[2002] QCA 143

COURT OF APPEAL

McMURDO P
McPHERSON JA
HELMAN J

CA No 353 of 2001

THE QUEEN

v.

ROBERT HAYES MYERS

BRISBANE

..DATE 19/04/2002

JUDGMENT

THE PRESIDENT: The appellant was convicted after a trial of one count of maintaining a sexual relationship with a child under 16 years with a circumstance of aggravation and five counts of rape. The jury were unable to reach a verdict on an additional count of rape. The appellant was sentenced to 11 years' imprisonment on the maintaining charge and to eight years' concurrent imprisonment on each of the rape charges.

He contends that the guilty verdicts are unsafe as there was no logical or rational basis upon which the jury could have arrived at different verdicts. In his oral submissions he has expanded and touched upon other grounds. He contends that the convictions should be set aside and that the sentence was manifestly excessive.

The appeal against conviction:

The complainant was 14 at the trial and nine or 10 years old during the period of the offences, each of which was charged as occurring in the eight month period between 1 November 1996 and 1 July 1997. The first count was the offence of maintaining and the remaining offences were particulars of that count.

The complainant gave evidence that her parents had separated and she was living at a caravan park in suburban Brisbane with her mother. She was nine years old. The appellant also

resided in the caravan park. He was known as "the mad hatter" because he always wore a straw hat. She called him Rob. One day he asked her if she wanted a drink and she went into his caravan. He started to kiss her, putting his tongue in her mouth. He told her to take off her shorts, shirt and underwear and she obeyed. He took off his clothes. They had been watching a video, "Monster Trucks", and he rubbed her back. He told her to sit on his lap. He rubbed his penis around her vagina. The penis went into her vagina. He manipulated his penis with his hand. As his penis entered her vagina it hurt. He moved it around inside her vagina. She returned home at a pre-appointed time. These facts constituted count 2, the first offence to be committed.

Count 3 occurred in the following way. On one occasion she attended the Capalaba Shopping Centre with the appellant with her mother's permission. The appellant stopped on the way at a park near water, about 20 minutes or half an hour from the shopping centre. He got out of the van and came around to the passenger side of the car where she was seated. The sun was going down. He got in the car and they talked. He removed her shorts and underpants. She was sitting on his lap and he pushed her forward a bit. He pulled his own pants down some way and made her sit on his penis. His penis went into her vagina and really hurt. He rubbed his penis around. Another car pulled up and he pulled her pants up, adjusted his own pants and got out of the car. He returned to the driver's

seat and drove to the shopping centre. She had an ice cream cone at McDonalds and they returned home after 8.30 because the TV show, The X Files, had started.

She remembered the appellant driving her a short distance to her house on another occasion. He took her inside after unlocking a door with a key. He pulled her shorts and underpants down and commented on some bruises she had on her hips from playing. He rubbed them with tiger balm. He took his penis out of his pants and rubbed it around her vagina. He was wearing short stubby pants. He put his penis into her vagina whilst she was seated on his lap facing him. They were both sitting on a cane chair. When his penis entered her vagina it hurt. He asked if it hurt and when she said it did he desisted. This constituted count 4.

The fifth count, the count on which the jury could not agree, occurred in this way. The appellant drove her in his van to a catamaran. It was day time and there were lots of boats there. They picked up pine cones. She thought it may have been around Christmas time. She said that they were sitting under a "boat thing" and it was dark, she could not see much. There may have been a chair there. She said, "I don't remember much but I remember, 'cause it was dark I couldn't see much, the - yeah, the penis going into the vagina." She didn't think anybody else was in the space. She could not remember what she was wearing. She did not think her pants

came down. She could not remember how she was positioned. When asked how the appellant was positioned she replied, "It was dark." She couldn't see his state of dress. When asked what it felt like she said, "Like, hurt." The prosecutor asked her the leading question, "Obviously you felt his penis in your vagina", to which she responded, "Yeah". She said she could not feel anything else and she didn't think she felt him touching her anywhere else.

