[2002] QCA 46

COURT OF APPEAL

DAVIES JA
McPHERSON JA
WILLIAMS JA

CA No 369 of 2001

THE QUEEN

v.

C Applicant

BRISBANE

..DATE 22/02/2002

JUDGMENT

McPHERSON JA: The applicant for leave to appeal against sentence was convicted on a plea of guilty in the District Court at Townsville on one count of unlawful carnal knowledge. He was sentenced to 12 months imprisonment with 44 days pre-sentence custody being declared time served under the sentence.

It is urged on his behalf in this Court that the sentence was manifestly excessive. While not complaining about the head sentence of 12 months imprisonment, the applicant through his counsel has submitted that the learned sentencing Judge erred in failing to discount the sentence for the plea of guilty in this case.

It is submitted that the utilitarian value of the plea of guilty, particularly in a case like the present involving a sexual act against a juvenile, should have been reflected in an appreciable discount in the sentence.

It is submitted that the appropriate sentence should have been 12 months imprisonment, partially suspended after three months. The applicant, it appears, has already served 16 weeks in custody and, viewing that as four months or so, it would, it is submitted, be appropriate to order the suspension of the sentence forthwith.

The circumstances of the offence are that it was committed on

a date between 30th of June 2000 and the 1st of August 2000 at a time when the complainant girl was approximately 15 years and nine months old.

The background is that the complainant's mother and the offending applicant had previously lived in a defacto relationship and they had, in fact, a child from that relationship. Although their relationship of defacto husband and wife had come to an end before the subject offence was committed, the applicant had continued to reside with the complainant's mother.

The complainant herself lived with foster parents, but on occasions visited her natural mother at her home, and it was during one of these visits in the July school vacation in 2000 that the offence in question took place.

According to the applicant's statement the complainant was lying on her mother's bed watching television while the applicant was operating a computer in the same room. The applicant got up from the computer, lay down next to the complainant on the bed and asked her if she was interested in having sex with him. To that she replied, "Yeah, whatever" and proceeded to remove her shorts and underpants. They then engaged in consensual sexual intercourse.

On leaving the room immediately after the event the complainant was confronted by her mother who said, or asked,

"Why?", to which the complainant answered, "I don't know."

The applicant on a later occasion invited the complainant to have sexual intercourse with him again, but she declined, telling him that she was concerned about the age difference between them. His response, either then or on some subsequent occasion, was, "How does the age difference matter at all."

The complainant did not make a formal complaint until 8 February 2001, which was just after her mother had moved out of the premises that the applicant had been sharing with her. There are victim impact statements which attest in some ways to the effect of the offence on each of the complainant and her mother.

The personal circumstances of the applicant are that he was 40 years of age and that he has a prior criminal record. He has a not unsubstantial criminal history, in which a series of different offences figure before 1987. Up to that time he'd been convicted of offences, among others, of unlawful use of a motor vehicle, stealing, break and enter, and assault occasioning bodily harm, as well as one instance in 1982 of aggravated assault on a female as a result of which he was sentenced to three months imprisonment.

Although he did not appear again before the Courts between 1987 and 1997, he has since been convicted of various drug offences and offences of violence including one or more

charges of assault occasioning bodily harm and breach of a domestic violence order.

The learned sentencing Judge was referred, as we were too, to three comparable sentences in particular. They are Queen v. Ray (CA No 111 of 1999) in which Ray, who was 26 at the time, went to lie down on a mattress where the 14 year old complainant was sleeping and had sexual intercourse with her. The complainant said she was shocked "and just froze" and lay there. No complaint was made to the police, but the complainant told her friends on the next day. The applicant had previous convictions for dishonesty and assault, and assault occasioning bodily harm, but no prior convictions of a sexual nature.

A sentence of 12 months imprisonment with a recommendation for parole after four months was not disturbed on appeal. That decision may not carry the matter very far because it shows only that the Court of Appeal in that instance did not think that the sentence should be altered applying the principles which usually prevail on appeals or applications for leave to appeal of this kind.

In the course of the remarks of the Court of Appeal in the Queen v. Ray, some reference was made to another case of Queen v. Poonkamelya (CA No 323 of 1993). In that instance, the applicant was 22 years of age and the complainant girl was 13 and a half. The offence took place at Aurukun, and the

sexual intercourse there was said to have been prompted by the girl herself, with no element of force or pressure from the applicant at all. He had, however, prior convictions for sodomy and assault, assault occasioning bodily harm on a female while armed with an offensive weapon.

