IN THE COURT OF APPEAL [1999] QCA 231

SUPREME COURT OF QUEENSLAND

C.A. No. 452 of 1998

Brisbane

[R v D]

THE QUEEN

v

D

(Applicant) Appellant

Davies JA

Thomas JA

Wilson J

Judgment delivered 22 June 1999

Judgment of the Court

APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE GRANTED. APPEAL DISMISSED.

CATCHWORDS: CRIMINAL LAW - JURISDICTION, PRACTICE AND

PROCEDURE - JUDGMENT AND PUNISHMENT - SENTENCE - JUVENILE OFFENDERS - murder - offender sentenced to life imprisonment - whether offence was particularly heinous - whether offender's subsequent conduct is relevant - whether offence was within worst category of offence of murder

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - APPLICATIONS TO REDUCE SENTENCE - WHEN REFUSED - PARTICULAR OFFENCES - OFFENCES AGAINST THE PERSON - murder - juvenile offender - offender sentenced to life imprisonment - whether offence was particularly heinous - whether offender's subsequent conduct is relevant - whether offence was within worst category of offence of murder

Juvenile Justice Act 1992, ss 104, 108, 109, 121(3)

R v Carroll (CA No 221 of 1995, 26 July 1995), applied

R v Chivers [1993] 1 Qd R 432, considered

R v Gwilliams (CA No 414 of 1996, 31 October 1997), applied

Ibbs v R (1987) 163 CLR 447, considered

R v Twala (NSW CCA No 60187 of 1993, 4 November 1994), considered

Veen v R [No 1] (1979) 143 CLR 458, considered

Veen v R [No 2] (1988) 164 CLR 465, considered

R v Wilson ex parte Attorney-General of Queensland (CA No 85 of 1998, 18 September 1998), applied

Counsel:	Mr A J Glynn SC with Mr M Green for the applicant/appellant Mr D Bullock for the respondent
Solicitors:	Legal Aid Queensland for the applicant/appellant Director of Public Prosecutions (Queensland) for the respondent

Hearing Date: 4 March 1999

REASONS FOR JUDGMENT - THE COURT

Judgment delivered 22 June 1999

1 D was found guilty by a jury of having murdered a young female Japanese tourist Michiko Okuyama on or about 20 September 1997. He was sentenced to life imprisonment. He has applied for leave to appeal against the sentence on the ground that it is manifestly excessive.

2 At the time of the offence D was a child having been born on 7 January 1981. Accordingly he was sentenced under Part 5 of the *Juvenile Justice Act* 1992.[1] Because of the nature of the offence, s 121(3) of that Act applied. It provides:-

> "In relation to a serious offence that is a life offence, the court may order that the child be detained for -
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> (a) a period not more than 10 years; or
> (b) a period up to and including the maximum of life, if -
>
> (i) the offence involves the commission of violence against a person; and

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[1] See ss 104 and 108.

> (ii) the court considers the offence to be a particularly heinous offence
>
> having regard to all the circumstances."

3 The sentencing judge considered that it was a particularly heinous offence and that life imprisonment was the appropriate penalty in the circumstances.

4 The victim was a 22 year old Japanese tourist holidaying in Cairns. She did not speak English. On 20 September 1997 she left her unit to post some letters and buy some groceries. She did not return. On 4 October 1997 her badly decomposed body was found under pandanus fronds in a swamp area near the Trinity High School in suburban Cairns. There was damage to her skull and loss of teeth consistent with her face having been struck with severe force against a hard surface such as a solid wall. According to the medical evidence the cause of death was aspiration of blood.

5 The Crown case rested largely on circumstantial evidence. It was that D had so severely and brutally bashed her that he had broken bones in her face and made her unconscious, with the result that she had drowned in her own blood.

6 D told the police he remembered a Japanese girl walking along Grafton Street, Cairns in his direction on 20 September 1997 at about 12.30 p.m. At the time he had been sitting outside Elphinstone's building where he worked. It was a

disused office and warehouse which contained a vault. He said he had gone inside when she was still about 20 metres away. He could not remember anything of relevance from then until the next day: when moving boxes around in the vault, he had found her naked body on a box. He had fetched a wheelie bin from the adjoining property and put her body in the bin, covering it with some rubbish. He had wheeled the bin out of the vault and left it near the roller door of the premises.

