

SUPREME COURT OF QUEENSLAND

CITATION: *R v Burdon; ex parte A-G (Qld)* [2005] QCA 147

PARTIES: **R**
v
BURDON, Frederick John
(respondent)
EX PARTE ATTORNEY-GENERAL OF
QUEENSLAND
(appellant)

FILE NO/S: CA No 85 of 2005
DC No 2753 of 2004

DIVISION: Court of Appeal

PROCEEDING: Sentence Appeal by A-G (Qld)

ORIGINATING COURT: District Court at Brisbane

DELIVERED EX TEMPORE ON: 10 May 2005

DELIVERED AT: Brisbane

HEARING DATE: 10 May 2005

JUDGES: McMurdo P, Muir and Wilson JJ
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Appeal against sentence dismissed**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – APPLICATIONS TO INCREASE SENTENCE – OTHER OFFENCES – where applicant convicted after pleas of guilty to one count of using the internet to expose a child he believed to be under 16 years to indecent matter and one count of using the internet to procure a child he believed to be under 16 years to engage in a sexual act – where sentenced to 18 months imprisonment wholly suspended with an operational period of two years and ordered to perform 240 hours community service – where applicant 50 years old – where thought he was communicating with a 13 year old girl – where sexually explicit language used – where sent sexually explicit photograph of himself – where made arrangement to meet in person – where plea of guilty at early stage – where active

member of community – where no previous convictions – where voluntarily sought psychiatric counselling – where publicly shamed in local community – where low risk of re-offending – where no real child recipient of communications – whether sentence manifestly inadequate

Criminal Code 1899 (Qld), s 218A

R v Campbell [2004] QCA 342; CA No 287 of 2004, 20 September 2004, considered

R v Kennings [2004] QCA 162; CA No 35 of 2004, 14 May 2004, considered

Ryan v The Queen (2001) 206 CLR 267, considered

COUNSEL: M J Copley for the appellant
M J Byrne QC for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Gilshenan & Luton for the respondent

THE PRESIDENT: Frederick John Burdon pleaded guilty on 8 March 2005 in the District Court at Brisbane to two offences against s 218A *Criminal Code* that he used the internet to expose a person he believed was under the age of 16 to an indecent matter and that he used electronic communication to procure a person he believed was under the age of 16 to engage in a sexual act.

He was ordered to perform 240 hours community service on the first count and sentenced to 18 months imprisonment wholly suspended with an operational period of two years on the second.

The appellant, the Attorney-General of Queensland, contends that the sentence was manifestly inadequate in that some

period of actual imprisonment should have been ordered to be served prior to suspension so as to properly recognise the importance of deterrence in sentencing offenders of this type. He submits that a term of 18 months imprisonment suspended after three months with an operational period of four years should be substituted and that persons of mature years who have no infirmities of intellectual incapacity must know that they will face the certainty of an actual period of imprisonment for offences of this kind.

Burdon was 50 years old when he made contact through an internet chat room with a person using the code "Angela_is_13". This person was a police officer pretending to be a 13 year old school girl. On 27 March 2004, Burdon, using the name "aussie_sugardaddy", asked Angela, "Does talking about sex interest you?" Angela replied, "I don't really talk about that stuff." "Okay. Do I interest you?" "I like chatting. It makes the day go by and you get addicted to talking." "Do you spend much time at home?" "Now it's just Dad and me I do but that's why he got me the computer. I get to play computer games and talk with people from school and stuff." "Nice. Do boys excite you yet?"

The conversation continued with the police officer pretending to be a naïve 13 year old school girl with divorced parents

living with her father in a unit and unsupervised between 3.30 pm and 5.30 pm.

In another conversation on 5 April 2004, Burdon asked Angela "Would you like to know more about sex and stuff ... like, have you seen a hard cock for real, what they feel like?" He offered then to send a picture of his erect penis and followed this up by sending a picture of himself and of his erect penis. These circumstances constituted count 1.

Burdon continued to discuss sexual matters with Angela on the internet enquiring on matters such as whether she got wet in between her legs and whether she had masturbated. He asked whether she would like to touch his penis. He suggested they meet, said he would not hurt her and asked if she was aroused by his photograph and suggested she rub her nipples. He again asked her if she would like to meet him somewhere where she felt safe, where he would kiss her and rub her breast and genitalia.

He arranged to meet her at McDonalds in Fortitude Valley at 2.10 pm on the 22nd of April 2004. Burdon arrived at the McDonalds store where he was met by police officers from Task Force Argos who were targeting internet paedophilia. He voluntarily took part in a record of interview in which he admitted he believed Angela was 13 or 14 years old. He

claimed he probably would not have done anything that day had Angela existed and met with him because his own conscience would have stopped him.

