SUPREME COURT OF QUEENSLAND

CITATION:	*R v RAZ; Ex parte Attorney-General (Qld)* [2018] QCA 178
PARTIES:	**R** **v** **RAZ** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 306 of 2017 DC No 2596 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 21 November 2017 (Muir DCJ)
DELIVERED ON:	3 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	14 June 2018
JUDGES:	Sofronoff P and Gotterson JA and Boddice J
ORDERS:	**1. Appeal allowed.** **2. The sentence of nine years imprisonment on count 1 of the indictment be set aside.** **3. The respondent be sentenced to 11 years imprisonment on count 1 of the indictment.** **4. The conviction on count 1 of the indictment be declared a serious violent offence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the respondent was convicted of 18 sexual offences committed against his step-grandson over the course of a period of 12 years – where the Crown submitted for a head sentence of between 10 and 12 years imprisonment at first instance – where defence counsel at first instance submitted that a head sentence of eight years imprisonment was appropriate – where all sentences were ordered to be served concurrently and the respondent was sentenced to a head sentence of nine years on the first count, that of maintaining a sexual relationship with a child under 16

– where the appellant complained of four errors on the part of the learned sentencing judge – where the period of offending was a very important factor to be considered – where the respondent's position as a magistrate was a relevant factor as it put him in a special position to fully appreciate the deleterious effects of sexual offences upon children – where the combination of the complainant's age, the length of the offending and knowledge of the effects of the offending on the complainant made this an exceptional case – whether the sentence imposed at first instance was so out of range as to warrant intervention

Everett v The Queen (1994) 181 CLR 295; [1994] HCA 49, applied
R v BAY (2005) 157 A Crim R 309; [2005] QCA 427, discussed
R v BCA [2011] QCA 278, discussed
R v PAK [2010] QCA 187, discussed

COUNSEL: T A Fuller QC for the appellant
A J Edwards for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
A W Bale & Son Solicitors for the respondent

[1] **SOFRONOFF P:** The respondent was convicted of 18 counts of sexual offences that he committed against his step-grandson over the course of 12 years. On 21 November 2017 he was sentenced to various terms of imprisonment between two years and nine years. All sentences were to be served concurrently. The Attorney-General now appeals against the sentences on the grounds that they were manifestly inadequate.

[2] The respondent was a sitting magistrate. He married the complainant's maternal grandmother at a time before the complainant was born. From the time when the complainant boy was four or five years old and until after he turned 16 the respondent continually committed sexual offences against him. Count 1 of the indictment charged the respondent with maintaining an unlawful sexual relationship with the complainant between March 1990 and March 2002. Over the course of that time, which was the whole of the complainant's childhood, the respondent did hundreds of sexual acts with this child. These acts included masturbating the complainant or having the complainant masturbate in front of him. It included sucking the complainant's penis and masturbating himself in front of the complainant to ejaculation. It involved rubbing his penis against the complainant's back or arm. It included one occasion of putting his penis into the complainant's mouth and one occasion of touching the complainant on or around his anus. He once attempted to sodomise the complainant and on another occasion he attempted to procure the complainant to sodomise him.

[3] After the complainant turned 16 the respondent committed two further offences by sucking the complainant's penis.

[4] As anybody with experience in such matters would expect, the effect upon the complainant was enormous. In his victim impact statement the complainant described some of these effects:

> "One of these are dreams. Since I was about 10 years old I have the same sort of dreams on a very regular basis. I'm in a bad situation, about to get physical hurt someone or a group of people and I try to fight back but I'm frozen in fear and can't move. When I finally can start moving, I have zero strength. I try to scream for help but no sound comes out of my mouth and when it finally does, no one hears me. Every one of these dreams I wake up terrified and the first things that pops up in my head is [RAZs] face, followed by a memory. This has me not being able to function properly for about 2 days. That's just how long it takes me to get over that one dream.
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> Sometimes it's not dreams it's just random memories. At work or home they just randomly pop into my head and that's me done for the rest of the day. My kids think they've done something wrong because I can't really talk to them (or anyone for that matter) when I'm like that, but really I'm just not saying anything to try and process and keep myself from falling apart.
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> This has also affected me accedemically [*sic*] and has affected my career choices. If you asked my family when I was 15/16 what I was going to be they would have said "pilot". I started my flight training when I was 14 and absolutely loved it, but by the time I was 16 and what had happened became real and not just a bad dream I turned to alcohol to try and drink the memories away, at the same time not caring about my studies anymore. I went from a kid in primary school who's [*sic*] parents where asked by the school to think about putting me in school for gifted kids to a boarder [*sic*] line alcoholic by the time I was 18.
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> This has also affected me socially. I find it hard and awkward to interact with people sometimes. Sometimes I don't even want to leave the house cause it will mean having to talk to people and my emotional cup is so full that I'm scared that even something as simple as talking to someone will spill it everywhere.
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> I'm 31 now and this is all still with me and will be for the rest of my life, but it's not just me that is affected it's everyone around me that's has to go through this as well. This will affect every aspect of my life forever and I will never be able to escape it."

