COURT OF APPEAL

DAVIES JA
JERRARD JA
MACKENZIE J

CA No 22 of 2002

THE QUEEN

v

WAG

BRISBANE

DATE 16/08/2002

JUDGMENT

DAVIES JA: Justice Mackenzie will deliver his reasons first.

MACKENZIE J: The applicant pleaded guilty to two counts of unlawfully and indecently dealing with a girl under the age of 12 years. He was sentenced to six months imprisonment and probation for two years with a counselling condition. He had no prior convictions for offences of a similar nature. However, he had been fined for possession of drugs on two previous occasion and for street offences. He also had been placed on probation for two offences of unlawfully using motor vehicles.

At the time of the offences the applicant was in a de facto relationship with the complainant's mother. The girl was nine years of age. The complaint was not made to the police until over two years after the offences occurred.

The first offence occurred when the applicant was lying on a bean bag while the complainant's mother played a Play Station. While he lay there the complainant pressed her

vaginal area against his hand. She continued to do this for five to 10 minutes unless he moved his hand away. He told the investigating police that he knew that what he was doing was wrong and that he could get into trouble for it.

The second offence occurred some time later when the complainant child approached him and asked him to rub her vagina in the same way as he had in the first incident. The applicant said that he did so on the outside of her pants for about a minute during which time the complainant was pushing her vaginal area against his hand.

He said that he had previously been asked by the complainant child about noises made by her mother at a time when her mother and the applicant were engaged in sexual relations, which the complainant had interpreted as him hurting her, for which he had given an explanation.

The applicant subsequently left the relationship and said that one motivating factor was to extricate himself from a situation which he did not know how to handle. He subsequently told the mother of the complainant what had happened between him and the girl.

The applicant co-operated in the investigation by giving a record of interview, consenting to a full hand up committal and notifying that he would plead guilty at an early stage. He was committed for sentence.

The Crown Prosecutor submitted below that a term of up to 12 months imprisonment was within range for an offence of this level, but also said that by reference to a schedule of comparable sentences there were authorities that would support defence counsel's submission that a suspended sentence would also be within range. In response his Honour said that he always understood that imprisonment was appropriate except in exceptional circumstances for this kind of case.

In support of the application for leave to appeal it was submitted that the learned sentencing

Judge had erred in failing to find special or exceptional circumstances and not finding that the applicant had demonstrated rehabilitation in the period between the commission of the offences and the making of a complaint.

In that connection reference was made to the fact that during that period he had the ongoing care of the six year old son of the relationship. Reference was also made to a psychologist's report to the effect that the offences were an aberration, that he was unlikely to re-offend and that he had developed insights into his motivations, and that he would benefit from a program of therapeutic intervention.

Other circumstances relied on as special were the voluntary separation from the family unit, the disclosure of the offences and the co-operation involved in resolving the matter.

Reliance was placed on *The Queen v. Law ex parte Attorney-General* [1996] 2 Queensland Reports 63 for the proposition that where the time between the commission of the offence and the sentence is sufficient to enable the Court to see that the offender has become rehabilitated, or that the rehabilitation process has made good progress, it would be unfair not to mitigate the sentence.

It was submitted that the imposition of a short term of imprisonment rather than non-custodial sentencing options was counter-productive and inappropriate. It was submitted that the appropriate range was from imprisonment to be served by way of an intensive correction order to probation with appropriate conditions for counselling.

It was submitted before us that probation for two years should be substituted for the sentence actually imposed, having regard to the fact that between two and three months had been served of the period of imprisonment.

In support of a non-custodial sentence, the applicant particularly relied on the authorities of *R*

v. Jackson ex parte Attorney-General, Court of Appeal 206 of 2001, and *The Queen v. H ex parte the Attorney-General*, Court of Appeal No 57 of 2001. The former was a case where there was a lengthy period of abuse after the girl revealed it to a youth leader of the church they both attended. The offender confessed to the Minister and to his own wife. Later he was suspended from the church and his identity and behaviour were publicly exposed before the congregation and elsewhere.

