[2002] QCA 171

COURT OF APPEAL

McMURDO P
McPHERSON JA
MACKENZIE J

CA No 49 of 2002

THE QUEEN

v.

H Applicant

BRISBANE

..DATE 14/05/2002

JUDGMENT

14052002 T19-20/JJD24 M/T COA102/2002

THE PRESIDENT: Justice Mackenzie will deliver his reasons first.

MACKENZIE J: The applicant pleaded guilty on 18th July 1997 to two offences of attempted rape and one of rape. He was sentenced on the 8th of August 1997. The complainant's mother was the wife of the applicant.

The first attempted rape was committed in 1995 or perhaps late 1994, before her 10th birthday and the other two offences occurred while she was 10 years of age. The matter had previously gone to trial on three counts of rape, but the jury failed to reach a unanimous verdict.

The applicant had told the police, when interviewed, that the complainant was making up the complaints and the defence of the trial was based on a denial that the relevant events had occurred. Prior to the commencement of the second trial, the prosecution offered to substitute charges of attempted rape for the counts of rape in respect of the first and second incidents. The count of rape was to be maintained in respect of the third incident.

The facts presented by the prosecution in sentencing submissions were that the complainant had, in a section 93A video, described what happened in the following way:

> "My dad does this thing and I don't know what it's called, you know, how you make babies. Well, my dad does that to me."

The Crown Prosecutor told the sentencing Judge that the complainant went on to describe how the applicant took her clothes off, then his, hopped on top of her, then moved up and down.

On the first occasion, she described in her interview that what happened hurt her vagina on the inside when he tried to place his penis inside it. It was accepted that he did not achieve actual penetration on this occasion.

On the second occasion, the description was similar and, once again, it was accepted that he did not penetrate her vagina. The Crown Prosecutor told the sentencing Judge that on the third occasion, four days before the complaint was made to the authorities, the complainant had no doubt in her mind that actual penetration occurred.

He said that evidence of spermatozoa consistent with the applicant's was found on the carpet in the area where this offence was alleged to have occurred, although the Scenes of Crime Officer who took the samples was on stress leave and reluctant to give evidence.

The prosecution also had evidence from the paediatrician who examined the complainant on the 14th of November 1995. He found that there was recent redness and tenderness on the

inner labia, just below the vaginal opening and there were a few scattered remnants of the hymen present. He concluded that this was abnormal and that the findings were consistent with and supportive of some form of sexual impropriety, although he could not distinguish, from the evidence, between interference with the finger, a blunt object or a penis.

The applicant, who has a criminal record for offences of dishonesty of almost habitual proportions dating from 1984, was also sentenced for 19 further offences of various kinds of dishonesty, including one count of armed robbery in company with personal violence, with a further 109 charges being taken into account.

The sentence for the count of rape was fixed at eight years and nine months, based on an appropriate sentence of nine years, reduced for "a slight reduction for cooperation with the authorities", to use the Judge's words. He was sentenced to five years' imprisonment on each of the attempted rapes, such sentences to be served concurrently with that for the rape.

All of the sentences for dishonesty, except that for the armed robbery in company with personal violence, were ordered to be served concurrently with the other offences. The armed robbery sentence was fixed at five years, to be served cumulatively upon the sentence for rape.

The present application is concerned only with the convictions for attempted rape and rape. The applicant has deposed that before he left the Correctional Centre on the morning of his second trial, he was told that his grandfather, to whom he was close, had passed away in the early hours of the morning.

He says that he was told by his counsel that the Crown was going to seek about 20 years' imprisonment if he was found guilty of three charges of rape. He said that he decided to accept an offer from the prosecution that they would drop two of the charges of rape to attempted rape, but would maintain the third charge of rape.

He said that he was also worried about the health of his youngest daughter, who had a congenital serious heart condition. He said that when he was in Court, he asked his wife what he should do and she said that he should do whatever it took to get him home sooner.

He had maintained his denial to his wife that any sexual misconduct had occurred to that time. He said that he did not fully realise the consequences of what he was doing by pleading guilty. He was an emotional wreck and wanted to get away from everything.

He decided to plead guilty, as he saw it was his only way out. He says that from the day he received his sentence, he

had regretted pleading guilty. An application for leave to appeal against the sentences imposed was dismissed by this Court on the 18th of November 1997. No complaints about the entering of the plea of guilty were made at that time, although it must be said that he has told us today that his solicitor said that he could not challenge the conviction in the absence of additional evidence.

That no doubt is relied on as explaining the delay in making the application presently before us. The applicant seeks to rely on a statement written by the complainant and affidavits from his wife and other relatives, which are said to cast doubt on whether the evidence established the offences to which he pleaded guilty.

Before analysing them it is desirable to refer to other aspects of the applicant's affidavit. He deposed that he did engage in sexual conduct with the complainant, but denied the allegations initially out of fear that he would lose his wife and children if he admitted such conduct. He therefore denied the allegations when interviewed by the police.

In his affidavit, he describes an incident where he wanted to get some skin lotion rubbed on his back because he suffered from dry skin. He said that the complainant offered to do so. She was dressed in swimming togs and

after anointing him, asked him to rub cream on her back.

