[2002] QCA 354

COURT OF APPEAL

McMURDO P
WILLIAMS JA
ATKINSON J

CA No 7 of 2002

THE QUEEN

v.

BARRY JOHN SHEARER Appellant

BRISBANE

..DATE 12/09/2002

JUDGMENT

THE PRESIDENT: The applicant was originally charged with 20 counts of indecent treatment of girls under 16. He pleaded not guilty before a jury, on 28 November 2001. After the jury was empanelled and put in charge, the applicant's barrister requested an adjournment to discuss matters of evidence with the prosecutor.

After that adjournment the prosecution indicated it would not proceed further on three of those counts, and the applicant's barrister asked that the applicant be re-arraigned. The applicant then pleaded guilty to 17 counts of indecent treatment of children under 16 years.

He originally sought to appeal against his conviction, in effect, an application to set aside his pleas of guilty. Indeed, his application for leave to appeal against sentence was adjourned from a listing in April or May this year, to allow him to pursue those claims.

The applicant filed and served an affidavit in which he challenged the propriety and competence of his legal representatives before the primary Court. The respondent then filed affidavits from the applicant's legal representatives contradicting the applicant's claims.

Yesterday, the applicant abandoned his application to set aside his guilty pleas. He now seeks only leave to appeal against his sentence of 18 months' imprisonment, suspended after nine months, with an operational period of three years.

The applicant, who was aged 57 at the time of the offences, owned a convenience store and take-away food shop on the Sunshine Coast. During November/December 2000, he employed in his store all four complainants, who were aged between 12 and 15 years.

His modus operandi was to isolate a complainant in the back room, offer them economic incentives, such as additional pay or additional hours of work and then indecently touch them.

He asked to photograph the first complainant in her bikini, but she declined. She commenced working in the shop on 2 November 2000. The applicant said he would like to photograph her and another girl and give them a full body oil massage. He showed her a work roster, in which she had only six hours' work and another girl had 25 or 30 hours' work. He pulled her onto his lap and told her that the other girl did more for him. He later hugged her, kissed her on top of her head and gave her some extra money. He pulled her onto his lap, so that she was facing away from him, placing his hand around her waist and rubbing her stomach. She stood up and left when a customer entered the store. This constituted the first count.

On another occasion, she wore a white transparent top to work. The applicant said she should show her natural shape and not wear a bra. He pulled up her top and moved her breast with his hands for about 30 seconds. This constituted count 2.

The second complainant commenced work for the applicant in November 2000, when she was 15 years old. She attended at the store to buy cigarettes and asked to use the toilet. The applicant asked if he could watch her, but she refused. The following day she saw that her hours of work on the roster had been reduced. The next day, he offered to take her to his house for a full body massage, so that he could take photographs of her, but she declined. On 8 November, she was inside the fridge area at the back of the store. The applicant entered and closed the door and asked why she wore a bra. He placed his left hand on her right breast. She said she needed to go to the toilet and left. This constituted count 5.

The offences concerning the third complainant, who was only 12 years old, occurred in this way. The applicant offered her work at the shop. He hugged her in the back area of the shop whilst he sat at his computer. He placed his hand over her right breast, outside her clothing and slid his hand under her clothing, placed it on her breast and rubbed and squeezed her breast. Later that day, he again rubbed her breast and told her not to tell anyone. From 4 December to 12 December, the complainant worked at the shop after school and on each of those days, he touched and rubbed her breasts under her shirt, whilst he was with her in the back of the store. On the 9th of December he rubbed her breast under her shirt, tried to kiss her and rubbed the outside of her vagina, on the outside of her underpants. The next day he placed both hands inside her togs, over her vagina, and rubbed her vagina with his

right hand. He gave her some extra money and told her not to tell anyone. On another occasion, as she leaned over the desk where the applicant was seated, he bit her on the left nipple. These facts constituted counts 6 to 15 and count 17.

The charges involving the fourth complainant, who was also 12 years old, occurred in this way. The applicant took a photograph of her whilst she was fully clothed and offered to photograph her at his house. On one occasion, she refused his request to hug him. He told her to go home early, saying he would not pay her if she stayed. Count 18 occurred when he pulled her onto his lap in the back of the shop, hugged her around the waist and kissed her on the neck for 30 seconds. Count 19 occurred when he asked her for a hug. She sat on his lap and he rubbed her back under her shirt, saying, "If you give me more hugs, I'll pay you more money." The final offence occurred when the applicant pulled the complainant onto his lap, rubbing her back under her shirt and kissing her.

Two complainants spoke to an older shop assistant about what was happening and the matter was eventually reported to police. Another complainant told her mother and that matter was also reported.

Victim impact statements were tendered by all the complainants. Unsurprisingly, they each felt the applicant had taken advantage of them. They now feel vulnerable in a work situation, especially with men. It has been a dreadful

introduction to them to the work force. One complainant was a 15 year old, living away from home, who was in desperate need of a job and income.

The applicant was born on 27 August 1943 and was 58 at the sentence. He had no relevant criminal history, his only conviction being for drink driving, with a blood alcohol level of .11 in 1983.

