SUPREME COURT OF QUEENSLAND

CITATION:	*R v LS* [2006] QCA 354
PARTIES:	**R** **v** **LS** (applicant/appellant)
FILE NO:	CA No 194 of 2006 DC No 1626 of 2006 DC No 3011 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	15 September 2006
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2006
JUDGES:	McMurdo P, Wilson and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application granted** **2. Appeal allowed to the extent of reducing the period of suspension in respect of the sentences for counts 2, 3 and 4 on Indictment No. 3011 of 2005 from nine months to five months**
CATCHWORDS:	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 GRANTED – GENERALLY – where applicant has severe physical difficulties which cause significant pain and affect his mobility – where his time in detention is made more difficult due to his condition – whether the sentence should be varied to take account of these difficulties – whether sentence was manifestly excessive *R v B* [2000] QCA 42; CA No 345 of 1999, 24 February 2000, cited *R v Pope; ex parte A-G (Qld)* [1996] QCA 318, cited *R v Smith* (1987) 44 SASR 587, applied *R v Vachalec* [1981] 1 NSWLR 351, cited

R v Vachon [1998] QCA 185, cited

COUNSEL: T D Martin SC for the applicant/appellant
C W Heaton for the respondent

SOLICITORS: Macrossan & Amiet for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with Douglas J.

[2] **WILSON J:** I have read the reasons for judgment of Douglas J. I agree with the order proposed and with his Honour's reasons.

[3] **DOUGLAS J:** The issue in this application is whether the applicant's sentences should be varied to take into account difficulties he has in detention because of painful physical injuries that affect his mobility. The ground of appeal is that the sentences imposed were manifestly excessive. The submissions focussed on an argument that the period of suspension of the sentences ordered should have been three months rather than nine months.

[4] The applicant was sentenced on 16 June 2006 to three years imprisonment suspended after nine months on his plea of guilty to two counts of indecent treatment of a child under 16 years whilst under care, to two years imprisonment suspended after nine months on another such count and to 12 months imprisonment suspended after three months in respect of charges of indecent dealing with a child under 16, two of which had the circumstance of aggravation that the child was under 12 years. A summary of the relevant facts derived from the applicant's submissions shows that there were three separate complainants and sets out the details of the offences.

Details of the offences
Complainant - BL

[5] The applicant and BL's mother formed a de facto relationship when BL was about 2 or 3 years of age. They married when BL was about 4 years old. The applicant and BL's mother separated subsequent to the offences comprising counts 2 and 3. The details of the facts for Count 2 were that, when in grade 6 or 7, BL was sharing a bedroom with her younger brother. She woke one night to find her pyjama pants and underpants removed and the applicant kissing and licking her vagina. BL tried to push the applicant away but he held her down and covered her mouth with his hand. (R9 l10).

[6] Count 3 related to an offence which again occurred at night in the bedroom shared by BL and her brother. BL awoke to find the applicant with his hand down inside her underpants and the applicant then pushed his finger (she was unable to say whether it was one or more fingers) in and out of her vagina. BL felt pain in the stomach area. She was unable to say how far the finger penetrated but it was not a little way. The applicant told her to be quiet and not to wake her brother. (R9 l20).

[7] Count 4 was an offence that occurred after the applicant and BL's mother had separated. The applicant had access to BL and her siblings. On one occasion of

access when BL was about 13 years of age and in grade 8, the applicant walked in on her when she was showering. He undressed and got in the shower with her. He washed her with soap and BL felt his penis on her back. Whilst doing this, the applicant asked BL to have sex with him. She could not recall whether the applicant had an erection at the time of this offence (R9 l50). At some time following separation, the applicant told BL not to tell her mother (about the offending conduct) and BL indicated that there was a threat of physical violence and further indicated that she interpreted what was said by the applicant as a threat of exposing BL's sisters to offending conduct (R11 l5).

Complainant - KC

[8] The applicant is KC's uncle and in 1999 and 2001 he lived with KC and her family in a rural town. KC made a complaint to her school chaplain about the applicant's conduct and this complaint ultimately led to the disclosure of the offences in respect of each complainant.

[9] Count 1 dealt with an occasion in about November 1999 when KC was in the lounge room with her brother and sister. The applicant touched her with his hand between her legs on top of her clothing. The applicant also whispered sexual comments but KC cannot recall what those comments were. KC moved away when the applicant touched her.

[10] Count 2 dealt with another occasion before Christmas 1999 when the applicant and KC walked past each other in the hallway. As they passed, the applicant pressed her against the wall and touched KC between her legs on the outside of her shorts for about five seconds. KC moved away (R12 l5).

