[2002] QCA 377

COURT OF APPEAL

de JERSEY CJ
DAVIES JA
JONES J

CA No 144 of 2002

THE QUEEN

and

L (Applicant)

BRISBANE

..DATE 23/09/2002

JUDGMENT

JONES JA: The applicant applies for leave to appeal against sentences imposed by the District Court following his pleas of guilty to a series of sexual offences against his step-daughter, his daughter and a young female friend of the step-daughter. Each of the complainants will be identified by initials.

The sole ground of the appeal is that the penalty is manifestly excessive. The offences are detailed in three separate indictments. Those offences and the respective penalties imposed are as follows:-

(i) Maintaining an unlawful relationship, of a sexual nature, with his step-daughter "A" a child under the age of 16 years - 16 years' imprisonment;

(ii) Maintaining an unlawful relationship of a sexual nature with his daughter "E" a child under 16 years of age - 14 years' imprisonment;

(iii) Four counts of aggravated indecent dealing with child "A" - seven years' imprisonment;

(iv) One count of procuring "A" to commit an indecent act, two counts of exposing "A" to an indecent act, three counts of unlawful carnal knowledge of "A" - 10 years' imprisonment;

(v) Two counts of aggravated indecent dealing with "E", three counts of exposing "E" to indecent acts, three counts of procuring or permitting "E" to commit indecent acts - 10 years' imprisonment;

(vi) Two counts of permitting himself to be indecently dealt with by the child "K" - five years' imprisonment.

All sentences were to be served concurrently.

Consequently, the focus is on the penalty of 16 years' imprisonment for the first mentioned offence. The applicant was born on 17 June 1959 and is now 43 years of age. These offences occurred between October 1996 and October 1993 at which time the applicant was between 27 and 34 years old.

The complainant "A" was born on 6 October 1997. She was a child of the applicant's wife whom he married believing she was pregnant to him. Subsequent tests showed that the child "A" was not the applicant's natural daughter but she was raised by him as though she were. "A" was seven years when the offences against her were commenced and they continued until she was well into her teens. She reported the matter to the police in August 2000.

The complainant "E" is the natural daughter of the applicant and was born on 4 August 1982. The eight offences against her commenced in August 1989 when she was seven years old. They continued until she left the applicant's home a year later upon the breakdown of his marriage.

The complainant "K" was born on 12 February 1980. She was a friend of "A" and visited the applicant's home to play during the years 1993 and 1994. "K" was 13 years of age when the two offences against her occurred. These offences consisted of the applicant calling "A" and "K' into his bedroom and asking them to masturbate him.

The particulars of each of the offences against "A" and "E" do not need to be detailed. Suffice it to say that the applicant followed a course of grooming these young girls to provide for his sexual gratification. This conduct included the manual touching of them and of "A" training her to masturbate him and of simulated intercourse between her thighs.

However, from the time "A" was 12 years of age the applicant had regular sexual intercourse with her until she left home. This occurred at various places around Australia in which they were residing at that time and lasted for a period of approximately six years. The break in the relationship between the applicant and "A" commenced when the applicant became friendly with a woman.

By this time, according to the information contained in a report of Mr Bryan Cooke, community corrections officer, Exhibit 3, "A" had become dominant in the relationship. "A" demanded that the applicant pay her $100 per fortnight and the applicant complied. The relationship, however, ended when the applicant actually commenced to cohabit with another woman.

The applicant was examined by Mr McIntyre, clinical psychologist, who opined that the applicant had little insight into his behaviour. The following passage appears from Mr McIntyre's report:

> "[L] demonstrated little insight into his offending behaviour. He described the details of the offences in a vague unspecific manner and although he understood what he had done must have caused grievance to his victims he

> failed to suggest specific ways his offending behaviour may have impacted on them."

The applicant does suffer some mental health problems which are described in the reports of Mr McIntyre and Dr Basil James, psychiatrist. Some of these problems find their aetiology in his own childhood experiences. He was subject to verbal and physical abuse at the hands of his mother and step-father and by a string of abusive boyfriends with whom his mother associated.

