[1999] QCA 84

COURT OF APPEAL

McMURDO P
WHITE J
MUIR J

CA No 486 of 1998

THE QUEEN

v.

G **Respondent**

and

ATTORNEY-GENERAL OF QUEENSLAND **Appellant**

and

CA No 11 of 1999

THE QUEEN

v.

G **Applicant**

BRISBANE

DATE 19/03/99

JUDGMENT

THE PRESIDENT: This is an appeal by the Attorney-General claiming that the sentence imposed was manifestly inadequate in that it did not properly reflect the criminality of the

conduct of the respondent and the learned sentencing Judge erred in not declaring the respondent to have been convicted of a serious violent offence. G also seeks leave to appeal against his sentence on the grounds that it is manifestly excessive.

The respondent pleaded guilty in the District Court Brisbane to one count of torture between 1 October and 28 December 1997. He was sentenced to six years imprisonment. The learned sentencing Judge declined to make a declaration under section 161B(3) of the *Penalties and Sentences Act* 1992 that G had been convicted of a serious violent offence as part of the sentence.

The facts are as follows. The child victim, T, was born on 10 April 1996 and was aged between 18 and 20 months when this offence occurred. His mother, C and his father, P, had separated in Perth at the end of 1996 when T was about eight months old.

Ms C kept custody of T and his sister aged 3. She met G in May 1997 and they commenced a relationship. She obtained a Housing Commission house in Loganlea. G asked if he could move in with her. Sometimes G's daughter came to stay.

When he moved in, G started to take an interest in T and this was encouraged by Ms C as T had no father figure. Ms C noticed some bruising on T. She noticed bruising around the penis during a nappy change.

G said that the child tugged at his penis in the bath and this may have caused the bruises. As T did do this on occasions that excuse was accepted.

Small bruises on T's body were also explained by falls and bumping into items. On another occasion Ms C heard a loud thud and heard T screaming: she saw him on the floor trying to get up with the prisoner standing over him. She asked what happened. The prisoner did not answer. His daughter said, "Don't hit T, daddy," and G said that it did not matter. She picked T up and he had a trickle of blood coming from his nose. The next day he had two black eyes and the nose bled again. The respondent said that on that occasion T had fallen over.

At this time Ms C noticed T did not appear to be as happy as he used to be nor as energetic.

She took him to the doctor to see if there was anything wrong with him and a blood test showed that he was somewhat anaemic and would bruise easily.

She told the doctor that T had received the black eyes when he fell over on a bike pedal. G would go into T's bedroom and check on him at night. Sometimes he returned from T's bedroom carrying him and Ms G noticed a red lump on the forehead and the prisoner got ice to put the swelling down.

The three children would often bathe together. On one occasion T defecated in the bath and G said, "That's it, no more. T can bath by himself." After this time she noticed on occasions that T's breath was foul.

On Saturday, 27 December, the respondent bathed T and Ms C heard some commotion between the prisoner and the girls. She went into the bathroom and could smell a bad smell. It seemed T had defecated in the bath. G agreed to clean up the mess. Fifteen minutes later Ms C heard T scream in a high pitched way that sounded as though he was in pain.

She ran into the bathroom. G said, "I'm sorry, I've dried him too hard." She saw the skin had come away from the base of the penis and it was profusely bleeding.

Ms C obtained assistance and the child was taken to hospital where he received treatment and surgery. He underwent a general anaesthetic. Police were called, Ms C denied causing any injuries to the child. G was interviewed and he denied causing injury to the penis of the child claiming that the only reason he could think of how it was done was that it occurred when he was roughly drying the child.

The police told Ms C that the injury to the penis could not have been caused in that way and she agreed to take part in a pretext phone call during which G made some admissions. It is these admissions upon which the Crown relies to establish the offence of torture.

Those are firstly that G put faeces into the mouth of T on probably five occasions as punishment for defecating in the bath; secondly, that G would hold the child under water long enough for the child to gag for breath when he came up. This occurred on a few occasions. G

admitted to holding T under the water until he could see bubbles coming out of his mouth.

Thirdly, G winded the child until he caught his breath by punching him below the chest. G said he had only done that a few times.

Fourthly, G admitted kicking the child in the (butt or) bottom so hard that the child travelled some distance and landed on his face causing bruises to the front of the face and two black eyes.

Finally G admitted the pulling of T's penis so hard that it caused the skin to tear away from the pelvis.

Dr Walker, a paediatric surgeon, examined photographs taken of T and was of the view that the injury to T's penis is not consistent with the rough towelling after a bath.

> "Considerable force would be required to avulse and tear the skin on the shaft of the penis.
>
> This type of injury can occur with forcible pulling of the foreskin and penile shaft skin downwards towards the end of the penis or by a sharp injury, circumferentially. A ring could cause this injury when being dragged off the penis or it could possibly be caused by teeth applied around the base of the penis. It is not a clean incised injury but more consistent with avulsion."