[11] Count 3 related to an occasion when, in 2001, KC was lying on the floor on her stomach wearing pyjamas and boxer shorts when the applicant touched her between the legs with his foot. The applicant moved his toes outside the pyjamas for about a minute. KC tried to move away but the applicant kept his foot between her legs. KC's brother was in the room at the time and the applicant was talking to him during the offence (R12 l10).

Complainant - KW

[12] In about February 2003 KW's mother formed a de facto relationship with the applicant. Both offences concerning KW occurred when she was 12 years of age.

[13] Count 6 dealt with an occasion when the applicant offered to take KW for a ride on his motorcycle. During the trip the applicant stopped the motorcycle and asked if he could kiss KW. She replied "No". The applicant kissed KW on the lips and put his tongue in her mouth. She pushed him away and they rode back.

[14] Count 8 related to another occasion when the applicant was watching a movie with KW in the lounge room, he put his two hands out and touched her on the stomach region before sliding his hands up and touching her breasts. His hands touched her breasts (through clothing) for about two seconds before KW pushed his hands away.

Applicant's background and injuries

[15] The applicant was born on 20 November 1961. He was convicted of unlawful carnal knowledge in 1979 when he was 17, a conviction which the learned sentencing judge thought to be of marginal relevance.

[16] He had a good working history up until he suffered serious disabilities as a result of an accident in September 2003. Those disabilities provide the main focus of this application. They occurred in a motor vehicle accident which left him with a 51 per cent permanent impairment caused by a compound fracture to his pelvis and a variety of other injuries, including one to the perineum which left him with a 94 per cent work related impairment when assessed pursuant to the *Workers' Compensation and Rehabilitation Act* 2003 (Qld). His injuries cause him constant pain, described as continuous torture, greatly reduced mobility and bladder and bowel incontinence. A doctor who reported on his condition said:

> "The immediate observation can be made that the only motivation in this man's life is to reduce the amount of additional pain that he suffers and his entire day is spent trying to control and minimise movement by carrying out all physical activities slowly and deliberately or by lying on his bed; when he must get up to urinate, open his bowels, take medication, eat, or dress to go shopping or to the doctor, all activity is slow painful and laborious. There is no pleasure in this man's life; he lives to survive and to minimise his constant pain."

[17] Before the learned sentencing judge the submission was made on behalf of the prosecution that his needs arising from his injuries would be able to be managed adequately within the prison and the submission is made that the learned sentencing judge made no allowance in the sentence for the applicant's ill health and the additional burdens endured by him as a result of imprisonment.

[18] Further evidence from both parties as to the effect on the applicant of his imprisonment was allowed without objection. The effect of the evidence from the applicant is that the accommodation in his cell makes things significantly more difficult for him than would be the case in his home, particularly because his bed is set too low, he is required to stand for significantly longer periods than he would be otherwise, especially during the "muster-up" process, the hardness of the seats and stools available to him in prison combined with his pelvic injuries makes it difficult to sit for anything other than short periods, there are no "walkers" available to assist him with walking and limited access to wheelchairs, and he has real difficulty cleaning his room and carrying items such as a box required for eating. He is also required to line up to receive medication and has difficulty standing in line for significant periods as he finds it painful.

[19] He says he is not allowed access to his medication more than twice a day so that there can be a period of some 16 or 17 hours between the afternoon medications he receives and the morning medication the next day. When he was sentenced it was thought that he would be able to receive medication three times a day. If he receives his medication after 9am he cannot go back into his room to lie down. That means he either has to sit on a steel stool or a steel bench or walk around between 9am and 11am. Apparently, on about four days out of seven, he is unable

to organise himself to be back in his cell before 9am. He says that by the time he gets back to his room at about 1 pm after a "muster-up" he is exhausted and suffering enormous pain as his medication has lost its effectiveness by that time.

[20] If he cannot get access to his room he is obliged to stay in a common area which has only one toilet to accommodate all the prisoners who may be in that area. Because of his physical disabilities he needs to go to the toilet often and to spend a significant time in there, which causes issues with other inmates who may wish to use the toilet and has caused him to soil himself while waiting to get access to it.