He was abused also by his older sister. His family life ended when he was 11 years old when he was kicked out of his home by his mother and step-father. He thereafter lived in the streets in Sydney and survived by stealing and working as a child prostitute. Dr James comments as follows:

> "Such experiences inevitably have profound effect on a person's developing personality in terms of self image and self worth, in terms of the way in which one construes the world and interacts with it. Undoubtedly, it would have had an impact on the degree to which psychological barriers develop to behaviours such as intergenerational sex."

It goes on:

> "In terms of the enduring relationship he had with his daughter and step-daughter, because of other earlier experiences and experiences of his later relationships the intergenerational boundaries would, as described to have been less functional and effective than had he not been so abused."

The report of Mr McIntyre, however, discloses that the applicant, at the time of psychological testing, was unreliable and manifested some degree of exaggeration in answers which he perceived to be of an advantage to him.

Nonetheless, it is clear that the mental health status of the applicant was compromised to some extent, manifesting some signs of schizophrenia, tendency to self harm, acute anxiety episodes and an affective disorder.

The applicant has expressed remorse for his actions but it seems with little understanding of the harm done to the personality development of his daughters. The respective victim impact statements outline the degree of this harm. The learned sentencing Judge approached the task with a view that this was "one of the worst cases of maintaining a sexual relationship" that he was aware of.

Since his Honour considered the appropriate sentence would be 20 years but having regard to discounting factors (lack of convictions and early plea) he imposed a penalty of 16 years. To establish that this penalty is manifestly excessive the applicant invites a comparison particularly of three decisions of this Court two of which were appeals by the Attorney-General.

In R v M, CA 136 of 1996, the offender pleaded guilty to 33 charges relating to his two sons and one daughter including three counts of maintenance of sexual relationships of a child under 16 years of age with circumstances of aggravation, two counts of incest, one of attempted incest and 20 counts of indecent treatment.

The highest penalty which was imposed related to maintaining a sexual relationship with his daughter for which he was imprisoned for eight and a half years with a recommendation for parole after 18 months. The offences against the children related to a number of incidents of the applicant masturbating himself in front of them and having them assist in the act. The more serious conduct against the daughter involved her being sexually intimate with him over a 15 month period commencing when she turned 14 years of age.

This conduct included indecent dealing, digital penetration and finally two acts of incest. Once these offences came to the knowledge of the offender's wife he went to the police and made a full confession. At sentencing the wishes of the family were explained to the sentencing Judge. The family had forgiven the offender. He continued to be supported by them and the family wished that he would be allowed to live with them.

Favourable psychiatrist and psychological reports were tendered. The offender was remorseful, had no prior convictions, had a good employment history and a background of himself being abused as an adolescent.

Despite the force of the family's wishes to have the offender leniently dealt with the Court of Appeal noted the need to mark the community's disapproval of such conduct in the interests of general deterrence and the Court then increased the penalty to 10 years' imprisonment.

This case has a number of distinguishing features quite apart from it being an Attorney-General's appeal which limits its usefulness here. The offending there was of a much lower order. The age of the complainant was higher when the unlawful conduct commenced. The period over which the more serious offences occurred was much shorter.

The next case relied upon was R v L, CA No 263 of 1998, also an Attorney-General's appeal. The case was concerned with one count of maintaining a sexual relationship with a child under 16 years of age over a period of one year. Other charges included 21 counts of indecent treatment of a child, 13 counts of taking a child for immoral purposes, one count of assault occasioning bodily harm.

The charges involve five boys between the ages of eight and 14 years. The offender was 50 years of age with a series of prior convictions for offences against young boys. He was described as a "committed paedophile" and his conduct was a serious example of continuing predatory conduct. He had a history of receiving psychiatric treatment and was himself an abused person. He was sentenced to eight years' imprisonment with a recommendation for consideration for parole after three years.

In an argument before the Court of Appeal the Crown conceded that the range for this offence was between eight and 10 years but sought a penalty at the higher end. This being an Attorney-General's appeal the appeal was refused but, again,

the case is of little value in assessing the penalty here because of the entirely different circumstances including the age of the complainant, the shorter duration of the sexual relationship and the general circumstances.

