

SUPREME COURT OF QUEENSLAND

CITATION: *R v SDB* [2018] QCA 156

PARTIES: **R**
v
SDB
(applicant)

FILE NO/S: CA No 193 of 2017
DC No 330 of 2014

DIVISION: Court of Appeal

PROCEEDING: Application for Extension (Conviction)

ORIGINATING COURT: District Court at Cairns – Date of Conviction: 11 November 2015 (Harrison DCJ)

DELIVERED ON: 6 July 2018

DELIVERED AT: Brisbane

HEARING DATE: 7 March 2018

JUDGES: Sofronoff P and McMurdo JA and Boddice J

ORDER: **Application for an extension of time within which to appeal the applicant’s convictions is refused.**

CATCHWORDS: CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – SENTENCE – PARTICULAR CASES – RAPE AND SEXUAL ASSAULT – where the applicant was convicted by a jury of one count of common assault and two counts of rape – where the complainant was a child at the time of the alleged offences

CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant seeks to appeal those convictions – where the applicant requires grant of an extension of time in order to appeal those convictions – where there is a significant delay – where the alleged offences occurred 10 years prior to the application for an extension of time within which to appeal – whether there is good reason shown to account for the delay – where the applicant is Indigenous, has limited education and legal resources, and has health issues – whether it is in the interests of justice to grant an extension of time – whether the basis for the proposed appeal supports such a conclusion – where the complainant gave specific and consistent evidence at trial – where other witnesses corroborated comments made to them by the complainant about the offending – where it was open to the jury to be satisfied beyond reasonable doubt that the applicant was

guilty of each offence – where the application to grant an extension of time within which to appeal the convictions is refused

R v DAQ [2008] QCA 75, followed

R v Sun [2018] QCA 24, cited

R v Tait [1999] 2 Qd R 667; [1998] QCA 304, applied

COUNSEL: The applicant appeared on his own behalf
D C Boyle for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

- [1] **SOFRONOFF P:** I agree with the reasons of Boddice J and the order his Honour proposes.
- [2] **McMURDO JA:** I agree with Boddice J.
- [3] **BODDICE J:** On 11 November 2015, the applicant was convicted by a jury of one count of common assault (count 1) and two counts of rape (counts 2 and 3). He was sentenced to one month imprisonment on count 1, and eight years imprisonment on counts 2 and 3.
- [4] On 28 August 2017, the applicant filed an application for an extension of time within which to appeal those convictions. His proposed grounds of appeal, should the extension be granted, were that there was insufficient evidence to support the convictions and there had been a miscarriage of justice by his barrister.

Background

- [5] The applicant was born on 23 November 1949. He is indigenous. He has limited education and resources. He suffers from poor health.
- [6] The complainant in each count was a male born on 27 April 1995. The complainant's great uncles were close friends of the applicant. The complainant called him "Grandad G", for respect. The offences were all committed between September and October 2008, when the complainant was 13 years of age and living at his grandmother's house. The applicant was also staying in that house.
- [7] The jury's verdicts of guilty followed a two day trial. The male complainant who was, at the time of trial, aged 20, gave evidence. Three other female witnesses also gave evidence for the prosecution. The applicant elected neither to give, nor call evidence at the close of the prosecution case.

Offences

- [8] The complainant gave evidence he was watching a movie with the applicant in the lounge room inside his grandmother's house when the applicant grabbed his hand tightly and said "I will see you later on".¹ The complainant could not go anywhere whilst the applicant had hold of his hand. The complainant thought he had done

¹ T1-17/27.

something bad. His hand hurt and there were tears coming down his face. This event formed count 1.

- [9] The complainant then went into a second lounge room where his cousin, T, was asleep on the couch. He sat down next to her and tried to wipe away his tears. He fell asleep. He awoke to the applicant trying to wake him. He pretended to be asleep because he thought he was going to be “flogged”, for whatever reason.² The complainant at that stage was positioned on his stomach, wearing a shirt, long pants and underwear. The applicant was wearing shorts and a rolled up shirt.
- [10] The applicant was touching himself, “playing with his genitals”.³ He was also touching the complainant’s backside. The complainant tried to escape to the other side of the couch, but the applicant grabbed his hands and laid the complainant on his back, on the ground in front of the couch. The applicant then spread the complainant’s legs and forced his penis into the complainant’s “bum”. It went on for five or six minutes. The applicant was saying “Shush, be quiet, shut up.” Afterwards he said “don’t tell anyone, or else”.⁴ This event formed count 2.
- [11] The complainant said sometime after that episode, during the September 2008 school holidays when the complainant was in grade eight, he was upstairs in the kitchen cleaning the dishes. The applicant kissed him on the neck and then punched him to the ground. At the time the complainant’s grandparents, uncles, aunties and cousins were all downstairs drinking and playing loud music. No one else was upstairs in the house.
- [12] The complainant was screaming and kicking but the applicant put him “underneath the deep freezer”.⁵ The complainant said the freezer was light. The applicant lifted the freezer and put the complainant’s hand under it. The applicant pulled the complainant’s pants and underwear down, then put his penis between the complainant’s legs and into the complainant’s “bum”. The applicant was holding the complainant down. He was telling the complainant to be quiet, to shut up, to tell no one else.⁶ This event formed count 3.