The prosecutor at sentence urged the judge to impose a term of imprisonment of 18 months suspended after three months to recognise the mitigating factors and the plea of guilty.

Defence counsel at sentence urged the judge to wholly suspend the term of imprisonment but to also order the maximum period of 240 hours community service as punishment. Burdon's counsel at sentence emphasised Burdon's co-operation with the administration of justice. He pleaded guilty at an early stage and proceeded by way of a full hand-up committal.

Burdon has been active in the Noosa community. He was Chairman of the Chamber of Commerce for three years and a member of its Executive for about seven years. He had been President of the Noosa Rotary Club and was Vice President until he resigned when charged with these offences. He was a manager/owner of a Noosa hardware store employing 11 staff.

There was a great deal of local media interest in his involvement in these offences and he received resulting notoriety both on local television and in the local press over some months. This has caused him great shame and he has been saddened by the shame and embarrassment it has brought on his innocent family. Apart from his commission of these offences he has been a hard working and decent citizen and has no prior

convictions. A number of references were tendered by family members and business associates establishing that his offending behaviour was out of character.

Burdon's counsel at sentence emphasised that Burdon had sought counselling from a psychologist, Mr Lynagh, and had completed 12 one to two hour sessions. Mr Lynagh reported that Burdon has now considerable insight into the seriousness of his behaviour and that he now realises that had Angela existed he would have been corrupting a female child. Mr Lynagh found no evidence of psychopathology. Burdon was a reasonably adjusted person who was emotionally immature and psychologically naïve. His current marriage is stable and satisfying. He suffers a paraphilia with a focus in fetishism. Mr Lynagh has treated Burdon therapeutically with counselling and with appropriate relapse prevention so that the risk of recidivism is minimal and Burdon currently offers no discernible threat to children in the community. Mr Lynagh emphasises, however, that it is important that Burdon continue to receive professional treatment for at least 12 months.

Psychiatrist Dr Curtis also tendered a report. He examined Burdon on the 17th of May 2004 at the request of Burdon's lawyers. Mr Burdon is not suffering from any psychiatric illness. At the time he committed this offence he was devastated and overwrought by the death of his father but

there was no relationship between family grief and these offences. Burdon has been humiliated and shamed in his local community. He is not an antisocial psychopath or a predatory paedophile and will be unlikely to reoffend. He may benefit from appropriate programs of treatment.

The learned primary judge recognised the importance of general deterrence in sentencing for offences of this kind rightly observing that, although there was no victim, the clear policy behind the legislation is to protect young people from behaviour such as this. His Honour took into account the mitigating factors - the plea of guilty, the co-operation with the authorities, his otherwise unblemished record in the community, that he had been shamed in his local community and, according to expert reports, was not a significant risk of reoffending and had embarked on his own rehabilitation. His Honour also considered some comparable authorities before determining the sentence imposed.

The maximum penalty for each offence is five years imprisonment. The appellant emphasises that Burdon was persistent in his attempts to arrange a meeting with the 13 year old Angela and that this conduct was even more serious than exposing her to an indecent photograph over the internet. It is possible, the appellant submits, that had the 13 year old Angela existed, Burdon may have been successful in

physically committing unlawful sexual acts on a child. The appellant contends that the learned sentencing judge placed too much emphasis on Burdon's shame brought on himself by the commission of these offences.

Judicial views differ as to the weight to be given to shaming or, as the High Court referred to it in *Ryan v The Queen* (2001) 206 CLR 267 at 284 and 303, public opprobrium. In *Ryan*, a case involving child rape, Justice McHugh at 284-285, with whom Justice Hayne agreed at 313-314, recognised that attempting to ascertain the extent of public opprobrium in a particular case would place a nearly impossible burden on a sentencing judge and would seem to favour the powerful and well-known over those who were lesser known and, in any case, the worse the crime, the greater the public stigma and opprobrium. On the other hand, Justice Kirby at 303 to 304 and Justice Callinan at 319 recognised that public opprobrium was an appropriate feature to take into account in determining the sentence in a general way.

In a case such as this, the shame experienced by Burdon as a result of his offending is an integral part of the factual matrix to be considered by the sentencing Court. The High Court's discussion of this issue in *Ryan*, however, demonstrates the sharp division of opinion as to the weight to be given to public opprobrium in exercising the sentencing

discretion. The learned primary judge in his sentencing remarks, although he referred to Burdon's shaming as a relevant factor, did not appear to place undue emphasis on it.

