

SUPREME COURT OF QUEENSLAND

CITATION: *R v Murphy* [2011] QCA 363

PARTIES: **R**
v
MURPHY, Nathan Lee
(applicant)

FILE NO/S: CA No 184 of 2011
DC No 20 of 2011

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Gympie

DELIVERED ON: 13 December 2011

DELIVERED AT: Brisbane

HEARING DATE: 30 November 2011

JUDGES: Muir JA and Margaret Wilson AJA and Mullins J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Application for leave to appeal against sentence granted.**
2. Appeal against sentence allowed.
3. Sentence varied by reducing to six months the term of imprisonment.
4. The sentence is to be served cumulatively upon the existing term of imprisonment now being served.
5. The applicant is eligible for parole on 16 April 2012.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded not guilty to a charge of sexual assault – where the applicant was found guilty after a trial – where the applicant was sentenced to 15 months’ imprisonment cumulative on a five year sentence he was then serving – where the parole eligibility was set at about twenty-one and a half months after the date of sentence – whether the sentence of 15 months was manifestly excessive – whether the parole eligibility date made the sentence manifestly excessive

Corrective Services Act 2006 (Qld), s 209
Penalties and Sentences Act 1992 (Qld), s 156A, s 160D, s 160F

R v Hatch [1999] QCA 495, considered
R v Keevers; R v Filewood [2004] QCA 207, considered

COUNSEL: J J Allen for the applicant
 S P Vasta for the respondent

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

- [1] **MUIR JA:** I agree with the reasons of Margaret Wilson AJA and with the proposed orders.
- [2] **MARGARET WILSON AJA:** The applicant pleaded not guilty to a charge of sexual assault. He was tried before a jury who returned a verdict of guilty. On 16 June 2011 he was sentenced to 15 months' imprisonment cumulative on a five year sentence he was then serving. The sentencing judge fixed his parole eligibility date as 1 April 2013.
- [3] The applicant seeks leave to appeal against the sentence on the ground it was manifestly excessive. His counsel submitted that the term of 15 months' imprisonment was itself manifestly excessive, and that the sentencing judge erred in fixing the parole eligibility date.

The circumstances of the offence

- [4] At some time between 5.30 am and 6.00 am on 6 February 2011 the female complainant was sleeping in her bedroom beside her boyfriend when she was woken by two male intruders who had come into the room and jumped on the bed. One of them, Ashley Leese, who was known to her, began to wrestle with her boyfriend. The other man, the applicant, smelt of alcohol and introduced himself to her. He told her she had a sexy body. The intruders left after about five to 10 minutes.
- [5] The applicant and Leese soon returned. Leese again began to wrestle with the complainant's boyfriend. The applicant lay down on the bed and started rubbing up the complainant's legs and back under the doona. She pulled away and screamed out to him to get out and not to touch her. The applicant told her she "needed a little bit of black in [her]." The applicant and Leese left the room.
- [6] They returned for a third time. Again, Leese wrestled with the complainant's boyfriend. The complainant was lying on her stomach and trying to avoid the applicant, who tried to rub her on top of the bedclothes. Eventually he slid his hand under the bedclothes and touched her left leg. He moved his hand up under her shorts and touched her bottom. She "pulled away really hard." He persisted, placing his hand under her shorts and underwear and sliding it towards her vagina. He inserted the tips of his fingers between her legs and reached "pretty close" to her vagina. She screamed at him to get away and get out. He left the room.

Antecedents

- [7] The applicant was aged 22 years at the time of the offence, and 23 years at sentence.

- [8] He had a criminal history. In 2005 he was convicted of attempted robbery with circumstances of aggravation, and sentenced to 12 months' imprisonment to be served by way of an intensive correction order. About six months after he was sentenced, he was fined for breaching the order. He breached it again by offences dealt with in the District Court on 1 August 2007.
- [9] On 1 August 2007 a judge of the District Court sentenced him for assaults committed on people in the streets in July 2006 and for offences arising out of a home invasion on 2 September 2006. The head sentence imposed was five years imprisonment, with a parole eligibility date of 8 August 2008.
- [10] The applicant was released on parole on 2 July 2009 – i.e. after serving 23 months in prison. Then he served approximately 19 months of his sentence in the community before his parole was suspended on 7 February 2009, when he was remanded in custody on the sexual assault charge. He served approximately four months in custody until 16 June 2011, when he was sentenced for the sexual assault and his parole was cancelled.¹
- [11] Thus, at the time he was sentenced for the sexual assault, the applicant had served approximately 46 months of the five year term of imprisonment which had been imposed by the District Court, and he had about 14 months of that sentence still to serve.
- [12] The applicant was also remanded in custody for a number of other offences allegedly committed on the same day. At the time of sentencing for the sexual assault, those charges were still to be dealt with in a Magistrates Court. Indeed, on the hearing of this application for leave to appeal, this court was told that they had been listed for hearing on 14 December this year.
- [13] The period of over four months the applicant spent in custody immediately before he was sentenced for the sexual assault could not be declared time served under the sentence.