At first instance the applicant was sentenced to 18 months imprisonment, but on appeal the Court of Appeal reduced the sentence to nine months imprisonment.

The third of the cases referred to his Honour and to this Court was The Queen v. Snow, ex parte Attorney-General (CA 389 of 1996). This was an Attorney-General's application for an extension of time to appeal against sentence. The 33 year old respondent was a friend of the complainant's mother who moved into the home of the complainant and her mother as a result of a back injury. Immediately after moving in the respondent made improper advances to the girl, who was some 14 and a half years old. Eight occasions of sexual intercourse took place and in each instance the complainant was a willing participant, although there was at some times an indication that she was unenthusiastic about it, and she subsequently felt that she had been taken advantage of.

The respondent there had no prior convictions, and, as well as having a reasonable work record, he was initially sentenced to six months' imprisonment with a recommendation for parole after six weeks. The Attorney-General applied for an

extension of time within which to appeal against the inadequacy of that sentence, but the Court of Appeal refused his application. It is perhaps doubtful, in view of the nature of the application and the way in which the matter came before this Court, whether very much reliance can be placed on the result in that case.

It should, however, be noticed that the maximum penalty for this offence was increased from five years to 14 years with effect from the 1st of July 1997. Two of the cases, that is Poonkamelya and Snow, to which I have referred, were convictions in respect of offences committed before that date, and so were subject to what was then the lesser penalty - lesser maximum penalty of imprisonment for five years. Queen v. Ray was one that arose after that increased maximum penalty came into effect in July 1997; but it would appear, so far as one can see, that the change in maximum was not referred to the Court of Appeal in that case, which may be why the Court relied on Poonkamelya as a case which was still of utility in arriving at an appropriate sentence in cases of this kind.

It is, however, necessary that we should take notice of the increase in penalty. In my view it has the effect that none of the three cases mentioned is capable of being regarded as an entirely satisfactory indication of the current attitude of this Court to offences of this kind, or of what it should be.

Coming back more specifically to the facts in this case, the

undesirable features that militate against the application in this case include the fact that the applicant was in a position of some seniority in what appeared to be a family unit and that the offence involved (as I think it did) an element of breach of trust.

The age disparity was quite considerable. The girl was older than the complainant in any of the other cases to which I have referred, but the applicant was 39 or 40 and it seems to me that the offence in question, that is unlawful carnal knowledge of a girl under 16, is one which is specifically designed to discourage older men from taking sexual advantage of girls under the age of 16.

The applicant's criminal history also goes against him; and to some extent I think the relationship between him and the complainant's mother introduces an additional element of seriousness to the offence.

In addition to noticing these features of the applicant's behaviour, the sentencing Judge observed that there was a lack of remorse in the applicant's attitude. He had, as I said, made a remark to the girl to the effect "who cares about the age difference". He also, it may be noticed, sought to have sexual intercourse with her again and it was her, rather than any action on his part, that led to their refraining from engaging in sexual intercourse once more.

This brings me back to the question at the basis of the application in this case. It is whether the learned Judge took no account or insufficient account of the applicant's plea of guilty. It is hard to believe that he took no account of it, but on the other hand there is no reference to the matter, as perhaps there should have been, in the course of his Honour's sentencing remarks.

If it had not been for the increase in maximum penalty to which we are bound to give effect, I would have been inclined to think that the head sentence of 12 months in this case was a little high and that it perhaps did not reflect the plea of guilty in this case. But it seems to me that that change in maximum penalty has produced the result that it is now difficult to say that the sentence in this case is excessive.

Even having regard to the plea of guilty, it was open to the learned Judge to impose a sentence of the duration of that which he did here without exceeding the proper bounds of the kind of penalty which both judicial discretion and the legislature says is fairly capable of being awarded in a case like this.

In short, I do not think that the judge's discretion can be seen to have miscarried. I would therefore refuse the application for leave to appeal.

DAVIES JA: I agree.

WILLIAMS JA: The matter which has caused me concern is whether or not the sentence in fact imposed properly reflected the plea of guilty. The plea of guilty in cases such as this is indicative not only of remorse, but it also means that the complainant girl is relieved from the necessity of giving evidence of the relevant events in open Court.

In my view in cases such as this the plea of guilty should always be reflected in a significant discounting. But given the increase in the maximum penalty to which Mr Justice McPherson has referred I cannot conclude that the sentence in fact imposed was manifestly excessive such as would warrant interference by this Court. I therefore agree with the order proposed.

DAVIES JA: The application is dismissed.
