[2002] QCA 221

COURT OF APPEAL

DAVIES JA
WHITE J
WILSON J

CA No 62 of 2002

THE QUEEN

v.

SAQ Appellant

BRISBANE

..DATE 21/06/2002

JUDGMENT

DAVIES JA: I will ask Wilson J to deliver her reasons first.

WILSON J: This is an application for leave to appeal against sentence. The applicant pleaded guilty to one count of indecent treatment of a child under 16 with a circumstance of aggravation, namely, that the child was under 12. The offence was committed on the 29th of December 2000. The child was a 7 year old girl. The sentence imposed was three years' imprisonment with no recommendation for early eligibility for parole.

The applicant was born on the 21st of December 1959. At the time of the offence he was a computer programmer by occupation.

The applicant was the complainant's uncle by marriage. The child's mother dropped her and her brother off at "Aunty [M]’s" place so that they could spend time with their cousins. Aunty M was the applicant's ex-wife and the cousins were the four children of that marriage.

The applicant came to his ex-wife's house to visit his children. The complainant's mother was aware that the applicant had previously been sent to prison for child molestation. However, she understood that her children and the applicant's would be supervised at all times they were in the company of the applicant.

In the computer room of the house, the applicant placed his hands inside the complainant's shorts and underwear and touched her on the vagina on five separate occasions within a relatively short space of time. There was no digital penetration. The child tried unsuccessfully to get away. She later said that it felt "really nasty". Since this happened, she has become distrustful of others, especially males. According to her mother, she has become introverted and "clingy", and given to outbursts of anger. She has undergone counselling.

The applicant had a history of similar offences. On the 8th of April 1989 he committed the offence of aggravated assault of a sexual nature upon a child of 10 by touching her vagina. He was sentenced to two years' probation and 240 hours' community service. Then on the 27th of September 1992 he committed two offences of indecent dealing with a child under 12, namely a girl aged 9 whose vagina he touched. He was sentenced to three years' imprisonment which was reduced on appeal to two years.

According to Dr Ian Curtis, his treating psychiatrist, he has the clinical disorder of paedophilia and a personality disorder, schizoid schizotypal personality. His offending has been intermittent and stereotypical, at times when he has had no adult female partner, or when he has been in the throes of being rejected by an adult female partner. He was responding well to chemical castration with the anti-testosterone Androcur.

The sentencing Judge expressed some concern that the applicant might not continue to take his medication and concern that he might reoffend. He recommended that he continue to receive treatment. He took account of the guilty plea which had saved the child the ordeal of giving evidence, and of the need for deterrence and protection of the community. He said that in the ordinary course with a plea of that nature he would have been inclined to recommend release on parole after a period of 12 months. However, he refrained from doing so, considering it a case where the prison authorities needed to consider the applicant's behaviour in prison and to give careful consideration to the question whether he imposed a risk to young children if granted early release. He imposed a reporting condition.

The application to this Court was brought on the ground that the sentence was manifestly excessive. The maximum penalty which might have been imposed for such an offence was 14 years' imprisonment. This was conduct within the lower end of the range of this type of offending. That the applicant had a relevant criminal history did not aggravate the criminality, but it was a reason for not extending leniency.

We were referred to the decision in *R v M*, CA No. 225 of 1995; 27 July 1995. M pleaded guilty to seven counts of indecent treatment of a child under 16. In each case there were two circumstances of aggravation: the child was under 12 and the child was for the time being under his care. The conduct was more serious than in the present

case. The applicant was then 39 and the child, his stepdaughter, was 8. The offences were committed when his wife was absent from the family home. The first three counts arose out of an incident in which he exposed the child to an indecent videotape, touched and licked her genitals, and had her touch and suck his penis. The other three counts arose out of another incident in which he again exposed the child to an indecent videotape, touched and sucked her genitals and touched her in the area of her anus, and had her suck his penis. On that occasion his erect penis touched her crutch area and he ejaculated over her body. A seventh count arose out of an incident in which he took his clothes off and masturbated in front of her, again ejaculating over her body. At the time, the maximum penalty for those offences was ten years' imprisonment. Mathers had no relevant criminal history. The sentence of three years' imprisonment on each count (to be served concurrently) was upheld on appeal.

The other case cited, Nash, [2001] QCA 543, 28 November 2001, involved four counts of indecent dealing with a boy under the age of 16 years. The circumstances were quite different from the present offence and I did not find that decision helpful.

The only truly comparable case cited to the Court was the earlier decision concerning this applicant. The facts there were very similar to the those in the present case. At

the time, the maximum penalty was ten years. As I have said, it is now fourteen. The sentence of three years was reduced to two years on appeal. There was no recommendation for eligibility for parole for reasons similar to those expressed by the sentencing Judge in the present case.

Counsel for the applicant submitted that the range within which the sentence should have been imposed was two to three years. He submitted that the sentence which should have been imposed was three years' imprisonment with a recommendation for community-based release after twelve months or, in his oral submissions, that it should be reduced to two and a-half years to take account of the guilty plea.

Counsel for the respondent submitted that the appropriate range was two and a-half to three years' imprisonment and that the sentence imposed was appropriate.

Pursuant to section 13 of the Penalties and Sentences Act, in imposing a sentence on an offender who has pleaded guilty a Court must take the guilty plea into account, and may reduce the sentence that it would have imposed had the offender not pleaded guilty. In this case, the effect of the guilty plea was not only to express remorse and to save the community expense. Perhaps more significantly it was to save the young complainant child the ordeal of giving evidence. These are powerful factors.

A common way of reducing the sentence is to make a recommendation for early eligibility for parole. However, it can never be any more than a recommendation. The parole decision is always one for the parole authorities to make in the light of factors such as the prisoner's conduct during his imprisonment and the risk of reoffending. It would, in my respectful view, be wrong to use those factors as a reason for not making a recommendation.

However, as I have said, this was a case of an applicant with a past history of very similar offending and it was not a case where leniency was called for in all the circumstances. Although the sentence imposed was at the top of the range, I would be disinclined to interfere. I would dismiss the application for leave to appeal.

DAVIES JA: In my opinion, the sentence which was imposed was, having regard to the previous conduct of the applicant and the offences looked at in the light of that previous conduct, not at the very top of the range, and his Honour took into account the plea of guilty, it seems to me, by reducing the sentence from the top of the range to something a little below the top of the range, namely three years.

I do not think in those circumstances that the sentence which was imposed was outside the range of the discretion open to his Honour and for that reason I would agree with the reasons given by Justice Wilson.

WHITE J: It is essential that offenders, particularly where the offences constitute sexual offences against children should be encouraged to plead guilty by the application of section 13(1)(b) of the Penalties and Sentences Act.

In this case there were factors which would suggest a reduction ought to have been made, an early plea, immediate recognition of guilt and expression of remorse and sparing the child cross-examination.

Although his Honour said that he took these matters into account the sentence is near the top of the range by reference to cases which, while not comparable, at least give some indication of the range and without a recommendation there is no clearly articulated recognition of these mitigating factors.

However in light of the applicant's past convictions the sentence although, in my view, high is not outside the range and I too would dismiss the application.

DAVIES JA: The application is dismissed.
