SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ritchie; ex parte A-G (Qld)* [2009] QCA 270
PARTIES:	**R** **v** **RITCHIE, Brett Richard** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 141 of 2009 DC No 223 of 2001 DC No 224 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	11 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	20 August 2009
JUDGES:	McMurdo P, Keane JA and P Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against the sentence imposed for the offence of unlawful carnal knowledge is allowed. The sentence is set aside and instead the respondent is sentenced to 12 months imprisonment suspended after serving two months with an operational period of three years.** **2. The appeal against the sentence imposed on the two counts of indecent treatment of a child under 16 is dismissed.** **3. A warrant is issued for the arrest of the respondent but it is to lie in the registry for two weeks.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – the respondent pleaded guilty to one count of unlawful carnal knowledge of a child under 16 years and two counts of indecent treatment of a child under 16 years – the respondent had extensive criminal history but no prior convictions for sexual offences – the offences seemed to be predatory and equate to grooming of the complainants – whether the sentence was manifestly inadequate

CRIMINAL LAW – SENTENCE – SENTENCING PROCEDURE – FACTUAL BASIS FOR SENTENCING – GENERALLY – the offences in question occurred in 2000 – the respondent was not at fault for the delay in finalising the charges – since the offences occurred the respondent has made significant efforts at rehabilitation and has given up alcohol and drugs – whether the sentencing judge gave too much weight to the respondent's rehabilitation – whether the efforts at rehabilitation were sufficient to avoid actual custody – whether the sentencing judge gave insufficient weight to the principle of general deterrence

R v Clifford; ex parte A-G (Qld) [2006] QCA 492, considered
R v Pham [1996] QCA 3, cited

COUNSEL: T Moynihan SC, with L Brisick, for the appellant
B W Farr SC, with K Hillard, for the respondent

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

[1] **McMURDO P:** The respondent, Brett Richard Ritchie, pleaded guilty on 20 April 2009 to two counts of indecent treatment of a child under 16 years between June and September 2000 and one count of unlawful carnal knowledge of a child under 16 years on 10 September 2000. Unusually in light of the seriousness of the offences, his bail was enlarged without objection by the prosecution to enable him to return to Victoria where he had resided for the past nine years. He was sentenced on 15 May 2009 to nine months imprisonment wholly suspended for 18 months in respect of the indecent treatment counts, and to 12 months imprisonment wholly suspended for 18 months on the count of unlawful carnal knowledge. The appellant, the Attorney-General of Queensland, appeals against those sentences contending that they failed to adequately reflect the gravity of the offences; to sufficiently take into account the aspect of general deterrence; and that the judge gave too much weight to mitigating factors.

[2] Ritchie was 40 years old at sentence and 31 at the time of the offences. He was committed for trial on 31 January 2001 but he left Queensland for Victoria where he lived for almost nine years until he was arrested on the bench warrant which issued in respect of these charges in Queensland. He was granted bail and voluntarily returned to Queensland without an extradition process to have these matters finalised. It seems to have been accepted at sentence that he mistakenly believed these charges were no longer outstanding.

[3] He had an extensive criminal history in Victoria, commencing when he was a 13 year old juvenile. He was placed on a 12 month supervision order for burglary and theft. He was dealt with as a juvenile for other property and driving offences between 1982 and 1985. These resulted in predominantly community based orders but he was given seven months in a youth training centre. Between 1987 and 1992 he was convicted of property and driving offences for which he was again sentenced to community based orders. He had no criminal history from 1992 when he was 24 years old until his present offending in 2000 when he was 31 years old.

Subsequent to the present offending, he was dealt with in the Shepparton Magistrates Court for making a threat to kill, criminal damage, intentionally destroying property and carrying a dangerous article. He was sentenced to an effective term of two months imprisonment, wholly suspended, with an order for compensation and a requirement that he undergo assessment and treatment for alcohol and drug addiction, and other related requirements. On 20 June 2005, he was sentenced to one month imprisonment, wholly suspended, for driving whilst disqualified. It is unclear if this was a breach of the 2004 orders. On 10 February 2006, he was sentenced to an effective term of three months imprisonment wholly suspended for another offence of driving whilst disqualified. This offence constituted a breach of the 2001 orders and the operational period of the 2004 suspended sentences was extended by 12 months.