[21] He has needed medical attention on one occasion when vomiting blood and on a second occasion in respect of a hernia that he suffered when he was getting into the transport vehicle to take him to prison. That has now caused his right testicle to swell and makes walking difficult. He estimates that his level of pain has increased to twice as much as it was before he was imprisoned and that he now has pain all the time at a greater level than before. He also says that he cannot control the pain because he has no medication at times when he needs it. He says his pain is getting to the point where he cannot walk because it is unbearable and that he has tripled the amount of walking or mobilisation that he is required to do at home. He also says that he has problems with bladder control which has worsened in prison and he has trouble from slipping in the kitchen area which becomes wet at times.

[22] That evidence was countered to some extent by an affidavit from the Health Services Manager at the prison where the applicant has been incarcerated, Ms Alborough. In respect of the allegation that the applicant is locked in his cell from 5pm to 7am with no medical assistance, she said that she had been advised that nurses were available 24 hours a day. He also has an intercom system to contact staff from his cell. She says that if he has any other difficulty obtaining medical care he can request the assistance from the operational staff. She also said there was a "buddy person" made available in every unit to assist prisoners with any minor issues they may be experiencing in relation to the prison system. Nonetheless the respondent accepted during the appeal that there were difficulties the applicant suffered in not being able readily to take his medication more than twice a day.

[23] Ms Alborough also interviewed and examined the applicant on 22 August 2006 and said that he presented to her with no complaints of pain at the time of interview. After the interview he was provided with a wheelchair to use for long distance trips, a walking frame with a seat attached to enable him to sit more comfortably when not in his unit and Ms Alborough has requested that he be supplied with an extra mattress to raise the height of his bed.

[24] She noted that the applicant walked with a limp and had a walking stick to aid his mobility but said that he was in no distress when interviewed and examined. She said that when he was admitted to the prison he presented with a history of incontinence of urine and faeces since his accident. She also said that he was asked whether he would like to be accommodated in a cell with rails and told Ms Alborough that he felt he could manage with the mobility aids that he had been provided with. According to Ms Alborough's affidavit the applicant also commented to her that "he has been advised by his solicitor to raise as many complaints as he can with regard to his placement" in the prison. Ms Alborough said that his incontinence problems can be managed in the correctional setting and that his health needs can be met there.

Sentencing principles where the prisoner is in poor health

[25] His Honour's reasons for the sentences he ordered addressed the effect of the applicant's injuries on his punishment. The evidence before him included two emails from the Department of Corrective Services which refer to the provision of walkers and wheelchairs to prisoners and the existence of a Health Centre operating 24 hours a day. There was also medical evidence setting out in detail the effects of the injuries the applicant had suffered. There was a report by Dr Reeves-Saunders dealing in particular with the consequences on him of incarceration. The doctor said:

> "I would state that Mr LS is already in a very real type of jail with extensive deprivation of liberty and loss of almost all usual pleasurable activities. However, the only saving aspect of his current situation is that he has the single remaining freedom of being able to order his daily activities on a moment by moment basis to avoid or minimise additional pain, prevent urinary incontinence and to manage his bowels."

[26] The principles that guide sentencing courts in cases like these were expressed in *R v Smith* (1987) 44 SASR 587 at 588-589 as follows:

> "The task of the Court of Criminal Appeal, speaking generally, is to see whether the trial judge went wrong on the material before him: *R v Dorning* (1981) 27 SASR 481 at 488. There is power to receive fresh evidence subject to certain conditions which are summarized in *Dorning's* case at 485. The proper purpose of fresh evidence on an appeal against sentence is to bring before the court facts which were in existence at the time of the imposition of sentence but were not known to the sentencing judge or to explain facts which were before the sentencing judge so as to put them in a new light. It is not open to the Court of Criminal Appeal to intervene upon the basis of events which have occurred since the imposition of sentence, *R v O'Shea* (1982) 31 SASR 129 and fresh evidence is therefore not receivable to establish the occurrence of such events. A clear distinction is necessary between fresh evidence as to events occurring before sentence and evidence as to events occurring after sentence.
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> While the evidence sought to be admitted on this appeal in a sense establishes the occurrence of events occurring after the passing of sentence, it does so for the purpose of explaining the full extent and implications of the appellant's condition of health which existed at the time of sentence. I think that the authorities show that it is permissible to have regard to events occurring after sentence for the purpose of showing the true significance of facts which were in existence at the time of sentence. In *R v Green* (1918) 13 Cr App R 200 evidence was admitted on appeal to show the true character and value of information given by the appellant to the police before sentence, as disclosed by subsequent events. In *R v Ferrua* (1919) 14 Cr App R 39 the evidence admitted on the appeal revealed how serious the appellant's state of health had been when he was sentenced. I think that the events occurring since sentence are

