[2019] QCA 145

COURT OF APPEAL

GOTTERSON JA
PHILIPPIDES JA
McMURDO JA

CA No 42 of 2019
DC No 165 of 2018

THE QUEEN

v

EO **Applicant**

BRISBANE

FRIDAY, 26 JULY 2019

JUDGMENT

McMURDO JA: After a five day trial, the applicant was convicted of seven counts of sexual offending against his daughter. The offences were committed over a period from 1979 to 1982, when the complainant was aged nine to 13 years. The applicant was between 32 and 36 years of age at the time.

Each count was an offence of unlawfully and indecently dealing with the complainant, a girl under the age of 16 years, with a circumstance of aggravation that she was also under the age of 14 years. The maximum penalty for these offences when they were committed was seven years' imprisonment.

Two of the counts involved the applicant touching the girl on her breast and vagina over her clothing, for which he was sentenced to terms of 18 months. Another two of the offences were committed in the family home during a party when the complainant was sitting on a couch. The applicant covered her with a blanket, and touched her breasts and vagina underneath her clothing.

For those offences he was sentenced to terms of two years and two and a half years, the latter being suspended after serving two years, with an operational period of 30 months. There were three offences involving the digital penetration of her vagina, each committed in the complainant's bedroom. For one of those offences he was sentenced to three years' imprisonment suspended after two years with an operational period of three years. For the others he received four year terms suspended after two years with an operational period of five years.

The applicant was aged 72 years at sentence on 8 February 2019, and had then served four days in pre-sentence custody. He applies for leave to appeal against each sentence on the ground that it is manifestly excessive.

The prosecutor's submission to the sentencing judge was that the head sentence for the more serious offences should be four years with parole eligibility after serving two years. The prosecutor cited this Court's decision in the *The Queen v Jackson; Ex parte Attorney-General of Queensland* [2001] QCA 445. Counsel for the applicant submits that their client's trial counsel provided little assistance to the sentencing judge because he did not suggest a sentencing range or cite any comparable cases.

The sentencing judge noted that the applicant had no criminal history, and that his history of traffic offences was irrelevant. His Honour said that there was no doubt that the offending had had a significant impact upon the complainant who read to the Court her victim impact statement. He observed that the statement was:

> "In many respects … balanced and expressed genuine distress which … would not be unreasonable, having regard to the offending which occurred."

This was the third trial of these charges. In the first trial, the jury had to be discharged because of a statement made by one of the witnesses, and in the second trial the jury had been unable to agree. In this third trial, the complainant was cross-examined over several hours, it being suggested that the events never occurred. His Honour observed that the complainant was "[e]xtremely traumatised by these events and also by the process of having to come to court and recount these horrid events in her life", which suggested to his mind that there was a complete absence of remorse on the applicant's part. His Honour observed that this was a strong Crown case and that the evidence of a pre-text conversation was particularly compelling.

There were mitigating factors of the absence of any criminal history, the applicant's creditable work history, including the conduct of his own business and the applicant's involvement in community service activities such as sporting and charitable organisations.

In *The Queen v Jackson*, a head sentence of four years' imprisonment was imposed for nine offences of indecent treatment of a girl who was aged between eight and 15 when the offences were committed. None involved the penetration of the complainant. That offender conducted a Sunday school class which the complainant attended. The sentences imposed were wholly suspended for an operational period of five years. The offending had occurred between 1979 and 1987. The Attorney-General argued that the sentences were inadequate because the terms had been wholly suspended. That argument was rejected. Justice Davies, who gave the principal judgment, said that the case was exceptional because of the length of time between the offending and when he was sentenced in 2001, during which he had made substantial progress in his rehabilitation. He had made complete admission of offences, whether otherwise provable or not. Justice Davies said that an unusual feature of the case was the extent of the remorse shown by the offender and his cooperation with the police. It is obvious to say that there were substantial mitigating factors there which were absent in the present case.

I go, then, to the cases which, in the applicant's argument, are said to be comparable. The first is *R v S* [2002] QCA 300, in which the offender, after a trial, was sentenced to four years' imprisonment on two counts of indecent dealing with a child, who was the younger sister of his then girlfriend, later his wife. The girl was aged 10 and 12 at the time. The nature of the offending in that case was no less serious than in the present, although there were only two offences. However, that offender was aged only between 19 and 20 when the first offence was committed, and between 21 and 22 at the time of the second. He did have a previous conviction for an offence of wilful exposure. Justice Holmes, as the Chief Justice then was, said that the sentences should be reduced for the facts of his relative youth, the absence of any physical force, the existence of only one previous conviction and the fact that over the 20 years since the offences he had apparently conducted himself properly with a good work history. His sentence was reduced to one of two years' imprisonment. The case is distinguishable from the present one because of the age of that offender and the relationship of father and daughter in the present case.

