SUPREME COURT OF QUEENSLAND

CITATION:	*R v Moffat* [2003] QCA 95
PARTIES:	**R** **v** **MOFFAT, Edwin John** (appellant/applicant)
FILE NO/S:	CA No 439 at 2002 DC No 12 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Cairns
DELIVERED EX TEMPORE ON:	11 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	11 March 2003
JUDGES:	de Jersey CJ, McPherson JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Dismiss the appeal against conviction** **Grant application and allow the appeal against sentence by suspending it for an operational period of two years after the applicant has served a term of six months imprisonment**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – CONSIDERATION OF SUMMING UP AS A WHOLE – whether the trial judge erred in directing the jury by saying 'if as reasonable people you have a doubt about the accused's guilt and you think your doubt is a reasonable one, then you have a reasonable doubt' CRIMINAL LAW – JURISDICTON, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – MISCELLANEOUS MATTERS – PLEA OF GUILTY, CONTRITION AND CO-OPERATION – GENERALLY – whether failure to plead guilty can be considered to increase sentence – whether traumatic effect on child of cross examination was impermissible taken into account

Siganto v The Queen [1998] 194 CLR 646, applied
R v Phuc Minh Pham (CA 435 of 1995), considered
R v Read (CA 178 of 1993), considered
R v T (CA 33 of 1994), considered

COUNSEL: M J Griffin SC appeared for the appellant/applicant
M J Copley appeared for the respondent

SOLICITORS: Legal Aid Queensland appeared for the appellant/applicant
Director of Public Prosecutions (Queensland) appeared for the respondent

THE CHIEF JUSTICE: I will invite Justice McPherson to deliver the first judgment.

McPHERSON JA: This is an appeal against conviction and sentence after a trial in the District Court arising out of a single count of indecent dealing with a girl aged 10 which took place on 6th January 2002.

The appellant was the groundsman at a caravan park at which the complainant and her sister used to go swimming at the swimming pool. A small fee was charged for this privilege but sometimes the appellant would give the girls an ice-cream or soft drink for helping him tidy up leaves and palm fronds, and at times he would let them swim free of charge.

In the afternoon of 6 January, the complainant went to the caravan park on two occasions. The first was around 1.00 p.m. She returned home, but later went out again, intending to see if a friend was coming for a sleep over at her place. The friend was not going to do so, so the complainant went late in the afternoon to see the appellant whom she was expecting to come over to visit her mother that evening. He invited the

complainant to come inside his caravan, which she declined until he offered her a drink. He told her to sit on his knee, which she refused. He suggested she sit down, and then pulled her by the waist and sat her on his knee. He rubbed her stomach and her upper thigh and then moved his hand up her leg and rubbed on top of her vagina.

She got up saying, "It was too hot". Where upon the appellant came up behind her and rubbed her with his hand between her legs on top of her vagina. At one stage he lifted up her skirt and pulled her pants out, but she stopped him and made some excuse about having to go.

He walked back to her house with her. On arriving there her mother was not yet home. She had gone to visit her boyfriend. The appellant gave the complainant's sister a bottle of coke and two chocolate bars which she was told to put in the fridge. The complainant told her sister that she hated the appellant and would tell her about it later. When the appellant left she told her sister that he had touched her. The two girls went on to the mother's boyfriend's place where the complainant told her what was happening. She was crying.

A taped interview with the complainant was made by police on 8th January 2002 and also with the complainant's sister. The appellant was interviewed on 10 January. He did not give evidence at the trial, but all three of these taped interviews, including his own were admitted at the trial. The complainant's mother gave evidence at the trial.

The appellant in his interview agreed that the complainant had come back to the caravan at about 5.30 p.m. She did not look her usual happy self, he said, so he tickled her to cheer her up. That was on a bunk bed in the caravan. The complainant had never been inside the caravan before. He said, he had not invited her in, but she had gone in for a drink. He had tickled her around the stomach and the arms, just, "Normal tickling" for about five to 10, or perhaps 15 minutes. He agreed that she was sitting on his knee while this was taking place. He had definitely not touched the inside of her leg, apart from perhaps brushing when he tickled her. He had not touched or patted her vagina, and this, it had happened accidentally while he was tickling her.

