insight into the

offending behaviours, were such that the risk of future offending was greatly reduced and that this supported the exercise of discretion not to make a declaration.

Conclusion

[33] In *R v McDougall and Collas* [2006] QCA 365 at [18], the Court set out relevant considerations in determining the appropriate level for a head sentence which constitutes a serious violent offence if a sentence of ten years or more is imposed. Those considerations include:

- that sentencing is a practical exercise which has regard to the needs of punishment, rehabilitation, deterrence, community vindication and community protection;
- that courts cannot ignore the serious aggravating effects upon a sentence, of an order of 10 years or more. The inevitable declaration that the offence is a serious violent offence is relevant in the consideration of what sentence is "just in all the circumstances" in order to fulfil the purpose of sentencing which is prescribed by s 9(1) of the Act.
- however, courts should not attempt to subvert the intention of Part 9A of the Act by reducing what would otherwise be regarded as an appropriate sentence, with the result, as described by Fryberg J in *R v Eveleigh* [2003] 1 Qd R 398, that while a court should take into account the consequences of any exercise of the powers conferred by the Part 9A, adjustments may only be made to a head sentence which are otherwise within the "range" of appropriate penalties for that offence; and
- the courts should also take into account the relevant sentencing principles set out in s 9 of the Act.

[34] Taking those considerations into account, in my view, the head sentence imposed of nine and a half years, which required only four years and nine months to be served before the respondent became eligible for parole was manifestly inadequate. It failed to reflect the serious nature of the offending by the respondent against young children, who were enticed and groomed in a persistent and calculated manner, in circumstances which involved a breach of trust. The conduct of the respondent, who admits to being unable to control his sexual urges, has had a devastating effect on the victims and their families. While credit must be given for the matters of mitigation, including the respondent's plea, admissions and cooperation, a particularly concerning aspect is the respondent's two previous convictions for sexual offences, which highlight that significant weight should be attached to considerations of deterrence and the need to protect the community. In my view, a sentence of ten years imprisonment ought to be imposed. The effect of that sentence is to add an additional period of six months to the head sentence. It also has the consequence of requiring the respondent to serve eighty per cent of the sentence before being eligible to apply for parole. That sentence more appropriately reflects the level of criminality involved including the aggravating aspect of the relevant prior criminal history.

Orders

[35] The orders I propose are:

a) Appeal allowed;

b) Set aside the sentence of nine and a half years for each of the maintaining offences and in lieu thereof impose a sentence of 10 years.