SUPREME COURT OF QUEENSLAND

CITATION:	*R v Byrnes; ex parte A-G (Qld)* [2011] QCA 40
PARTIES:	**R** **v** **BYRNES, Gerard Vincent** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 246 of 2010 DC No 894 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	11 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	17 February 2011
JUDGES:	Chief Justice and Muir and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where respondent pleaded guilty to serious violent offences of a sexual nature against complainants under 12 years of age – where respondent sentenced to 10 years imprisonment – where appellant submitted that sentence failed to give weight to the seriousness of offending, number of complainants and position of authority of the respondent – whether sentence manifestly inadequate *Criminal Code* 1899 (Qld), s 669A *Penalties and Sentences Act* 1992 (Qld), s 161A, s 161B *AB v The Queen* (1999) 198 CLR 111; [1999] HCA 46, cited *R v D* [2003] QCA 88, distinguished *R v D'Arcy* (2001) 122 A Crim R 268; [2001] QCA 325, considered *R v Ellis* (1986) 6 NSWLR 603, cited

R v HAV [2009] QCA 259, followed
R v MBG & MBH [2009] QCA 252, distinguished
R v TS [2009] 2 Qd R 276; [2008] QCA 370, followed
R v ZA; *ex parte A-G (Qld)* [2009] QCA 249, distinguished

COUNSEL: A W Moynihan SC, with A D Anderson, for the appellant
M J Byrne QC for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Peter Shields Lawyers for the respondent

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree that the appeal should be dismissed, for those reasons.

[2] **MUIR JA:** **Introduction** The respondent pleaded guilty to one count of maintaining an unlawful sexual relationship, 10 counts of rape and 33 counts of indecent treatment of a child under 16 with the circumstance of aggravation that the complainant was under 12 years of age. He was sentenced to 10 years imprisonment for each of the maintaining and rape offences and to seven years imprisonment for each of the indecent treatment offences. Each term of imprisonment was ordered to be served concurrently. By operation of ss 161A and 161B of the *Penalties and Sentences Act* 1992 (Qld), the respondent was convicted of serious violent offences with the consequence that he was required to serve 80 per cent of the head sentence of 10 years before becoming eligible for parole.

[3] The appellant Attorney-General appealed on the grounds that the sentences imposed were inadequate.

The circumstances of the offending

[4] The subject offences were committed over a 23 month period by the 58/59 year old respondent on 13 female students in his grade 4 class at a Toowoomba school. As well as being his victims' teacher, the respondent was one of the school's two child protection officers. As such, he was held out as a person whose assistance students could seek with safety in the event of inappropriate conduct. All of the offences were committed at the school and all but two were committed during the conduct of a class.

[5] The respondent's modus operandi was to call the intended victim to the front of the class room and, when marking her work or asking questions of her, cause her to sit on his lap or stand in front of him. He would then engage in the offending activity. Three of the indecent dealing counts involved the rubbing of girls' chests under their blouses. Another three involved the placement of the respondent's hand up the girls' skirts and rubbing their legs below their underwear. Two such counts involved licking the vaginal regions of two girls. One girl was kissed on the lips. Three of the offences involved the feeling of girls' buttocks under their underwear. Another three involved rubbing of girls' genitalia outside their underwear and 15 of the counts involved the rubbing of buttocks outside of the girls' underwear. The licking incidents occurred when the girls, having been asked to remain behind during morning tea, were alone in the classroom with the respondent.

[6] The digital penetrations are the subject of counts 7, 8, 9 and 12 on the indictment. Counts 10 and 11 relate to the indecent treatment of this complainant and count six

is the maintaining count. It was constituted by the conduct the subject of the four rape counts, the indecent treatment counts and other uncharged acts. The six remaining counts of rape occurred when the respondent digitally penetrated the vaginas of five other children on separate occasions.

[7] One girl complained to the school principal on 6 September 2007 that the respondent had put his hand inside her shirt and up her skirt and that she had seen him kiss another girl on the cheek. The principal wrote to the respondent informing him of these allegations and inviting him to respond. The respondent did so on 20 September 2007 acknowledging that he kissed a child on the cheek and that girls in his class often sat on his knee. He denied the other allegations. The respondent erroneously assumed that a particular girl was the informant, and ceased offending against her. He continued to offend against the other girls including the girl who had actually complained. He also interfered with two girls who had not previously been subjected to his indecent acts.

[8] In November 2008, the complainant with whom the respondent had been maintaining an unlawful sexual relationship complained to her mother and the police were informed. The respondent participated in interviews with police in relation to the offences. He initially denied allegations made by some children but admitted offending conduct which had not been the subject of allegations by a complainant. Six of the 10 counts of rape were based solely on the respondent's admissions.

The Sentencing Remarks

[9] In her sentencing remarks the sentencing judge referred to the position of trust held by the respondent, the distress experienced by some of the girls and to the continuation of the offending conduct after the initial complaint. The sentencing judge accepted that the remorse expressed by the respondent was genuine and noted that the respondent's convictions on a number of the charges, including some of the more serious ones, were based on his admissions. It was accepted that the respondent's imprisonment would be served in protective custody and that this would make incarceration more onerous than would otherwise be the case. Her honour took into account the age of the respondent and his previous good character.

