SUPREME COURT OF QUEENSLAND

CITATION:	*R v Moodley* [2013] QCA 253
PARTIES:	**R** **v** **MOODLEY, Nemalan Seshagiri** (applicant)
FILE NO/S:	CA No 17 of 2013 DC No 427 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	10 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	11 July 2013
JUDGES:	Holmes and Fraser JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal is granted.** **2. The appeal is allowed and the sentence imposed on each count set aside.** **3. A sentence of twelve months imprisonment on each of counts 1-8 and a sentence of three years imprisonment on count 9 is substituted, the last sentence to be suspended after 12 months with an operational period of three years.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to nine counts of sexual assault and was sentenced to four years imprisonment on each count, to be served concurrently and suspended after 16 months – where the applicant was a general practitioner – where the offences involved the applicant, while clothed, rubbing his genitals against female patients' bodies during the course of examining them – where the applicant had no criminal history, had lost his career as a medical practitioner and was the subject of many favourable character references – where the applicant's co-operation in the administration of justice was limited – where the number of complaints and offences, the protracted time over which the offending took place and

the breach of trust implicit in a doctor-patient relationship added an extra dimension of gravity – whether the extent to which the sentences were increased in order to reflect the overall criminality of the conduct lost sight of the proportions of the actual offences – whether in all the circumstances the sentence was manifestly excessive

Director of Public Prosecutions v Joseph [2001] VSCA 151, considered
R v BAS [2005] QCA 97, considered
R v Fereiro [2006] QCA 10, considered
R v Nagy [2004] 1 Qd R 63; [2003] QCA 175, considered
R v Thompson; ex parte A-G (Qld) [2003] QCA 200, considered

COUNSEL: D R MacKenzie for the applicant
P J McCarthy for the respondent

SOLICITORS: Hawkers Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** The applicant for leave to appeal against sentence was a general practitioner working at a country medical centre. He pleaded guilty to nine counts of sexual assault committed on six female patients in the conduct of his practice and was sentenced to four years imprisonment on each count. Those sentences were to be served concurrently and were, in each case, ordered to be suspended after 16 months imprisonment was served, with an operational period of four years. All of the offences entailed the applicant, while clothed, rubbing his genitals against female patients' bodies while performing physical examinations of them.

The offences

[2] The six complainants were aged between 34 and 40, with the exception of one who was only 17 years old. The offences giving rise to the first two counts occurred in 2003. In the first of those cases, the patient was lying on an examination bed while the applicant examined her stomach. In the course of doing so, he rubbed his erect penis from side to side against her right hip for a minute and a half. In the second case, while performing a pap smear and while he had his fingers inserted into the patient's vagina, the applicant rubbed his erect penis up and down her back for a minute or so. Both those women made complaints to police but were dissuaded from pursuing them.

[3] In December 2008, another patient of the applicant had a similar but more protracted experience. She was being examined for back pain and, in the course of the examination, was lying on her stomach. The applicant massaged her neck and shoulders and then rubbed his erect penis against her upper thigh and hip. At his direction, she rolled onto her side with her back to him. She felt his penis rubbing against her bottom for a period of about 10 seconds. The applicant then told her to stand and bend. While she was doing so, he felt her lower back and then rubbed his erect penis against her bottom for about 10 seconds. As she moved away from him, he took hold of her pelvis and held her, pushing and rubbing his penis against her while making groaning noises. She made a complaint to a friend, a nurse and

a doctor but was persuaded not to take the matter further. She, like the patients who had been assaulted in 2003, renewed her complaint in 2009 after hearing that the applicant had been charged with similar offences.

[4] The remaining assaults occurred between March and October 2009. The fourth complainant was being examined for back pain and was required to lie on her stomach. The applicant leant over her and pressed his erect penis against her hip and buttocks, then put his knee on the examination table, leant over her again and briefly rubbed his erect penis against her thigh. The fifth complainant (the 17 year old) was also being examined for back pain. She was made to lie on her side on an examination table. The applicant pulled her body towards him and rubbed his penis from side to side against her bottom. Then he asked her to stand and bend over. He pulled her towards him, pushed himself up against her and rubbed his penis against her for two or three minutes.