In cross-examination it was put to her that she attended the appellant's boat area and inspected a boat under construction covered by a poly tarp canopy making a tent- like structure. She agreed with this. It was also put to her that the only occasion she went to the area was when a large boat was being launched. She answered that she went another time but then qualified that answer with the words, "I think". She agreed there were other people around.

On another occasion she drove into some bushland with the appellant in his van somewhere near the Brisbane River along a dirt track. It was rocky with long grass. There were no other people around. There was a big cargo ship moving in the river. She saw a crab. The appellant called her over to where he was sitting on a rock, pulled her pants down including her underpants. He took his own pants down a bit and exposed his penis. He pulled her towards him and sat her on his lap and moved his penis around her vaginal area with

his hand. His penis went into her vagina, a car came down the track and he stopped quickly. His penis was inside her vagina for a shorter period than on the other occasions. He pushed her away, pulled her pants up and pulled his pants up. His penis hurt here whilst it was in her vagina. This constituted count 6.

The final offence, count 7, occurred at the Port of Brisbane when the appellant took her there during the day in his van. She saw big buildings and containers. He drove around for a long time and finally went down a track with big buildings on either side. He stopped in a bush area where there were no other people around. He came around to her side of the car and got in. He took her pants down a little and put her on his lap, initially facing towards the dash board and then towards him. He pulled his pants down a bit to expose his penis, he pulled her back onto him and his penis went into her vagina. She could feel his penis in her vagina and it hurt as he moved it around, but not as much.

On one occasion he said that if she ever told anyone he would kill her.

She did not give him permission to do these things to her and at the time she did not understand what he was doing.

At the time she was examined by a doctor, on 9 October 1999,

she had not had any sexual contact with anyone other than the appellant.

No complaint was made until 4 October 1999 when the complainant spoke to her mother and the police were contacted.

On 9 October 1999, as I have noted, the complainant was medically examined by Dr Crawford, a qualified paediatric specialist. She noted a healed tear to the hymen and that she was able to insert two fingers into the vagina. This was consistent with penetration by an adult penis or other object.

The complainant's mother gave evidence relevant to the chronology of the offences and confirming the opportunity for the appellant to commit these offences.

The appellant did not give evidence but he called Mr Robert Colclough, a resident of the caravan park at the relevant time. He knew both the appellant and the complainant. He did not notice any untoward conduct by the appellant towards the complainant and the relationship between the complainant and the appellant seemed appropriate. The complainant's mother formed a relationship with a male during this period and police were twice called to her caravan because of this male's behaviour. He recalled an occasion when the complainant watched a video called "Big Wheels" in the appellant's caravan in the presence of David Salvison, a friend of the appellant.

The door of the caravan was open and he was within 10 feet of the caravan whilst the video was watched. At the completion of the video Mr Salvison left with the video.

The complainant's evidence of the offences was therefore uncontradicted.

Her evidence on count 5, as is demonstrated by my outline of the facts, was more vague and less certain than her evidence on the remaining counts. It seems plain the jury were concerned about this: during the course of their deliberations they requested that the transcript of questions from the prosecution and defence concerning count 5 be provided to them. That evidence was read to them at 1.11 p.m. and at 3.30 p.m. they told the Judge that whilst they had a verdict on the remaining counts they could not reach agreement on count 5. The verdicts were then taken.

The learned primary Judge noted in his sentencing remarks:

> "There was one of the charges that the jury could not agree on, and that the Crown did not seek to proceed any further in respect of, where the events that the child alleged were suggested to have occurred in darkness and where the child's evidence was notably more vague than the evidence in respect of the remaining four counts. It certainly could be said, from where I sit, that the evidence on the count concerning which the jury were unable to agree was of a lesser standard than the evidence relating to the five counts in respect of which the jury convicted".

