[2018] QCA 34

COURT OF APPEAL

SOFRONOFF P
PHILIPPIDES JA
BODDICE J

CA No 256 of 2017
DC No 489 of 2013

THE QUEEN

v

GANESHALINGHAM, Elango **Applicant**

BRISBANE

MONDAY, 12 MARCH 2018

JUDGMENT

SOFRONOFF P: The applicant, Elango Ganeshalingham, was born in Sri Lanka in 1980. He left school at the age of 10 and began to work alongside his father on their farm. Later, his father opened a shop and the boy worked there. In about 2006, members of the Liberation Tigers of Tamil Eelam, more often called the Tamil Tigers, kidnapped him and brought him to one of their training camps. The Tamil Tigers were, at the time, engaged in an insurrection in the course of which they engaged in terrorist acts against the government of Sri Lanka. He was forced to work for this group for two years and was then released. This may have coincided with the end of the conflict in 2009.

Mr Ganeshalingham was then imprisoned by the Sri Lankan Government. He says that he was interrogated, tortured, beaten and starved. He was released after the Red Cross

intervened in his case. However, according to Mr Ganeshalingham, such releases were often temporary, and prisoners who had been released were frequently re-arrested after impartial scrutiny by international observers. He says he was frightened for his life and arranged for passage on a boat to Australia. He is the only son of his parents, who are alive. He has two sisters.

His voyage ended on Christmas Island in February 2012, where he was detained for the third time in his life, this time by the Australian Government. The Australian Government has held him in detention for the last six years. From the beginning of 2012, Mr Ganeshalingham was held at the Scherger Immigration Detention Centre in Weipa, on Cape York. During this period, he applied for protection in accordance with Australia's obligations under the Convention Relating to the Status of Refugees. Under that Convention, to which Australia is a party, a contracting state must, among other things, issue identity papers and travel documents to a refugee. A refugee is defined as follows:

> "…a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

A delegate of the Minister for Immigration found that Mr Ganeshalingham, in fact, satisfied that definition. That is to say the Minister's delegate found that Mr Ganeshalingham was a genuine refugee.

He was diagnosed as suffering from post-traumatic stress disorder, with flashbacks, nightmares and high anxiety levels. He had a feeling of helplessness. His sleep was disordered. He fell asleep at 2 or 3 am and was then awakened by nightmares or restlessness. His appetite was poor and he sometimes had to force himself to eat. He lost his motivation and his energy was low. Doctors at the immigration detention centre had given him antidepressant sedatives. He felt the onset of age, he felt the loss of years of life because of

his incarceration by successive authorities, and he felt feelings of guilt for abandoning his parents.

It was in this frame of mind that Mr Ganeshalingham received news that his girlfriend in Sri Lanka had found another love and that their relationship was over. He took an overdose of sleeping tablets. He began to feel dizzy. He became frightened. He reported what he had done and was immediately taken to Weipa Hospital. Prior to these events, beginning with his kidnapping, Mr Ganeshalingham had suffered from no psychiatric disorders. He has no criminal history or history of any other antisocial acts.

On 17 June 2012, while he was at the hospital in Weipa, a nurse came to take his vital signs. She was kind to him. She inquired about his family. According to the prosecutor's submissions at sentence the nurse placed a pulse oximeter on his finger and the defendant then grabbed her firmly and pulled her towards him. She was mistakenly anticipating that he had something more to tell her so she leaned in towards him. The defendant then sucked and gently bit her cheek. Her skin was not broken. There was no bruising.

She stepped away from him and continued to take his vital signs. She took his temperature and then she made to pack up her observation trolley. As she turned around the defendant grabbed her with both hands. One hand grabbed her right breast and the other her right buttocks. These were a fleeting touch.

Mr Ganeshalingham was charged with one count of indecent assault. The indictment was later changed to one charging him with one count of serious assault, contrary to s 340(2AA) of the *Criminal Code*. He then pleaded guilty. That section provides:

> "A person who unlawfully assaults … a public officer while the officer is performing a function of the officer's office commits a crime. Maximum penalty: seven years imprisonment."

