[2018] QCA 315

COURT OF APPEAL

MORRISON JA
PHILIPPIDES JA
CROW J

CA No 155 of 2017
DC No 358 of 2016

THE QUEEN

v

YEATMAN, Theodore Joshua **Applicant**

BRISBANE

TUESDAY, 13 NOVEMBER 2018

JUDGMENT

CROW J: The applicant was convicted by a jury on 7 September 2016, of one count of rape contrary to s 349 of the *Criminal Code Act* 1899 (Qld). The primary Judge sentenced the applicant to seven years imprisonment. As no parole eligibility date was specified, the applicant will be eligible for parole after serving half his term pursuant to s 184(2) of the *Corrective Services Act* 2006 (Qld). On the 22nd of August 2017, the applicant filed a notice of application for extension of time within which to appeal a notice of appeal against a conviction and a notice of application for leave to appeal against sentence.

The applicant's application for leave to appeal sentence was filed approximately 10 months out of time; no explanation is given for the delay. The conviction appeal has now been abandoned. The application to appeal against the sentence is pursued on the ground that it is

manifestly excessive. The applicant contends that a head sentence of seven years imprisonment was manifestly excessive and that the failure to order a parole eligibility date earlier than at half-way point also rendered the sentence outside the exercise of the sentencing discretion in *House v The King* (1936) 55 CLR 499. The principle is applicable to an extension of time as set out in the Court of Appeal's decision in *R v Tait* [1999] 2 Qd R 667 at 668, and recently summarised by the Court of Appeal in the decision of Gotterson JA in *R v Taj* [2018] QCA 305 at [5], thus:

> "Two issues which are central to the exercise of the discretion to grant an extension of time here are whether there is good reason for the applicant having delayed in filing an application for leave to appeal and whether it would be in the interest of justice to grant the extension of time sought. The latter necessarily depends upon the prospects that an application for leave to appeal against sentence would have of success, those prospects themselves depending very much upon the prospects of ultimate success of the proposed ground of appeal."

The relevant background is recorded in the sentencing judge's remarks as follows:

> "[A]fter a heavy night of drinking and entertainment, the complainant was driving home when she was dazed by the headlights of an oncoming car. Her car left the road and crashed into a ditch. She struck her head on the steering wheel, was bleeding and in shock. At that time, she made a phone call to a friend about the crash. Her friends immediately set out to look for her."

The applicant was the driver of an oncoming car. He turned and returned to the crash site. The complainant was walking around her car at that stage. She had removed her jeans for reasons which are unknown. But she was wearing her shorts, her underwear and her other clothing. The applicant asked if the complainant was okay and he offered to take her to hospital. Trusting the genuineness of the gesture, the complainant got into the applicant's car. The applicant, however, diverted the journey away from the hospital and went to a beach.

> "The complainant repeatedly told [the applicant] that she wanted to go home or to the hospital. She was becoming increasingly apprehensive and used her phone to call or connect with friends during the trip. She did this in a way that would not alert [the applicant] to what she was doing.
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> At the beach, [the applicant and the complainant] both got out of the car. [The applicant] would have realised by then that [the complainant] was intoxicated, dazed, in shock, uncomfortable and scared. [The complainant]

> looked around to see if anyone was present… After [the applicant] got out of the car, there was a brief conversation. [The complainant repeated] that she wanted to go home or back to her truck. [The applicant] kept on telling her that it was going to be okay. [The applicant] started touching her physically. In one of the phone calls that [the complainant] managed to connect with her friends, she's heard to say, "Leave me alone." In another she whispered, "Call the police" twice. At one point [the applicant] picked up the phone and threw it.
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> [The complainant] retrieved [her phone], then [the applicant] picked her up by the shoulders, pinned her up against the car. There was a scuffle, and she tried to escape. She then tripped and fell over onto her back. [The applicant] then got on top of her, tried to take her clothes off while she was struggling and holding on to her clothing. [The applicant] made her touch [his] penis, [then he raped her]. [The applicant] said something like [he'd] always wanted to 'fuck her.'
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> After about 30 seconds, [the applicant] got off. At that point, the complainant made her escape, grabbing her things including her jeans in her hands, while running along the beach. In doing so, she dropped her ID card and, again, tried to make telephone contact with her friends.
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> [The complainant] was heard panting, screaming and crying. She told her friends to meet her at a fig tree along the beach. During that time, she heard [the applicant] call her name and then [the applicant] started his car and left. When she met up with her friends at that point, she was in distress, scared and in a panicked state. She jumped straight into the back of a two-door car, was crying, shocked and hypervigilant. […the complainant reported the rape once she was in a safe place] and was taken to hospital for treatment."