[10] In determining the respondent's sentence the primary judge derived assistance from *R v D'Arcy* [2001] QCA 325 in which the head sentence, imposed after a trial of offences against four complainants, which included three counts of penile rape, was reduced on appeal to 10 years imprisonment. The primary judge concluded that the starting point for determining the sentence should be 12 to 14 years imprisonment. She then took into account the plea of guilty, the respondent's co-operation with the police and the respondent's admissions and the other matters previously mentioned and arrived at sentences of 10 years for the maintaining and rape offences.

The Appellant's Contentions

[11] Counsel for the appellant submitted that the head sentence of 10 years imprisonment failed to give sufficient weight to the serious nature of the offending, general deterrence, denunciation and protection of the community. It was submitted that the starting point adopted by the primary judge would have been appropriate for an offence of maintaining a sexual relationship with one child or a small group of children but not for offending on the subject scale by a teacher over a long period in respect of his own students.

[12] Reliance was placed on *R v D*,[1] *R v MBG & MBH*,[2] *R v ZA*; *ex parte A-G (Qld)*[3] and *R v D'Arcy*.[4]

[13] *R v D* was quite a different type of case to the present. The 40 year old offender who had a lengthy criminal history, not including convictions for sexual offences, succeeded in having a 12 year term of imprisonment for the rape of a five year old complainant set aside as being manifestly excessive. A sentence of 10 years imprisonment was substituted. The court did not interfere with a three year term of imprisonment imposed for deprivation of liberty. The complainant's mother noticed that the complainant was missing and that the offender was no longer sitting in his back yard where she had previously seen him. She ran to the offender's house, entered it and found the complainant naked on a bed with the applicant leaning over her, touching her vaginal area while holding down her legs. The complainant told her mother that she had not responded to her mother's calls because of threats made by the offender that he would punish her.

[14] On medical inspection, the complainant's hymen was found to be bruised and haemorrhaging was evident. The injuries were thought to be more consistent with digital than penile penetration. There was evidence that the complainant's behaviour had changed since the offence and she slept with her mother most nights. Her sleep was interrupted and she was wary and distrustful of strangers.

[15] In *R v MBG & MBH* a sentence of 10 and a half years imprisonment imposed on a mother and father who pleaded guilty to maintaining a sexual relationship with their seven to eight year old daughter was not disturbed. The offenders also pleaded guilty to two counts of raping their daughter, one count of attempting to do so; 10 counts of indecently treating her; the rape of her nine year old friend; three counts of indecently treating that friend and indecent treatment of that friend's sister.

[16] The offending conduct in respect of the complainant daughter occurred on about 100 occasions and included: an attempt by the male applicant to insert his penis into the complainant's vagina; the performance of oral sex on the complainant by her parents and vice versa; the watching of pornographic films together; the applicants having sexual intercourse in front of the complainant; the complainants rubbing an object in her mother's vaginal area; the placing of the male applicant's semi erect penis inside the leg opening of the complainant's underwear; and the application of a vibrator to the complainant's genitalia.

[17] It was submitted that this decision demonstrated that the subject sentences were too low as there were only four female complainants. That case, however, involves not only more serious sexual acts but the protracted abuse and corruption of a young child by her natural parents. The moral culpability of the offenders in *MBG & MBH*, to my mind, was substantially greater than that of the respondent, appalling though his behaviour was in both its quality and extent. The sentencing judge justly observed that the respondent's conduct involved a protracted and gross beach of trust.

[18] In *R v ZA; ex parte A-G* the nine and a half year sentence imposed on the 48 year old offender with a history of sexual offending against children was increased on

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1 [2003] QCA 88.
2 [2009] QCA 252.
3 [2009] QCA 249.
4 (2001) 122 A Crim R 268.

appeal to 10 years, thereby attracting a serious violent offence declaration. The respondent committed 34 offences over a 15 month period against six boys aged between 10 and 15 years. The offences included: 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. As well as sodomy, the respondent's conduct included the insertion of a vibrator into a complainant's anus; fellatio on and by complainants and the showing of pornographic material including films involving bestiality. Again, the offending conduct was more extreme and corrupting than in the present case and it was perpetrated by an offender with a prior history of sexual offending.

[19] The remaining case relied on by the appellant was *R v D'Arcy*, in which the appellant offended against four young complainants, three girls and one a boy who were the appellant's pupils when he was the principal of a one teacher school. The offences came to light many years after the event by which time the applicant was in his sixties and had significant health problems. His sentence was reduced from 14 years imprisonment to 10 years. The offending conduct was singularly grave. The appellant digitally penetrated one female complainant and rubbed his exposed penis up and down her body from her navel to her genitalia. Another female complainant was subjected to painful penile rape culminating in ejaculation on three occasions.