There were some small, but significant differences between the accounts given by the complainant and the appellant. There was no corroboration of the complainant's account that the appellant had touched or rubbed her vagina. Her creditability was, however, supported by the complaints she made to her sister and her mother at the first opportunity. Her mother was not at first told, or did not realise that the complainant had been touched on the vagina. That may have been because the complainant had indicated where she had been touched by pointing to her left upper thigh which the mother thought was, "Private enough".

Given this evidence it was well within the province of the jury to find that the appellant had touched the complainant on

the vagina. Indeed there was a sense in which the appellant's version of what had happened went far to supporting the complainant's account. He admitted letting her into the caravan for a drink. She had remained there for some time, and he had tickled her. There were differences about whether she had been invited in, whether he had sat her on his knee, and whether he had touched or patted her on the vagina, or had done so on two occasions. One of which according to her account could not have been accidental. The learned trial Judge was in my opinion justified in describing the accounts given by the complainant and the appellant as, "competing versions". He made it clear that the prosecution had to prove each factual element of the charge beyond doubt. "You have", he said to the jury, "got to be satisfied beyond reasonable doubt that he touched her, not just momentarily, or inadvertently, but he touched her over a significant period of time. Whether it was seconds or minutes does not matter, but certainly beyond the momentary, inadvertent touching."

In my view there can be no legitimate complaint about the way in which the issue was put to the jury. And I notice there was no request for a redirection in relation to it. Nor do I consider that the Judge's direction with respect to reasonable doubt is open to challenge in this case. What he said was, "I'm sure you have heard that term before. The phrase beyond reasonable doubt, is not a term of art. It is not a special legal definition. You are expected to approach your task as jurors as reasonable people of common sense. Therefore, if as reasonable people you have a doubt about the accused's guilt,

and you think your doubt is a reasonable one then you have a reasonable doubt."

It was argued on appeal that the inclusion of the portions of that direction which italicised in the appellant's written outline are fatal to its integrity. It is unwise for Judges to embroider the conventional direction within embellishments of their own. But no proper complaint can be, or indeed at this trial was made about the direction in this instance. No re-direction was sought in relation to it. The jury were, in fact, bound to approach their task as reasonable people of common sense. They were, in other words, not to indulge in fanciful doubts as reasonable people of common sense would not entertain. Approaching the matter in that way it was correct to say that if they thought their doubt was a reasonable one then they had a reasonable doubt and they were bound to give effect to it. I do not consider that the direction given at this trial transgressed by suggesting a different or less exacting standard of satisfaction or persuasion than the law requires. Thomas v The Queen [1960] 102 CLR 584 596 was relied upon but it involved a direction of a quite different kind. To suggest that the use of the word "think" in this context which is no more than the equivalent of consider invited the jury to apply "subjective emotional considerations and sensations" is in my opinion simply not tenable. The direction here exhibits none of the frailties which were detected by the High Court in Green v The Queen [1971] 126 CLR 28. I would dismiss the appeal against conviction.

Turning to sentence, the penalty imposed was imprisonment for 12 months. The appellant was aged 53 years old at the time of the offence and 54 at sentencing. There is no reason to suspect he will offend again. He has no previous convictions of any kind and had a good work record having worked at the caravan park for the preceding 12 or 13 years. It is true that the complainant trusted the appellant because of the friendship which had grown up between her family and him which is probably why she accepted his invitation to enter the caravan. She was obviously shocked and upset by what he did to her although there is no direct or specific indication of any other significantly adverse consequence as a result of his action. The Crown accepts that the evidence is that the appellant touched or patted her on the vagina only outside her clothing. If he was attempting to do more than that when he pulled down her shorts he did not persevere with the attempt nor did he try to detain her when she left to go home. The Judge recorded his impression that the offence was committed impulsively rather than planned in any way and noticed that the appellant had drunk some eight or nine beers before the incident.

In the course of sentencing his Honour said, I quote:

> "There is, in addition, of course, the added and the significant emotional trauma to the child. In this case the child submitted to what for her at least would have been lengthy cross-examination at a committal hearing and lengthy cross-examination during the course of the trial. This is not intended as any criticism of the prisoner's solicitor who appeared at the committal nor Mr Murray who appeared at this trial. The approach to cross-examination was as considered as the circumstances allowed but it was certainly obvious during the trial that it was a very emotional, traumatic experience for

> the child. This only served to prolong the emotional trauma that the child no doubt suffered by the act of indecency itself."