[5] The sixth complainant was the subject of four different assaults. On each of the four occasions involving her, the applicant rubbed his genitals against her buttocks while she was lying on the examination table. On the fourth occasion, he had also made her stand and bend and touched his genitals to her buttocks. It was also said in the schedule of facts that on one of the four occasions he had conducted a breast examination on the patient, in the course of which he had rubbed her nipples between his fingers and said "nice". It is not clear whether the rubbing of the nipples was said to be beyond the parameters of a breast examination, but the offending relied on seems to have been not that act but a distinct incident during the same consultation in which the applicant rubbed his genitals against the patient's buttocks while he massaged her back.

[6] Each of the complainants was required to give evidence and be cross-examined at a committal hearing in June 2011. When the indictment was presented in the District Court, the applicant unsuccessfully sought separate trials of the various counts. The matter was listed for trial, but on the first day of the sittings in question, he was arraigned and entered a plea of guilty to all of the charges. Four of the complainants made victim impact statements in which they spoke of the effect of the offences in damaging their confidence and, particularly, their trust in male doctors.

The applicant's antecedents

[7] The applicant was of Indian descent and was born in South Africa. He studied in both those countries and qualified as a general practitioner before coming to Australia in 1996. He was married with two children. His registration as a medical practitioner had been suspended in light of the charges and he faced the prospect of deportation. He had been unable to work while on remand, and had been reduced to living on charity. His counsel tendered some 40 character references from doctors and employees of the medical practice in which he had worked, patients, family members and friends. Some 15 of them were from former patients who spoke with enthusiasm of him as a caring and compassionate doctor.

The sentence proceeding

[8] The prosecutor placed three decisions of this court - *R v Thompson; ex parte A-G (Qld),*[1] *R v BAS*[2] and *R v Fereiro*[3] - before the sentencing judge, arguing that they

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1 [2003] QCA 200.
2 [2005] QCA 97.
3 [2006] QCA 10.

pointed to a range of between four and five years for the head sentence in the present case. The applicant relied on a decision of the Victorian Court of Appeal, *Director of Public Prosecutions v Joseph*.[4]

[9] The learned sentencing judge observed that the case involved not only a breach of trust by a practitioner towards female patients, but a gross abuse of his power which, not surprisingly, had significant impacts on the women concerned. He noted the absence of any medical problem which might have caused the applicant to act as he did, drawing the inference, as a result, that he had acted for his own personal sexual gratification. His Honour accepted that the applicant was unlikely to be able to practise as a medical practitioner again. He was to be given credit for his pleas of guilty as serving the administration of justice. His Honour noted the importance of both personal and general deterrence in the sentence to be imposed. In imposing the four year sentences, the learned judge said he had regard to the submissions made and the authorities placed before him; one infers that he accepted the four to five year range advanced by the prosecutor.

The decisions relied on here and at first instance

[10] Both the applicant and respondent referred, by way of comparable authority, to the four decisions put before the court below. Of those, *R v Thompson* does not, in my view, assist. The Attorney-General's successful appeal in that case concerned the manifest inadequacy of sentences of five years imprisonment, suspended after 18 months, for offences under s 317 of the *Criminal Code* of causing complainants to take a noxious thing with intent to disable, an offence which carried life imprisonment. There was no challenge to sentences of two years imprisonment for three associated offences of indecent assault. The respondent was a middle-aged dentist without previous convictions who had pleaded guilty to three counts of causing complainants to take a noxious thing with intent to disable, and three counts of indecent assault.

[11] In the first instance, the respondent administered an anaesthetic and benzodiazepines to a young man during a dental procedure, keeping him unconscious for three or four days. There was no allegation of indecency in respect of that complainant. The second of the complainants, to whom two of the indecent assault counts and one of administering a noxious drug related, woke from a dental procedure to see the respondent naked, holding his feet in a raised position. On another occasion, that complainant was kept under the influence of a drug for four days; the respondent was seen to leave the room in which he lay, tying up the drawstring of his trousers. That complainant had to be hospitalised after the events and was found to have a large number of needle marks on his body. The third complainant was not a patient, but had visited the respondent's home and taken a drink from him which was spiked. While still under its effects, he woke at one point to find the respondent wiping his stomach and pubic area.

[12] The majority in this court identified as the particularly serious features of the case the involvement of three complainants; the respondent's abuse of his professional and personal position of trust in relation to two of them; the dangerous behaviour in maintaining two of them in drugged states for prolonged periods; and his misuse, for sexual gratification, of his medical knowledge and his access to dangerous drugs. The court set aside the sentence of five years imprisonment imposed in

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4 [2001] VSCA 151.

respect of the s 317 count which had resulted in the complainant's hospitalisation, and substituted a sentence of six years imprisonment with a recommendation for eligibility for parole after two and a half years. The appropriateness or otherwise of the indecent assault sentences was not considered, so they can have no greater import than that involved in any single judge decision on sentencing.