In determining the submissions made by the appellant, it is helpful to refer to two previous decisions of this Court. In *R v Campbell* [2004] QCA 342; CA No 287 of 2004, 20 September 2004, Campbell pleaded guilty to using the internet to procure a child to engage in a sexual act. The circumstances were comparable to those here in that a police officer used the internet to pose as a 13 year old girl but, unlike here, no meeting was arranged. Campbell was only 22 years old and had no previous convictions. He was sentenced to 18 months imprisonment suspended after three months with an operational period of four years, a sentence which this Court determined was not manifestly excessive.

In *R v Kennings* [2004] QCA 162; CA No 35 of 2004, 14 May 2004, Kennings pleaded guilty to one count of using the internet to procure a person who he believed to be under 16 years to engage in a sexual act. He was sentenced to two and a-half years' imprisonment suspended after nine months with an operational period of four years. He was the first person to be sentenced for an offence under s 218A *Criminal Code*. He was 25 years old. He made contact with someone who was apparently a 13 year old girl but was, in fact, a police

officer. Their conversations were comparable in their level of sordidness with those in this case and, as here, he made an arrangement to meet her to pursue his lewd suggestions. He was intercepted by police at the arranged meeting place. He made admissions and co-operated with the authorities. He pleaded guilty to an ex officio indictment after a full hand-up committal. He told police he did not intend to follow through with his suggestions on meeting the girl but the learned sentencing judge rejected that claim. (I note that no such finding of fact was made in this case.) Kennings had no previous convictions, was in a stable relationship and was a university graduate looking for full-time employment. He had voluntarily sought assistance from a psychiatrist who diagnosed him with a major depressive order as a result of his unemployment and an avoidant personality disorder but he was not a paedophile although he had some sexual interest in prepubescent girls in a fantasy environment. He had responded well to treatment and his prognosis was good so the likelihood of him reoffending was low. This Court recognised the importance of general and specific deterrence in cases of this sort and that a sentence requiring actual imprisonment was not outside the range of appropriate sentences. This Court considered that, because of Kenning's personal circumstances, no real child was the recipient of his communications, his obvious remorse, co-operation with the authorities, his ongoing psychiatric treatment and good prognosis, the sentence

imposed was manifestly excessive. The Court allowed the appeal and suspended the term of imprisonment forthwith.

There are some extremely serious aspects to Burdon's offending. The widespread use of the internet in Australia, especially amongst young people, gives those like Burdon disposed to corrupting and sexually exploiting children unprecedented access to vast numbers of potential victims. In enacting s 218A *Criminal Code* the legislature has plainly intended to punish those who commit such acts and to deter those who might otherwise consider taking part in such behaviour with the aim of protecting children from predatory conduct of this type. It is of concern that Burdon, a successful middle aged businessman, who, in other ways, has been a worthy member of the community, would prey on an apparent 13 year old innocent and vulnerable child. His approaches were sickening and his persistence in encouraging the fictional Angela to meet him extremely concerning.

As in *Campbell* and *Kennings*, there was no real victim in this case and the sentence imposed cannot be as severe as if he physically carried out his suggestions made over the internet. Nevertheless, denunciation, just punishment and special and general deterrence are important factors in determining sentences in cases like this.

The penalty now sought by the appellant and by the Prosecutor at first instance (18 months imprisonment suspended after three months of actual imprisonment) would have been well within the appropriate range. That, however, is not sufficient to warrant this Court's interference. This Court will only allow the appeal and interfere with the sentence if the sentence was manifestly inadequate. The learned sentencing judge gave careful consideration to all relevant factors including the need for deterrence in exercising his sentencing discretion.

It is a difficult decision to determine whether the combined mitigating factors here, namely the early plea of guilty and co-operation with the authorities, Burdon's prior good history and character, his efforts at rehabilitation and his low risk of reoffending, were sufficient to allow the imposition of an effective non custodial sentence. Burdon has now completed his 240 hours community service in an exemplary manner. Two hundred and 40 hours community service was the maximum period which could have been ordered. He has now had this matter hanging over him with resulting public notoriety since his arrest on 22 April 2004, a period of over a year. These additional factors tip the scales in favour of Burdon and persuade me that the Attorney's appeal should not be allowed. Nevertheless, people who are considering using the internet like Burdon to attempt to make contact with young people with

a view to corrupting or sexually exploiting them must now be on notice that such behaviour will be likely to result in a salutary penalty generally involving a term of actual imprisonment, even where indecent physical contact does not and could not eventuate.

For the reasons given, I would dismiss the appeal.

MUIR J: I agree.

WILSON J: I agree. The sentence imposed by the sentencing Judge was on balance within range but, in my view, at the lower end of the range.

THE PRESIDENT: The appeal is dismissed.