The sentencing remarks

- [14] The sentencing judge described the offending conduct as a gross violation of the complainant in her bed against her will. His Honour read her victim impact statement into the record. It was a handwritten document dated about three months after the incident and a few days before the trial. She said she “no longer [felt] comfortable around males”, that she had difficulty communicating with them, and that she was “scared to think about things in sexual ways or have a sex life with a partner ‘cause if [she said] ‘no’ [she] could get hurt”. His Honour concluded that she was “suffering considerably as a result of what [the applicant] did”. He continued -
- “You invaded her bedroom in much the same way as a person involved in a home invasion invades a house. You weren't invited into her bedroom, nor was Ashley Leese. You are currently serving, amongst other things, a sentence of five years' imprisonment for a home invasion.”
- [15] His Honour noted that the fact the applicant was drunk at the time may have explained what he did but could not excuse it. He said of the applicant –

¹ *Corrective Services Act 2006 (Qld) s 209.*

“You have shown a complete lack of remorse here. In evidence you said that the first time you saw the complainant was when she gave evidence in this Court. You gave a false alibi. You lied in your notice of alibi. Your defence in my view was fanciful and the jury was correct to reject it.”

- [16] It is a somewhat curious feature of this case that the applicant’s boyfriend apparently did not raise any particular objection to Leese’s being there, wrestling with him. But his Honour was correct to focus on the applicant’s conduct towards the complainant, and not to use what went on between her boyfriend and Leese as a measure of its seriousness. That said, while what the applicant did to the complainant was no doubt distressing for her and it had some ongoing effect on her, it was towards the lower end of the spectrum of sexual assault cases which come before the courts. I do not think that the analogy with a home invasion was really apposite.

Cumulative sentence

- [17] As the sentencing judge appreciated, any term of imprisonment imposed for the sexual assault had to be made cumulative on the period of imprisonment the applicant was then serving.² Accordingly, it was necessary to ensure that the total sentence was proportionate to the applicant’s overall criminality and otherwise appropriate. Both the term of imprisonment imposed for the sexual assault and the new parole eligibility date were part of the total sentence for that purpose. Counsel for the applicant submitted that the sentence which should have been imposed was a cumulative term of six months’ imprisonment, either wholly suspended or with a parole eligibility date at the date of sentence.

The term of imprisonment

- [18] Both counsel cited *R v Hatch*³ and *R v Keevers; R v Filewood*⁴ for comparative purposes. Both involved more serious conduct than that in the present case.
- [19] In *Hatch* the offender was convicted after trial of unlawfully and indecently assaulting a woman in her house. The complainant went to sleep in her bed. She woke to find the offender on top of her. Despite her asking him to desist, he proceeded to put his fingers inside her vagina. This caused some pain. She kept asking him to stop. He went on to forcibly grope her breasts. She continued to ask him to stop. Instead, he moved his hand in between her legs. She managed to push him off and ran out of the bedroom to seek help from her flatmate. She left in a taxi. The sentencing judge commented on the offender’s lack of remorse, and his arrogance evidenced by his earlier remarks to the complainant –

“If I want to sleep with you I will sleep with you. If I want to fuck with you I will deal with it.”

“You are nothing but a child, you are stupid and you have no life, you do nothing, don’t be silly.”

The offender, who was aged 25 when he committed the offence and 27 at sentence, had no prior convictions. This court declined to interfere with the penalty of 18 months’ imprisonment imposed by the sentencing judge.

² *Penalties and Sentences Act 1992* s 156A.

³ [1999] QCA 495.

⁴ [2004] QCA 207.

- [20] Filewood and Keevers were respectively convicted after trial of rape and unlawful and indecent assault committed on the same occasion. After a night out at a soccer presentation dinner and later drinking at a hotel, the complainant and her boyfriend returned to the unit where she lived and engaged in sexual intercourse. After they fell asleep, the two offenders entered the bedroom. The complainant awoke to find Keevers kissing her and fondling her breast, and Filewood digitally penetrating her vagina. Keevers was aged 23 and Filewood 24. Neither had any criminal history. Keevers was sentenced to 12 months' imprisonment suspended after 21 days for 18 months. Filewood was sentenced to two and a half years' imprisonment suspended after nine months for three years. Both appealed unsuccessfully against conviction and sought leave to appeal against sentence. This court considered that a custodial term was warranted in each case. But it considered that was no utility in requiring Keevers, a comparatively young first offender, to serve a mere three weeks imprisonment – of which he had in any case already served one week. It interfered with his sentence to the extent of ordering that the 12 months' imprisonment be suspended at the expiration of the period of custody already served, for an operational period of 18 months. It declined to interfere with Filewood's sentence.
- [21] In the present case the imposition of a cumulative term of 15 months was, in my view, manifestly excessive. The appropriate range for offending of this nature was six to nine months.

