[2002] QCA 107

COURT OF APPEAL

McPHERSON JA
WILLIAMS JA
MUIR J

CA No 17 of 2002

THE QUEEN

v.

STEVEN GLEN HARPER Applicant

BRISBANE

..DATE 19/03/2002

JUDGMENT

WILLIAMS JA: This is an application for leave to appeal against a series of sentences imposed on the basis that they are manifestly excessive. Counts 1 to 4 on the indictment alleged sexual assaults against two females which occurred on the evening of 21/22 July 2001.

At the time the applicant was a patron at the Mossman Hotel and the two female complainants were 18 year old female employees at the hotel. Apparently they were each wearing miniskirts at the time which was probably part of their work attire.

So far as count 1 is concerned the complainant was collecting glasses in the public bar area when the applicant approached her from behind, placed his hand up the back of her miniskirt, and touched her on the vagina. She did not suffer any physical injuries. She was shocked and upset and apparently verbally abused the applicant for his conduct.

Somewhat later that evening, between 9 p.m. and 10 p.m., the other complainant was collecting glasses in the public bar area. Again she was approached by the applicant who placed his hand up the front of her miniskirt and touched her upper thigh area near her vagina. She jumped away and again apparently abused the applicant in strong terms. That constituted count 2.

Later that evening, between 10 p.m. and 1 a.m., exactly the

same thing happened involving the second complainant; that was count 3. Then at about 1.25 a.m. the applicant once again approached that complainant and on this occasion he placed his hand under the back of her skirt and, to use the word which appears in the record, he "grasped" her vagina.
That was count 4.

As a result of the trauma of those three incidents that second complainant resigned from her job. The applicant was evicted from the hotel by other hotel staff after the last of those offences. It appears that a complaint was made to the police, but it is not clear from the material when the complaint was investigated.

Count 5 on the indictment involved an offence which occurred on the 19th of August 2001. On that occasion the applicant had gone with others to a farm property. A group were sitting on the verandah of the home for some time and a nine year old girl was present. At some stage in the course of the evening it was noticed that the applicant was no longer on the verandah and the young girl's voice was heard coming from the garage. The adults went to the garage and there found the nine year old girl and the applicant in "quite close proximity". They were facing each other.

The applicant was seen to be holding the waistband of his tracksuit pants with one hand and masturbating himself with the other. He continued doing that for some 20 or 30 seconds

after the other adults arrived on the scene. The child was heard to point to the applicant's penis and say "Oh, yuk". The matter was reported to the police and an investigation immediately made.

Some six days later on the 25th of August 2001 the applicant was again in the Mossman Hotel. On that occasion he stood behind an 18 year old female who was seated at a poker machine. He was apparently quite close behind her so that she was virtually trapped between the applicant and the machine. The applicant had his right hand inside his shorts and appeared to be masturbating. The girl told him to stop but he continued. Another female helped that complainant extricate herself from the situation. Apparently the applicant continued his masturbatory conduct for some time.
He was charged with all the offences on the 4th of August. The sentencing Judge was asked to take into account a summary charge in relation to the incident of 25 August 2001.

The applicant was 32 years of age at the time, having been born on the 14th of June 1969. He had a minor prior criminal history involving stealing and the possession of a dangerous drug on two occasions which was dealt with in the Magistrates Court. He had no previous for similar offences.

A pre-sentence report was before the Court which indicated that the applicant had been educated to Year 12 and had a number of jobs in the local area. It indicated that he was a

suitable candidate for a community based order provided that a sex offender's treatment program was involved. The sentences imposed were six months imprisonment on counts 1 to 3 on the indictment, 12 months imprisonment on counts 4 and 5 on the indictment, and six months imprisonment on the summary charge; all the sentences to be served concurrently.

The principal contention by counsel for the applicant is that the sentence imposed failed to reflect the applicant's early plea of guilty. In his sentencing remarks the learned sentencing Judge did refer to the persistent conduct of the applicant. Indeed he used the expression "remarkably persistent".

As counsel for the respondent points out, care must be taken when considering comparable sentences because most of the comparable sentences which appear in the schedule involving sexual assaults were sentences imposed before the penalty for a sexual assault was increased from seven to 10 years from 1 July 1997.

The offence, count 5 on the indictment, involving the nine year old girl, alleges an offence against section 210(e) of the Criminal Code and the penalty for that was increased at that time from 10 years to 14 years. In my view count 5 is the most serious of the offences.

Counsel for the applicant referred the Court to the decision

of this Court in the matter of Alan Wayne Nelson, CA 527 of 1996, judgment 27 February 1997. In that case there were four counts of indecent assault between the 17th of August and the 7th of November 1993 involving a mature aged woman. The applicant had some prior convictions for offences of dishonesty. He was sentenced to 12 months imprisonment suspended after three months with an operational period of three years.

The Court held that in the circumstances that sentence was not manifestly excessive. I do not find that case of great assistance in resolving this particular application, partly because, as I have said, I regard count 5, the offence involving the nine year old girl, as the most serious, particularly coming, as it does, a few weeks after the other sexual assault counts and also being followed a few days later by another offence which involved masturbating in a public area.

In my view, particularly given the increase in the maximum penalty with respect to count 5, the learned sentencing Judge, were it not for the early plea of guilty, could well have imposed a sentence in excess of 12 months for that offence alone. In my view a sentence of 12 months imprisonment, though perhaps arguably towards the top of the range, nevertheless did duly reflect the early plea of guilty.

In all the circumstances I would refuse the application for

leave to appeal.

McPHERSON JA: I agree.

MUIR J: I agree.

McPHERSON JA: The order is that the application for leave to appeal is dismissed.