[5] The complainant's wife also provided a victim impact statement. She describes how, in many ways, their lives and those of their children are continually being affected by the respondent's crimes. As she put it in conclusion:

> "So far, my husband has endured 30 years of pain. As a family, we will live with the aftermath until the end of our time. …"

[6] The respondent has shown no remorse whatsoever for his crimes. He pleaded not guilty and instructed his counsel to put to the complainant in cross-examination that he had made up a story to get money.

[7] After the jury convicted him, the respondent refused to accept their verdict and proclaimed himself to be innocent of all charges.

[8] There being no actual features of mitigation that could be put forward on the respondent's behalf, his counsel emphasised to the learned sentencing judge, Muir DCJ, the absence of actual penetration and the absence of violence. The submission concerning the absence of penetration lost some of its force by the concession, which had to be made, that one of the offences involved the respondent placing his penis into the complainant's mouth and another involved attempted sodomy.

[9] Nevertheless, counsel's submissions sought to distinguish the present case from other cases that did involve actual penetration or violence.

[10] Muir DCJ took into account the factors enumerated in s 9(6) of the *Penalties and Sentences Act*. That provision was enacted after these offences had been committed but the principles which are reflected in s 9(6) have always been relevant to sentencing offenders who have committed sexual offences against children and in this way her Honour gave effect to them.

[11] Her Honour also took into account the length of the period of the offending and the effect of the offences upon the complainant. She took into account the lack of violence but considered that, having regard to the age of the respondent's victim, not a great deal of weight could be attached to that factor. Her Honour took into account the respondent's absence of remorse.

[12] Her Honour referred to the fact that the applicant had been a magistrate from 1985 until his retirement in 2008. She said:

> "There is an obvious display of hypocrisy in this case given that your offending behaviour occurred whilst you were sitting in judgment of others. No doubt there would have been many occasions over the years when victims of sexual abuse appeared before you as defendants having turned to drugs and excessive alcohol consumption to numb the pain. Having said this, I do not consider that the fact you were magistrate aggravates your offending behaviour."

[13] Her Honour referred to *R v BCA*.[1] That was a case in which, after a trial, the defendant had been convicted of one count of maintaining an unlawful sexual relationship and numerous other counts of sexual offences against a child. He was sentenced to concurrent terms amounting to 10 years imprisonment. The sentence was upheld on appeal. Her Honour considered that case to be a more serious one than the present case because it "included actual acts of sodomy".

[14] Her Honour also referred to *R v PAK*.[2] A sentence of seven and a half years imprisonment imposed for a maintaining offence was not disturbed on appeal. The period of offending was eight years. It involved frequent instances of digital penetration of the complainant's vagina and one instance of sodomy.

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1 [2011] QCA 278.
2 [2010] QCA 187.

[15] The Crown had also relied upon *R v BAY*.[3] That was a case of maintaining over a period of seven years. A sentence of 12 years imprisonment on the maintaining count was reduced, on appeal, to 10 years. Her Honour observed that the offence involved numerous occasions of having carnal knowledge. The sentence was imposed after a guilty plea. The plea reduced the head sentence from 12 to 10 years.

[16] Other cases were also referred to but it is not necessary to deal with them further.

[17] The Attorney-General submits that there were three errors in the exercise of the sentencing discretion. First, the overall sentence failed to give appropriate weight to the lengthy period over which the offending occurred. Second, her Honour placed too great an emphasis upon the absence of penetrative acts as against the length of the period of offending itself. Third, it was submitted that her Honour erred in imposing sentences for the offending that occurred after the complainant had turned 16 years of age that were concurrent with the sentences that were imposed for the earlier offences.