7 Some days after the girl's disappearance police officers attended Elphinstone's building in response to a complaint about a bad smell. He told them there were vegetables in the wheelie bin and put his arm in to demonstrate this. Subsequently he wheeled the bin through suburban streets to the place where the body was eventually found. He tipped up the bin, slid the body out and covered it with pandanus leaves. In the meantime he had taken the victim's clothing and other property back to his place of residence.

8 To fall within the description of "a particularly heinous offence" the offence must be one that was particularly odious or reprehensible. The circumstances which are relevant to this issue are the circumstances of the killing itself and not the

offender's subsequent conduct in dealing with the body.[2]

9 Death was inflicted by vicious and violent means. The victim, a stranger who could speak no English, had been innocently walking along the street. There was no evidence whether she was taken into the warehouse or the vault or whether she went there willingly. No motive for the killing was established. Even though the sentencing judge's finding that the attack was premeditated at the time it was pressed into action was not open on the evidence, it was nevertheless a callous and brutal attack. In our view he was correct in categorizing the offence as a particularly heinous one in all the circumstances.

10 The sentencing judge then had a discretion to impose a penalty up to the maximum of life imprisonment. He was obliged to have regard to the sentencing principles in s 109 of the *Juvenile Justice Act*. It was open to him to impose the maximum penalty only if the offence was within the worst category of offences of

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[2] This was the approach adopted by this Court in *Gwilliams* (CA No 414 of 1996, 31 October 1997) and *Carroll* (CA No 221 of 1995, 26 July 1995).

murder, although not necessarily the worst imaginable case.[3] In *Twala*[4] Badgery-Parker J (with whom the other members of the NSW Court of Criminal Appeal agreed) said:-

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[3] See *Ibbs* (1987) 163 CLR 447 at 451-2; *Veen* [*No. 2*] (1988) 164 CLR 465 at 478 and *Chivers* [1993] 1 Qd R 432.

[4] (NSW CCA No. 60187 of 1993, 4 November 1994).

> "However, in order to characterize any case as being in the worst case category, it must be possible to point to particular features which are of very great heinousness and it must be possible to postulate the absence of facts mitigating the seriousness of the crime (as distinct from the subjective features mitigating the penalty to be imposed)."

11 The same factors which led to the conclusion that this was a particularly heinous offence along with the absence of any objective mitigating factors lead us to the view that this offence was within the worst category of murders. Thus, it was open to the sentencing judge to impose the maximum penalty unless there were subjective features mitigating the penalty to be imposed.

12 D showed no remorse at all. His conduct after the death was macabre. He maintained his innocence even after the jury found him guilty and lodged an appeal

against conviction. That appeal was not abandoned until shortly before the appeal on sentence came on for hearing.

13 It is not relevant to the determination of the appropriate sentence that had he been a few months older he would have been sentenced as an adult.[5] However, it is relevant that he was a boy of 16½ years of age who ought to have had a greater sense of right and wrong and a greater capacity for self restraint than a child younger in age. He was of high average intelligence. He had had somewhat of a troubled family and personal background. He was not suffering from any psychiatric disturbance, although there seemed to be two sides to his personality - to some he appeared gentle and caring, but his commission of this offence disclosed a darker side. The sentencing judge was entitled to have regard to the evidence of a psychiatrist that if D had committed this offence he was "presumably highly dangerous, unpredictable and someone who will on the one hand, deny doing it, while on the other hand drop hints that he has done it." The risk of danger to the

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5 *R v W, ex parte Attorney-General of Queensland* [2000] 1 QdR 460.

community was properly taken into account in determining the weight to be given to subjective factors otherwise calling for leniency.[6]

14 In all the circumstances we consider that the sentencing judge did not err in imposing the maximum penalty. We would grant leave to appeal, and dismiss the appeal.

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6 *Veen [No. 1]* (1979) 143 CLR 458; *Veen [No. 2]* (1998) 164 CLR 465. See also *Juvenile Justice Act* s 109(1)(a); *R v Wilson ex parte Attorney General of Queensland* (CA No 85 of 1998, 18 September 1998).