He did that and proceeded to put cream on her arms and legs and became aroused by what he was doing. He said that he did not do anything on that day by way of sexual misconduct. He went on to say that around the time of the complainant's birthday, his wife had gone to bingo. He was watching a video when he heard the complainant going to the toilet.

While watching the video, he became sexually aroused and asked the complainant to rub cream on his back. When she had finished, he asked her if she wanted him to do the same to her. He initially got her to take her pyjama shirt off, but later helped her to take off her pyjama pants so that he could rub her whole body.

He says, to use his words: "For some strange reason doing this to [her] made me feel very aroused." He said that he started to tickle around her vagina area and having asked her to roll onto her stomach, began to rub his penis against, as he put it, her bottom. He denied trying to penetrate her in any way.

He also describes an incident on the 9th of November 1995 when his wife had again gone to bingo. He asked the complainant to rub cream on his back and once again, when she had finished, he asked if she wanted him to rub some on her.

He asked her to take off her nightie and later to take off

her underpants. She was initially lying on her stomach, but he asked her to roll over. He became aroused while rubbing the cream closer and closer around her vaginal area. He rubbed her vaginal area for some time and then began to rub his penis against the outside of her vaginal area.

The statement of the complainant, dated the 7th of December 2001, upon which the applicant relies, is to the effect that when she was of the age between 9 and 10, her mother used to go to bingo. While she was away, the applicant would sit her on his lap and touch her in places that she knew were not meant to be touched. She never told him not to do that, as she was very scared of him and knew that she would get the belt if she complained. He would then tell her to take off her pyjamas and undies and tell her to lie on the floor.

He would then shut all the doors and turn off all the lights. All she could see was him moving up and down on top of her. She said that she hurt so much on one occasion that she was nearly going to cry and when she went to the toilet it was painful.

She said that she could not say whether he put his penis in or not. That incident apparently relates to the last occasion, since she says that it was the occasion when he

gave her $5 and told her not to tell her mother. There is also a statutory declaration that states that the applicant fondled her on the first two occasions and that on the last occasion, he hurt her so much that she wanted to cry.

With regard to the last incident, the proposed fresh evidence, in my view, is of no assistance to the applicant. Even taking the evidence at its highest for him, it would, in my view, almost inevitably lead the jury to conclude that, on that occasion, he effected a sufficient degree of penetration when the evidence is taken in conjunction with the evidence of the paediatrician.

There is reference in the outline of argument to an audio cassette of conversations between himself, the complainant and the complainant's mother recorded over the telephone while he was in prison. I have listened to the tape. It consists of several conversations during the course of one day with his wife.

The complainant is in the background and, as the tape is reproduced, it is very difficult, if not impossible, to hear

what the complainant herself is actually saying. In any event, it seemed to me that the conversations as relayed to the applicant by his wife left the matter in an inconclusive state as to the extent of the recollection of the complainant of events of the days in question.

An affidavit from the applicant's wife states that the

complainant had said to her that she was confused about what had happened when she was younger and that now that she was old enough to understand all about sex, she realised that the applicant did not do what he had been charged with. However, she was of the view that he should be in trouble for touching and fondling her.

The applicant's wife deposes that the applicant admitted substantially the version of what he says occurred in his application to her in this period. The applicant's mother said that the complainant told her that the applicant did not force her and that he only fondled her and that she was sore when she went to the toilet.

The deponent says that the applicant was asked if it was rape and she said, "No, it was indecent dealing." If that is based on the proposition that penetration of the vagina itself is necessary to constitute rape, it is based on an imperfect understanding of the law as it stood at the time of these events at least.

The slightest penetration of the labia was sufficient to constitute the element of carnal knowledge (Randall (1991) 53 Australian Criminal Reports 380, where Justice Cox gives a succinct overview of the common law position, which was adopted for the purposes of the Code). Given the age of the child at the time, the question of actual consent or an

honest and reasonable belief in consent is not a serious issue.

The applicant was sentenced on the basis that no violence beyond what was necessary to commit the offences had been shown and there were no threats of violence. However, the prisoner told the girl to keep silent and gave her money on the last occasion. I have gone into the facts of the matter in some little detail to illustrate what I think is the essential point in this application. The evidence as it stands, in my view, falls far short of a case where an extension for leave to appeal should be entertained at this point, or that leave to withdraw a plea of guilty should be granted.

The Crown Prosecutor reminded the Court that the onus is on the applicant to show a miscarriage of justice if he wishes to withdraw his plea and that the Court is entitled to act on a plea of guilty made on the free choice of a decision to plead guilty.

The evidence does not establish why the plea of guilty made on that occasion ought now to be allowed to be withdrawn and there are no other factors, such as impropriety or improper pressure imposed upon him to plead guilty, on that occasion.

In all of the circumstances, I am of the opinion that the

application for leave for an extension of time should be refused.

THE PRESIDENT: I agree.

McPHERSON JA: I agree.

THE PRESIDENT: The order is the application for an extension of time is refused.