[18] In oral argument the Attorney-General also submitted that her Honour had been wrong to conclude that the respondent's status as a magistrate during his offending was irrelevant.

[19] The first, second and fourth submissions ought to be accepted. The third submission seeks to attack an orthodox approach to sentencing and should be rejected.

[20] This was a remarkable case in which the respondent began his sexual victimisation of the complainant when he was only four or five years old. He used his position of trust and the opportunity it gave him as the child's putative grandfather to enable him to satisfy his perversions. He persisted with his predation until after his victim turned 16. In this way he devoured the complainant's whole childhood and thereby ultimately corroded his whole life.

[21] The period of the offending and when it occurred in the child's life, therefore, was a very important factor to be considered.

[22] So too was the respondent's position as a magistrate. In my respectful opinion her Honour was led into the error of concluding that the respondent's status as a magistrate was irrelevant. It is true, as her Honour said, that the offending while serving as a magistrate shows him to be an utter hypocrite. But it demonstrates more than that.

[23] As a magistrate hearing cases of sexual offences the respondent was in a special position to gather knowledge from the mouths of victims about the effect of sexual offences upon children. While the wider public may not have been aware until recent times about the persistent corrosive effect upon the lives of such victims, those in the legal profession, in law enforcement and in some medical fields have long known that even a single sexual offence against a child may have terrible and enduring consequences.

[24] The respondent's position as a magistrate meant that, while he was committing these crimes, he knew very well what his criminal acts were doing to his victim and

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[3] [2005] QCA 427.

would continue to do. That is a factor that cannot be ignored in the sentencing process.

[25] The combination of such knowledge, the very young age of the victim when the respondent began committing his crimes and the extraordinary length of his offending, which persisted even after the boy turned 16, makes this an exceptional case. The respondent's remorselessness in offending and his lack of remorse now are all factors that weigh heavily in the sentencing process. They call for a condign denunciation of this offender.

[26] In my respectful opinion, her Honour's sentencing remarks show that they were not given the weight that they deserved. The effective head sentence of nine years imprisonment so failed to give appropriate weight to the length of that offending and its circumstances, as to support a conclusion that there was a misapplication of the proper sentencing principles. The sentence imposed is so out of range as to warrant intervention.

[27] I have considered the cases that were cited to Muir DCJ and the cases relied upon in this appeal. It is difficult to discern within them a guiding principle that reconciles the different circumstances and varying sentences.

[28] I am mindful of the limitation inherent in Crown appeals against sentences.[4] Before Muir DCJ the Crown submitted that a head sentence of at least 10 years but less than 12 years for the offence of maintaining would be appropriate.[5] Defence counsel submitted that a head sentence of eight years would be most appropriate.

[29] A principle that informs Crown appeals against sentence is that inadequate sentences are likely to undermine public confidence in the ability of the Courts to play their part in deterring the commission of crimes.[6]

[30] In my opinion the sentence of nine years that was imposed in this case was wholly inadequate. A sentence that properly reflects the respondent's offending, the circumstances of that offending and of his character and which properly reflects the community's expectation that the Court denounce such crimes, calls for a sentence in respect of the maintaining offence of 11 years imprisonment.

[31] I take into account the fact that such an order will have the effect that the respondent will have to serve at least eighty per cent of that sentence before becoming eligible for parole. In a case like this one, in which an offender has committed these particular crimes and continues to refuse to acknowledge them, such a consequence is appropriate. The facts of such a case give no reason to suppose that any rehabilitative purposes to be served by parole at an earlier time could be achieved.

[32] For these reasons I would allow the appeal, set aside the sentence of nine years imprisonment in respect of count 1, the charge of maintaining an unlawful sexual relationship with a child under 16 years, and order that the respondent be imprisoned for 11 years. I would declare the conviction on this count to be a conviction of a serious violent offence. I would not interfere with the remaining sentences.

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4 *Everett v The Queen* (1994) 181 CLR 295 at 300, 306-307.
5 Transcript 1-7 ll 7-8; AB20.
6 *Everett, supra*, at 306.

[33] **GOTTERSON JA:** I agree with the orders proposed by Sofronoff P and with the reasons given by his Honour.

[34] **BODDICE J:** I agree with the reasons of Sofronoff P.