Dr Winkle, a urologist, also examined the photographs. He was of the opinion that the photographs showed a tear in the skin at the junction of the penis and the anterior abdominal wall.

> "The tear extends for approximately a third of the circumference of the penis. The skin tear seems to be full thickness with fat apparent in the wound. The skin around the wound is haemorrhagic suggestive of local trauma. Both testes looked normal and there is no scrotal injury.
>
> It is my view that considerable force would be necessary to tear the skin in this way. I think that the foreskin must have been pulled fairly severely to achieve such an injury. I doubt that such an injury is possible by simply wiping the area. In 10 years of practice in paediatric urology I have seen a number of penile injuries that children have sustained with falls and so forth but I have never seen an injury of this nature from a fall."

Not surprisingly the victim impact statement shows that there has been considerable trauma to

not only T but also his sister in relocating the family.

Fortunately, however, there has been no permanent physical injury and no demonstrated psychological injury at this time, but of course that must remain an unknown factor. It is quite possible there may be psychological difficulties associated with this in the future.

G is 26 and was 25 at the time of this offence. He has no previous convictions. He has since married Ms C. The children are in the care of their natural father. G was in employment as a mechanic's assistant at the time of his sentence and has a very satisfactory work history. To his credit he has sought counselling. This was an early plea of guilty and G has demonstrated remorse. A number of references tendered on his behalf suggest that despite his dreadful conduct towards T he has many good points.

The psychiatrist Dr Mulholland examined G on 26 and 27 November 1998 and his report was tendered at sentence. He notes that G had an alcoholic father who used to bash his wife. As a child he did not relate satisfactorily to other children and had hardly any friends. He had learning problems at school and was teased a lot and was called names like "slow" and "stupid". He had special education at school due to his dyslexia. He was very quiet and withdrawn; a child who wanted to be accepted by others but never was.

He can read and write enough to get by but his reading and writing is of a low standard. Because of his learning problems he is not a qualified mechanic. His dyslexia has had major effects in his life in terms of his education, his working career, his personality and socially. His relationship with Ms C, it seems, was important to him and he was fearful of the relationship breaking down. He said that he had troubles with T who sometimes had tantrums and screaming fits and he had difficulty knowing how to handle this behaviour in T. His own daughter was an easy child. He said that some of his behaviour was to control or discipline T but admits it went very wrong. He had some insight into his lack of self-control when trying to discipline T. Dr Mulholland described this as 'partial insight' in that:

> "... he recognises and accepts his offending behaviour, but he probably does not have any knowledge or understanding of the background factors associated with [it]..."

In conclusion Dr Mulholland is of the view that:

> "... the reason for the offending behaviour was that [G] experienced T's 'bad behaviour' as being personally directed towards him and being yet more rejecting behaviour, thus he felt aggrieved and hurt by [it]...
>
> He has been receiving some counselling and that is to be applauded. In the long run he will need to be involved with extensive counselling and particularly so if he is going to have anything to do with young children.
>
> He is fit for trial and it is expected that he will remain so. There is no question that he is or ever has been mentally ill.
>
> Now that these matters have come to light and he is receiving specific counselling regarding same, the likelihood of future offending behaviour is low."

The offence of torture was included in the Criminal Code and became operational on 1 July 1997. "Torture" is "the intentional infliction of severe pain or suffering on a person by an act or series of acts done on one or more than one occasion." It is punishable by a maximum term of 14 years imprisonment.

The learned sentencing Judge took note of the wording of the section and the seriousness of the offence. The explanatory notes to the amending Act which brought in the offence of section 320A torture are of no further assistance. Some assistance as to the intention of the legislature can be gained by the comments of the then Attorney-General, the Honourable D Beanland, who said this:

> "Clause 51 will insert a new section 320A titled 'torture'. As the facts in the recent trial of The Queen v. David Keith Griffin revealed, there is no adequate offence in Queensland of deliberately inflicting severe pain and suffering. Griffin was convicted of one count of common assault. Griffin used a machine capable of producing 600 volts to administer electrical shocks to the toes and legs of his de facto wife's five year old son. One would imagine this would inflict severe pain and terror. The trial judge, Healy DCJ, commented that he would have preferred to impose a sentence in the order of two to three years' imprisonment, but because the maximum for common assault was only 12 months that is what he would impose. This Bill will increase the maximum penalty for common assault under section 335 from 12 months to three years imprisonment. The charge of assault occasioning bodily harm was not laid because there must be a bodily injury as well as pain or discomfort.
>
> There are no other offences in the Criminal Code which deal with this form of torture unless the injury amounts to bodily harm, wounding or grievous bodily harm. The offences of kidnapping, deprivation of

> liberty, threats, desertion of children, endangering life of child by exposure and other offences have been considered, but none of them cover the situation. In this case the boy did actually have severe pain and suffering inflicted. Severe pain or suffering or something similar is not an element of any of those offences. This Bill will therefore introduce the new offence of torture - defined to be 'the intentional infliction of pain or suffering on a person by an act or series of acts done on one or more than one occasion'."

