

COURT OF APPEAL

DAVIES JA  
McPHERSON JA  
WILLIAMS JA

CA No 3 of 2002

THE QUEEN

v.

J Applicant

BRISBANE

..DATE 22/02/2002

JUDGMENT

WILLIAMS JA: After events which occurred on 8 February 2001 the applicant was charged with the attempted rape of a woman who had been his former de facto partner, with the alternative count of unlawful and indecent assault arising out of the same events. The applicant's plea of guilty to the indecent assault count was accepted in full discharge of the indictment.

The applicant and the complainant were aged about 32. They had a de facto relationship which existed for most of the period between October 1996 and September 1999. Their relationship, according to the material placed before the Court, was at times a stormy one and it does seem that their sexual encounters often involved activity which was described in the material as "rough".

After the relationship broke up the parties did see each other on occasions and indeed in about September 2000 they went on a holiday together to Bali for a little more than a fortnight. During that period sexual intercourse took place on a number of occasions. After that, the complainant indicated that the relationship was over. There was after that at least one night on which the applicant stayed at the complainant's residence and intercourse occurred.

But again, there was an intimation from the complainant on that occasion that the relationship was ended.

There followed telephone contact, generally initiated by the applicant. On the day of the offence the applicant telephoned the complainant twice at work and indicated he wanted them to meet and talk things over with a view to getting back together. The complainant informed him that the relationship was over and abruptly terminated the last call at work. That night the applicant telephoned the complainant at home. He was again informed that the relationship was over. He suggested that he come over and speak to the complainant but she indicated she did not want that. The telephone rang on a number of occasions after that but the complainant did not answer it.

At about 9 p.m. the applicant arrived at the complainant's house. He said that he was worried about her and wanted to see if she was all right. The complainant let him into the house; the applicant indicated that he felt they were still friends. There was some discussion over a period of time during which they watched a television program. During that the applicant asked for a second chance with respect to the continuation of the relationship but the complainant's attitude was as previously indicated, that it was over.

Thereafter, the applicant asked the complainant for sex. Indeed, it could be said that he pleaded with her for sex that night. At one stage it appears the complainant did indicate that she would have sexual intercourse with him but then she

resiled from that by saying, "You repulse me when you touch me." At that point the applicant forced a kiss on the complainant's face but she turned away and that appears to have caused the applicant to become agitated.

He picked the complainant up, carried her into the bedroom, placed his hand over her mouth and told her to shut up and put her down on the bed. The complainant began struggling, kicking with her legs, digging her nails into the applicant's body. The applicant then removed the complainant's underwear, unzipped his jeans and exposed his penis. His penis came into direct contact with the outside of the vagina on more than one occasion but there was no penetration. Apparently the applicant then masturbated himself until ejaculation. He then left. That provides the circumstances for the offence.

The sentence imposed was 12 months' imprisonment to be suspended after serving four months with an operational period of two years. The contention of the applicant is that the sentence is manifestly excessive and the submission was made that the learned sentencing Judge placed too much weight on a victim impact statement and too little weight on the previous relationship between the parties. It is true that in the course of the sentencing remarks the learned sentencing Judge said:

"Having regard to the impact on the complainant as set out in a statement placed before the Court it cannot really be said that the impact on her was significantly less than one would have expected had there not been a previous relationship."

The victim impact statement in question may be regarded as somewhat exaggerated. It does contend that the incident in question had greatly changed the complainant's lifestyle and that her quality of life was much less than it had been prior to the incident. But even allowing for some exaggeration it nevertheless does seem that the incident in question did have an impact on the complainant and that is understandable. It is the circumstances of the offence which are of most significance on the issue whether or not the sentence imposed was manifestly excessive.

Counsel for the applicant referred to the decisions of this Court in Hatch, CA 320/99; and Patterson, CA 337/95; and also the earlier decision of the Court of Criminal Appeal in O'Connell, CCA 118/91. Having regard to the facts which gave rise to the sentences imposed in each of those cases I am of the view that the sentence here is not out of line with authority. One has to have regard to the background relationship between the parties, the circumstances of the particular offence and also the criminal history of the offender in determining the appropriate sentence. In this case the applicant had a minor criminal history which did not involve any offences of a similar nature.

In my view the learned sentencing Judge addressed all of the matters relevant to the imposition of a proper sentence. He

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obviously had regard to the plea of guilty and that is reflected in the suspension of the sentence after four months had been served.

In all of the circumstances, I am not persuaded that the sentence in fact imposed was manifestly excessive and I would refuse the application for leave to appeal against it.

DAVIES JA: I agree.

McPHERSON JA: I agree.

DAVIES JA: The application is dismissed.

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