[2018] QCA 8

COURT OF APPEAL

SOFRONOFF P
MORRISON JA
PHILIPPIDES JA

CA No 186 of 2017
DC No 1039 of 2017

THE QUEEN

v

SQUIRES, Christopher James **Applicant**

BRISBANE

TUESDAY, 13 FEBRUARY 2018

JUDGMENT

PHILIPPIDES JA: The applicant was convicted upon his plea to an offence pursuant to s 218A of the *Criminal Code*, that he used electronic communication with intent to procure a person under 16 years to engage in a sexual act. The applicant was sentenced to six months imprisonment, wholly suspended for an operational period of three years. He seeks leave to appeal against that sentence on the basis that it was manifestly excessive.

The sentence proceeded on the basis of an agreed schedule of facts. The offending was committed between 24 April 2015 and 18 December 2015, in the context of the applicant, who was not known to the complainant, sending the complainant a friend request on Facebook, and maintained Facebook contact. The complainant's date of birth was displayed

on her Facebook profile. She was 14 to 15 years of age during the relevant period. The applicant was 20 years of age at the time.

The conversations commenced with a discussion about what the applicant would do if he were in a hotel, and what the complainant would do. The applicant asked the complainant if she would suck his penis, and if she would have sex with him in the movies, and whether they would use a condom or not. The complainant responded, in relation to what the applicant would do if she were wearing a dress in bed, and the complainant replied to the effect that he would have oral sex with her. The applicant and the complainant also subsequently exchanged telephone numbers and spoke over the telephone as well as on Facebook.

The content of the messages thus included queries by the applicant of the complainant as to whether she would perform oral sex on him, have sexual intercourse in public places, or have unprotected sexual intercourse, as I explained. The applicant also described sexual acts that he would perform on the complainant. The applicant asked the complainant to send him a picture of her getting undressed; the complainant sent a photo of her wearing her bra. The applicant commented on her appearance and asked whether she wanted a "dick pic", and sent her a photo of his penis. He asked her whether she would take her bra off, and that he wanted to see her in her underwear. The complainant sent another picture, to which the applicant replied:

> "Yay. You want more to fuck."

It was in those circumstances that the applicant sent the complainant a picture of his penis. The conduct only ended when the complainant's father intervened, and brought the matter to the attention of the police.

The applicant took part in an interview with police. Notwithstanding that the applicant had the complainant's Facebook profile as a friend on Facebook, and the complainant's telephone number saved in his telephone, the applicant denied having had sexualised conversations with the complainant, and claimed his account had been hacked. The applicant also told the

complainant to delete all of their exchanges. The complainant deleted the photographs and some of the messages.

The applicant has been diagnosed with depression, at 11 years of age, and has been receiving treatment for his condition. A report from a consulting psychiatrist, Dr Hosking, who had seen the applicant on three occasions, detailed that the applicant suffered from a previously diagnosed major depressive disorder and generalised anxiety disorder. Not being a forensic psychiatrist, Dr Hosking stated that he was not able to assess or comment on whether the applicant's psychological state had any relationship to his offending. He considered the condition to be in remission with medication, and expected the applicant to remain well controlled. The applicant continued on treatment involving consultation appointments and medication. The applicant had suffered from bullying throughout his education, was socially withdrawn, and found it difficult to mix with peers. The evidence pointed to the applicant having good prospects of being a useful and productive member of the community.

At first instance, the Crown's submissions were that general deterrence and community denunciation were significant considerations in the exercise of the sentencing discretion, and reliance was placed on the decisions of *R v Rogers*[1] and *R v McGrath*[2] as indicative of the range of sentencing options. It was also noted that the maximum period to which the applicant was liable was 10 years imprisonment, having been increased from five years imprisonment from 29 April 2013. It was submitted that the application's prospects for rehabilitation could be reflected by the suspension of the whole of any term of imprisonment that may be imposed. It was also acknowledged that the applicant had not previously been sentenced to a community-based order, and might benefit from supervision if the Court were minded to sentence him to a community-based order.