[4] He therefore had no previous or subsequent history for like offending and does not seem to have previously been sent to adult prison. The fact that the bench warrant issued in Queensland in respect of these offences did not surface in his 2005 or 2006 court appearances in Victoria lends credence to his claim that he mistakenly thought these charges were no longer being pressed.

[5] The indecent treatment offences were committed on a 13 year old complainant, R. At the time of the offences, Ritchie was a boarder in her mother's home. The complainant in the unlawful carnal knowledge offence, K, was 14 years old. She was a friend of R. Ritchie met K through R. He asked K her age. She said she was 14. He asked K if she was a virgin. She said she was. On several occasions he asked her for sexual intercourse but she did not comply. He also "asked her to write him some dirty letters" and she complied. On 9 September 2000, R was having a sleepover at her home. K was present. Ritchie arrived home at 1.00 am. He spoke with the girls at the sleepover and then took K to a downstairs bedroom. She lay down with him. They had both been drinking alcohol. He removed her underpants, put two fingers inside her vagina, and then lay on top of her and had penile sexual intercourse. K said that this hurt and it felt like he had sex with her for about 10 minutes. K heard R coming downstairs. Ritchie jumped off K and lay next to her in the bed as if nothing had happened. She felt something wet and sticky between her legs. R entered the room and said, "I don't want to know what's going on." K dressed and went upstairs. She told R she had sex with Ritchie and that he did not use a condom. K appeared to be drunk. K spoke to police on 26 September 2000 but did not make a formal complaint until 29 September 2000. She was examined by a doctor on 11 October 2000. The examination result was consistent with her account. K telephoned Ritchie in November 2000. Ritchie told her he could not recall the incident because he was drunk at the time.

[6] The indecent treatment counts involving R occurred in this way. Ritchie knew that R was 13 years old. On several occasions he asked her for sex. On an occasion after 1 June 2000, she was at netball practice with K when Ritchie approached them. He put his left hand on R's left breast outside her clothing and squeezed her breast. K saw this. This constituted the first offence of indecent treatment.

[7] On another occasion after June 2000, R was in the front seat of Ritchie's car at her home listening to a CD. Ritchie was in the driver's seat. He put his left hand between her thighs and rubbed his hand with an up and down motion against the

outside of her clothing in the vaginal area. She did not say anything as she was a little scared. The incident lasted about 10 seconds. She got out of the car and went upstairs. This constituted the second offence of indecent treatment. R also made a formal complaint to police on 29 September 2000.

[8] R did not supply a victim impact statement. K's victim impact statement dated 5 May 2009 was tendered. It contained the following information as to the dreadful effect of this offence upon her. Following the incident, she left high school and abandoned her plans to become a nurse. She was diagnosed with depression and anxiety. At times she felt suicidal. She became obese. She has never returned to her education or achieved her ambition to become a nurse. She felt frightened of Ritchie. He had made threats to "get her".[1] She was told Ritchie had disappeared but she still felt frightened even to go to the local shops in case she bumped into him. She apprehended that she had no control over her life. She felt, at 23 years of age, that she was still suffering the effects of the offence. She blamed her subsequent poor education and depression on it.

[9] The prosecutor at sentence made the following submissions. The evidence suggested that Ritchie may have had a drinking problem at around the time of these offences. This was an explanation for, but did not excuse, his behaviour. Ritchie left Queensland for Victoria under "a misunderstanding" about these offences. When he was eventually arrested on a bench warrant, he was granted bail and, to his credit, returned to Queensland to face court. It was not necessary to extradite him. He pleaded guilty at the first opportunity after speaking to his legal representatives. Since these offences, Ritchie had given up drinking; become a devoted member of his local church; and had the support of his pastor and other church and community leaders. In the absence of special circumstances, the sexual abuse of children should ordinarily mean detention in custody. Ritchie's offending warranted a term of imprisonment of between 12 and 18 months, with suspension after about one-third in recognition of the many mitigating features.

