# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Bradford* [2007] QCA 293 |
| PARTIES: | **R**<br>**v**<br>**BRADFORD, Carl Andrew**<br>(applicant) |
| FILE NO/S: | CA No 162 of 2007<br>DC No 1906 of 2006 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED EX TEMPORE ON: | 11 September 2007 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 11 September 2007 |
| JUDGES: | McMurdo P, Muir JA and Lyons J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDER: | **1. Application for leave to appeal against sentence granted**<br>**2. Appeal against sentence allowed**<br>**3. Vary the sentences made on 4 June 2007 in each case by suspending the term of imprisonment forthwith with an operational period of 12 months to operate from 4 June 2007** |
| 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 – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – where applicant pleaded guilty to three counts of unlawful and indecent assault – where applicant sentenced to 12 months imprisonment on each count – where applicant seeks leave to appeal against sentence on grounds it is manifestly excessive – whether sentence imposed is manifestly excessive<br><br>*R v AQ* [2003] QCA 479, distinguished<br>*R v Demmery* [2005] QCA 462, distinguished<br>*R v Hatch* [1999] QCA 495, cited<br>*R v Hill* [1995] QCA 450, cited |

*R v Murray* [2005] QCA 188, cited

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| COUNSEL: | A Moynihan SC for the applicant<br>M J Copley for the respondent |
| SOLICITORS: | Legal Aid Queensland for the applicant<br>Director of Public Prosecutions (Queensland) for the respondent |

THE PRESIDENT: Justice Muir will give his reasons first.

MUIR J: The applicant was convicted on 4 June 2007 in the District Court on his own pleas of guilty at the beginning of the first day of his trial of three counts of unlawful and indecent assault after the Crown had agreed not to proceed on the fourth such count on the indictment. He was sentenced to 12 months imprisonment on each count, such terms to be served concurrently. Parole eligibility was fixed at 4 November 2007. The applicant seeks leave to appeal against his sentence on the grounds that it is manifestly excessive.

The complainant, who was 18 years old at the time of the offences, is the applicant's step-sister. They had resided in the same home for seven years and prior to the events in question enjoyed a normal relationship. The applicant was 29 at the time of the offences and 31 when sentenced.

The subject offences were committed in the following circumstances. On 28 August 2004 the applicant, whilst driving a car in which the complainant was a front seat passenger, unexpectedly asked the complainant to expose her

breasts. She refused. He said that no one would know. He then reached across, placed his hand inside her shirt and bra and touched her left breast. The complainant told the applicant not to and he withdrew his hands. Those facts relate to count 1 on the indictment.

The facts constituting count 2 are that the applicant then put his hand between the complainant's legs, rubbed in the area of her vulva outside of her pants and as he did so, made sexually suggestive remarks, querying, by implication, whether the complainant wished to engage in sexual activity. The applicant decided not to make any complaint about the matter.

After a lapse of about nine months, on 26 April 2005, when the complainant was in the house caring for the applicant's four year old son, the applicant arrived home. The applicant inquired of the complainant's sex life and sexual orientation. She left the room to shower and change before going out. After she left the shower, the applicant engaged in sexual banter. He then wrestled her to the bed saying, "We could fuck in here". The complainant said, "No".

When she went to the bathroom the applicant followed and continued his sexual banter. He then picked up an electric razor, switched it on and placed it against the complainant's left breast outside her clothes. Those matters constitute count 4 on the indictment.

The complainant subsequently moved out of the house to avoid further contact with the applicant and reported the incidents to the police. When interviewed by police officers the applicant denied the conduct in counts 1 and 2. He admitted to the conduct in respect of count 4, but sought to explain it away.

The applicant had no prior criminal history and did not reoffend whilst on bail for a very extended period. He had a good work history and had the care of his four year old son. There was a full hand up committal and a guilty plea was entered immediately after the Crown discontinued a count on the indictment.

It is submitted on behalf of the applicant that the sentencing judge's discretion miscarried in that she impermissibly fettered the sentencing discretion, placed too much weight on deterrence, punishment and breach of trust, and failed to give sufficient weight to the considerations just mentioned including the true gravity of the offences.

The useful review of comparable sentences is to be found in Justice Jerrard's reasons in R v Demmery [2005] QCA 462. His Honour there discusses a number of indecent assault cases, most of which involve conduct more physically intrusive and generally more serious than the conduct in this case.

In one of those cases, R v Hill [1995] QCA 450, the applicant licked the anus of the 10 year old complainant in a bedroom at night and rubbed his penis against her buttocks for an extended period. The sentence of 18 months with a recommendation for consideration for release on parole after six months was reduced to 12 months imprisonment suspended after three months with an operational period of two years.

In R v Hatch [1999] QCA 495, the appeal of a 25 year old applicant against an 18 month sentence imposed after a trial for unlawful and indecent assault involving digital penetration was dismissed. At the higher end of the spectrum in the cases reviewed by Justice Jerrard is R v Murray [2005] QCA 188 in which the applicant, who pleaded guilty to one count of stealing, one of indecent assault and one of committing a public nuisance was sentenced to 12 months imprisonment for stealing and two and a half years imprisonment with a recommendation for consideration for post-prison community based release after serving nine months on the indecent assault charge.