The ultimate submission of counsel for the applicant was that the appropriate sentence was three years probation, but it was accepted that the range extended to a period of imprisonment, wholly suspended, also. It was acknowledged that that range was supported by the comparatives that had been put forward by the Crown. In urging that the sentencing judge

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1 [2013] QCA 192.
2 [2006] 2 Qd R 58.

give the applicant the benefit of a community-based order in the nature of probation, and also not record a conviction against the applicant, it was submitted that the onerous reporting obligations under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004 would affect the applicant's social wellbeing and impact his ability to work moving forward.

The sentencing judge described the offending as involving sexualised conversations, developing at the applicant's instigation, in an ever more serious way, and progressing to the exchange of telephone numbers and text messages and the exchanging of pornographic photographs. His Honour observed that the applicant was in a position to know that he was communicating with a girl very much younger than him, and with whom he should not have been engaging in sexualised communication, given that her date of birth was correctly entered in her profile. His Honour remarked that, although the total time of all the communications was in the order of 10 minutes, it had involved persistent communication that spanned several months, escalating in seriousness, and only ended on the intervention of the complainant's father.

The sentencing judge had regard to the importance of denunciation and deterrence in the sentencing process. Although the offending was not at the more serious end of offending of its kind, it was nonetheless protracted. Further, the applicant initially tried to divert blame by telling police his Facebook page had often been hacked. He also tried to have the complainant delete all messages and photos sent, indicating an awareness on his part that his conduct was wrong.

In the applicant's favour, the sentencing judge took into account his relative youth – he was 22 years of age when sentenced; his lack of criminal history; and that, notwithstanding his initial denial of offending, he entered an early plea of guilty. The sentencing judge had regard to the reference that was tendered on his behalf, and that the applicant was remorseful and otherwise of good character; and that there was reason to believe he had good prospects of rehabilitation.

The sentencing judge also had regard to Dr Hocking's report that the applicant suffered from a major depressive disorder, but observed that the disorder did not explain the offending. His Honour noted that it was apparent from the report that the applicant's arrest had had a sobering effect on him, and that he had since diligently avoided communicating with others through social media, and had not returned to Facebook. The applicant was also attending to dealing with his depressive disorder, and his symptoms were in remission.

His Honour referred to s 9(4) of the *Penalties and Sentences Act* 1992, which specified that a sentence requiring an actual term of imprisonment was to be imposed in respect of any offence of a sexual nature committed in relation to a child under 16 years, unless there were exceptional circumstances. In deciding whether there were exceptional circumstances, the sentencing judge had regard to the closeness in age between the offender and the child, as required by s 9(5). In relation to that matter, his Honour commented that, while the age difference of five years was significant, the complainant was not an extremely young age, as was sometimes seen in cases of such offending.

His Honour also had regard to s 9(6), which outlines the matters to which primary regard is to be had in sentencing an offender to whom s 9(4) applies. In relation to those matters, his Honour noted that no impact statement had been put before the court, and there was no evidence before the court of any specific impact on the complainant. His Honour considered that, when regard was had to the nature of the offending, which was not at the more serious end of examples of such offending, the need for deterrence did not require the imposition of an actual custodial sentence. His Honour was also satisfied, when regard was had to the complainant's good prospect of rehabilitation, remorse, and his relatively low risk of reoffending, his age, and other antecedents, including his mental health conditions, that there were exceptional circumstances in the applicant's case which warranted the imposition of a sentence which did not require a period of actual custody to be served.

The sentencing judge referred to the submission advanced on behalf of the applicant that a community-based order be made, which enlivened the sentencing discretion under s 12 of the

Act not to record a conviction. Conscious of the social consequences that applied by reason of the reporting obligations which a conviction attracted under the *Child Protection (Offender Reporting) Act* 2004, and bearing in mind that the offending was not at the more serious end of the range of offending, his Honour nonetheless considered the circumstances of the offending were such that the more appropriate sentence was a wholly suspended term of imprisonment.