The final case relied on on behalf of the applicant in the submissions is Queen v R, CA No 126 of 2000 where the offender, on pleas of guilty, was sentenced to 11 years' imprisonment for maintaining a sexual relationship with a child under 12 years. There were associated offences including two counts of raping the child, three counts of unlawful carnal knowledge.

These offences occurred over a two and a half year period. The offender was then 39 to 41 years of age and the child 9 to 11 years of age. The child was the daughter of a friend whose association with the offender was such with the offender that the children called him "Uncle".

Before the Court of Appeal it was acknowledged that the range for these offences in the particular circumstances of the case was 10 to 12 years so there was no complaint of the head sentence being manifestly excessive. Rather, the appeal was concerned with the automatic declaration of serious violent offender because of the length of the term. Allowing for the effect of that declaration in all the circumstances, including the offender's prior conviction for sexual offences, the Court of Appeal did not interfere with the penalty.

Again, the circumstances are not comparable with the appeal before us by reason of the offender's conduct being intermittent and opportunistic rather than, as here, committed regularly over a prolonged period in the family home. The mitigating circumstances in that case were also more compelling than those that exist here.

The arguments raised on behalf of the appellant demonstrate yet again the difficulty of making comparisons between cases, the difficulties referred to by Thomas Justice in R v. H [2001] QCA 167. That case was particularly relied upon by the Crown before us. There the offender was sentenced to 17 years' imprisonment for conduct of gross sexual misconduct against three children spanning 16 years.

The unlawful conduct against the daughter commenced when she was five to six years of age. It commenced with touching, including digital penetration, escalated to oral sex and ultimately to sexual intercourse. Full scale intercourse commenced when the child was nine years of age. In his reasons Justice Thomas expressed the view that the case was "close to the worst category of such offences". He thought the commencing level applied by the trial Judge of 20 years was high but not outside the range. The circumstances of mitigation reduced the penalty to 17 years.

The significant distinguishing feature between that case and the present is that in R v. H there was an extraordinary level of violence perpetrated against members of the family over a

long period of time. On one occasion the offender said to the daughter, "Sleep with me or I'll kill your mother." When she refused he continued to hit her in the head and face until her mouth filled with blood. She sustained a hairline fracture to her ribs and a broken wrist. Despite having inflicted these injuries, he had sexual intercourse with the girl.

Similar remarks can be made with respect to the case of R v. P [2001] QCA 188 which involved maintaining a relationship with a number of boys over a long period of time. In my view, it does not help to repeat other examples which go on to illustrate the worst category of cases and their comparisons with this case, but I should, at least, make passing reference to other cases relied upon by the prosecution, particularly The Queen v. S CA No 316 of 1993 where the offender was sentenced to 15 years' imprisonment and the case of R v K CA No 13 of 1991 where again the penalty of 15 years' imprisonment was not disturbed.

In all the circumstances here, there are few redeeming features for the applicant. It is not said that he used violence against the complainants throughout this period of unlawful conduct, but that was not necessary because of the long period of grooming to which he subjected, particularly the daughter A, to prepare her for the demands which he made on her in her teenage years. This has had a profound effect upon her as is demonstrated by the remarks in her victim impact statement.

But, despite those effects, the comparison with the case of R v. H, it did seem to me that the starting point of 20 years was high, but when the mitigating factors are taken into account the ultimate penalty of 16 years' imprisonment, whilst it remains at the high end of the permissible range, cannot be said to be outside the range in which a proper exercise of a discretion would occur.

There is also the fact when comparing that penalty with the decisions in more recent cases that the applicant here was not affected by the consequences of an automatic declaration of being a serious violent offender. In the end result he will be eligible for parole after serving midway in his sentence and that makes his penalty significantly less than those to which the Crown has made reference, particularly the case of R v. H. In all the circumstances then, I would dismiss the application.

THE CHIEF JUSTICE: I agree.

DAVIES JA: I agree.

THE CHIEF JUSTICE: The application is refused.