[10] After referring to relevant cases, the prosecutor stated that in this case there were no particular circumstances to warrant Ritchie not serving a period of actual imprisonment. He had no previous convictions for sexual offences. He continued:

> "… the authorities would suggest that imprisonment of 12 to 18 months is within range for the … small group of offences. [Ritchie] should be given the benefit of the plea of guilty and other mitigating circumstances which, I understand, will be put to you by my learned friend.
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> … that term of imprisonment might be suspended after serving a third. My learned friend may ask you to consider wholly suspending the sentence, given the time period and the changes to [Ritchie's] circumstances, or perhaps releasing him on probation. The difficulty with probation, of course, is that he still resides in Victoria. So there may have to be some probation carried out with the Victorian counterpart.
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> … the only difficulty, as I see with a suspended sentence, is he – he has breached a suspended sentence on a prior occasion in Victoria.

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1 This was disputed at the sentence.

> Although, once again, not for matters of a similar nature. The Crown certainly submits that a conviction is warranted, given the nature of the offences, and the period of time the defendant spent trying to groom the women, the young women, to fulfil his needs at the time."

[11] It is not clear from these submissions whether the prosecutor ultimately pressed for a period of actual custody.

[12] Defence counsel at sentence made the following submissions. In the last nine years Ritchie had overcome a drug and alcohol addiction. At one time, he had an $800 a day drug dependency which included methylamphetamine, cocaine, cannabis and alcohol. He strongly denied making any threats to the victim. On the contrary, in his post-offence telephone conversations with K he asked if she still loved him. The committal proceedings were by way of full hand up committal and he pleaded guilty. He was the seventh of 12 children raised in poor circumstances in a Victorian household where violence and alcohol and drug abuse were endemic. He fell into the juvenile justice system and was placed in a youth detention centre when he was 15 years old. When he was 17, he formed a relationship with a young woman. He became a father at 18. By the time he was 19, he had two children. He abused drugs and alcohol, left his family and moved to Ipswich, Queensland, in 1996. The relationship broke down in 1999. He obtained work but, because of his drug and alcohol abuse, he was often homeless. It was in this period of his life that he committed the present offences. In 2002, he returned to live in Shepparton because his mother was ill. He became a Christian and began a relationship with a woman who helped him change his lifestyle. They married in 2006. He has been drug and alcohol free for six years. He now helps his wife raise her three children and her grandchild. In 2005 he completed his Certificate IV in Drug and Alcohol Work and now assists others to deal with their addictions. His pastor came with him from Shepparton to attend the court. In this case, Ritchie's rehabilitation outweighed considerations of deterrence and justified a sentence without any period of actual custody.

[13] Defence counsel tendered letters of support. These attested to Ritchie's excellent work ethic; his work in Indigenous drug and alcohol rehabilitation; and his community work as a sports first-aider and trainer with a football and netball club.

[14] In sentencing Ritchie, the judge noted the serious aspects of his offending and the particularly detrimental effect it had had on the complainant, K. The judge then referred to Ritchie's rehabilitation despite his dysfunctional upbringing and that he had voluntarily returned from Victoria to Queensland following his arrest. Although he had some criminal history, he had no previous offences of a sexual nature. There was nothing to suggest he was at risk of committing further sexual offences against young children. Whilst normally adults who sexually abuse young children should go to jail, in the unusual circumstances of this case the term of imprisonment imposed should be fully suspended.