Before this Court, the applicant's complaint is that the sentence imposed was manifestly excessive, in the sense that it was so unreasonable or plainly unjust as to give rise to an inference that the discretion has miscarried, in the *House v The King* sense. In advancing that contention, the applicant submitted that it was not open to the sentencing judge to conclude that, on balance, the interests of the community were best served by imposing a period of imprisonment, which necessitated the recording of a conviction. It was submitted that the consequent effect that order would have on the facilitation of the applicant's rehabilitation ought to have outweighed the countervailing considerations, particularly in circumstances where there was no immediately apparent risk, but the public was likely to be seriously misled about the applicant's character; there was no evidence that the applicant suffered from sexual deviancy, which might give rise to a particular concern regarding the protection of the community. The effect of the recording of a conviction on the facilitation of the applicant's rehabilitation was significant. Particularly, it was said that conviction for a sexual offence presented special difficulties with respect to the applicant's social wellbeing. The degree of shame and humiliation endured by the applicant was already substantial, and would be exacerbated by the recording of a conviction. The applicant referred to authorities concerning the discretion under s 12 of the *Penalties and Sentences Act* not to record a conviction. It was submitted that the sentencing discretion should be exercised afresh by imposing a community-based order with a conviction not being recorded.

The sentencing judge correctly identified the operation of s 9(4) of the *Penalties and Sentences Act* in relation to the exercise of the sentencing discretion in respect of an offence under s 218A of the *Code*, being an offence of a sexual nature. Accordingly, by virtue of that

provision, imprisonment was not a sentence of last resort. Further, pursuant to s 9(4)(b), the sentencing judge was required to sentence the applicant to imprisonment and to serve at least part of that imprisonment in a correctional facility unless satisfied that there were exceptional circumstances. Although s 9(4) was not expressly referred to by counsel in the course of submissions, it is implicit in the submissions made that each party proceeded on the basis that exceptional circumstances were present and the sentencing Judge so determined.

His Honour referred to the submissions that had been urged upon him by the applicant's counsel, in particular, the additional obligations arising from sentencing the applicant to a term of imprisonment flowing from the recording of a conviction including reporting obligations under statute. The sentencing judge's conclusion that the appropriate sentencing option was a term of imprisonment has not been demonstrated to have proceeded on an erroneous approach that he exercise the sentencing discretion, nor to have been so unreasonable or plainly unjust that it is to be inferred that the sentencing discretion was carried.

It is to be noted that the sentence imposed was accepted as one that was open to his Honour in the submissions of counsel for the applicant at first instance. Further, although the Crown in its submissions acknowledged that a community-based order was an option in the sentencing discretion, the fact that a lesser sentence was also one that may have been imposed does not, of itself, render the sentence in fact imposed manifestly excessive.

While both *Rogers* and *McGrath* were referred to the sentencing judge as relevant to the sentencing options, neither case demonstrated that the sentence imposed on the applicant was manifestly excessive. In *Rogers*, the Court of Appeal exercised the sentencing discretion afresh due to errors identified in the exercise of the sentencing discretion at first instance. The Court was, therefore, not required to express any view as to whether the sentence imposed at first instance of three years probation with a conviction being recorded was manifestly excessive.

In resentencing the applicant in *Rogers*, the Court held that a community-based order was within the proper range of the sentencing discretion in all the circumstances of that case. It was common ground, it is to be noted, that a period of probation was an appropriate sentence in that case. It is also to be noted that the offences in that case were committed prior to the commencement of the predecessor to what is now s 9(4)(b) of the *Penalties and Sentences Act*. The sentence of three years probation was maintained by the Court of Appeal. A conviction was not recorded. I note that the applicant was critical of the sentencing judge's comment during oral submissions of the offending in *Rogers*, being a single lapse of judgment on the date of the offending. But, as the respondent pointed out, this was not an error by the sentencing judge and accorded verbatim with a description of the offending by the Court of Appeal in *Rogers*. Indeed, the confession by the applicant in *Rogers* to sexual intercourse with the complainant on a separate occasion was not the subject of charges and was not a matter that made the offending in that case more serious. On the contrary, the sentencing judge's consideration of the other offending in imposing sentence was identified as an error leading to the Court allowing the appeal. The Court of Appeal considered the relevance of an applicant's relationship in identifying the level of culpability in comparison to a case where similar offending was committed against strangers or by predators seeking to establish a relationship.