It is well settled that it is proper for a sentencing Judge in a particular case to remark on the absence of circumstances which attract leniency. Siganto v The Queen [1998] 194 CLR 646 664. In the same case their Honours adopted a statement by the Victorian Court of Criminal Appeal in The Queen v Gray [1977] Victorian Reports 225 231 that:

> "It is impermissible to increase what is a proper offence for the offence committed in order to mark the Court's disapproval of the accused having put the issues to proof or having presented a time wasting or even scurrilous defence."

The difference between not imposing a lower sentence because of remorse manifested by a plea of guilty and not imposing a higher one because the accused pleaded not guilty might as their Honours acknowledged in Siganto appeared to be a matter of semantics but the distinction can, as they went on to add, be important. See Siganto v The Queen [1998] 194 CLR 656 at 667.

In allowing the appeal and remitting the case for resentencing the High Court in Siganto said it was incorrect to regard distress occasioned by a complainant by having to give evidence as an aggravating circumstance for sentencing purposes. See Siganto at 667. In the present case his Honour in sentencing began by saying that a plea of guilty is recognised as an expression of genuine remorse to which weight might be given by a practical reduction of the sentence from what it might otherwise have been but that in the case before

him there had been no expression of remorse to which such consideration might have been given.

No one could cavil at that statement but the learned Judge then went on to express himself in the extract from his sentencing remarks that has already been set out.

Although as the High Court said in Siganto it is often difficult to distinguish between the two alternatives, one legitimate and the other illegitimate that are open to a sentencing Judge it seems to me that in this case that this is a case in which his Honour may have impermissibly taken into account the traumatic effect on the child of the cross-examination both at committal and at the trial as a factor affirmatively supporting a heavier sentence in the appellant's case.

To the appellant listening to those remarks it would certainly have appeared that that was taking place. The Judge proceeded to add that he might have been able to consider a different form of sentence, "Had there been a plea of guilty as I have no doubt the prisoner was advised". It is not clear on what information, if any, his Honour based this conclusion or whether, in fact, it is true that the appellant was so advised. The case therefore presents as one in which it is appropriate that this Court should determine for itself whether the sentence may be excessive.

In The Queen v Phuc Minh Pham (CA 435 of 1995) this Court approved a statement in an earlier appeal that "other than in exceptional circumstances those who indecently assault or otherwise deal with children should be sent to gaol." There a sentence of imprisonment was reduced from two years to 12 months in the case of a 24 year old offender with no prior criminal history who was convicted after a trial of a single count of indecent dealing. The victim was a girl aged under 12 who came to his fruit shop. He gave her some chocolates and a drink and pushed her into the back of the shop to which he returned after leaving temporarily to serve a customer.

The sentence as reduced to 12 months by the Court of Appeal is the same as that imposed by his Honour in the present case. The offending conduct was described in that case by counsel for the applicant as "a single isolated act not involving any touching of the girl's private parts although he pulled her pants down and not accompanied by any substantial force or threats or intimidation of any kind."

The comparison such as it is ends there, however, because the applicant's behaviour which was described in that case by the sentencing Judge as revolting was recounted in the Court's reasons as follows:

> "He kissed her on the lips and cheek. He pulled her pants down, pulled his own jeans down to his ankles, showed her his penis, placed her hand on his penis, ejaculated, then hugged the complainant and told her that he loved her."

After the incident the complainant in that case became very insecure and somewhat withdrawn.

Comparing offences of this kind is always a little like trying to match shades of colour but in my opinion the conduct of the appellant in the present case was on a considerably lower or less serious plane than that in The Queen v Phuc Minh Pham. I have come to the conclusion that in arriving at the sentence here the learned Judge was unduly influenced by the applicant's failure to plead guilty and that either for that reason or otherwise the sentence imposed on him was excessive.

The conclusion that it is excessive is supported by decisions in R v T (CA 33 of 1994), R v McCormack (CA 161 of 1993) and R v Read (CA 178 of 1993), in which lower sentences were imposed for offences involving behaviour of a somewhat similar kind or quality although it should be noticed by much younger offenders.

In the circumstances I would dismiss the appeal against conviction but grant the application and allow the appeal against sentence by suspending it for an operational period of two years after the applicant has served a term of six months' imprisonment.

THE CHIEF JUSTICE: I agree.

ATKINSON J: I agree.

THE CHIEF JUSTICE: The orders are as indicated by Mr Justice McPherson.