[13] *R v BAS* is similarly limited in its usefulness by the fact that it was also concerned with offences – rape in that case - which carried life imprisonment. The appellant was said to be a practitioner of alternative medicine. He was found guilty after a trial of nine counts of indecent dealing, 12 of sexual assault and three of rape. The conduct took place over six months and was described as consisting of

> "acts of touching of breasts by hand and by machines, blowing air on to a breast, touching an area between the anus and the vagina with a machine and digital penetration of vaginas".[5]

Those acts were performed on seven young women, two of whom were under 16 years of age. They consented to the acts in question, but the basis of the charge against the appellant was that their consent was obtained by fraud because the conduct was represented as therapeutic. He was sentenced to imprisonment for five years in respect of the three counts of rape, and two years imprisonment in respect of each of the other counts, to be suspended after 18 months.

[14] The Attorney-General unsuccessfully appealed against the sentence as inadequate. Fryberg J, with whose reasons the other members of the court agreed, observed that the sentence of imprisonment for five years was not too low to reflect the gravity of the offence. The digital rapes were not events of violent penetration and caused no immediate distress to the complainants, although they suffered considerably once they realised they had been duped. The sentence was properly suspended in part because of the appellant's impressive references, lack of previous convictions and volunteer work in the community. The case has the limitations already referred to as a comparable authority. The five year sentences were imposed in respect of rape, not indecent dealing, in a context where the offending as a whole involved 24 offences, 10 against minors.

[15] *Joseph*, the decision of the Victorian Court of Appeal, does contain features of marked similarity to the present case. The respondent, a medical practitioner, had pleaded guilty to 11 counts of indecent assault over a two and a half year period against eight victims. He was sentenced to concurrent terms of imprisonment ranging between one and three years, wholly suspended for a period of three years. (The relevant maximum penalty was 10 years imprisonment, as it is in the present case.) The Director of Public Prosecutions mounted an appeal on the ground that the effective sentence was manifestly inadequate.

[16] The respondent in *Joseph* had come to Australia as a refugee from Iraq, and it was accepted that he had undergone a number of traumatic experiences during the Gulf War. His offending began almost immediately after he secured employment at an Australian hospital. Six of the complainants were his patients, one was a trainee nurse and the last was an 18 year old woman who had been employed as a chaperone at the direction of the Medical Practitioners Board because of complaints about earlier sexual assaults. The offences involved a variety of conduct

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5 At [12].

by the respondent, which included rubbing patients' inner thighs, touching their vaginal entrances, (in one case) massaging a woman's clitoris and, on a couple of occasions, placing a patient's hand on his groin. One of the assaults on a patient, which consisted of rubbing her upper thigh, occurred while she was giving the respondent a history of anxiety attacks resulting from a rape. The offence which attracted a three year sentence entailed the respondent's massaging a patient's buttocks while moaning and groaning and then trying to reach between her legs to her vagina, at which point the patient pulled up her pants and ended the assault.

[17] The Victorian Court of Appeal set the sentences aside because they did not properly reflect the actual seriousness of the offences; the facts of the offence which had led to the three year sentence could not, for example, merit the imposition of a sentence of those proportions. The court's view of how the sentences should be structured to reflect the criminal conduct as a whole differed from the practice in this State, of increasing the sentence on one count for that purpose.[6] The methodology it used in arriving at the ultimate sentence in that case is thus of no relevance here, but a consideration of the results is useful.

[18] The court substituted a series of sentences ranging between 14 days (for the touching of the student nurse's buttocks) to 18 months (for offences which respectively involved vaginal touching, clitoral massaging, and a protracted assault on the chaperone in which the respondent rubbed her leg and inner thigh, forced her hand onto his groin, massaged her breasts and kissed her neck). The sentences were made partly cumulative on each other in such a way as to create an effective total sentence of imprisonment for three years, the same net result as arrived at irregularly (in the Victorian context) by the sentencing judge. The Crown had not contended that that sentence, as a total, was manifestly inadequate. The court then turned its attention to whether the sentence should have been wholly suspended, taking into account the fact that it was a Crown appeal and the mitigating circumstances relating to the respondent's background. It confirmed the order for total suspension.

