[2002] QCA 409

COURT OF APPEAL

DAVIES JA
JERRARD JA
HELMAN J

CA No 219 of 2002

THE QUEEN

v.

M. Applicant

BRISBANE

..DATE 03/10/2002

JUDGMENT

MR M GREEN (instructed by Legal Aid Queensland) for the applicant

MR M D NICOLSON (instructed by the Director of Public Prosecutions (Queensland)) for the respondent

HELMAN J: On 14 June this year the applicant, a truck driver now aged sixty-one, pleaded guilty before a judge of the District Court at Brisbane to the offence of unlawfully and indecently dealing with a girl under the age of fourteen years at Brisbane in December 1987. The learned Judge sentenced him to imprisonment for three years and recommended that he be considered for parole after he had served nine months of the sentence. He applies for leave to appeal against his sentence complaining that it was manifestly excessive.

The girl was only four years old when the applicant molested her. He was forty-six. When the offence occurred the complainant was living in a household the other members of which were her mother and stepfather. The applicant, the stepfather's father, was on a visit, and, on an occasion when she was playing in her bedroom he came and said, "We're going to play a game. This is our game." He said, "You're my little princess. You'll always be my princess. Don't tell anyone or I'll come into your dreams." The complainant remembered being scared, but did not know what the applicant was talking about. She did not remember what happened in detail next, but certain parts stuck in her mind.

She remembered that she was put on the bed and he was aggressive with her. He undid his pants and said, "Touch my

willie." She said, "No, I don't want to", and he yelled at her saying, "Touch my willie", and so she did. He then took all her clothes off. She was naked on the bed and cross-legged. He then started to touch her between her legs, on her vagina. He was saying, "You're my little princess", and he kept saying it while he was touching her. He then moved away for a short time and came back. He told her to lie down and he said to her, "Look at me" and so she did, and he put something in her vagina. It hurt and she told him that it was hurting. He was moving the object around inside her and she cried and told him to stop. He just kept on saying, "Look at me." He was smiling the whole time. She estimated that it all went on for about twenty minutes and then something made the applicant stop and he put the object under the bed. He then told her to put her clothes back on and to sit on the floor and play. And then, before he walked out of the room, he said, "If anybody asks what happened say the boys next door poked you with a stick while climbing trees. Don't tell anyone or I'll come back in your dreams" or words to that effect. He then left the room, and she looked under the bed and saw a wooden spoon.

Soon after the event the complainant claimed that she was sore in the vaginal area and she was medically examined. The examination was at least a couple of days after the incident and it revealed a little bit of redness on the outside of the vulva. Otherwise her condition was normal. The complainant told the police who then investigated the matter that the neighbour's children may have poked her with a stick and poked

a stick into her vagina. She also told her mother a similar story, that the neighbour's children had poked a stick into her vagina.

The applicant himself was spoken to about the incident by the police at the time and he denied touching the complainant in any way. He agreed to move from the family house and the complainant then appears to have blocked the memory of the incident out for a number of years until she was about sixteen years old, and then something triggered her recollection. She describes it as "having built a brick wall around it; and then, all of a sudden, the wall fell down". She then started having constant nightmares about it and she told her mother about it then.

The effect on the complainant is set out in some detail in the victim impact statement that was before the learned sentencing judge. It shows that since the assault she had found it increasingly hard to trust people. She had had physical and emotional breakdowns, often resulting in self harm. The memory of what happened continues to torment her, and she suffers from depression, anxiety, and panic attacks, although she has had two and a half years of counselling.

She has vivid nightmares and it has had an adverse effect on her social life, her ability to complete her schooling, and on her employment prospects. She concludes her victim impact statement by saying:

> "I have never felt good about myself or anything that I've done. I am hoping that after this court case I will have closure and be able to move on with my life. All I want is to be happy again and not to have to worry about it any more. I know that I will still be receiving counselling for a few years to overcome my problems with self-esteem, confidence, self worth and depression."

The applicant has a history of having committed offences of this kind both before and after the incident the subject of this application. In 1983 he was convicted on two charges of aggravated assault on a female child in a Western Australian Court of Petty Sessions and fined $100 on each charge. Following that offence he committed this offence, and then he was dealt with in the Goondiwindi District Court on 28 May 1990 on four charges of unlawfully and indecently dealing with a girl under the age of fourteen years. On each charge he was ordered to submit to probation for three years. Following that, in the Moree District Court on 6 September 1993 he pleaded guilty to indecent assaults. The complainant in that case was a nine year old girl and he was sentenced effectively to a term of eighteen months imprisonment.

It is, of course, open to a Court to take into account not only prior convictions, that is convictions of offences committed before the offence in question, but also convictions of subsequent offences.

In R. v. Aston (No. 2) [1991] 1 Qd.R. 375, Cooper J., with whom Kneipp and Shepherdson JJ. agreed, said this:

> "Evidence of convictions and the sentences imposed for offences committed both before and after the offence for

> which sentence is to be imposed is both relevant and admissible when the sentencing discretion is to be exercised. Evidence of later convictions may be used to determine whether leniency ought to be exercised (see R. v. Hutchins (1957) 75 W.N.(N.S.W.) 75). Such evidence may also be used to determine the risk of recidivism, the prospect of rehabilitation, and, the connection, if any, between the offence for which the offender is being sentenced and the later offences for which the offender has being earlier sentenced." (p. 382)

In sentencing the applicant his Honour referred to the two prior convictions for indecently assaulting young girls, remarking that they were relatively minor, but also referred to the applicant's having been convicted of other sexual offences involving young girls. He also noted that the applicant had not committed any offences within the ten years prior to the imposition of the sentence. His Honour referred to the fact that the applicant was at the time in a position of trust and that the incident had caused the complainant serious psychological consequences. It is also, of course, relevant that the offences were accompanied by threats by the applicant.

It is said on behalf of the applicant that the sentence was manifestly excessive. First, that the range for this offence is up to two and a half years imprisonment and therefore the three year sentence is outside the range. We have been referred to a number of cases of the commission of similar offences but there are distinguishing features which show, in my view, that the range is not so limited, and that the head sentence in this case was within an acceptable range for such an offence. We have been referred to the cases of Ford (C.A.

no. 140 of 1987), Salcedo (C.A. no. 307 of 1989), and Ward (C.A. no. 54 of 1993). In those cases, it should be noted, the complainants were older than the complainant in this case, who, as I have said, was only four years old. It is also the case that the applicant's history is a relevant consideration when considering the range. I conclude that those cases do not suggest that the head sentence of three years was manifestly excessive.

It is said further that insufficient weight was given to the fact that the applicant had not committed further offences for a number of years. That appears to me to have been taken into account by his Honour in making the recommendation for parole after his serving nine months imprisonment. I do not think there is any substance in the submission that his Honour failed to consider that aspect of the case.

One important feature of the case which cannot be overlooked is the devastating effect that the incident has had upon the complainant, and that feature was taken into account by his Honour in arriving at the sentence he imposed.

Taking all of the circumstances of the case into consideration, I am not persuaded that it calls for the intervention of this Court and I should refuse the application.

DAVIES JA: I agree.

JERRARD JA: I agree.

DAVIES JA: The application is refused.