Rogers is distinguishable when regard is had to the brief period of offending in that case, the nature of the relationship with the complainant, and the difference in maximum penalty. The maximum penalty to which the applicant in *Rogers* was liable was five years imprisonment whereas in the present case, as mentioned, it is 10 years. Furthermore, it is to be observed that in *Rogers* the age disparity, which was similar to that in the present case, was somewhat tempered by the applicant in that case being of below average intellectual capacity. In addition, the offending consisted in sending an image and video to the complainant, neither of which were seen by her. There was also the factor of a delay in sentencing Rogers arising from his being prosecuted for other offending, resulting in his being on bail for two years and nine months. The Court observed that the strain of long being subjected to the other serious

charges of which he was acquitted was itself of punitive effect and a relevant factor in the exercise of the sentencing discretion.

As in the case of *Rogers*, *McGrath* concerned a sentence imposed prior to the increase in the maximum penalty. The same can be said of *R v Bedeau*[3] and *R v Campbell*[4] which were also cases referred to in submissions. The significance of an increase in maximum penalty to a consideration of early decisions and the exercise of the sentencing discretion is discussed by this Court in *R v Murray*.[5] No case was identified as imposing sentence after the increase in the maximum penalty and, in those circumstances, the authorities referred to are of relatively little assistance.

As the respondent submitted, to succeed on an application for leave to appeal against sentence, it is not enough for the applicant to establish that the sentence imposed was even markedly different from examples placed before the Court or the sentences imposed in other matters. It is necessary to demonstrate that the difference is such that there must have been a misapplication of principle or that the sentence was unreasonable or plainly unjust. Consistent with the understanding that there is no single correct sentence, judges at first instance are to be allowed as much flexibility in sentencing as is cognisant with consistency of approach and accords with the statutory regime that implies.

The sentence of imprisonment imposed by the sentencing judge concerned persistent conduct that took place over a protracted period of approximately seven and a-half months in circumstances where the applicant could have been in no doubt as to the complainant's age. It involved escalating seriousness, with each escalation occurring at the applicant's instigation. The applicant did not cease the offending of his own accord but because of the intervention of the complainant's father. He then lied about his involvement and prevailed upon the complainant to hide what had occurred by deleting the photos and messages. In the circumstances of this case, as I indicated earlier, it has not been demonstrated that the sentence imposed was not within the sound exercise of the sentencing discretion.

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3 [2009] QCA 43.
4 [2004] QCA 342.
5 [2014] QCA 250 per Fraser JA at [16].

Accordingly, I would order that the application for leave to appeal against the sentence imposed be refused.

SOFRONOFF P: This is a difficult case because of the youth of the applicant. As a matter of sentencing principle, there is, rightly, a reluctance on the part of judges to stigmatise a youthful first offender by recording a conviction and to affect such a person's development and future prospects by imposing a term of imprisonment. That reluctance yields when a youthful offender is being sentenced for a sexual offence against a child. In such cases, s 9 of the *Penalties and Sentences Act* 1992 requires a different attitude to be adopted as Justice Philippides has explained. Youth remains a factor but in such cases, as a factor, it stands opposed to the nature of the crime and its significance is accordingly greatly lessened.

The present case is one in which it was open to the learned sentencing judge to decline to impose a sentence of imprisonment or to record a conviction. The applicant's personal factors, namely his youth, his lack of criminal history, the absence of any real risk of recidivism, and his general good character, work in his favour. The reporting requirements that conviction would automatically impose upon him by reason of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004 would arguably be unnecessary in his case. It was open to a sentencing judge to decline to record a conviction. However, in my respectful opinion, it was also open to Judge Rackemann to give effect to the significance of the applicant's character in the way that he actually did, that is to say, by wholly suspending the obligation to serve any period of actual incarceration while recording a conviction.

Normally, such an offence would result in incarceration. The recording of a conviction and the imposition of a term of imprisonment, albeit suspended, marks the community's judgment of what the applicant did. He tried to induce a girl whom he knew to be a child to engage in a sexual act with him. The conviction and term of imprisonment gives due weight, as the learned judge intended, to the need to deter not just the applicant but anyone else tempted to engage in such acts. I am not prepared to say that any error has been shown in the exercise of

discretion by his Honour nor that the sentence was manifestly excessive. I agree with the reasons for judgment of Justice Philippides. I, too, would refuse leave to appeal.

MORRISON JA: I agree with Justice Philippides and the additional reasons delivered by the President.

SOFRONOFF P: The order of the Court is leave to appeal is refused. I thank counsel for their assistance in this matter.