This offence is referred to as a "serious" assault. Its seriousness derives from the status of the victim as a public officer. The provision is intended to offer greater deterrence to assaults against such officers in the execution of their duty. This offence can be contrasted with the

offence of common assault for which s 335 provides that the maximum penalty is three years imprisonment.

Mr Ganeshalingham was interviewed by police on the day after the incident. He said that the nurse had been kind to him. She had asked about his family. He said that this had made him emotional and so he reached out to hug and kiss her. He admitted brushing her cheek but denied touching her breast or buttocks.

He told a psychiatrist who saw him in order to prepare a report for the Court that he had been upset and tearful talking to the nurse about his parents and he had attempted to hug her and cry. He denied that he had any sexual motivation. He said that he was now extremely regretful. He said that he had previously hugged a member of the medical staff and also an interpreter. In fact, although he has had many interactions with female medical staff, he has not previously or since engaged in any inappropriate behaviour.

It was the opinion of Dr Nick Argyle, the psychiatrist to whom I have referred, that his mental state at the time was affected by his being post-overdose of psychiatric medication and his being distressed and wanting emotional support. Dr Argyle added this:

> "It is also very possible that he was unfamiliar with cues for touching or hugging a female in the local culture."

Consistently with this the prosecution later submitted to the learned sentencing judge that:

> "The cultural thing of – she was also the first person, it would appear, that was really kind to him."

The nurse that the applicant assaulted was very much affected by this episode. She was relatively new to the profession. In her victim impact statement the nurse explained that what had happened had made her very conscious of her personal safety at work. She now questions her own confidence in her ability to protect herself. She feels ashamed at what she saw as her own inability to protect herself.

Mr Ganeshalingham was sentenced on 26 November 2013. He now applies for an extension of time within which to appeal and submits that the sentencing judge erred in imposing a

sentence of imprisonment, albeit a suspended one. The applicant seeks to explain his delay in seeking leave to appeal by the fact that he did not know he could apply to appeal against his sentence. He only learned this last year and he then moved promptly. Having regard to his incarceration by immigration authorities and his lack of knowledge of English this ignorance is understandable. The Crown does not challenge this submission.

Mr Heaton QC, for the Crown, rightly takes the position that the fate of the application for extension should abide the result of the arguments in support of the application for leave to appeal against sentence. Taking the complainant's and the applicant's circumstances into account, at the sentencing hearing the learned prosecutor, Mr English, very properly submitted that the sentence of imprisonment that this offence normally justified should be tempered to reflect the defendant's personal circumstances.

Mr Ganeshalingham's counsel, Mr Trevino, submitted that the circumstances justified making an order under s 19 of the *Penalties and Sentences Act* 1992. That provision only applies if the Court does not record a conviction. In such a case, s 19 empowers a Court to release the offender absolutely or to make an order that the offender be released if the offender enters into a recognisance to be of good behaviour and to appear for conviction and sentence if called upon during a period stated in the order. He submitted, correctly, in my respectful submission, that the claims of general deterrence and the need for denunciation were significantly reduced in this case.

The learned sentencing judge expressly took into account that the applicant was suffering from post-traumatic stress disorder when he committed the offence. He regarded the applicant's emotional state and his mental health at the time as relevant considerations. He concluded that the offence was nevertheless a serious offence but one for which a wholly suspended sentence of imprisonment was appropriate.

In this Court Mr Holt QC, who appeared for the applicant, emphasised two additional features of the case that, he submitted, had not been considered by his Honour and which had led to error. The first of these was that, unlike the usual cases of assault within the section, the

applicant had not been motivated by a desire actually to hurt or to assault or even to obtain sexual gratification by a non-consensual touching constituting an assault. Rather, he had been impelled by an emotional need for the comfort of a non-sexual physical contact with a sympathetic nurse and, the evidence strongly suggests, also by a mistaken view that what he wanted to do was not inappropriate.

It must be recalled that, at the time he committed this offence, Mr Ganeshalingham was recovering from a sleeping pill overdose suicide attempt. As he told one of his treating doctors, the nurse's solicitude for him was the first act of kindness he had experienced since coming to Australia.

The second feature is that there is not a single sentencing precedent that would justify the imposition of a term of imprisonment in such a case. The two cases that come closest to the present are *R v McDowell* and *R v Juma*, both of which also concern offences against s 340(2AA) and in which the offenders also pleaded guilty.

