

SUPREME COURT OF QUEENSLAND

CITATION: *R v SAH* [2004] QCA 329

PARTIES: **R**
v
SAH
(applicant)

FILE NO/S: CA No 184 of 2004
DC No 174 of 2004

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Ipswich

DELIVERED ON: 10 September 2004

DELIVERED AT: Brisbane

HEARING DATE: 2 September 2004

JUDGES: McPherson and Williams JJA and Holmes J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Grant leave to appeal**
2. Allow the appeal
3. Set aside the sentence imposed at first instance, and in lieu thereof order that the applicant be imprisoned for a period of three years to be suspended after serving 12 months with an operational period of three years

CATCHWORDS: CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where applicant convicted of rape – where applicant inserted finger into anus of three year old boy who was in his care – where sentenced to five years imprisonment with a recommendation for post-prison community based release after 18 months – where applicant has criminal history – where applicant 19 years old when offence was committed – where plea of guilty – whether sentence imposed was manifestly excessive

R v C; ex parte A-G (Qld) [2003] QCA 510; CA No 328 of 2003, 13 November 2003, cited
R v K [2003] QCA 521; CA No 290 of 2003, 20 November 2003, cited
R v M [2003] QCA 443; CA No 114 of 2003 and CA No 276 of 2003, 17 October 2003, referred to

R v Richardson [2000] QCA 166; CA No 18 of 2000, 8 May 2000, cited

COUNSEL: K M McGinness for the applicant
R G Martin for the respondent

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

- [1] **McPHERSON JA:** I agree, but I confess without marked enthusiasm, in the reasons and the orders proposed by Williams JA. The appeal should be allowed to the extent stated by his Honour in those reasons.
- [2] **WILLIAMS JA:** The applicant seeks leave to appeal against a sentence of five years imprisonment with a recommendation for post-prison community based release after 18 months following on his plea of guilty to a count of rape.
- [3] On a date unknown between 30 June and 11 August 2002 the applicant inserted a finger or fingers into the anus of a three year old boy who was then in his care. The applicant was the partner at the time of the boy's mother. She had been admitted to hospital and the applicant had care of the boy and his half sister during that period. In consequence the applicant was in a position of trust with respect to the particularly young boy.
- [4] The boy complained to his mother during a visit to the hospital that "[SAH] naughty, [SAH] hurt me". Later the boy again said to his mother; "[SAH] hurt my bum when you were at doctors".
- [5] When the mother initially confronted the applicant, indicating she believed the boy, the applicant cried and said, "I think I did it". He said that he took the boy into the bedroom, bent him over a chair, and put his fingers inside the boy a couple of times until the boy started screaming. At that point the mother started hitting the applicant who then blamed her saying that she had not let the boy bond with him. The applicant told the boy's mother that he himself had been sexually abused as a child.
- [6] Subsequent medical examination revealed no physical injury to the child.
- [7] The applicant was born on 16 July 1982, meaning that he was 19 years old when the offence was committed and aged 21 when sentenced. He had a not insignificant criminal history for a young man. Relevantly he was convicted in the Gatton Magistrates Court on 20 February 2001 of assault occasioning bodily harm; he was convicted and fined on that occasion. Then he pleaded guilty to a wide variety of charges in the Ipswich District Court on 19 February 2002. There were charges of stealing, burglary, entering premises with intent to commit an indictable offence, and importantly two charges of assault occasioning bodily harm while armed committed on 2 July 2001 and 28 July 2001, another charge of common assault committed 17 July 2001, and finally another charge of assault occasioning bodily harm committed on 24 July 2001. On all of those counts the one sentence was imposed namely imprisonment for four months followed by three years probation. That was his first period of imprisonment and the sentence appears to have been heavily influenced by his age at the time the offences were committed. It follows

that the applicant was on probation at the time this offence was committed. Subsequent to the commission of this offence he received a short prison sentence for property offences. It should be noted that the criminal history does not contain any offences of a sexual nature.

- [8] The plea was an early one although there was a committal hearing at which the boy was not required to give evidence.
- [9] The learned sentencing judge referred to all of the above matters in her sentencing remarks. It was a particularly serious offence which called for the imposition of a custodial sentence notwithstanding the youth of the applicant if only to give effect to the deterrent aspect of sentencing.
- [10] Prior to 27 October 2000 the conduct in question would have constituted indecent treatment of a child under 12 years punishable by 10 years imprisonment. By amendment which became effective on that date such conduct now amounts to rape punishable by life imprisonment.
- [11] The court was not referred to any cases involving digital penetration of the anus of a young boy on one occasion under the new regime. Each counsel referred to the decision of this court in *R v M* [2003] QCA 443. The offender in that case was a mature man who committed a number of sexual offences on his son on or about 25 November 2001. There were four counts: putting his penis in the complainant's mouth, inserting his finger into the complainant's anus, sucking the child's penis, and rubbing his penis until ejaculation on the boy's back. The head sentence of three years imprisonment was imposed after a trial. The court refused the application for leave to appeal against sentence saying the "sentence imposed of three years imprisonment was by no means manifestly excessive for the applicant's combined offences; it was lenient." The conduct in *R v M* was clearly much worse than the conduct here, but the decision of this court therein affords no real guidance on the appropriate sentencing range.
- [12] It is instructive to look at some sentences imposed for comparable offences prior to the new regime coming into force. In *R v Richardson* [2000] QCA 166 this court dismissed an application for leave to appeal against a sentence of 18 months imprisonment suspended after five months with an operational period of three years imposed on a mature man who digitally penetrated the vagina of a 15 year old girl. In *R v K* [2003] QCA 521 this court dismissed an application for leave to appeal against a head sentence of 12 months imprisonment with three years probation imposed for a series of sexual offences committed on two of his stepdaughters. The offences involved inappropriate touching and on two occasions involved digital penetration of the complainant's vagina. The girl was aged about 13. In *R v C; ex parte Attorney-General* [2003] QCA 510 this court dismissed an appeal by the Attorney-General against sentences of three and a half years imprisonment, suspended after 14 months with an operational period of four years, imposed for 34 counts of indecent dealing. The respondent, serving as a parish priest at the material time, pleaded guilty to the charges which involved a variety of sexual mistreatment including on occasions digital penetration of the vagina.
- [13] Since the new regime came into force higher sentences are called for for offences of the type referred to in the previous paragraph. But, in my view, application of the

new regime would not result in more than about a doubling of the sentences previously imposed.

- [14] Notwithstanding the criminal history of the present applicant a head sentence of five years imprisonment is in my view outside of the range established by previous decisions after making due allowance for the new regime. A single offence of the type in question, where a youthful offender who allegedly had himself been sexually abused as a child was involved, would call for a head sentence of three years imprisonment. Given the early plea of guilty, the youth of the applicant, and the fact that references submitted to the sentencing court indicate reasonable prospects of rehabilitation, that head sentence should be suspended after serving 12 months with an operational period of three years.
- [15] I would therefore grant leave to appeal, allow the appeal, set aside the sentence imposed at first instance, and in lieu thereof order that the applicant be imprisoned for a period of three years to be suspended after serving 12 months with an operational period of three years.
- [16] **HOLMES J:** I agree with the reasons for judgment of Williams JA and with the orders he proposes.