[19] In *R v Fereiro*, the applicant had pleaded guilty to one count of recording an indecent visual image and two counts of indecent dealing and was sentenced to 18 months imprisonment, suspended after eight months, with an operational period of three years. He was a self-employed podiatrist who had secretly filmed a 15 year old complainant undressing in the rooms of a physiotherapist whose premises adjoined his own. More relevantly to the present case, when the girl was referred to him by the physiotherapist for treatment, on two occasions he undertook massages which constituted indecent dealing.

[20] On the first occasion, the applicant massaged the girl's buttocks, shoulders, lower back and above her breasts and her groin to the line of her underwear; on the second occasion, he massaged her buttocks and then, after having asked her to remove her top, massaged her above and between her breasts. On both occasions, the girl's mother was present. Mother and daughter accepted that the massaging was part of the professional care provided by the applicant, but of course, that was not so. The applicant's marriage had broken down because of the publicity arising from the offences. He was expected to lose his livelihood as a podiatrist, at least in the short term.

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6 See *R. v Nagy* [2004] 1 Qd R 63 at 72.

[21] Appealing against the severity of the sentence, the applicant argued that the circumstances were exceptional because the complainant was not aware that she was being exploited sexually during the massages. This court noted the serious breach of trust by the applicant who was in a position to prey on a young person, and the persistence involved in the filming and the two acts of indecent treatment. McMurdo P (with whose reasons Muir J agreed), referring to *Joseph*, observed that the sentence was not lenient, but it was within a proper sentencing range. *Fereiro*, of course, is distinguishable from the present case involving a single complainant and far fewer offences; although they were of greater gravity, having been committed against a minor.

Conclusions

[22] The learned sentencing judge was faced with a difficult task in sentencing, given the paucity of comparable authorities. However, the applicant is correct, in my view, in contending that the cases put before his Honour did not support the range which the prosecutor advanced for the head sentence, of four to five years. The decisions in *Thompson* and *BAS* concerned offences of far greater seriousness in the criminal calendar. *Fereiro* did have some relevance, but it suggested a lower level of sentencing, as did *Joseph*.

[23] The assaults in this case, in which the applicant rubbed his genitals against patients were relatively fleeting and occurred while the applicant was fully clothed. None of the offences was penetrative or involved actual flesh to flesh contact. The more serious offences were the two in which there was a longer course of conduct, with the applicant rubbing his penis against a recumbent complainant, making her stand and then holding her while he rubbed his penis against her again, and the incident in which the rubbing occurred while the applicant was actually conducting a pap smear. Taken individually, those more serious offences would have warranted, in my view, head sentences of between 12 and 18 months.

[24] What then added an extra dimension of gravity were the number of complainants and offences; the fact that the second round of offences occurred over a 10 month period between December 2008 and October 2009; and the appalling breach of the trust implicit in the doctor-patient relationship. It was a proper approach, and accorded with what this court said in *R v Nagy*, to increase the sentence above what any individual count might attract in order to reflect the overall criminality of the conduct;[7] although the practice endorsed in that case was the imposition of the higher sentence on only one count. Nonetheless, the features to which I have referred did not warrant increasing the sentence in each case to four years. To sentence at that level was, with respect, to lose sight of the proportions of the actual offences. The result was a manifestly excessive head sentence.

[25] The applicant submitted that the conduct taken as a whole would properly attract a head sentence of between two and three years. There is force in that submission; but the sentence must recognise the repetition of the offences and the gravity of the breach of trust involved. I would substitute a sentence of three years imprisonment on the final count to reflect the criminality of the conduct as a whole, while taking a more moderate approach to the remaining counts. The applicant's lack of convictions, the consequences of his conviction for his career, and the many references in his favour might have indicated an earlier than usual suspension, but

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[7] [2004] 1 Qd R 63 at 72.

those features are, in my view, counteracted by the fact that his co-operation in the administration of justice was limited; all of the complainants had to give evidence at his committal. Given that fact, I would adopt the approach of the learned sentencing judge in suspending the head sentence after a third of it is served.

Orders

[26] The application for leave to appeal should be granted, the appeal allowed and the sentence imposed on each count set aside. I would substitute a sentence of twelve months imprisonment on each of counts 1-8 and a sentence of three years imprisonment on count 9, the last sentence to be suspended after 12 months with an operational period of three years.

[27] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with those reasons and with the orders proposed by her Honour.

[28] **DOUGLAS J:** I also agree.