[2002] QCA 106

COURT OF APPEAL

McPHERSON JA
WHITE J
HOLMES J

CA No 8 of 2002

THE QUEEN

v.

S Appellant

BRISBANE

..DATE 20/03/2002

JUDGMENT

HOLMES J: The appellant was arraigned on 26 March 2001 and pleaded guilty to one count of indecent dealing with an intellectually impaired person under care and one count of carnal knowledge of an intellectually impaired person under care.

His appeal against conviction was not lodged until 21 December 2001. Consequently, he requires an extension of time before that appeal can proceed.

The allegation in respect of the indecent dealing count was that the appellant procured the complainant, an intellectually impaired young woman, to perform fellatio on him. Alleged sexual intercourse following that event is the basis of the carnal knowledge count.

The Crown case was set out in a precis tendered on the appellant's sentence. The complainant was a 21 year old woman suffering from what was described as a moderate degree of intellectual impairment. She resided at a residential care service and required 24 hour care but was able to undertake weekend visits to her mother, the de facto wife of the appellant.

Initially the complainant told a support worker that the appellant had had sex with her. She was interviewed by police and confirmed the incidents, the subject of the two counts I have outlined.

She said that the appellant had told her not to reveal that he had sex with her; if she did she would not be allowed to visit her mother.

Sheets from the appellant's bed were found to contain DNA from the complainant likely to be from vaginal or oral mucous. The appellant was interviewed by police. His account, according to the precise, was that he had woken to find the complainant jumping up and down in his erect penis. He conceded that he had ejaculated inside her vagina.

As I have said, the appellant pleaded guilty to these two counts. That plea having been offered, the Crown entered a nolle prosequi in respect of the third count of carnal knowledge. However, for various reasons the sentence of the appellant was adjourned.

He subsequently made application to the Court to vacate his pleas of guilty. In essence, his grounds for that application were that he had pleaded guilty because he had been advised that he would get a lighter sentence by doing so and that the time he would spend in actual custody would be only 12 months. He was anxious, he said, to ensure that it was no longer, so that he would be able to care for his partner who suffered from cerebral bleeding and for a disabled uncle for whom he had responsibility.

In one of his affidavits filed on the application to vacate

the pleas of guilty, he said he believed himself to be entering the guilty pleas on the basis identified in his interview, that is that he had woken to find the complainant bouncing up and down on him.

However, under cross-examination in the course of the application, the appellant conceded that he had been aware that the essence of what he was pleading guilty to was the allegation that he had induced the complainant to suck his penis and the allegation of carnal knowledge. He also conceded that he understood that by entering a plea of guilty he would be indicating an acceptance of those allegations.

The barrister and solicitor who had represented the appellant accepted that he had not expressly admitted his guilt to them. However, he had twice signed instructions to them indicating his wish to plead guilty and his understanding of what was alleged. He did not raise with them prior to, or on the occasion on which he pleaded guilty, any desire to enter a different plea.

The learned Judge at first instance who heard the appellant's application for a vacation of the guilty pleas concluded there was nothing to suggest a miscarriage of justice.

In circumstances where there was no suggestion that the appellant had been subjected to improper pressure where he had received appropriate and, as it seems to me, accurate advice

from his legal representatives as to his poor prospects of success at trial, and the likely consequences in terms of penalty if he were convicted after a trial, and where he concedes that he understood the nature of the allegations as to which he was entering a plea of guilty, it is difficult to see how the learned Judge could have reached any other conclusion.

On the evidence, these were guilty pleas which were the result of a free choice by an accused who understood the charges to which he was pleading guilty. I would grant an extension of time to 21 December 2001 for the appeal against the conviction but would dismiss the appeal.

The appellant is also applying for leave to appeal against his sentence. He was sentenced to three years imprisonment in respect of the count of unlawful carnal knowledge and 18 months imprisonment in respect of the indecent dealing count. Both sentences were suspended after nine months with an operational period of three years.

It is to be noted that section 216 of the Criminal Code provides a maximum penalty for the crime of unlawful carnal knowledge of the person who was under the offender's care of imprisonment for life.

In this case, the Crown Prosecutor submitted, and defence counsel accepted, that an appropriate head sentence was three

years imprisonment, the sentence which was in fact imposed. I do not understand Mr Rafter here to be suggesting any different.

The learned sentencing Judge in my view adequately recognised the mitigating factors of the pleas of guilty notwithstanding the attempted withdrawal. The appellant's ill health and his otherwise good character is reflected in references by suspending both sentences after nine months. It is to be noted that the experienced defence counsel on the sentence submitted that the appropriate sentence was one of three years imprisonment to be suspended after eight months.

Mr Rafter here submits that the sentence ought to have been suspended after six months. In my view, the learned trial Judge's decision to suspend the sentence after nine months was an entirely appropriate exercise of his discretion and should not be interfered with.

I would grant leave to appeal against sentence and would dismiss that appeal also.

McPHERSON JA: I agree. The appeal against conviction and the application for leave to appeal against sentence should both be dismissed.

WHITE J: I agree also.

McPHERSON JA: The orders are as I have stated them.