Having read the evidence, I respectfully agree with those observations. I am far from persuaded that the verdicts are

so inconsistent as to render the resulting convictions on the remaining counts unsafe or unsatisfactory. On the facts before it, this jury was perfectly entitled to accept the complainant's evidence on counts 1 to 4 and 6 to 7 inclusive, even though one or more jurors was not satisfied beyond reasonable doubt of the complainant's less certain evidence on count 5. The inability to reach a verdict on count 7 is not so inconsistent as to make the other six convictions unsafe or unsatisfactory. See McKenzie v. The Queen (1996) 190 CLR 348 at 365 to 369.

In his oral submissions the appellant emphasised that the penetration, according to the doctor, could have been by an object and that the medical examination occurred when she was 13 years old, not nine or 10 years old when the offences occurred. He emphasises there was no evidence that it was his penis which penetrated the girl. This was, of course, self evident to the jury and was pointed out to them in cross-examination of the doctor, no doubt in defence counsel's address, and by the Judge in his summing-up.

The appellant also contends that full penetration would have caused far more damage to the girl than was revealed in the medical examination. His difficulty, of course, is that there was no evidence on this point but, in any case, it is a matter about which the jury would have tried their collective commonsense and experience.

The appellant emphasises that there are many things that the complainant could not remember. Again, this was obvious to the jury who heard her evidence and was a matter plainly canvassed at the trial.

He particularly stresses the evidence of Mr Colclough and says that this evidence is inconsistent with the complainant's evidence on count 2. Mr Colclough's evidence, in my view, did not contradict the complainant's evidence on count 2 and may well have related to a completely different incident. In any case, even if it were the same incident (which I doubt), there is no reason why the jury were compelled to accept Mr Colclough's evidence.

The appellant also makes the standard general complaints about his barrister's conduct of the trial, but there is nothing in these unsworn allegations, raised for the first time today, to suggest either impropriety or incompetence such as to throw doubt on the jury's verdicts. In any case the appellant agrees that it was his decision not to give evidence at the trial.

None of the matters raised by the appellant in his articulate and forceful oral submissions make the verdict unsafe and unsatisfactory.

I would dismiss the appeal against conviction.

The application for leave to appeal against sentence:

The applicant was 59 years of age at sentence and 54 or 55 during the period of the offences. He has no convictions for like offences, although he has some minor convictions for offences of dishonesty in 1987 and 1993. He had quadruple bypass heart surgery in 1996 and it was submitted at sentence that he is not in robust health, although no medical reports or further details were given.

He does not have the mitigating factors of remorse or the willingness to facilitate the course of justice demonstrated by an early plea of guilty.

I note that these offences occurred before the coming into force of the 1997 amendments to the Penalties and Sentences Act 1992 (Qld), so that part 9A of that Act does not apply to the applicant's sentence.

Each of the six offences of which the applicant was convicted was punishable by up to life imprisonment. The applicant's offending is particularly serious because of the number of the offences, the fact that the complainant was aged only nine or 10 and the continuing nature of the offending. The applicant took advantage of the complainant's family situation and on one occasion took the complainant to a house, contrary to her mother's specific instructions. The applicant told the

complainant on another occasion not to tell anyone or he would kill her. The mother's victim impact statement indicates that the offences have had an enormous detrimental impact on the complainant.

The respondent, at sentence and on this appeal, contends that the appropriate range was a sentence of 10 to 12 years' imprisonment. The applicant, though self-represented on this appeal, was represented at trial and sentence and his counsel there contended the appropriate range was nine to 11 years.

The comparable cases of R v. Griffiths [2000] QCA 070, CA No 218 of 1999, 15 March 2000, R v. Adams [1997] QCA 237, CA No 158 of 1997, 8 August 1997, R v. McKenzie [1999] QCA 344, CA No 219 of 1999, 20 August 1999 and R v. Massey [1997] 1 QdR 404, demonstrate that although the sentence imposed here was not lenient, it was within a proper exercise of the sentencing discretion.

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

McPHERSON JA: I agree.

HELMAN J: I agree.

THE PRESIDENT: That is the order of the Court.