Consideration

[20] Counsel for the respondent submitted that in *D'Arcy* the offending conduct was markedly more serious than the subject offending conduct and that there was a lack of a primary basis for mitigation. It was found in *D'Arcy* that the applicant exercised control over the children through fear and violence. There was a trial, no co-operation at the trial and an absence of remorse. The complainants were obliged to give evidence thus reliving their experiences. *D'Arcy* therefore does not support the appellant's argument, even when regard is had to the far greater number of victims in the present case. In that regard it is relevant that the more serious offences were committed against relatively few complainants in the present case, making the circumstances more comparable with those in *D'Arcy* than mere reference to numbers would suggest.

[21] Counsel for the respondent submitted that the primary judge's sentence was also supported by *R v TS*[5] and *R v HAV*.[6]

[22] In *R v HAV* the offender was sentenced after a trial to concurrent terms of imprisonment of 14 years for maintaining a sexual relationship with a child under 16 and rape. Concurrent terms of imprisonment of five years were imposed for six offences of indecent treatment of a child under 16. The primary judge found that the complainant was "to all intents and purposes" the offender's step daughter and that the offender had sexually abused the complainant from when she was about seven until she was sixteen.

[23] The offending conduct was persistent and involved the offender's masturbating in the presence of the complainant, masturbation of the offender by the complainant,

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5 [2009] 2 Qd R 276.

6 [2009] QCA 259.

cunnilingus, the dressing of the complainant in her mother's underwear as an aid to the offender's sexual gratification, penetration of the complainant's anus with a finger and penile penetration of the complainant's vagina. The abuse "had a significant impact" on the complainant and resulted in the breaking of the bond between mother and daughter.

[24] In *R v TS* the applicant, after guilty pleas, was sentenced to 20 years imprisonment for counts of maintaining an unlawful sexual relationship, sodomy and rape of child who was his lineal descendant. Other sentences were imposed for offences of attempted rape and indecent treatment. On appeal, 12 year terms were substituted for the 20 year terms. The offences were committed over a six year period commencing when the victim was three years of age. The offences were "committed against the complainant at every available opportunity during the maintaining period" and continued until the complainant grew older and was able to resist the applicant's advances. The conduct included vaginal intercourse, anal intercourse causing great pain and distress and forced fellatio. The period of maintaining in count 1 began when the complainant was under 10 and continued for six years.

[25] Both *R v TS* and *R v HAV* tend to support the subject sentence, as do *R v MBG & MBH*, *R v ZA; ex parte A-G* and *R v D'Arcy*. The submissions made on behalf of the appellant insufficiently acknowledged the combined effect of the respondent's guilty pleas and his early admissions, without which some of the rape convictions would not have been secured.

[26] Of particular relevance for present purposes is the following passage from the reasons of Street CJ in *R v Ellis*,[7] quoted with approval by Hayne J in *AB v The Queen*:[8]

> "This Court has said on a number of occasions that a plea of guilty will entitle a convicted person to an element of leniency in the sentence. The degree of leniency may vary according to the degree of inevitability of conviction as it may appear to the sentencing judge, but it is always a factor to which a greater or lesser degree of weight must be given.
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> When the conviction follows upon a plea of guilty, that itself is the result of a voluntary disclosure of guilt by the person concerned, a further element of leniency enters into the sentencing decision. Where it was unlikely that guilt would be discovered and established were it not for the disclosure by the person coming forward for sentence, then a considerable element of leniency should properly be extended by the sentencing judge. It is part of the policy of the criminal law to encourage a guilty person to come forward and disclose both the fact of an offence having been committed and confession of guilt of that offence.
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> The leniency that follows a confession of guilt in the form of a plea of guilty is a well recognised part of the body of principles that cover sentencing. Although less well recognised, because less frequently encountered, the disclosure of an otherwise unknown guilt of an offence merits a significant added element of leniency, the degree of which will vary according to the degree of likelihood of that guilt being discovered by the law enforcement authorities, as well as guilt being established against the person concerned."

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7 (1986) 6 NSWLR 603 at 604.

8 (1999) 198 CLR 111 at 155, 156.

[27] Prior to quoting the above passage Hayne J made the following observations which are also of immediate relevance:

> "Leniency is extended to both offenders for various reasons. By confessing, an offender may exhibit remorse or contrition. An offender who pleads guilty saves the community the cost of a trial. In some kinds of case, particularly offences involving young persons, the offender's pleas of guilty avoids the serious harm that may be done by requiring the victim to describe yet again, and thus relive, their part in the conduct that is to be punished."

Conclusion

[28] When regard is had to the mitigating factors taken into account by the primary judge and, in particular, the early guilty pleas and admissions, the comparable sentences relied on by counsel for the appellant do not support the imposition of higher sentences. On the other hand, the subject sentences are supported by the comparable sentences referred to by the respondent's counsel. The appellant has failed to demonstrate any proper basis for the exercise by this Court of its discretion under s 669A(1) of the *Criminal Code* and I would order that the appeal be dismissed.

[29] **WHITE JA:** I have read the reasons for judgment of Muir JA and agree with his Honour for those reasons that the Attorney-General's appeal should be dismissed.