The complaint to the police was not made until about 10 years after the complaint to the youth leader. Through the 11 years or so until sentence he attended a psychiatrist on a number of occasions and then a self help group for sex offenders.

The *Queen v. H* involved an offence of maintaining a sexual relationship over a period of 11 months with the offender's step-son. By the time of sentence the child was again comfortable in the offender's presence and his wife wished to restore the family unit. There was nothing to suggest that the child would have ongoing problems, or that the conduct would be repeated. The offender had completed over four months of an intensive correction order. The wife's attitude was given considerable weight by the Court.

Justice Davies with whom the President and Justice Thomas agreed said that had he been sentencing he would have thought a short period of imprisonment followed by probation would have been more appropriate, but because of the unusual circumstances and the proportion of the intensive correction order served, he declined to interfere. Each of those offences was an Attorney-General's appeal.

Reference was also made to *The Queen v. Payne ex parte Attorney-General*, Court of Appeal 195 of 1999, in the written submissions. That was a case of a single opportunistic offence by an offender who was 58 with no criminal history and a good work record and who was in ill health. It is plainly less serious than this case.

The respondent submitted before us that a custodial sentence of up to 12 months imprisonment was appropriate in the circumstances of the case and that the sentence was not manifestly excessive.

Particular reliance was placed on *The Queen v. L*, Court of Appeal No 373 of 1998, an Attorney-General's appeal where there had been two separate indecent dealings with a 10 year old boy occurring a couple of months apart by the offender who was a family friend.

A sentence of 12 months imprisonment, suspended after three months for an operational period of two years was imposed in lieu of a sentence of 15 months imprisonment wholly suspended for four years.

In that case the Chief Justice pointed out that it was not a case of casual isolated touching. The child had been sexually aroused for the offender's gratification and been emotionally affected in a not insubstantial way, which had been given little attention in the sentencing remarks. He concluded that because of the betrayal of trust and the substantial discrepancy in ages, reasonably minded members of the community would expect the offender to have to serve a term of imprisonment notwithstanding the other features in mitigation.

There was nothing specifically relating to rehabilitation in the matters put in mitigation in that case, but there was reference to the fact that the offender, who had been active in community organisations, had suffered from being ostracised as a result of his conduct.

Reference was also made to *The Queen v. M ex parte Attorney-General* [2000] 2 Queensland Reports 543, also an Attorney-General's appeal. The offences were committed on the offender's nephew on two consecutive days.

Justice McPherson said that while the appellant's condition arising from an abused childhood and recent personal circumstances merited sympathy and treatment, the factor of

rehabilitation was not the exclusive, or even the dominant consideration to be borne in mind.

Matters such as a personal and general deterrence and vindication of the right of the victim and the right of others to be protected from similar conduct had a proper place in the sentencing process.

A sentence of imprisonment for 12 months to be served by an intensive correction order was set aside and imprisonment for 18 months with a recommendation for parole after six months was substituted.

As Mr Justice McPherson observed, no two sentencing cases are ever precisely alike. He referred to the proposition in *The Queen v. Pham*, Court of Appeal No 435 of 1995, that other than in exceptional circumstances those who indecently assault or otherwise deal with children should be sent to gaol, was not an absolute rule, but should not be departed from without compelling reason.

The situation is that it is not inevitable in all cases that an offender be sent to prison for offences of this kind, and it is clear from the authorities which have been analysed that examples of custodial and non-custodial outcomes can be found.

The version of events upon which the appellant was sentenced displays opportunistic rather than predatory conduct, but it did occur on two separate occasions, the second of which was after the appellant had realised that engaging in that kind of conduct could get him into trouble.

While the case is one where it may have been that a sentence involving not having to serve time in prison may not have been able to be successfully challenged on an Attorney-General's appeal, I am of opinion, even giving due weight to the circumstances of the case, that the sentence imposed by the learned District Court Judge cannot be said to be outside a proper

sentencing discretion and that the application for leave to appeal against sentence should be refused.

DAVIES JA: I agree.

JERRARD JA: I agree.

DAVIES JA: The order is as indicated by Justice Mackenzie.