[2002] QCA 378

COURT OF APPEAL

McPHERSON JA
WILLIAMS JA
HELMAN J

CA No 201 of 2002
DC No 30 of 2002

R

v

KAI **Applicant**

BRISBANE

DATE 24/09/2002

JUDGMENT

McPHERSON JA: Justice Williams will give the first judgment.

WILLIAMS JA: The applicant pleaded guilty in the District Court at Townsville to three counts of indecent dealing with a circumstance of aggravation, two counts of unlawful carnal knowledge with a circumstance of aggravation, eight counts of incest and one count of maintaining a sexual relationship with a child.

The complainant girl was aged nine years when the first offence occurred and the offences extended over a period of six years. The applicant was the complainant girl's stepfather and was aged between 39 and 45 years when the offences occurred.

The applicant and the complainant girl's mother had been in a de facto relationship for some time before they married in about February of 1995. The first of the offences occurred at about the time that that marriage occurred.

The particulars of the offences as detailed in the record show that initially there was touching on the breasts and vaginal area over clothes. That extended then to actually touching breasts and vagina and then the first act of carnal knowledge occurred in the year 1996. Later in the year 1996, the first incident of oral sex occurred, that was the applicant performed oral sex on the girl. Subsequent offences involved both vaginal intercourse and oral sex performed by each on the other.

A serious aggravating circumstance was that the complainant girl gave birth on 24 February 2001 to a baby of which the applicant was the father. That would appear to accord with the evidence that on 1 April 2000 the applicant and the girl stayed at a motel in Charters Towers and intercourse then took place; that would appear to be the approximate date of conception given the birth of the child.

The material discloses that on a number of subsequent occasions the applicant had intercourse with the girl, the last occasion being on or about 25 October 2000 when she would have been between five and six months pregnant. In my view, the fact that the applicant pleaded guilty to some five counts of incest after the girl obviously was pregnant shows that he had little or no remorse with respect to his conduct.

I should also record that it was because of a change in the law in 1997 which deemed a stepdaughter to be a lineal descendant that there are eight counts of incest after that date whereas on the two occasions on which intercourse occurred prior to then the charge was one of unlawful carnal knowledge with a circumstance of aggravation. All of those charges carried as the maximum penalty that of life imprisonment.

I would also record that the complainant girl was cross-examined at committal. It may be that it was not extensive cross-examination but, nevertheless, she was cross-examined at that stage.

The actual plea of guilty was to an ex officio indictment and the applicant is entitled to some discounting because of that; but, in my view, for the reasons that I have already given, primarily relating to the conception of the child and the continuation of intercourse after it was known that the girl was pregnant, little additional discounting can be given for remorse.

The applicant has no previous convictions but that, of course, does not detract from the seriousness of the offences to which he pleaded guilty on this occasion.

Before the sentencing Judge a schedule was admitted into evidence setting out numerous cases where the charges were broadly similar to those with which the Court was concerned on this occasion. Additionally, in this Court, reference has been made to a number of other decisions of this Court.

Perusing all of those decisions indicates that there is a broad range for offences of this type from seven to 13 years with some exceptional cases justifying sentences in excess of 13 years. That, to my mind, demonstrates that the sentence of 10 years' imprisonment imposed in this case is within the range. The comparable cases would certainly support a head sentence of 12 years if there was no plea of guilty and a discounting to 10 years for the plea of guilty in my view is appropriate.

Given all that I have said, I am not persuaded that the sentence of 10 years was manifestly excessive and, in the circumstances, I would refuse application for leave to appeal against sentence.

McPHERSON JA: I agree. Mr Kelly, who appears for the Crown on this hearing, has rightly, in my opinion, stressed the seriousness to the complainant of her pregnancy to the applicant as a consequence of the commission of these offences. It has burdened her future with the responsibilities of a mother at a very early age to say nothing of the effect on the life and future of the baby who was conceived and born in these unhappy circumstances.

I agree with what Mr Justice Williams has said and with the order he proposes.

HELMAN J: I agree. The complainant's victim impact statement, which was before the learned sentencing judge, shows that the complainant now cannot afford to work because she has to take care of her fourteen month old daughter, and that she is on a pension because she had to drop out of school to support her baby. The statement also shows other effects of the applicant's heinous conduct.

I agree with everything Mr Justice Williams has said and with what Mr Justice McPherson has said. The application should be refused.

McPHERSON JA: The application for leave to appeal against sentence is dismissed.