

SUPREME COURT OF QUEENSLAND

CITATION: *R v Newman (a pseudonym)* [2021] QCA 13

PARTIES: **R**
v
NEWMAN (a pseudonym)
(applicant)

FILE NO/S: CA No 320 of 2019
DC No 284 of 2019

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Childrens Court at Brisbane – Date of Sentence: 8 November 2019 (Dearden DCJ)

DELIVERED EX TEMPORE ON: 9 February 2021

DELIVERED AT: Brisbane

HEARING DATE: 9 February 2021

JUDGES: Sofronoff P and Mullins JA and Boddice J

ORDER: **Application for leave to appeal is refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was 14 years old and the complainant six years old at the time of the offence – where the applicant had no previous criminal history and had been diagnosed with multiple intellectual disabilities – where the applicant pleaded guilty to one count of rape – where the applicant was sentenced under the *Youth Justice Act* 1992 (Qld) to three and a half years detention with 60 per cent to be served in detention and a conviction recorded – whether the applicant’s personal circumstances operates as a mitigating or aggravating factor or has no substantial influence at all

R v Neumann; Ex parte Attorney-General (Qld) [2007] 1 Qd R 53; [\[2005\] QCA 362](#), explained
R v Patrick (a pseudonym); R v Patrick (a pseudonym); Ex parte Attorney-General (Qld) (2020) 3 QR 578; [\[2020\] QCA 51](#), followed

COUNSEL: J P Benjamin for the applicant (pro bono)
D Balic for the respondent

SOLICITORS: No appearance for the applicant
Director of Public Prosecutions (Queensland) for the

respondent

- [1] **SOFRONOFF P:** In March 2018, when the applicant was 14 years old, he went to Kmart at Wynnum Plaza after school where he loitered there for some time, watching school-aged children, while pushing a shopping trolley. He noticed the complainant, a six year-old girl. He lured the complainant into an area in the store where they could not be seen, and in that place, he pulled her onto the floor, removed her underwear and inserted a 20 centimetre pen into her vagina. He then ran away. The complainant's mother heard her daughter's screams of pain and found her, lying on the ground with the end of the pen protruding from her body. Police were called and the child was taken to hospital. The complainant was in pain and was bleeding. An examination showed abrasions and lacerations within her vagina caused by multiple insertions of the pencil which, as the examining doctors said, would have been extremely painful. The doctors treated the complainant with antibiotics and scheduled her for further treatment. The complainant and her parents were recent migrants and were not Australian citizens. For this reason they were not entitled to free treatment. The medical treatment given to the complainant cost \$10,000. There remains the possibility that the healing of these lacerations may lead to the formation of scar tissue which may affect the function of the complainant's cervix and vagina and may affect her sexual and reproductive capacity.
- [2] The applicant was identified on security video recordings at Kmart. His fingerprints were found on the pen. Police arrested him at his school. The applicant declined to participate in an interview.
- [3] The applicant was examined by a psychologist whose report dated 31 October 2019, was tendered at sentencing. The following is taken from that report.
- [4] The applicant was born premature at 31 weeks and required resuscitation upon delivery as well as intensive care to maintain breathing and feeding. From an early age he began to show severe developmental delay. He began to walk only at

20 months, was slow to speak and was not toilet trained until he was three years old. He showed increasingly disturbed behaviour, such as screaming and tantrums. His parents separated when the applicant was five years old. They both had a history of substance abuse. This may have affected their parenting ability. The applicant remained with his mother at first and then moved to live with his father. Neither parent could cope, and he was sent to live with his paternal grandmother.

- [5] As he grew, he became more and more violent towards her. This violence included stabbing his grandmother with a fork, pushing a key into her forehead, breaking her arm and knocking out several of her teeth. He also misbehaved outside the home. He was dealt with on five occasions between 2012 and 2017 for stealing, arson of a car, setting a fire, possession of knives in a public place and shoplifting. The applicant suffered some physical abuse himself. There is a report that he was sexually abused by a friend of his father's.
- [6] From the middle of 2016, the applicant began to engage in sexually abusive behaviour at home and at school. In 2017 he was charged with sexual offences committed against two girls. In 2018, he was taken into care. The applicant has been diagnosed with Autism Spectrum Disorder, Intellectual Disability, Attention Deficit Hyperactivity Disorder and Oppositional Defiant Disorder. His intellectual disability is such that he has well below average vocabulary and grammar skills and moderate speech production difficulties. He functions in the "Extremely Low Range" cognitively. These conditions affect his ability to infer the mental states of others and to understand that others may have attitudes and beliefs that are different from one's own. This can result in aggression.
- [7] The applicant's sexually deviant behaviour is not uncommon in children with Autism Spectrum Disorder. At school, he was prone to going into toilets when others were using them and taking sexual photos of himself. He attempted to grope a female student between the legs on numerous occasions, expose his penis to others and invite them to do the same and touch other children inappropriately.

