[2002] QCA 65

COURT OF APPEAL

McMURDO P
WILLIAMS JA
PHILIPPIDES J

CA No 327 of 2001

THE QUEEN

v.

S Applicant

BRISBANE

..DATE 08/03/2002

JUDGMENT

THE PRESIDENT: The applicant who represents himself today was convicted in the Townsville District Court of one offence of rape. He was sentenced to two and a half years imprisonment with a recommendation for parole after two months.

He claims the sentence was manifestly excessive. He emphasises that he finds prison life stressful and he is on medication for his nerves. He also emphasises his age at 66 years and his prior lack of criminal history and asks us to consider making an earlier recommendation for parole.

The complainant, a 13 year old boy, and his father knew the applicant who lived nearby. The complainant occasionally did odd jobs for the applicant. On the 30th of March 2001 he went to the applicant's unit in a retirement village. The boy was sitting in a chair when the applicant lifted him out of the chair by the arms and despite the boy's protests carried him into the bedroom, threw him on the bed, locked the front door and closed the bedroom door.

He said, "No one will know, it won't hurt." He removed the complainant's and his own pants and smeared cooking oil, or margarine, which was in a container beside the bed, on his penis and the complainant's penis. The applicant had an erection and forced the complainant to suck his penis holding his head with his hand. He then sucked the complainant's penis.

The complainant unsuccessfully attempted to push the applicant away. While sucking the complainant's penis the applicant attempted to digitally penetrate the complainant's anus, however, the complainant pushed the applicant's hand away.

The applicant bit the complainant on the penis causing considerable pain. The applicant stood up, masturbated and ejaculated on the leg of the complainant, saying, "You'd better not ring the police." The complainant dressed himself and road off on his bike, but before reaching home dialled 000 and made a complaint.

These facts were not contested at sentence.

Police attended the complainant's residence late - later that day and took possession of a number of items. The applicant denied any impropriety and declined to be interviewed.

The applicant's conduct now comes within the extended definition of rape, which relevantly includes penetrating the mouth of the complainant with the offender's penis.

Before 27 October 2000 such conduct constituted the offence of indecent dealing, punishable by up to 10 years imprisonment, or indecent assault with a circumstance of aggravation punishable by up to 14 years imprisonment. The offence charged here is now punishable by life imprisonment.

The applicant pleaded guilty on an ex officio indictment. He was 66 years old at sentence. He had a good work history, including five years service with the Australian Army, of which 11 months was spent in Vietnam on active service. He has no prior criminal convictions. As a result of this offence he was evicted from the retirement village in which he lived. It seems the applicant's conduct was fuelled by his consumption of a quantity of home brewed alcohol.

The sentence proceedings were adjourned on 26 October 2001 and the Court ordered a pre-sentence psychological report.

The sentence hearing resumed on the 11th of December. Psychologist, Mr Zemaitis reported that the applicant attempted to minimise his involvement in the offence and to place blame on his 13 year old victim. The applicant was married from 1956 to 1966 and has two adult children. He insisted this was the first time he had been sexually involved with a male. Mr Zemaitis formed the view that the applicant was not open and transparent in answering some questions. The applicant showed no remorse for his behaviour and had no insight as to the likely consequences of it upon a 13 year old youth. The applicant pleaded guilty when he became aware that the complainant had semen on his leg.

The additional pre-sentence report prepared by a Community Corrections Officer confirmed aspects of the psychologist's

report and the defence submission that the applicant was a heavy drinker at the time of the offence.

The tendered victim impact statement recorded that the complainant was sore and bruised from bites and scratches around his genital and anal area. He could not sit properly for days, he was scared, shocked and hurting. He felt dirty and angry, and could not sleep at night. He would not let anyone touch him. He will never forget this act. He has received counselling and has been referred to a psychiatrist. He avoids the company of other males unless females are present. He has declined to go to boarding school. He has been teased by his peers in the small community in which he lives. He has stopped playing contact sport because he dislikes being touched. He has great difficulty sleeping and he no longer does odd jobs for people. He feels he cannot trust even his family and friends.

The serious aspects of this offence are that the applicant locked the door of his home and used a degree of force to commit the offence in circumstances where the child was plainly unwilling. He took advantage of a vulnerable youth who had reason to feel safe in the applicant's home because his father knew the applicant. Some force was used. Although not seriously physically injured, the offences have had a significant effect on the complainant. The applicant has shown no remorse.

In his favour are his early plea of guilty by ex officio indictment, his prior good work record and his lack of convictions.

The respondent submits that the sentence was, in fact, grossly lenient because the legislature now regards this conduct as rape. This is not an Attorney's appeal. This case, where the applicant is unrepresented, is not the appropriate venue to deal with that contention. It is sufficient here to consider only the essential question, namely whether the sentence here was manifestly excessive.

Comparable sentences imposed for offences of indecent dealing (punishable by a maximum of 10 years imprisonment) or indecent assault with a circumstance of aggravation (punishable by up to 14 years imprisonment) are of limited assistance because this is an offence of rape punishable by life imprisonment. The case of R v. Goulding [1994] QCA 276 CA No 154 of 1994 delivered 3 August 1994 does, however, support the sentence imposed here. See also R v. Biffin [1999] QCA 312 CA No 171 of 1999, 5 August 1999 which has some features of comparability. These cases demonstrate that the sentence imposed here was certainly within the appropriate range, or at least was not manifestly excessive.

The mitigating factors have been reflected appropriately in a moderated head sentence and an earlier recommendation for parole.

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

WILLIAMS JA: I agree.

PHILIPPIDES J: I agree.

THE PRESIDENT: The order is, the application for leave to appeal against sentence is refused.
