[2002] QCA 141

COURT OF APPEAL

DAVIES JA
WILLIAMS JA
HELMAN J

CA No 352 of 2001

THE QUEEN

v.

S Respondent

and

ATTORNEY-GENERAL OF QUEENSLAND Appellant

BRISBANE

..DATE 16/04/2002

JUDGMENT

DAVIES JA: This is an appeal by the Attorney-General against an effective sentence of five years imprisonment with a recommendation for release on parole after serving two years imposed on the respondent in the District Court on 13 November 2001 for 32 offences of a sexual nature against young children. That sentence was imposed for 24 offences of indecent treatment of a child under 16 with circumstances of aggravation. Those circumstances were in each case that the child was under 12 and that he or she was under the respondent's care. There were three children, as I have indicated, who were the victims of those offences. The respondent was also sentenced to four years imprisonment for four offences of indecent dealing with an intellectually impaired person then under his care. He was sentenced to three years imprisonment for attempting to sodomize the same person who was then under 18 years of age. He was also sentenced to two years imprisonment for indecently dealing with the same person who was then aged between 15 and 16. They comprised the total of the 32 offences to which I have referred.

The offences for which he was sentenced to two years imprisonment, three years imprisonment and four years imprisonment were committed when the respondent was aged between 41 and 44 years of age and the offences for which he was sentenced to five years imprisonment were committed some years later when he was 53. He was 54 at the time of sentence. He has no prior criminal history.

There is little point in setting out in detail the circumstances of these offences. The respondent was a foster parent of each of the victims. Their vulnerability and his duty were both high. Consequently, the seriousness of these offences cannot be doubted. Moreover, whilst there were undoubtedly some commendable aspects of the respondent's conduct once it was exposed, it came to light only when he was confronted by his wife who suspected there had been some misbehaviour involving at least one of the two girls aged seven and four, the subject of most of the offences for which he was sentenced to five years imprisonment. Nevertheless, there were substantial mitigating factors in this case.

The first of these was that, although the offences involving the girls came to light only because of the respondent's wife's suspicions, once she had confronted him he made a complete confession to the police about these and other offences about which, had he not confessed, there may never have been any evidence to convict him. His committal then proceeded as a full hand up committal and he pleaded guilty at the first opportunity.

The second substantial mitigating factor in the present case is that, according to the report of Dr Curtis, a psychiatrist, which the learned sentencing judge plainly accepted, the respondent does not exhibit the typical psychological denial of a typical and compulsive paedophile offender. He has exhibited genuine remorse, he has a

genuine drive to accept his punishment as administered by the court and he has an excellent prognosis for recovery from his current depressive condition. But most importantly of all, I should say, he is most unlikely to re-offend.

The question then is whether, having regard to those mitigating factors, the serious nature of these offences over quite a substantial period of time rendered an effective sentence of five years imprisonment with a recommendation for parole after two years one which was manifestly inadequate.

The learned sentencing judge referred to decisions of this Court in R v. Benetto, CA No 367 of 1997, 2 December 1997. And we were also referred here to the decision of this Court in R v. Bettridge, CA No 51 of 1998, 27 May 1998. The first of those cases his Honour thought was of particular assistance, although he said that there were features of that case which made it slightly more serious than this. In my opinion, his Honour was correct in that conclusion. R v. Benetto involved 58 counts involving 42 separate acts against eight complainants, six of whom were under 12 and two of whom were aged 12 to 16, although it must be said that the victims in that case were all a little older than the young victims in this case. Moreover, although that was a guilty plea also, there was no express mention in the case of remorse in contrast to this case. That case, like this, involved a position of trust. There was no psychiatric evidence in that case, unlike this one, explaining the

behaviour of the offender. In the end, this Court reduced an eight-year sentence with parole after three and a half years to one of six years imprisonment with parole after two and a half years. However as counsel for the appellant has pointed out, the maximum sentence for these offences has increased since R v. Benetto and that must also be taken into account.

The other case relied on before this Court, R v. Bettridge, has some similarities to this case although, as Mr Thomas for the Attorney-General has pointed out, there are also some significant differences. One such difference is that 30 years had elapsed since the commission of the offences during which the offender had led a successful and productive life. There were, however, more serious aspects of that case in that the conduct of the offender involved what was said to be great cruelty towards the children including obtaining their consent to indecent behaviour by aggressive bullying and the acts which were involved in that case appear to have been more serious than those here. There were, in that case, four offences of indecent dealing involving three children. A sentence of seven years imprisonment was reduced to four years with a recommendation for parole after 18 months.

Mr Thomas, for the Attorney-General, sought to distinguish this case from R v. Bettridge and R v. Benetto, the latter of which is more closely comparable to this, on the basis that the offender here had an official position of trust as

undoubtedly he did. In my opinion, that factor alone is not a sufficient distinguishing factor. In the end, the question of trust and the seriousness of the breach of trust involves in the first place, the extent of the dependence of the child, the beneficiary of the trust, upon the person in the position of trustee and, consequently, the extent of the duty of that person and the responsibility of that person to the younger beneficiary. And secondly, it depends upon the degree of departure from that duty. They are common factors in all the cases involving breach of trust of which this is one.

Another factor which was pointed to by Mr MacSporran for the respondent is that, in the court below, the Attorney-General submitted for a sentence of seven years imprisonment with eligibility to apply for parole after serving two to two and a half years imprisonment. Mr Thomas could not point us to a case which would support a sentence of seven years imprisonment in a case of this kind.

It cannot be said, in my opinion, that the sentence imposed in the present case was a high one. In fact, when one considers the range, it would be between the lower end and the middle of that range. On the other hand, I do not think that, in the light of the cases which have been cited to us and the cases generally in this Court and the mitigating factors to which I have referred, that the sentence was manifestly inadequate.

I would therefore dismiss the appeal.

WILLIAMS JA: A head sentence of five years is within the appropriate range for the present offences given all the relevant circumstances of this case. It was conceded by the prosecution before the sentencing Judge that there should be eligibility to apply for parole after serving two to two and a half years of the sentence imposed.

In all the circumstances, it cannot be said that the sentences in fact imposed were manifestly inadequate. I agree with the reasons of Justice Davies and the order he proposes.

HELMAN J: I agree with the reasons of the learned presiding Judge and with the orders he proposes.

DAVIES JA: The appeal is dismissed.