In *R v PAC* [2006] QCA 327, the offender was convicted after a trial of five counts of indecent treatment, which had been committed some 12 to 15 years earlier. The offending was no less serious than in the present case. The offender was aged 74 at the time of sentence and was in poor health. There had been no remorse demonstrated or any cooperation with authorities. A sentence of two years' imprisonment was not disturbed on appeal.

In *R v T* [1996] QCA 45, the offender was convicted after a trial of four counts of indecently dealing with his niece who was in his care at the time. The extent of the offending was comparable to the present case. A sentence of 15 months imprisonment was not disturbed.

In *R v Marsh* [1993] QCA 452, the offender pleaded guilty to offences of indecent dealing with a child under 16 years, permitting himself to be indecently dealt with by a child under 16, and permitting the child to have carnal knowledge of him by anal intercourse. The maximum penalty for that last offence was 14 years' imprisonment. The applicant was the neighbour and family friend of the complainant and the offences occurred over a single incident. He was originally sentenced to terms of two years and five years' imprisonment.

The five year term was reduced on appeal to three and a half years, with a recommendation for parole after serving one year.

In *R v G; Ex parte Attorney-General of Queensland* [1995] QCA 158, the offender had pleaded guilty but contested the details of the offending, which required the complainant to be cross-examined. She was his step-daughter. The sentencing judge accepted that he showed remorse and imposed a sentence of two years' imprisonment wholly suspended, which was not disturbed on appeal.

In *R v M* [1999] QCA 118, a sentence of four years' imprisonment was reduced to three years' imprisonment with parole recommendation after serving 15 months for offences of indecent dealing committed over a period of one to two months against the applicant's 10 year old daughter. The offending was no less serious than in the present case. It was a late plea of guilty after the trial had been commenced. The maximum penalty at the time was 10 years' imprisonment. The court noted that the late plea of guilty had spared the complainant the experience of giving evidence.

The last of the cases relied upon by the applicant as comparable sentences is *R v K* [1999] QCA 41. The applicant pleaded guilty to seven counts of indecent dealing with a girl under the age of 12 who was a family friend. There were also offences involving other complainants. He was aged 74 when sentenced and in poor health. A sentence of three years with parole recommendation after serving 12 months was not disturbed on appeal.

On the basis of these cases, it is submitted that having regard to the applicant's age, the absence of a criminal history, his contribution to the community, the absence of violence or threats to the complainant and the expiry of time since the offending, what was described as the proper sentencing range", was a term of two years' imprisonment suspended after serving nine to 12 months.

Of the cases relied upon by the applicant, those in which there was a plea of guilty are of limited relevance to the present case. The cases in which a sentence was not disturbed on

appeal are also of limited relevance because the outcome does not suggest that the case was at the higher or lower end of the range open to the sentencing judge.

The cases where a sentence was substituted by this court are of more relevance. Of the cases cited, only *R v S* was of that kind, and where the offender had been convicted after a trial. As I have discussed, that offender was a very young man at the time and the relationship was not that of father and daughter.

Counsel for the applicant also cited *R v Illin* [2014] QCA 285 in submitting that the long passage of time between the offending and the sentencing required a lower sentence in this case. That period was acknowledged by the judge, but it is said that his Honour did not give any weight to that circumstance. But this is not a case like *Illin* where the substantial delay was between being charged and the sentence, and where that offender had demonstrated his rehabilitation, which involved an acknowledgement of his wrongdoing.

I am not persuaded that the sentences imposed in this case resulting in a period of imprisonment of four years, of which the applicant will serve two years, are such as to suggest some error by the judge in the exercise of the discretion. A complete absence of remorse on the part of the applicant, who seriously violated the trust inherent in the relationship of parent and child, made it open to the judge to impose the sentences which he did. I would refuse the application for leave to appeal.

GOTTERSON JA: I agree.

PHILIPPIDES JA: I agree with Justice McMurdo. I note that in oral submissions some emphasis was placed on the issue of the passage of time between offending and conviction as pointing to rehabilitation and also the applicant's age, both of which were said to particularly indicate that the sentence was manifestly excessive. As Justice McMurdo has stated, some reliance was placed on the decision of *Illin* in relation to delay – the issue of delay between arrest and sentence, or conviction, referred to in *Illin* raises quite distinct considerations which were examined in *R v Cox* and *R v Melrose*, and are not applicable in this case. I agree with the order proposed.

GOTTERSON JA: The order of the Court is that the application for leave to appeal is refused.