There are no truly comparable sentences because of the novelty of this charge in Queensland. Only in a general way can assistance be gained from child abuse cases which pre-dated the operation of this offence of torture. Those have been referred to by Mr Martin SC who is appearing for G. A schedule of those cases was also before the learned sentencing Judge. It must be said that the penalties in that schedule seem to be lenient for the seriousness of the offences described.

Mr Martin particularly referred to a matter of *R v. J* CA No 456 of 1997, delivered 17 March 1998, where the appellant had suffered from "Munchausen by Proxy", a condition caused by lack of self-worth and desire to achieve attention, admiration or sympathy and a way of dealing with angry feelings. Her child aged 18 months was left with life-threatening bowel and rectum problems after J had inserted her finger into the child's anus on numerous occasions. The child may require major reconstructive surgery in the future entailing surgical removal of scarred and diseased areas of the rectum and replacement of part of the bowel. The child also suffered injuries to her oesophagus consisting of legions caused by two separate acts. J was 27 years old, had no prior criminal history and due to her condition showed no remorse and had poor prospects of rehabilitation. She was employed at the time of the sentence. She had a difficult childhood and had been severely depressed after her son died from a severe infant illness. Her condition made her emotionally detached from the harm caused to her child. The sentence imposed below of five years imprisonment with a recommendation for parole after two years imprisonment was not interfered with.

Such cases can only be of assistance in the most general way. This offence particularly targets behaviour which is the intentional infliction of severe pain or suffering on another.

The offence is undoubtedly serious and would cause all right-minded people to feel revulsion at the abuse of an innocent and defenceless young child. The offence is such that it warrants

a sentence which will deter not only this offender but also others.

Nevertheless it cannot be said that this offence is one of the most serious examples of its type. The offending conduct did not for example include serious permanent injuries such as severe fractures or worse.

The respondent, to his credit, has no prior convictions and it seems is an immature 25 year old with some significant problems. He pleaded guilty and has made efforts at rehabilitation. Fortunately little T has recovered, at least physically.

In my view a sentence of six years was within the proper range of a sound sentencing discretion in this very difficult case. I can see no reason to interfere with the sentence of six years imprisonment.

The appellant Attorney-General argues that His Honour should have exercised his discretion to declare G a serious violent offender under section 161B(3) of the *Penalties and Sentences Act* 1992. His Honour gave this issue careful consideration as can be ascertained from his sentencing remarks. Whilst His Honour did make a comment towards the end of his sentencing remarks to the effect that broadly speaking his current view was that such a declaration should be reserved for extreme cases, it is plain from what precedes that comment that His Honour carefully considered all the relevant matters and finally concluded that this was not an appropriate case where G should spend at least 80 per cent of his sentence in custody. I cannot ascertain any error on the part of the learned sentencing Judge in exercising his discretion not to declare the respondent a serious violent offender.

Mr Martin argues that an early recommendation for release on parole should have been made in this case to take into account the mitigating factors and the early plea of guilty. His Honour obviously considered that submission, which was made below, in what was clearly a difficult sentencing case. He decided not to declare the offender a serious violent offender under section 161B(3). He also formed the view that the circumstances were such that a recommendation for parole was not warranted, bearing in mind the head sentence he imposed.

Whilst another sentencing Judge may have decided to make a recommendation for eligibility for parole slightly earlier than the usual half-way period, I am not satisfied that His Honour erred in any way in not giving a recommendation for parole in the circumstances of this case. The sentence in my view is not manifestly excessive. I would dismiss the appeal and I would refuse the applicant leave to appeal against sentence.

WHITE J: I agree.

MUIR J: I agree. The sentence imposed by the learned sentencing Judge is high in comparison with some of the sentences to which we are referred, particularly when regard is had to the applicant's early plea, his expression of remorse and lack of previous convictions.

None of those comparable sentences, however, is in respect of the offence of torture although they are obviously of some general relevance. But the subject conduct was engaged in over a protracted period and carried with it a substantial risk of inflicting serious physical and psychological injury. I instance the applicant's conduct in holding the child's head under the bath water and in winding him by pushing under his ribs so hard that air was expelled from his lungs.

The sentencing remarks were carefully and thoughtfully expressed and I am not persuaded that the sentence was outside the permissible range. Having regard to the breadth of criteria to which a sentencing Judge may have reference in considering the making of a declaration under section 161B of the Penalties and Sentences Act it will often be impossible to conclude whether a determination to make or not make a declaration is affected by error.

Like The President I doubt that the sentencing remarks reveal that the sentencing Judge unduly fettered the exercise of his discretion. He was fairly careful in his choice of language and prefaced his relevant comments by use of the words "very broadly speaking". He then went on to give an example. Like the sentencing Judge, however, I am not persuaded that this is a case which calls for the making of the declaration.

THE PRESIDENT: The orders are the appeal is dismissed; the application for leave to

appeal is refused.