The parole eligibility date

- [22] Counsel for the applicant submitted that the sentencing judge was required by s 160D(2) of the *Penalties and Sentences Act 1992* (Qld) to fix a parole eligibility date. Counsel for the respondent agreed that his Honour had to do so.
- [23] Sections 160D and 160F provide:-

“160D Sentence for a serious violent offence or sexual offence

- (1) This section applies if the offender's period of imprisonment includes a term of imprisonment for a serious violent offence or a sexual offence.
- (2) If the offender had a current parole eligibility date or current parole release date, the court must fix the date the offender is eligible for parole.
- (3) If subsection (2) does not apply, the court may fix the date the offender is eligible for parole.
- (4) A date fixed under subsection (2) must not be earlier than the current parole eligibility date or current parole release date.

Note—

See also section 160F.

160F Significance of an offender's period of imprisonment

- (1) One of the objects of sections 160A to 160E is to ensure that at any 1 time there is only 1 parole release date or parole eligibility date in existence for an offender.

- (2) When fixing a date under this division as the date an offender is to be released on parole or is to be eligible for release on parole, the date fixed by the court must be a date relating to the offender's period of imprisonment as opposed to a particular term of imprisonment.

Examples—

- 1 O is sentenced to a term of 1 year's imprisonment on 1 July 2007 with a parole release date of 1 January 2008. O is released on parole on 1 January 2008. On 1 April 2008, O is sentenced to a further term of 1 year's imprisonment for another offence. A parole eligibility date fixed for O under section 160B(2) must relate to the 2 years period of imprisonment to which O has been sentenced and must not be earlier than 1 January 2008.
- 2 O is sentenced to a term of 1 year's imprisonment on 1 July 2007 with a parole release date of 1 January 2008. On 1 November 2007, O is sentenced to a further term of 1 year's imprisonment for another offence, to be served concurrently with the first term. A parole release date fixed for O under section 160B(3) must relate to the 16 months period of imprisonment to which O has been sentenced and must not be earlier than 1 January 2008."

- [24] His Honour was told that the applicant's full-time discharge date on the five year term he was serving was 16 August 2012.⁵ He said –

“I propose to fix a parole eligibility date after you've served half of the sentence I am imposing on you.”

The parole eligibility date he set (1 April 2013) was seven and a half months after 16 August 2012.

- [25] Counsel for the applicant submitted that in doing so his Honour erred in that he set the parole eligibility date beyond the halfway point of the combined sentence. That halfway point (thirty-seven and a half months from 1 August 2007 when the initial sentence was imposed) had already passed. The effect of what his Honour did was, in counsel for the applicant's submission, to set the applicant's parole eligibility date at sixty-seven and a half months into a 75 month term of imprisonment, which resulted in the sentence being manifestly excessive.
- [26] Counsel for the respondent submitted that the parole eligibility date ought to have been fixed in the context of a total period of imprisonment of 29 months (the 14 months still to be served pursuant to the initial sentence plus the 15 months imposed for the sexual assault). He submitted that the parole eligibility date could well have been set after fourteen and a half months: that would have been about 31 August 2012.
- [27] If the term of imprisonment for the sexual assault is to be reduced, it will be necessary to revisit the parole eligibility date. In my view, it should be fixed in

⁵ This was what was shown on the Presentence Custody Certificate (Exhibit 8 on sentence); AR 28-29, but it was more likely 1 August 2012 since the sentence was imposed on 1 August 2007. See AR 12 and 30-35.

the context of the 14 months still to be served pursuant to the initial sentence plus the term imposed for the sexual assault.

Outcome

- [28] In all the circumstances a cumulative term of six months ought to have been imposed with parole eligibility being fixed at 16 April 2012.

Orders

- [29] I would make the following orders –
1. Application for leave to appeal against sentence granted.
 2. Appeal against sentence allowed.
 3. Sentence varied by reducing to six months the term of imprisonment.
 4. The sentence is to be served cumulatively upon the existing term of imprisonment now being served.
 5. The applicant is eligible for parole on 16 April 2012.

- [30] **MULLINS J:** I agree with Margaret Wilson AJA.