[2017] QCA 197

COURT OF APPEAL

SOFRONOFF P
McMURDO JA
BODDICE J

CA No 329 of 2016
DC No 28 of 2013

THE QUEEN

v

KAM (No 2) **Applicant**

BRISBANE

THURSDAY, 7 SEPTEMBER 2017

JUDGMENT

McMURDO JA: On 6 December 2013, after a trial in the District Court, the applicant was convicted by the jury of three counts of rape, and a further count of indecent treatment of a child under 16 and under his care. The complainant was his 12 year old daughter.

He appealed against those convictions by a notice of appeal filed on 11 February 2014. That was filed out of time but the respondent, on that occasion, consented to an extension. His appeal was heard in November 2015 and dismissed in February 2016: see *R v KAM* [2016] QCA 35.

He was sentenced in March 2014 for these offences. On each of the counts of rape, he was ordered to serve eight years' imprisonment, with a concurrent sentence of 18 months for the indecent treatment offence. His parole eligibility date was fixed at the half way mark.

He now applies for an extension of time within which to appeal against his sentences. He also seeks to appeal again against his conviction. Where an appeal against conviction has been dismissed, it is well established that the Court has no jurisdiction to hear a further appeal against conviction: see eg. *R v MAM* [2005] QCA 323; *R v Nudd* [2007] QCA 40 and *R v Lumley* [2008] QCA 155 and [2009] QCA 172. These and other judgments to the same effect have applied *Grierson v The King* (1938) 60 CLR 431, which held that where a right of appeal is provided by a statute in terms such as in s 668D of the *Criminal Code* (Qld), the statute is to be interpreted as allowing for only one appeal. Consequently, his application for an extension of time in which to appeal against conviction must be refused.

His proposed appeal against sentence would be upon the ground that the sentences, more particularly the eight year concurrent terms for the rape offences, were manifestly excessive.

His application for an extension of time within which to appeal was filed last November, more than two and half years after he was sentenced. He filed an amended application on 30 January this year, which for the most part, raised complaints about his convictions rather than his sentence, although it did complain that the sentence was manifestly excessive. The applicant is without legal representation, as he was at the trial and at his unsuccessful appeal against conviction. He says that he has not had the means to pay for private representation and that he has not been granted legal aid. He says that he has had limited access to computers because he has been in prison. He has the further difficulty that English is not his first language. He came to this country as a refugee from the French Congo. All of those circumstances could explain some delay in seeking to challenge his sentences. But they do not adequately explain a delay of two and half years. Nor do they explain why he did not seek to challenge his sentence when

appealing his conviction. As to that, it should be said that he was not sentenced until after he filed his original application to extend time to appeal his conviction. But some 18 months passed before that conviction appeal was heard.

Although there is not a satisfactory explanation for this delay, an application to extend time in which to appeal should not be refused where that would result in a miscarriage of justice. See eg. *R v CAP (No 2)* [2014] QCA 323. It is therefore necessary to consider the merit of his proposed appeal.

The offences occurred in the period from late 2010 to February 2011. The appellant, had the care of his two daughters, the complainant and a younger sister. The appellant had arrived in Australia in 2008. The three had come to Australia as refugees. In February 2011, the complainant told a refugee support worker, that her father had had sex with her. That person went to the police. The complainant participated in three interviews with police. She disclosed an episode when the appellant touched her breast and three subsequent episodes when he had carnal knowledge of her. She said that he had used condoms on two of those occasions.

The applicant was born in the Belgian Congo, the eldest of seven children. His father died when he was young leaving the mother and the children with no support. Still he completed school and university studies with a Bachelor of Arts. He was politically active and was imprisoned for three years during which he was tortured. On his release he fled the Belgian Congo and went to the French Congo. From there he successfully applied for a refugee visa to come to Australia with his family. In this country, he worked as process worker in a factory and subsequently as a postal worker. He also worked as a volunteer in some community work, assisting other refugees.

The sentencing judge referred to four decisions of this Court as comparable sentences. The respondent here says that they support the sentence which was imposed.

The first of them is *R v F* [2001] QCA 416. The applicant there was sentenced to 10 years' imprisonment, with the recommendation for release on parole after four years, on two counts of rape. The complainant was his step-daughter who was aged 13. The offences had occurred in the house where he and the complainant lived. He defended the case and unsuccessfully appealed against his conviction. He was said to have shown no remorse. Nonetheless his sentence was reduced by this Court from 10 years' to eight years' imprisonment. He therefore received the same sentence as the present applicant.

In *R v BBP* [2009] QCA 114, the applicant was convicted, after a trial, of raping his niece who was nine or 10 years old at the time. He was sentenced to eight years imprisonment and three years for an offence of indecent dealing against her. His appeal against conviction was dismissed and he was refused leave to appeal against that sentence. He showed no remorse. That fact, together with the circumstances of a breach of trust, caused the Court to conclude that this sentence was not outside an available range for the sentencing judge.

In *R v P* [2001] QCA 25, the applicant applied for an extension of time within which to appeal against a sentence of eight years for one count of rape. The complainant was his 12 year old step-daughter. The lateness of the application was explained by his challenge to some related convictions. He was refused an extension of time because of the lack of merit in his proposed appeal. The offence involved penile penetration in the house where he and the complainant lived.

The fourth case is *R v Lee* [2012] QCA 239. After a trial, that applicant was sentenced to six years for one count of rape and three years (concurrent) on one count of attempted rape. The complainant was a 15 year old girl. She and her mother were neighbours of the applicant. He had a long criminal history but for minor assault and drug offences. There was no element of remorse or co-operation. The sentenced imposed was held to be not manifestly excessive.

Clearly those comparable cases, most relevantly *R v F* in which this Court re-sentenced the applicant, demonstrate that the present sentence was within the range available to the sentencing

judge. It is obvious to say that these were very serious offences committed by a father against a young girl in his care. In one episode, she was exposed to the risk of pregnancy. He appears to show no remorse. His proposed appeal against sentence has no merit. I would refuse an extension of time in which to appeal against sentence.

SOFRONOFF P: I agree.

BODDICE J: I agree.

SOFRONOFF P: The order of the Court is the application for extension of time in which to appeal against sentence is refused.