[2002] QCA 369

COURT OF APPEAL

WILLIAMS JA
JERRARD JA
HELMAN J

CA No 159 of 2002

THE QUEEN

v.

GARRETT TIMOTHY BIELEFELD Applicant

BRISBANE

..DATE 19/09/2002

JUDGMENT

MR N V WESTON (instructed by Legal Aid Queensland) for the applicant

MR M J COPLEY (instructed by the Director of Public Prosecutions (Queensland)) for the respondent

HELMAN J: On 29 April this year the applicant pleaded guilty before the District Court at Southport to one count of abduction (taking away the complainant girl who was then nine years old with intent to know her carnally), one count of sodomy of the girl, and one count of unlawfully and indecently assaulting her by penetrating her vagina with a finger. The offences were all committed on 19 September 2000 at the Gold Coast, Queensland.

The learned judge sentenced the applicant to imprisonment for eight years for the sodomy and, as part of the sentence, declared the applicant to be convicted of a serious violent offence. For each of the other two offences he was sentenced to imprisonment for two years. The applicant had been subject to a probation order made in the Southport District Court on 17 February 1999 in relation to offences of unlawful use of motor vehicles and other property offences. His Honour resentenced the applicant for those offences. He imposed sentences of imprisonment for nine months in each case. All of the sentences imposed by his Honour are to be served concurrently.

The applicant seeks leave to appeal against the sentence imposed for sodomy asserting that the declaration makes the sentence manifestly excessive, and that, in making it, his

Honour made an error of law. The argument advanced on behalf of the applicant at the hearing of the appeal focussed on the first ground. I should say at the outset that if his Honour erred it was in exercising his sentencing discretion and that otherwise no error of law is evident.

The applicant then aged nineteen came upon the complainant near the Nerang State Forest. She had injured her foot. He offered her a lift to her home on his motor cycle. She accepted. The applicant rode some distance past her house, stopped and carried her into the bush and there assaulted her. The learned judge described the assaults in this way:

> "The prisoner removed his own pants as well as the pants of the young complainant. He placed his hand over the girl's mouth, no doubt to prevent her from screaming and yelling for help, and the child experienced difficulty in breathing. She felt the prisoner's penis enter her bottom. She tried to say something to him but was unable to do so. The child was then pulled back and the prisoner placed a finger in her vagina while still penetrating her anus with his penis. When the prisoner had finished committing the sexual offences, he pulled his own pants up and shook the motor cycle in an apparent attempt to assess the amount of petrol in the tank. The girl was pushed to the ground shortly before the prisoner made his escape.
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> The child waited for several minutes before running home and telling her mother. Her condition was described by her mother as shaking, as white as a ghost, crying and her clothes were dusty. The child's father was contacted and the police duly notified."

On behalf of the applicant, it was argued that his Honour's sentence fails to maintain parity with sentences imposed in comparable cases and so the applicant, it was argued, has been treated unjustly because his sentence is harsher than the case

warrants. As I have indicated, no complaint was made about the sentence of imprisonment for eight years, it being the declaration that is the focus of the applicant's complaint.

It was submitted that the serious violent offence declaration was not warranted when regard is had to a number of matters. They were: the lack of any prior convictions for sexual offences of violence; the applicant's youth both at the time of the commission of the offence and at the time of sentence; the very limited degree of violence employed by the applicant in committing the offence - most notably the absence of any blows to the child; the absence of any threats uttered by the applicant; the absence of a weapon; the fact that the sexual acts were relatively brief and that the applicant did not ejaculate; that the obstruction of the child's breathing was not deliberately done, but was rather a consequence of the applicant's attempting to stop the complainant calling out; that the offence was an opportunistic one in that the applicant only formed the intent to commit the offence once the complainant had mounted the motor cycle and put her arms around him; and that the applicant had not previously been sentenced to a term of imprisonment.

It may be accepted that there is some substance in each of those submissions. It is true that there was a limited degree of violence employed by the applicant and there is no evidence of threats uttered by the applicant. On the other hand, the complainant was a very young child and it is obvious that the applicant used the force necessary for him to achieve his

object. The submission that the obstruction of the child's breathing was not deliberately done is possibly correct, but the important point, I should have thought, was the fact of the obstruction rather than the motive for impeding her breathing.

Taking into account the youth of the complainant, her abduction, and the fact that she was subjected simultaneously to suffocation and violation in both anus and vagina, I should have thought that even if one gives full weight to the matters relied on by the applicant his Honour was justified in making the declaration. Added to those considerations, there must be the entirely predictable effects of the events in question on the complainant. In a victim-impact statement which was placed before his Honour, the complainant's mother described the effects on her daughter. She concluded by saying that her daughter

> "used to be a bright, cheery, outgoing little girl who has lost her childhood innocence. No more does she like to be on her own, riding her bike or even going to the local shop.
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> She still cries herself to sleep at times and waking up in the middle of the night screaming, 'Why did he have to do it to me?'
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> Never again will she look at young people the way she used to. She has no trust left."

We were referred to some cases where, it is said, the facts were comparable with those of this matter. The first matter referred to in the oral submissions made on behalf of the applicant was R. v. Basic [2000] Q.C.A. 155. In that case, a sentence of imprisonment for eight years with the declaration

the subject of this application was imposed on a thirty-one-year-old man who had raped a nineteen-year-old victim. In that case, the offender had a significant criminal history which included a prison sentence for trafficking in heroin. The rape in question in that case was an anal rape. Serious threats were made to the complainant, and it is said that therein lies one of the distinguishing features of that case.

But it must be borne in mind that this case involves a very young victim, and, although there is no suggestion that threats were used to her, the overall effect of the attack on her was as serious, I should have thought, as that on the nineteen-year-old victim in the case of R. v. Basic.

Another case referred to was R. v. P [2000] Q.C.A. 271 in which an offender was convicted of committing sodomy and other sexual offences upon a ten-year-old boy who was in his care. A sentence of nine years' imprisonment with a serious violent offence declaration was held not to be manifestly excessive, and it was held that the applicant's prior convictions for like offences was an important feature of the case justifying the sentence. It is pointed out that, in this case, the applicant had no prior convictions for offences of the kind which are the subject of this application, but it is not without significance that, at the time when he committed these offences, he was subject to a probation order which he clearly breached in committing the offences. It is also, of course, relevant that the sentence imposed in R. v. P was for imprisonment for nine years rather than for eight.

Taking all of the circumstances into account, the gravity of the attack on the complainant and the distinguishing features between this case and the cases to which we were referred, I am not persuaded that it has been demonstrated that this case warrants the intervention of this Court. I am not persuaded that the sentence imposed by his Honour was manifestly excessive and I should therefore refuse the application.

WILLIAMS JA: The main thrust of submissions by counsel for the applicant was that the degree of violence used in committing the offences in question was not so great as to warrant the adding of a serious violent offence declaration.

As with the offender in Basic [2000] QCA 155, the offender here used sufficient force in order to achieve his purpose, namely to rape the female in question. It was only because he was more readily able to overcome any resistance from a nine year old that the applicant here did not have to resort to a greater degree of force or the use of threats of physical violence.

In the circumstances, I agree with all that has been said by Justice Helman and with the order he proposes.

JERRARD JA: I agree.

WILLIAMS JA: The order of the Court therefore is application refused.

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