At the start of the trial the applicant made an admission that he had sexual intercourse with the complainant. In imposing sentence the sentencing judge observed that the offending was opportunistic; the applicant taking advantage of the complainant's vulnerable and impaired state. His Honour had regard to the serious nature of the offence and the significant impact it had on the complainant. The complainant continued to feel emotionally drained and was constantly worried about her own safety. She described continually feeling traumatised and having nightmares. She was also concerned about the backlash from the applicant and from those who are connected with him.

The sentencing judge also had regard to the applicant's circumstances. The applicant was 26 years old at the time of the offending, and was dealing with relationship issues as well as the loss of his brother in tragic circumstances. The applicant had previous convictions, mainly for multiple drug offences as well as an assault occasioning bodily harm whilst armed

and in company, and a common assault. He had no criminal history involving sexual offending. For his past offending he received punishment by a fine of community-based orders, and had successfully served periods of probation without breach.

His Honour accepted in the applicant's favour that the offending was significantly out of character and the applicant had a good work history and had been a significant contributor to society. The applicant's failure to provide an explanation as to the delay in seeking an extension of time is not fatal. It was submitted that the delay should be understood in the context of an applicant unfamiliar with the criminal justice system of this state. The issue is one of what is in the interest of justice with respect to the application.

In the present case, the granting of an extension is not warranted, in any event, given the lack of merit in the sentence application. At sentence the prosecutor relied on the authorities of *R v Conway* [2012] QCA 142 and *R v Daniel* [1998] 1 Qd R 499 to submit that a sentence in the range of seven to eight years was appropriate. In *Conway*, there are distinguishing features. The first is: the remorse of Conway, demonstrated by his plea, albeit, a late plea of guilty. Additionally, in comparing the antecedents: Conway, with no prior criminal convictions; a better history of employment and community involvement had generally better antecedents.

Before this Court, Mr Caruana and Mr O'Brien, who appeared pro bono, submitted that whilst the range may have extended as high as six and a-half years, a sentence of seven years was excessive and that the appropriate head sentence, with reference to cases and the facts of the present case, was one, in fact, of six years imprisonment. As was accepted, that submission is made difficult by the fact that the sentence imposed was in accordance with the submissions made by the applicant's counsel at sentence. However, it was argued that the applicant, with a sentence imposed, was outside the permissible range. As the applicant submits was the case, the submissions at sentence are an 'obstacle' not a bar to this Court intervening. The authority for that proposition is *R v Frame* [2009] QCA 9 at [6].

In the present case, all of the offending consisted of a single act of penetration over a short period of time. The applicant took advantage of the complainant's vulnerability. That is: she was intoxicated; she had been injured; she was alone and in a remote location. The applicant took advantage of that vulnerability to commit a serious offence and subject her to a terrible ordeal with ongoing consequences to her. A head sentence of seven years was not outside the appropriate range when regard is had to the comparatives put before the sentencing judge and this Court.

The applicant's relative youth and prospects of rehabilitation were matters taken into account. The sentence was not able to be further reduced to take into account remorse and cooperation as would be demonstrated by a plea of guilty. There was no error in exercising the sentencing discretion by not imposing a parole eligibility date of less than half of the head sentence in circumstances where there had been a trial. The application for extension is, therefore, refused.

MORRISON JA: I agree.

PHILIPPIDES JA: I also agree.

MORRISON JA: The order of the Court is that the application for an extension of time is refused.