[2017] QCA 187

COURT OF APPEAL

SOFRONOFF P
BODDICE J
FLANAGAN J

CA No 90 of 2017
DC No 1602 of 2016
DC No 268 of 2017

THE QUEEN

v

MCM **Applicant**

BRISBANE

THURSDAY, 31 AUGUST 2017

JUDGMENT

BODDICE J: MCM seeks leave to appeal against sentences of imprisonment imposed on 29 March 2017 for nine counts of indecent treatment of a child under 12; three counts of indecent treatment of a child under 16; one count of incest; three counts of rape; one count of common assault; and one count of indecent treatment of a child under 16, under care.

The ground of appeal sought to be relied upon is that the sentence imposed was manifestly excessive in all the circumstances. Within that ground of appeal, the applicant also contends that

the learned sentencing judge erred in failing to give adequate consideration to the delay and the applicant's rehabilitation, and failed to have due regard to the principles of totality.

The applicant was born on 6 September 1956. He has no prior criminal history. He is married with one son. He has a good work history. All of the offences, bar the offence of indecent treatment of a child under 16, under care, occurred between 31 December 1966 and 1 January 1975. The remaining offence, of indecent treatment of a child under 16, under care, occurred on a date unknown between 31 August 2009 and 2 September 2010. The applicant was aged 52 at the time of that offence. The offending between 31 December 1966 and 1 January 1975 occurred when the applicant was aged between 10 and 18 years.

The applicant was sentenced to imprisonment for three years in respect of each of two of the counts of rape, and lesser periods of imprisonment in respect of the remaining count of rape and the other offences committed between 31 December 1966 and 1 January 1975. All sentences of imprisonment were to be served concurrently. In respect of the offence of indecent treatment of a child under 16, under care, the applicant was sentenced to imprisonment for 12 months, which was ordered to be served cumulatively on the head sentence of three years imposed in relation to the other offences. It was ordered those terms of imprisonment be suspended, after the applicant had served a period of 12 months' imprisonment, for an operational period of four years.

The offences committed between 31 December 1966 and 1 January 1975 involved two complainants. One was the applicant's full sister; she was aged between seven and 15 years at the time of the offences. The other was the applicant's half-sister; she was aged between seven and 14 years at the time of the offences. The offence of indecent treatment of a child under 16, under care, was committed against the applicant's biological niece; she was aged 14 years at the time of the offence.

The offences against the applicant's sister involved oral sex and digital and penile penetration of her vagina. The offences against the applicant's half-sister also involved oral sex and digital and

penile penetration of her vagina. The three counts of rape, committed against the half-sister, involved forceful penile penetration of her vagina, despite her protests and complaints of pain. The applicant was aged 17 to 18 years at the time of the rape offences; his half-sister was aged 12 to 13 years. The offending against the sister and half-sister occurred in circumstances where the applicant had been physically disciplined by his father after an earlier report by his half-sister of what had occurred between her and the applicant.

The offence of indecent treatment of a child under 16, under care, involved the applicant placing his hand down his niece's pants and underwear, against her vagina. The offence occurred after the applicant had asked his niece, "How much money would it take to let me touch you?" and she had rebuffed that inquiry.

At the sentencing hearing, a victim impact statement was provided by the applicant's siblings and niece. The applicant's half-sister spoke of attempts on her life from a young age, of depression, and of distrust of others, particularly family members. The applicant's sister spoke of an inability to hold relationships or to be intimate with others, due to distrust. The niece spoke of isolation from her family and suicidal ideation.

In sentencing the applicant, the sentencing judge noted the serious aspects of the applicant's offending. The sentencing judge also noted the applicant had entered early pleas of guilty, and had made admissions at early stages of the investigation. That conduct had spared the complainants from giving evidence, although the applicant's offending had grossly affected each complainant's life. The sentencing judge also acknowledged that delay between offending and sentence was relevant, as was the applicant's lack of criminal history, good work history, and the fact that the offending occurred in the context of the applicant's own history of having been brought up in a dysfunctional household, in which the applicant was most likely sexualised when young.

On this latter aspect, the sentencing judge had particular regard to a report by a psychiatrist, Dr Beech. Dr Beech opined that the applicant did not have a large number of risk factors for reoffending, and did not have a sexual deviance such as paedophilia. In Dr Beech's opinion, the applicant's risk of reoffending was low, although the applicant would benefit from counselling, either as an individual or in a group setting, to educate him further about the nature of his offending, its effects, and management of further risk.

The sentencing judge accepted that sentences of actual imprisonment would have a significant financial impact on the applicant's life and family, but determined, in the exercise of his discretion, that a sentence requiring the applicant to serve an actual period of imprisonment was appropriate in all the circumstances.