Conclusion

[15] Ritchie, at the age of 31, committed three sexual offences against two girls aged 13 and 14. The disparity in age between Ritchie and K, with whom he had penile sexual intercourse, means that, ordinarily he would be sentenced to a period of

actual custody: *R v Clifford; ex parte A-G (Qld)*;[2] *R v Pham*.[3] A period of actual custody is all the more warranted where, as here, Ritchie committed two further sexual offences against another young complainant. The most serious of these three offences is unquestionably that involving K. He had unprotected penile sexual intercourse with a 14 year old girl. The circumstances, unlike in *Clifford*, were not opportunistic. His conduct seemed predatory and equated to the grooming of both complainants for his sexual gratification. Whilst there was no victim impact statement in respect of R, the offence against K has had a dramatic detrimental impact on her young life. Another feature which distinguished this case from *Clifford* where no actual period of imprisonment was required to be served, was that Clifford admitted his offending; without his admission the charge against him could probably not have been brought. By contrast, Ritchie made no admissions and professed to have no recollection of the offence against K because of his intoxication.

[16] Ritchie had no prior convictions for sexual offences but he had a discreditable record of property and street offences. He came from a severely disadvantaged and dysfunctional background so that his prior criminal history is not unexpected. It is perhaps more surprising that it is not worse. Since at least early 2006 he has not committed further offences. His last two convictions in 2005 and 2006 were for driving whilst disqualified. He has no significant criminal history since 2004. It seems that Ritchie left Queensland believing that these charges were not being pursued. The nine year delay in finalising these charges should be regarded as no fault of his. It is to Ritchie's great credit that in that time, and especially since 2006, he has made impressive efforts at rehabilitation. To now send him to jail could jeopardise that rehabilitation.

[17] It seems almost certain that Ritchie's alcohol and drug addiction at the time of these offences was a disinhibiting factor in his commission of them and that he does not have paedophilic tendencies, at least when sober. He seems to have turned his life around by giving up alcohol and drugs. He has formed a steady relationship and become a family man. He has involved himself in community and church activities. He is in steady employment. Unquestionably, a prison sentence is not in the interests of his rehabilitation.

[18] But Ritchie's rehabilitation is not the only factor this Court must consider in sentencing. Impressionable young girls like K and R must be protected from the predatory conduct of considerably older men. That is why courts ordinarily impose custodial sentences upon older men who have sex with underage girls. Ritchie's offending has had a dreadful impact on K's life.

[19] I accept that sending Ritchie to jail is not in the interests of Ritchie, his family, or the community of which he is now a valued part in Victoria. I am finally persuaded, however, that the appellant is right in the contention that the primary judge gave too much weight to Ritchie's rehabilitation and the mitigating factors and insufficient weight to the principle, critical in cases like this, of general deterrence. Whilst it is to Ritchie's great credit that he has now rehabilitated and is unlikely to re-offend, 31 year old men, whether or not in the grip of substance abuse, must know that if

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2 [2006] QCA 492.

3 [1996] QCA 3.

they sexually abuse juveniles they will very likely go to jail. The relatively minor touching in respect of R did not require a custodial sentence. The unlawful carnal knowledge of K did, especially when coupled with the offending against R.

[20] The lengthy delay in finalising these matters through no fault of Ritchie, his co-operation with the authorities; his guilty pleas; and his impressive efforts at and prospect of rehabilitation greatly mitigate the appropriate sentence, but not to the point of saving him from some period of actual custody. The unusual combination of significant mitigating factors warrants a moderated head sentence and a remarkably early suspension. A significant operational period will mean that if Ritchie's rehabilitation is a false dawn and he re-offends during it, he will be returned to prison to serve the balance of the sentence.

[21] I would allow the appeal only in respect of the sentence imposed for the unlawful carnal knowledge offence concerning the complainant K. I would set aside that sentence and instead substitute a sentence of 12 months imprisonment suspended after serving two months with an operational period of three years. A warrant for the arrest of Ritchie should issue but lie in the registry for two weeks. I would dismiss the appeal from the sentences imposed for the two counts of indecent treatment of a child under 16 in respect of the complainant R.

[22] **KEANE JA:** I agree with the reasons of McMurdo P and with the orders proposed by her Honour.

[23] **P LYONS J:** I have had the advantage of reading the reasons for judgment of her Honour the President. I agree with her Honour’s reasons and the orders she proposes.