He married at 17 and had three sons, who are now adults. That marriage ended in divorce after 11 years. He married again, had two daughters and that marriage also ended in divorce after five years. He married for a third time in 1987 and he and his wife had triplets, now aged nine years. His third wife had two daughters, aged 20 and 17 from a previous marriage, who assisted the applicant and his wife run the convenience store.

On 30 October 2000, the applicant's wife told him she was leaving with her children. There were mutual allegations of domestic violence. They had been under intense financial strain because the shop was not doing well and the triplets had significant disability. One suffers cerebral palsy and the others have been diagnosed with attention deficit hyperactivity disorder.

During this period, he was taken to Nambour Hospital psychiatric ward, where he was examined, but subsequently discharged; no reports were tendered as to his mental health.

He has a host of medical problems outlined in a tendered report, the most significant current problems being a cataract, osteoarthritic pain in both knees and mild cardiomyopathy. It was not suggested that his medical condition would worsen or be untreatable whilst in custody. He has been told he may require a heart transplant in the future. He was bankrupt at the sentence and living on a disability pension.

The plea of guilty was late and the complainants were cross-examined during the committal proceedings. The applicant has shown no remorse, either in his conduct of the matter up until sentence or during this appeal.

The prosecutor at sentence submitted the range was 12 to 18 months' imprisonment and that the applicant was entitled to some consideration for the plea of guilty. That range was accepted by defence counsel, who urged the Judge to suspend the sentence forthwith, or after a very short period.

The learned primary Judge considered the applicant had flagrantly and consistently preyed upon the young complainants and that this had had a distressing effect upon their lives. His Honour noted the value of the plea of guilty, though late, and imposed the sentence under appeal.

Fortunately, the extent of the touching involved in these offences was at the lower end of the range of offences of indecent treatment which come before this Court.

Nevertheless, there are very serious aspects to them. The 17 offences were committed upon four teenagers, aged as young as 12, who were working for the applicant. He used this power to take advantage of them in a despicable way. His offending behaviour has resulted in an extremely negative introduction to the work force for these young women. It will continue to have a deleterious effect on their lives into the future.

The applicant is close to 60 years old and was apparently under great stress when he behaved so abominably. He has no prior convictions, but the level of his offending was deserving of a deterrent sentence and an actual period of custody was required to be served. The sentence imposed has the advantage of placing restrictions on the applicant's behaviour for the next three years. Although the sentence of 18 months' imprisonment could have been suspended after six months to reflect the mitigating circumstances, including the applicant's lack of prior convictions and his late pleas of guilty, I am not persuaded that the 18 month imprisonment, suspended after nine months' sentence, is manifestly excessive.

However, there are other circumstances here that nevertheless persuade me to allow the appeal. Unfortunately, the applicant was granted bail on the 20th of June 2002, after serving six months and 22 days of the sentence. It seems on the material placed before this Court, that it was inappropriate to grant bail at such a late stage and where the appeal hearing had been adjourned to accommodate the applicant. It is

regrettable that this occurred. As the sentence imposed was at the top end of the appropriate range and the applicant has now served almost 7 months' imprisonment, there seems to be no real point now in returning this applicant to custody to serve, in effect, two further months of imprisonment. Only because of these peculiar circumstances, I would grant the application and allow the appeal to a limited extent and instead of suspending the sentence after nine months, suspend the sentence forthwith. The sentence is otherwise confirmed.

The appeal against conviction is dismissed.

WILLIAMS JA: I will not repeat the detail of the offences, which have been recounted by the President. I would, however, emphasise that the four complainants were aged 14 years, 15 years and two at 12 years, at the time the 17 counts of indecent dealing occurred.

The most serious incident involved touching one of the young girls on the outside of the vagina. The girls gave evidence at committal proceedings and it was only after an initial plea of not guilty that the applicant at trial changed his plea to that of guilty.

Apparently that was consequent upon the prosecution dropping some further charges against him. In the circumstances, he was entitled to some discount for the, albeit belated, plea of guilty.

Both counsel before the sentencing Judge submitted that the appropriate range was 12 to 18 months' imprisonment, suspended after a period because of the plea.

In the circumstances, it is arguable that suspending the sentence after nine months, which is the stage at which the applicant would have become eligible for release, did not reflect sufficiently the discount for the plea of guilty.

That, to my mind, makes the sentence a borderline one, or at least one at the top of the appropriate range. However, as the President has said, other events have overtaken the situation. The appeal against conviction and application for leave to appeal against sentence were initially listed before this Court on the 16th of April this year, but they were adjourned at the request of the applicant.

Thereafter, an application was made for bail on the 20th of June this year, that is after some six months and 22 days had been served. In my view, it was inappropriate to grant bail where a significant portion of the sentence had already been served. If there is to be an application for bail because a gaol sentence is relatively short, then that application should be brought promptly after the application for leave to appeal against sentence is filed.

In my view, it was inappropriate in the circumstances of this case to grant bail at the time at which it was granted. This

Court is now faced with the question whether or not all the circumstances justify returning this man to prison for a brief period of approximately two months.

In my view, that would be an unacceptable order to make in the circumstances. In consequence, I agree with all of the orders proposed by the President.

ATKINSON J: I agree with the orders proposed by the President, for the reasons that she gives. I should also say that I specifically agree with what Justice Williams has said about the inappropriate nature of the grant of bail on this occasion.

THE PRESIDENT: The orders are as I have outlined.