No further punishment was ordered in relation to the public nuisance charge. The indecent assault offence was committed nine days after the applicant's release on bail. Whilst intoxicated he approached a woman in the street and rubbed his hand against her vulva on the outside of her jeans. When she attempted to force his hand away he pushed her vulva quite forcefully and then forcibly squeezed her left breast. He had a lengthy criminal history and the offences

of stealing and indecent assault were committed in breach of a two year probation order and in breach of a three months suspended sentence.

The Court, in R v Murray, accepted that decisions cited to it supported a submission that the range of sentence appropriate for the offence of indecent assault was 12 to 18 months imprisonment. The Court also considered that a sentence of 18 months imprisonment was an appropriate starting point for the indecent assault offence but reduced it to 15 months because of the futility of suspending part of its term, having regard to the applicant's background.

In Demmery itself, the sentence of two years imprisonment suspended after six months with an operational period of two years was set aside and a sentence of 12 months, suspended after 25 days, with an operational period of 12 months, was substituted. In his reasons, Justice Jerrard, with whom the other members of the Court agreed, accepted the learned prosecutor's submissions that the appropriate range for a head sentence was 12 to 18 months.

The 27 year old applicant in Demmery was discovered naked, kneeling over the sleeping and inebriated complainant. Her skirt had been lifted up and her underwear pulled aside. A witness saw fluid around the complainant's exposed vulva and noticed that the applicant had an erection. The applicant admitted masturbating and ejaculating over her vulval area.

The learned Crown prosecutor submits that Demmery and R v AQ [2003] QCA 479 demonstrate that the term of 12 months with actual custody is not manifestly excessive. He submits that the offences in those cases were not as serious as those under consideration. In R v A, the 31 year old applicant had been in a sexual relationship with the adult complainant for some time. When the applicant stayed in the town in which the complainant resided he would stay in the complainant's house overnight and consensual sexual activity would then take place.

On the night on which the offences occurred, the complainant had determined to end the relationship. That was not clear to the applicant, at least at the outset of the unlawful conduct. When the applicant initiated sexual activity the complainant asked him to stop and pushed him away. The applicant persisted, saying, amongst other things, "No means yes".

The applicant continued to force himself on the complainant, holding her hands above her head, stroking her and rubbing his penis in the area of her vulva. The complainant left the bed, went to the veranda for a time, then came back to the bed. The applicant then resumed his previous conduct, culminating in simulated sexual intercourse without penetration.

In my view, the conduct in both Demmery and R v A was more serious than that involved in this case. The complainant in

Demmery was a minor. She was taken advantage of in a sordid fashion whilst unconscious and vulnerable. In R v A, the complainant was forcibly restrained for two protracted periods during which the applicant rubbed his penis around the area of her vulva.

Whilst the applicant's conduct was reprehensible in this case, and no doubt very distressing to the complainant, it was not as intrusive and gross as the conduct in Demmery. It did not concern a minor. Nor did it involve the same degree and extent of coercion and physical contact as that in R v A.

In my view, the sentence was manifestly excessive having regard to comparable sentences and the matters on which the applicant's counsel relies. In view of this conclusion, it is unnecessary to consider whether, by her remark, that "a sentence of imprisonment is inevitable", the sentencing judge considered that she had no discretion not to impose a lesser sentence and thus fettered the exercise of her discretion.

I would order that the application for leave to appeal against sentence be granted, the appeal be allowed, and that the sentences imposed on 4 June 2007 be varied in each case by suspending the term of imprisonment forthwith with an operational period of 12 months. Obviously, if the first count stood by itself, the 12 month sentence could not have been allowed to stand.

THE PRESIDENT: I agree. The sentence of actual custody imposed in this case was perhaps more appropriate had these offences involved an adult and a child where the balance of power in the relationship between victim and offender was less evenly weighted than in this case. The 29 year old applicant nevertheless twice behaved abominably towards his young, adult step-sister. But in the end, he desisted once the complainant was able to finally get through to him that his advances were unwanted.

It seems that she had to make a complaint to police to be entirely sure that his conduct would stop. The victim impact shows that, especially because of her particularly unfortunate history, the applicant's conduct has significantly detrimentally affected her life.

The cases of R v Demmery [2005] QCA 462 and R v AQ [2003] QCA 479 are more serious than this case as Justice Muir has demonstrated. A sentence of 12 months imprisonment fully suspended or suspended after a short term of imprisonment would have been open here. The comparable sentences to which we have been referred demonstrate that the sentence of actual imprisonment imposed here made the sentence manifestly excessive in all the circumstances. I agree with the orders proposed by Justice Muir.

LYONS J: I agree with the reasons of Justice of Appeal Muir and the orders he proposes. I also agree with the President that the term of imprisonment fully suspended or suspended

after a short term of imprisonment would have been open in the circumstances of this case. The orders are as set out by Justice Muir.

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