

SUPREME COURT OF QUEENSLAND

CITATION: *R v Ahmadyar* [2007] QCA 342

PARTIES: **R**
v
AHMADYAR, Osman
(applicant)

FILE NO/S: CA No 93 of 2007
DC No 3029 of 2006

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED EX TEMPORE ON: 16 October 2007

DELIVERED AT: Brisbane

HEARING DATE: 16 October 2007

JUDGES: McMurdo P, Dutney J and Douglas J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **1. Application for leave to appeal is granted**
2. The appeal is allowed
3. The sentence imposed at first instance is varied and instead the applicant is sentenced to a period of six months imprisonment on each count with no suspension of the sentence
4. It is declared that a period of 1,341 days from 13 January 2003 to 14 September 2006 is imprisonment already served under the sentence

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 the appellant pleaded guilty to three counts of indecent assault – where previous to the trial the appellant was declared temporarily unfit to stand trial by the Mental Health Court and was held in custody on remand for over three and a half years – where the appellant was sentenced to six months imprisonment on each count suspended forthwith with a 12 month operational period – where the pre-sentence custody period was not declared as time served – whether there

should be a declaration for time already served under the sentence – whether the sentence of 6 months imprisonment fully suspended for 12 months without a declaration for time served was manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 159A(4)

R v Al Aiach [2006] QCA 157; CA No 93 of 2006, 12 May 2006, followed

COUNSEL: A W Moynihan SC for the appellant
M J Copley for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: Osman Ahmadyar pleaded guilty on 10 April this year to three counts of indecent assault. These counts were contained in a 10-count indictment including two counts of common assault, seven counts of sexual assault and one count of rape. He was in custody on remand for all 10 offences for a period of over three and a half years from 13 January 2003 to 14 September 2006. The delay in finalising the case against him was because he was declared by the Mental Health Court to be temporarily unfit to stand trial after he suffered a major mental breakdown when he was charged and imprisoned without bail. After receiving extensive treatment, including involuntary electroconvulsive therapy, he gradually recovered sufficiently to stand trial on the rape offence. He was tried and acquitted of that offence in March this year. When he pleaded guilty to the three counts of indecent assault the prosecutor entered a nolle prosequi in respect of all the remaining six counts and Mr Ahmadyar was discharged on them. On each of the counts to which Mr Ahmadyar pleaded guilty he was sentenced

to six months' imprisonment suspended forthwith with an operational period of 12 months. He contends that the sentence was, in all the circumstances, manifestly excessive.

Mr Ahmadyar was 34 years old at sentence and between 30 and 31 at the time of the offences which occurred between 5 August 2002 and 11 January 2003. He had a minor criminal history for a breach of bail and for an unauthorised dealing with shop goods. Both these matters occurred in the second half of 2006 so that they post-dated the present offences. Convictions were not recorded in respect of them. He came to Australia as a refugee from Afghanistan where he was apparently a torture victim of the Taliban. His father was killed by the Taliban. Post-traumatic stress arising from those circumstances was largely responsible for his mental breakdown.

The present offences had some serious aspects. They concerned assaults on female sales assistants aged between 17 and 18 years. The young women were employed at a clothing store in Brisbane City where Mr Ahmadyar was manager. He seriously abused his position of power over each complainant in sexually harassing and then indecently assaulting them. The first offence concerned hugging and kissing a complainant on the face and lips and touching her breasts. The second offence involved questioning a different complainant about her sexual experiences and then putting his arms around her from behind, asking if he could

touch her breasts and pushing his penis against her back as she pulled away. The final count involved an attempt to pull down another complainant's pants after he noticed a tattoo on her right pelvis.

The prosecutor at sentence told the primary Judge that the pre-sentence custody period could not be declared as time served. Both Mr Moynihan SC, who now appears for Mr Ahmadyar, and Mr M J Copley, who now appears for the respondent, agree that the prosecutor's contention was wrong: the pre-sentence custody was declarable as time served under section 159A(4) of the *Penalties and Sentences Act 1992* (Qld). Mr Moynihan concedes that ordinarily a term of six months imprisonment would be within range for this type of offending, consistent with the approach of this Court in *R v. Al Aiach* [2006] QCA 157, CA No 93 of 2006, 12 May 2006. He contends, however, that Mr Ahmadyar should have been convicted and not further punished or a declaration should have been made as to time already served under the sentence, so that he now cannot be subjected to further punishment. Mr Copley concedes that in the present circumstances the sentence was manifestly excessive in that it has exposed Mr Ahmadyar to the possibility, should he commit another offence during the operational period of his suspended sentence; to an effective term of four years imprisonment for these offences of sexual assault.

All those concessions are rightly made. Neither counsel submits that the substitution of an actual period of six

months imprisonment with a declaration as to time in custody already served is to impose a harsher penalty than was imposed at first instance.

It follows that, in the unusual circumstances of this case, the application for leave to appeal should be granted, the appeal allowed and the sentence imposed at first instance varied by ordering that Osman Ahmadyar be sentenced on each count to imprisonment for a period of six months without any suspension. It is declared that he has been in custody for a period of 1,341 days from 13 January 2003 to 14 September 2006. That period of time is declared to be imprisonment already served under the sentence.

DUTNEY J: I agree.

DOUGLAS J: I agree.

THE PRESIDENT: Those are the orders of the Court.