In *McDowell* the victim was a paramedic and in *Juma* the victim was a police officer. In each case the offender committed deliberate assaults by way of kicking, head-butting and so on. In each case the offender was suffering from severe emotional distress of some kind. In *McDowell*, this was due to a diagnosed disorder. In *Juma*, there was history of suffering in the Congo from whence the defendant had escaped to Australia causing emotional disorder. In *Juma,* the complainant suffered bodily harm. In each of these cases probation was ordered with no conviction recorded. These comparable sentences were not cited to Judge Rafter.

For these two reasons, Mr Holt submits that his Honour erred in concluding that an order under s 19 was not appropriate and in deciding that he ought to impose a suspended sentence of imprisonment. The submission must be accepted.

As his Honour observed, it is necessary to take into account the emotional harm done to the complainant. Indeed, the offence with which the applicant was charged is calculated to protect nurses, among others, from such harm caused by assaults committed against them

while they are doing their duty. The higher maximum sentence imposed for such assaults signifies the legislature's and the community's denunciation of such offences.

These important factors, as well as the effects that such an assault can have and did have on the victim who was assaulted in this case, must be taken into account, but together with other countervailing factors. One of these is, in this case, the circumstances that led the applicant to do what he did.

As I have said, Mr Ganeshalingham pleaded guilty to this offence, and, accordingly, is taken to have admitted every element of it. Section 245 defines "assault", relevantly, as follows:

> "A person … who touches … the person of another … without the other person's consent … is said to assault that … person and the act is *assault*."

Such consent can often be implicit, but there is no doubt that the complainant here did not consent to Mr Ganeshalingham's touching in any way, whether expressly or implicitly. She was a professional nurse going about her duty, including making appropriate expressions of sympathy and empathy. However, the applicant's overwrought emotional state and his nurse's compassion and sympathy evidently urged him to seek to hug her in a way that was, to her, intrusive and shocking. The background of facts supports the conclusion that the applicant's acts were not the result of a criminal intent to assault his helper; rather, he committed an assault because of a mistaken but unreasonable belief that his embrace would not be rejected.

In addition, the comparable sentences imposed in *McDowell* and *Juma* confirm that in cases under s 340(2AA) it can be a mitigating factor of great force, depending on the particular offender's idiosyncratic circumstances, that an assault was prompted by an extreme state of distress or by a real psychological disturbance. It is well established that an offender's mental disorder, short of insanity, may lessen moral culpability and so lessen the claims of general or personal deterrence upon sentencing: see *Goodger* [2009] QCA 377 at paragraph [21] per Justice Keane and *Neumann* [2007] 1 Qd R 53. In this case, Mr Ganeshalingham's history of torture, imprisonment, exposure to danger, flight, dislocation, isolation from family, friends

and his native land, mental illness and his suicide attempt constitute very weighty matters for consideration. In addition, the motivation for the assault he committed is lacking in the moral blameworthiness that exists in the usual cases, including *McDowell* and *Juma*.

In my view, this was an appropriate case in which to exercise the discretion conferred by s 12 of the *Penalties and Sentences Act* 1992 not to record a conviction. Having regard to the applicant's character and history and having regard specifically to the nature of the offence, as I have described all of these, I am of the opinion that no conviction should have been recorded. Nor do I think that there is any purpose to be served in making any order that the applicant provide a recognisance to be of good behaviour. Had such a bond been required when he was originally sentenced it would have been spent by now. I would order that an extension of time be granted within which to apply for leave to appeal, that leave to appeal be allowed, that the appeal be allowed, that the sentence imposed in the District Court be set aside, and that instead of that sentence:

(a) the applicant be convicted of the offence;
(b) such conviction shall not be recorded; and
(c) the applicant be released absolutely.

PHILIPPIDES JA: I agree.

BODDICE J: This offence was, understandably, very distressing to the young female nurse. However, the truly unusual circumstances in which it was committed in the context of the applicant's unique personal circumstances, including well established serious mental health conditions, render the sentence imposed below unjust and inconsistent with a proper exercise of the sentencing discretion. That sentence was, therefore, manifestly excessive. I agree with the reasons and the orders proposed by the President.