- [8] From the age of 12, he began to view pornography regularly, and to steal women's underwear. He touched a five year old child on the vagina in July 2017, and then in September of the same year, he removed a baby's nappy in order to touch the baby's vagina. He admitted to the psychologist that he has a sexual interest in female children and thinks about them while masturbating. He admitted planning the current offence and was proud to tell the psychologist that he knew where the security cameras were placed at Kmart, so that he could avoid them. He acknowledged that he continues to think of engaging in further sexual offences with children because "younger ones can't get away as easy ... not that smart than the older ones".
- [9] He showed limited empathy for his victim. The current offence showed a significant increase in premeditation and planning compared with his earlier offences. The applicant, nevertheless, has shown "some progress in his present care arrangement" although this was said to be likely due to the restrictions and supervision afforded by his residential care workers.
- [10] Not surprisingly, the psychologist concluded that the applicant "presents as a probable high risk of sexual reoffending." His "future risk of sexual recidivism has been assessed as high."
- [11] The learned sentenced judge, Dearden DCJ, took all of these matters into account, and concluded:
- "...my view is that the appropriate sentence, reflecting the mitigating and aggravating factors when balanced as best as possible, is a sentence of three and a half years detention. In my view, there are special circumstances which would warrant some reduction of the actual period to be served, in particular, your plea of guilty and the limited positive response to the supervision that you've been receiving. And so I will order that you serve that three and a half years detention at 60 per cent. That will, of course, also mean a longer period of supervision on your release into the community.
- [12] His Honour also considered whether to record a conviction and said:

“In respect of the recording of a conviction, I acknowledge that the default position is that no conviction should be recorded. However, there is no evidence before me of the potential effect of any conviction on employment and there is, in my view, an overwhelming and clear imperative or need to identify to others, the clearly identified high risk of further sexual offending against children by you, even potentially, of course, on your release from custody. In those circumstances – and I accept that this is an unusual decision, given that the bulk of orders made in this court would normally be that no conviction be recorded, but the combination of the very, very serious nature of your offending against this young child and the matters outlined in detail in the pre-sentence report persuade me that in these circumstances, it is appropriate to record a conviction for this offence.”

- [13] The applicant now seeks leave to appeal against his sentence. He contends that the sentence was manifestly excessive and that the proper sentence ought to have been one of three years’ detention with an order that the applicant serve 50 per cent of the period of detention. The applicant submits that his intellectual disability mitigates his offence. He relies upon *R v Neumann; Ex parte Attorney-General (Qld)*.¹
- [14] That reliance is misplaced. *Neumann* recognises that, depending upon the circumstances a mental disability may operate either as a mitigating factor or as an aggravating factor. Of course, it might also have no substantial influence upon the sentence at all.
- [15] A mental disorder might have such a connection with the commission of the offence that the fact of general deterrence is rendered insignificant, thus reducing the sentence. It may have such a connection with the offence that it reduces the offender’s moral responsibility for the offence. On the other hand, the relationship between the disability and the offending may be of such a nature as to show that the offender is likely to reoffend. This latter consideration would not justify a longer sentence than would be appropriate but its significance is to remove the disability as a mitigating factor. That is the applicant’s situation here. To a very great extent his mental disability has rendered him prone to commit sexual offences against children. Although that propensity exists through no fault of his own, it exists and cannot be overlooked. Nor did Dearden DCJ overlook it. As the passage quoted above

¹ [2007] 1 Qd R 53.

shows, his Honour made express reference to the applicant's evident need for supervision. There would be no good conferred upon the applicant by a too early release from the rehabilitative services and supervision that, alone, can possibly give his life some normalcy.

[16] The offence was a most serious one and deserved a significant penalty. There was little to mitigate the offence. The guilty plea was one that was made in the face of overwhelming evidence. The applicant's personal circumstances also demanded a longer, rather than a shorter time in a place in which he may be given some help to overcome his grave difficulties. In addition, the objective seriousness of the offending had to be reflected in the sentence for the reasons I gave in *R v Patrick (a pseudonym); R v Patrick (a pseudonym); Ex parte Attorney-General (Qld)* (2020) 3 QR 578.

[17] For these reasons, I would refuse leave to appeal.

[18] **MULLINS JA:** I agree.

[19] **BODDICE J:** I agree.

[20] **SOFRONOFF P:** The order of the court is that leave to appeal is refused.