[2018] QCA 236

COURT OF APPEAL

SOFRONOFF P
FRASER JA
PHILIPPIDES JA

CA No 176 of 2018
DC No 102 of 2017
DC No 105 of 2016
DC No 52 of 2018
DC No 54 of 2018

THE QUEEN

v

WELLS, Trevor Roy **Applicant**

BRISBANE

WEDNESDAY, 26 SEPTEMBER 2018

JUDGMENT

FRASER JA: The applicant has applied for leave to appeal against sentence on the ground that it is manifestly excessive. The applicant was convicted upon his pleas of guilty and sentenced on 5 June 2018 to concurrent terms of imprisonment as follows: 15 months for assault occasioning bodily harm while armed, a domestic violence offence, committed on 6 June 2016; two years and six months for an indecent assault committed on 15 January 2017; two years for an indecent assault committed on 25 January 2017; and 12 months for two summary offences of committing an indecent act in a public place on 11 October 2017 and 1 May 2018.

One hundred and sixty-eight days of pre-sentence custody were declared to be time served under the sentence in relation to the indictable offences, and 35 days were declared to be time served in relation to the summary offences. A parole eligibility date was fixed on 5 October 2018 when the applicant will have served 10 months or one-third of the effective sentence of two years and six months imprisonment.

The applicant is a 62 year old man. The complainant in the first indictable offence is the daughter of the applicant's partner. When the complainant attended at the applicant's house to pick up some medication, the applicant was threatening and abusive. He locked himself in the house and continued yelling. After about 15 minutes, the applicant left the house. He swung a baseball bat with two hands at the complainant's head, hitting her and causing her head to split open. She was taken to hospital where she was given six stitches and released. When the applicant was arrested, he told police that he had tripped and hit the complainant in the head with the bat.

Some seven months later, the applicant approached a 66 year old lady on the street and, after making inappropriate comments, hugged her and pressed his erect penis against her hip. The applicant followed that complainant when she freed herself from the applicant's hold and walked to her car. The applicant grabbed her and hugged her whilst pushing his erect penis towards her pelvis in a grinding motion. After the complainant pushed the applicant away and told him to leave her alone, the applicant attempted to kiss her on the lips. She turned away and he kissed her on her cheek. Eventually, the complainant was able to close her car door and drive away.

Ten days later, the applicant approached a 19 year old lady in a shop where she worked. The applicant had previously gone into the shop and stared at that complainant, attempted to obtain her telephone number, asked other staff members about her, and spoken to her. On this occasion, the applicant put his hands on the complainant's lower hips from behind and pulled her towards him. The complainant felt the applicant's penis against her. She pushed the applicant and told him to go away. Eventually, he left the shop.

In the first of the summary offences, the applicant walked into the store where a teenage girl worked, took his penis out of his pants and began masturbating while he watched that complainant. When approached by an older employee, the applicant stopped masturbating and zipped his pants back up.

About seven months later, the applicant reached through an open window of a car in which a 71 year old lady was eating an ice cream near a shop. The applicant grabbed the top of that complainant's shirt. After making a lewd suggestion, he put his hands into his pants and made vigorous shaking movements in the front part of his pants near his penis. When the complainant pushed the car door into the applicant and yelled at him, he ran backwards with his hands still in his pants, continuing the motion of masturbation. When the applicant was arrested, he admitted that he had approached a lady and made the lewd suggestion, but said that he thought that he had done nothing wrong. The applicant was on bail for the first indictable offence when he committed the other indictable offences and the summary offences.

The applicant has a criminal history in Queensland and New South Wales which includes many offences during the last 20 years. Most relevantly, his history includes indecent assault in 1995, indecent acts in 2001 and 2002, and sexual assault in 2005. The applicant was given sentences of imprisonment and other sentences that were designed to assist him in rehabilitating himself.

The applicant argues that the sentence for the assault occasioning bodily harm while armed should instead be two and a-half years imprisonment, with 5 October 2018 being fixed as a parole release date rather than a parole eligibility date. Upon the applicant's argument, lesser concurrent terms of imprisonment should be imposed for the other offences, together with orders suspending that imprisonment so that he is assured of release.

In support of this argument, the applicant submits that when he was a young child he was sexually abused by an adult. He submits that after trying for a long time to get professional help to stop his offending behaviour, earlier this year he started attending sessions with

a psychologist. The applicant states that he believes this treatment to be his only hope of rehabilitation.

Similar submissions were made to the sentencing judge. The sentencing judge acknowledged that sexual abuse of the applicant as a child might explain his conduct, but observed that the applicant had significant opportunities in the past under Court orders to help himself, and that the applicant's self-realisation had not stopped him committing offences against strangers in the street.

The applicant has been in and out of jail for a significant period of his life. Recommendations have been made in the past about appropriate treatment for the applicant, and a court report concerning an earlier period when the applicant was on parole indicated that although the applicant had partly complied with the parole order, he was resistant to any treatment. The sentencing judge considered that community protection was a significant consideration in the sentences to be imposed upon the applicant.

The applicant has made submissions about the facts of his sexual offending which depart from the agreed facts with reference to which he was submitted. There is no basis upon which this Court could proceed otherwise than with reference to the agreed facts. The applicant referred to one decision, which the prosecutor had referred to the sentencing judge – *R v Smith* [2017] QCA 45. In that case, an offender was given a much more severe sentence for a more serious assault. The case does not assist the applicant's argument.

Having regard to the matters identified by the sentencing judge, and particularly the brazen nature of the applicant's sexual offences, the circumstance that he repeatedly reoffended after he was arrested and released on bail, and the applicant's relevant criminal history, there is no reasonable basis upon which it could be concluded that the applicant's sentence is manifestly excessive.

The applicant argues that as a result of the unavailability of certain programs in prison he may be unable to apply for or obtain parole, with the result that he may remain in prison for all or most of the term of two years and six months. Under the *Corrective Services Act* 2006,

s 180(2), the applicant was eligible to apply for parole immediately after he was sentenced; although he would not be granted parole until on or after the parole eligibility date: see *R v Craigie* [2014] QCA 1 at [19]. According to a recent email from a Corrective Services employee, the applicant has not been recommended for any prison programs. The applicant's argument is not supported by any evidence. The applicant has not established that if he had promptly applied for parole, his failure to complete any prison program that was not made available to him rendered it impractical for him to obtain release on parole by the parole eligibility date and that this would thwart the intended effect of the sentence. The case is, therefore, unlike *R v Daly* [2004] QCA 385 at [8] or *R v Lloyd* [2011] QCA 12 at [20], in which a demonstrated practical inability of a prisoner to obtain release on parole meant that effect could not be given to what was intended by the sentencing judge.

I note that the respondent submitted that the effect of s 180(2)(b) of the *Corrective Services Act* is that the applicant's application for leave to appeal against sentence precludes him from applying for parole. It has been held that the operation of that provision is incapable of being treated as a factor rendering a sentence manifestly excessive: see *R v Fares* [2012] QCA 13 at [54] and *R v Omar* [2012] QCA 23 at [38]. Section 180(2)(b) could not be an obstacle to the applicant immediately applying for parole immediately after the determination of this application. As the sentencing judge remarked, if the applicant applies for parole, it will be for the parole authorities to determine whether or not the applicant should be released on parole.

I would refuse the application for leave to appeal against sentence.

SOFRONOFF P: I agree.

PHILIPPIDES JA: I also agree.

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