> admissible to show the extent and implications of the condition of health which the appellant was in when he was sentenced. The evidence which proves the occurrence of those events and which bears generally upon the extent and implications of the AIDS condition from which the appellant was suffering at the time of sentence, meets the tests referred to above for the admission of fresh evidence on appeal. We therefore admitted the evidence.
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> …
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> How far should the new information about the appellant's health affect the matter? The state of health of an offender is always relevant to the consideration of the appropriate sentence for the offender. The courts, however, must be cautious as to the influence which they allow this factor to have upon the sentencing process. Ill health cannot be allowed to become a licence to commit crime, nor can offenders generally expect to escape punishment because of the condition of their health. It is the responsibility of the Correctional Services authorities to provide appropriate care and treatment for sick prisoners. Generally speaking ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health."

[27] That decision was applied by this Court in *R v Pope ex parte A-G (Qld)* [1996] QCA 318 at p. 8 and see also *R v B* [2000] QCA 42 at pp. 5-8.

Submissions

[28] The focus of the submissions for the applicant was that the learned sentencing judge should have suspended the period of imprisonment after three months rather than the nine months suspension he did impose. It was conceded that it was open to the sentencing judge to impose a head sentence of between two and three years imprisonment. Some of the lesser offences which attracted sentences of 12 months imprisonment were suspended after three months by his Honour. He said that the earlier suspensions he imposed were "in recognition of his pleas of guilty to these offences." It was submitted that "no doubt influenced by the … emails suggesting that Corrective Services would be able to adequately manage the Applicant's needs" his Honour made no allowance in the sentence for the applicant's ill health and the additional burdens endured by him as a result of imprisonment.

[29] It was also submitted to us that we should take into account matters subjective to the applicant showing that imprisonment was especially burdensome for him because of his injuries and constant pain and far more burdensome than if he were living at home; see *R v Vachon* [1998] QCA 185 and *R v Vachalec* [1981] 1 NSWLR 351, 353.

[30] Although his Honour's comments suggested that the period of suspension he ordered related only to the pleas of guilty it was submitted to us by the respondent that the suspension after serving only one quarter of the total term of imprisonment is greater than the usual one third mark commonly imposed to reflect cooperation

and remorse evidenced by a plea of guilty. In the absence of some comment by his Honour to that effect, however, I am not satisfied that considerations relevant to the applicant's medical condition were significant in determining the appropriate period of suspension of the sentences.

Decision

[31] Even though the applicant will now have a higher bed, a walker with a seat to enable him to sit more comfortably and can have medical assistance when and if he requires it, it was accepted by the respondent that the applicant continued to have problems greater than those he would have at his own home in having access to his medication only twice a day, being required to stand for significant periods during the day with less of a chance to lie down or sit comfortably and with incontinence that sometimes he cannot deal with during periods sometimes of some hours before he can return to his cell. These are problems that it seems were not anticipated or the subject of informed evidence before the learned sentencing judge so that the true significance of his state of health and its consequences at that time was not realised.

[32] This is not a case where the imprisonment in itself creates a serious risk of a gravely adverse effect on the applicant's health. The issue is rather whether the imprisonment will be a greater burden on him by reason of his state of health.

[33] One has to be careful in a situation like this to compare the applicant's situation in prison with his situation were he not incarcerated. In the words of Dr Reeves-Saunders he has lost his single remaining freedom of being able to order his daily activities on a moment by moment basis. The detailed effect of that freedom is what has been made clearer by the new evidence. Although he was already suffering constant pain with greatly reduced mobility in any event, and the evidence of Ms Alborough deals satisfactorily with some of his problems in detention, his limited ability to treat himself with painkillers and to relieve his pain by lying or sitting down in a comfortable position back in his cell and his problems in dealing with his incontinence make me think that he is significantly worse off in prison than he would be if he were still at home, to adapt the words of McPherson JA in *R v B* at p. 6.

[34] These difficulties do not seem to have been anticipated by his Honour or reflected in his sentencing remarks probably because they would not have been expected on the evidence before him. In my view some allowance should be made for them by reducing the period of suspension in respect of the sentences for counts 2, 3 and 4 on Indictment No. 3011 of 2005 from nine months to five months. The seriousness of the applicant's behaviour and the steps taken in the prison to alleviate his problems militate against any further reduction in that period of suspension.

Order

[35] I would, therefore, grant the application for leave to appeal and allow the appeal to the extent of reducing the period of suspension in respect of the sentences for counts 2, 3 and 4 on Indictment No. 3011 of 2005 from nine months to five months.