The sentencing judge found that the applicant's offending between 31 December 1966 and 1 January 1975 should be the subject of a global head sentence of three years' imprisonment, noting that the rapes were violent, even though they occurred when the applicant was young. In coming to that sentence, the sentencing judge expressly observed that the applicant must be sentenced in accordance with the sentencing regime at the time of the commission of the offences, and that had the violent rapes been committed today, the sentences of imprisonment would have been far longer.

In respect of the offence of indecent treatment of a child under 16, under care, the sentencing judge observed that a head sentence in the order of 18 months would be appropriate, but that as he proposed to make that sentence cumulative, the sentence should be reduced to 12 months to reflect totality. The sentencing judge further observed that, having regard to the mitigating factors, and in particular the pleas of guilty, delay, and the financial impact, the term of actual imprisonment required to be served would be reduced to 12 months. Accordingly, the sentences of imprisonment were suspended, after the applicant served 12 months' imprisonment, for an operational period of four years.

The applicant submits that the sentencing judge failed to give due weight to the factors of delay and rehabilitation. In particular, the sentencing judge failed to have regard to the significance of the contents of Dr Beech's report in relation to the applicant's untreated own sexual abuse in the context of a dysfunctional household, and the applicant's low risk of future reoffending. The sentencing judge also failed to give proper regard to the applicant's good character and work history, and the fact that the applicant may have been 17 years of age at the time he committed the offences of rape.

The applicant submits that when regard is had to comparable cases, namely, *R v OQ* [2011] QCA 348, *R v Hennessy* [2002] QCA 523, *R v Beaver* [1992] QCA 238, *R v Stallan* [1995] QCA 109, and *R v J; ex parte Attorney-General* [2001] QCA 216, a sentence of imprisonment requiring the applicant to serve actual time in custody was manifestly excessive. The applicant, at the hearing, accepted that a sentence requiring the service of some actual time was, in the circumstances, not manifestly excessive, but submitted that the fact that the applicant had now served five months was more than sufficient time. Accordingly, a sentence requiring service of an actual period of 12 months' imprisonment remained manifestly excessive.

The applicant submitted that the public interest was best served by allowing for the applicant's ongoing rehabilitation by ordering that all sentences be served concurrently, and that those sentences be suspended immediately, for an operational period of four years.

A consideration of the sentencing remarks does not support any of the applicant's contentions. Whilst the applicant was young at the time of the first episode of offending, he engaged in escalating types of sexual offending against two younger female complainants in the context of a family relationship and physical discipline by his father early in that offending period. The offending included acts of rape, using force to overcome protests, which continued despite complaints of pain.

Notwithstanding the significant delay and the significant mitigating factors in the applicant's favour, including the early pleas of guilty, his admissions, and his lack of other criminal history, such sexual offending required the imposition of a significant head sentence. A consideration of the comparable authorities amply supports a conclusion that a global sentence of three years' imprisonment for that episode of offending was not manifestly excessive.

Similarly, the offence of indecent treatment of a child under 16, under care, properly attracted a sentence of imprisonment of 12 months. That offence occurred when the applicant was a mature, married man. Again, it involved a family member, and the applicant persisted despite her protests.

Having regard to the significant time difference between that offending and the earlier episode of offending, and the significant age difference between the applicant and that complainant, the requirement that the applicant serve that period of imprisonment cumulatively on the earlier period of imprisonment constituted a sound exercise of the sentencing discretion. To have made that sentence of imprisonment concurrent would not have properly reflected the seriousness of this separate episode of sexual offending by a now mature applicant.

A requirement that the applicant serve a period of actual imprisonment also fell within a sound exercise of the sentencing discretion. Whilst Dr Beech opined the applicant was a low risk of reoffending, and the applicant had no prior criminal history, his prospects of rehabilitation and the need for deterrence had to be considered in the context of the further episode of sexual reoffending in more recent times.

Further, there is no basis to conclude the sentencing judge failed to have due regard to the applicant's prospects of rehabilitation and the significant consequences of a requirement that he serve actual time in custody. Those factors were important, but were not of such an exceptional nature as to justify a conclusion that a requirement the applicant serve 12 months in actual custody resulted in a sentence that was manifestly excessive in all the circumstances.

Similarly, delay could not be said to be a factor which justified the applicant not being required to serve an actual period of 12 months in custody, particularly when regard is had to the fact that the applicant sexually reoffended in more recent times against another family member.

The applicant has not established that the sentencing judge failed to adequately consider delay or the applicant's rehabilitation. The applicant has also not established that the sentencing judge failed to have due regard to the principle of totality, or that the imposition of cumulative periods of imprisonment, whilst requiring the applicant to serve 12 months' actual time in custody, was manifestly excessive in all the circumstances.

I would order that the application for leave to appeal be refused.

SOFRONOFF P: I agree.

FLANAGAN J: I agree.

SOFRONOFF P: The order of the Court is that the application for leave to appeal is refused.