SUPREME COURT OF QUEENSLAND

CITATION:	*R v Horvath* [2014] QCA 344
PARTIES:	**R** **v** **HORVATH, Sandor Jozsef** (appellant)
FILE NO/S:	CA No 35 of 2014 DC No 1794 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction – Further Orders
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Holmes and Morrison JJA and Philip McMurdo J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appellant is sentenced to nine months and 29 days imprisonment on count 1.** **2. The appellant is sentenced to six months imprisonment on count 4.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL ALLOWED – where the appellant was convicted, after a trial, of five counts of indecent treatment of a child under 16, in three instances with the aggravating circumstance that she was under 12 years – where three of those counts were set aside on appeal – where the appellant falls to be re-sentenced on the two remaining counts – where the appellant has already served nine months and 29 days in custody – whether that sentence constitutes an adequate penalty for the offending *GAF v QPS* [2008] QCA 190, considered *R v CBI* [2013] QCA 186, considered *R v Halvorsen* [1994] QCA 565, considered *R v Horvath* [2014] QCA 273, related *R v KT; ex parte Attorney-General (Qld)* [2007] QCA 340, considered *R v Porter; ex parte Attorney-General (Qld)* [2009] QCA 353, considered

COUNSEL:	No appearance for the appellant, the appellant's submissions were heard on the papers No appearance for the respondent, the respondent's submissions were heard on the papers
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** The appellant was convicted, after a trial, of five counts of indecent treatment; three of those counts were set aside on appeal.[1] He now falls to be re-sentenced on the two remaining counts, Counts 1 and 4.

The offences

[2] The complainant was the daughter of friends of the appellant, and on occasions he looked after her because of conflict in her own family. During school holidays, when she was 11, he looked after her at his home while her parents worked. She was playing computer games when he sat next to her, touched her chest and put his finger into her underpants. He touched her vaginal area; she described him as "playing" with it. He desisted when she told him to stop. That conduct was the subject of count 1. On the complainant's twelfth birthday, the appellant took her shopping. While driving there, he touched her chest area, through her clothes, for about five seconds and said that her "boobs" had grown. That offence gave rise to count 4.

[3] The appellant was aged between 56 and 57 when the offences were committed. He had a prior criminal history for minor offences of dishonesty, with one offence of assault occasioning bodily harm and a breach of a domestic violence order. All of those convictions were dealt with by way of fines in the Magistrates Court. At the time of sentence below he was a disability pensioner. He was said to have the support of his children. It was put on his behalf that the fact that he spoke very little English would make serving a sentence more difficult for him.

Comparable decisions

[4] The appellant originally received concurrent sentences of 21 months on three counts, including count 1, and sentences of 15 months imprisonment on two counts, including count 4. The head sentence of 21 months reflected the combined seriousness of all the offences of which the applicant had then been convicted. The relevant allegations were that on separate occasions he had forced the child to watch pornography; made her touch his penis and masturbated, ejaculating onto her leg; attempted to touch her vaginal area as she lay sleeping; and made her touch his penis and testicles. The offences for which he is now to be sentenced are, of course, no longer to be seen in the context of those other allegations.

[5] The appellant relied on *R v KT; ex parte Attorney-General (Qld).*[2] In that case, a 58 year old man had touched the genital and anal areas of a boy of eight on two successive nights while visiting the child's family, with whom he was friendly. He had been sentenced to nine months imprisonment, suspended after two months, on each charge. On the Attorney-General's appeal, the court concluded, given the betrayal of trust involved and the youth of the complainant and having regard to the need for

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1 *R v Horvath* [2014] QCA 273.

2 [2007] QCA 340.

denunciation, that the sentences should be set aside and instead the respondent be imprisoned for 12 months, suspended after six months, on each charge.

[6] The respondent relied on *R v Halvorsen*;[3] *GAF v QPS*;[4] *R v Porter*;[5] and *R v CBI*.[6] In *Halvorsen*, the applicant showed a ten year old some pornographic material and masturbated in front of him. That applicant was a 48 year old with previous convictions for wilful exposure. There was some suggestion that he was of below average intellectual capacity because of a mild closed head injury. He was sentenced to imprisonment for two years with a recommendation for parole after nine months. His application for leave to appeal was allowed and the sentence was varied by suspending it from the date of his appeal, after he had served two months imprisonment.

[7] In *GAF*, the appellant indecently dealt with his 14 year old niece, having taken her out of school and to a motel. He rubbed her upper legs with cream and repeatedly asked if he could "lick her out". A magistrate sentenced him to 15 months imprisonment, suspended after four months. The sentence was upheld in the District Court. On an application for leave to appeal in this court, the sentence was regarded as at the high end of an acceptable range, but not manifestly excessive.

[8] In *Porter*, the respondent had pleaded guilty to three counts of exposing the complainant, who was aged between six and seven years, to indecent treatment. He was her teacher and a friend of her family. On two occasions he masturbated in front of her to the point of ejaculation, in one instance inviting her to put her mouth over his penis, and on a third occasion, showed the complainant his penis. He had breached his bail by going to her new school and speaking to her. At first instance, he was sentenced to two years imprisonment, suspended after eight months, a period he had already spent in custody; a sentence which accorded with the Crown prosecutor's submission. This court dismissed the Attorney-General's appeal, regarding the sentence as appropriate.

[9] The applicant in *CBI*, who was 69 years old, was convicted after a trial of two counts of indecently dealing with an eight year old child. He was described as in the position of a grandfather to her, and she was staying with him at the time of the offences. He lay on top of her while she was under bedclothes and, while tickling her, "scrunched" her over her genital area. On a second occasion, he took her to a vehicle, laid her down, pulled her underwear down and touched her on the skin of her genital area. He was sentenced to concurrent terms of imprisonment of twelve months and eighteen months, with parole eligibility half-way through the longer sentence. The sentences were regarded as severe, but not manifestly excessive. The application for leave to appeal was accordingly refused.

Conclusion

[10] Having regard to those authorities as "yardsticks", I would ordinarily consider the appropriate sentences for the indecent treatment offences in this case to be 15 months and six months on counts 1 and 4 respectively, with suspension of the longer sentence after seven and a half months. However, what makes this case unusual is that the appellant has already served nine months and 29 days in custody, somewhat longer than would have been the case had the suggested sentences been imposed on him initially.

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3 [1994] QCA 565.
4 [2008] QCA 190.
5 *Ex-parte Attorney-General (Qld)* [2009] QCA 353.
6 [2013] QCA 186.

[11] In those circumstances, rather than imposing the 15 month sentence and setting a suspension date which has already been passed by some two and a half months, I consider the better course is simply to sentence him to nine months and 29 days imprisonment on count 1 and six months imprisonment on count 4. Given that the entire period entails actual incarceration without the usual amelioration of early release on parole or suspension, that sentence, in my view, constitutes an adequate penalty for the offending.

Orders

[12] I would make the following orders:

1. The appellant is sentenced to nine months and 29 days imprisonment on count 1.

2. The appellant is sentenced to six months imprisonment on count 4.

The appellant has been held in custody between 10 January 2013 and 24 July 2013 and between 13 February 2014 and 28 May 2014 on these counts, a total of nine months and 29 days, which is declared to be time already served under this sentence.

[13] **MORRISON JA:** I agree with the reasons and the orders proposed by Holmes JA.

[14] **PHILIP McMURDO J:** I agree with Holmes JA.