Extension

- [13] The applicant submitted an extension of time within in which to appeal his conviction ought to be granted as there were aspects of the complainant’s account, which were improbable or contradictory, causing a jury to have a reasonable doubt as to the applicant’s guilt of all of the offences.
- [14] Those matters included the unlikelihood of the applicant lifting a deep freezer whilst holding the complainant and then placing the complainant’s hand under that freezer, the presence of others in the near vicinity, inconsistencies in the complainant’s accounts and a failure to complain for many years.
- [15] The applicant’s explanation for bringing the application some 20 months after his convictions was that he had limited education, a poor understanding of legal processes and significant health issues.

² T1-18/35.

³ T1-19/7.

⁴ T1-20/5.

⁵ T1-13/21.

⁶ T1-14/19.

- [16] The respondent submitted the application for extension of time ought to be refused because even if there was an adequate explanation for delay, any appeal was devoid of merit. An independent assessment of the evidence would, according to the respondent, conclude it was open to the jury, on the whole of the evidence, to be satisfied beyond reasonable doubt of the applicant's guilt on all counts.
- [17] There was direct evidence from the complainant implicating the applicant in respect of each count. The jury's verdict depended upon the jury's assessment of his truthfulness and reliability. There was no suggestion the jury had been improperly directed in relation to the elements of the offence or as to delay in the making of a complaint.
- [18] The respondent further submitted there is no basis to conclude the conduct of defence counsel occasioned a miscarriage of justice. The matters raised by the applicant, in support of his application for an extension of time within which to appeal, were matters expressly the subject of cross examination of the complainant.

Consideration

- [19] In determining whether to grant an extension of time in which to appeal a conviction, a court will examine whether there is good reason shown to account for the delay and whether overall, it is in the interests of justice to grant the extension. Those overall considerations may involve some assessment of whether the appeal seems to be viable.⁷ Where there has been a deliberate decision not to appeal initially, the discretion to allow the appeal to proceed should be exercised only where the applicant presents a compelling demonstration of a serious injustice which can only be corrected on appeal.⁸
- [20] The applicant's application involves a lengthy delay in seeking to appeal his convictions. His explanation for the delay is that he has limited education and limited legal resources. There were also health concerns. Those matters, in the applicant's particular circumstances, may account for his delay in seeking to appeal his convictions. However, a consideration of his circumstances overall, including the basis for the proposed appeal, does not support a conclusion that it is in the interests of justice to grant the extension.
- [21] The complainant gave specific and consistent evidence in relation to his hand being held forcefully against his will and two acts of anal penetration against his express resistance. Whilst there were inconsistencies in aspects of the complainant's evidence, the complainant maintained those central assertions in cross-examination. The complainant gave an explanation for not complaining at the time of the offences. The complainant said after the events in counts 1 and 2, he was scared. He thought he would get punished for telling someone. He was 12 years of age at the time.
- [22] Further, the matters relied upon by the applicant to support a contention that the jury ought to have had a reasonable doubt about the truth and accuracy of the complainant's account, were the subject of specific cross-examination by the applicant's counsel.
- [23] The complainant gave an explanation of how the first act of rape could occur, notwithstanding his cousin sleeping soundly beside him, and why he did not call out

⁷ *R v Tait* [1999] 2 Qd R 667 at 668.

⁸ *R v DAQ* [2008] QCA 75 at [11].

- to others in the household. His cousin is a heavy sleeper. While the applicant was pulling off the complainant's clothes, the complainant tugged on her hand to try and wake her up. She was of no use. The complainant tried to kick the applicant away whilst he was still on the couch. His cousin still did not wake up. The complainant did not yell out because he knew no one would help him as they were all asleep in bed.
- [24] The complainant said he continued to struggle, but the applicant pinned him down so that he could not move. The episode on the ground went for about five minutes and he tried to get away the whole time. The complainant said the applicant's hips were on the bottom of the complainant's hips. He denied it was not possible for the applicant to rape him in that position.
- [25] The complainant also explained how the applicant was able to place the deep freezer on the complainant's hand on the occasion of the second act of rape. The complainant said on this occasion, when the applicant came up behind him, he did scream and shout. He recognised what would happen and screamed so he could get help. No one saved him. It was the T Festival and his grandparents had a lot of people at the house. People were drinking and food was served at the party. He denied people were coming in and out of the kitchen to get food and drinks. There was an esky downstairs. He accepted guests had to walk through the kitchen to go to the toilet.
- [26] The complainant said he physically struggled against the applicant and pushed and kicked him, but the applicant overcame his resistance. He dragged the complainant to the deep freezer. There was hardly anything in it, just bread and a tiny bit of meat, so it was not very heavy. The applicant grabbed the complainant's hands with one of the applicant's hands and lifted up the freezer with the other hand. The applicant put the deep freezer on his knee, separated the complainant's hands and slowly put the deep freezer on the palm of the complainant's hand. It was very painful but it did not damage his hand. He had bruises, but no broken bones. He did not show the bruises to anybody and did not go to a doctor. The complainant hid them from his family because if you get bruised or hurt, you get a punishment.
- [27] The complainant accepted he said nothing to anybody after this happened in the kitchen. He did not say anything about it until 2012, when he felt comfortable talking to his cousin. The complainant accepted that between when he was aged 12 and 17 years, the applicant would be away for a couple of months or more, and then return to stay at the residence. The complainant did not, when the applicant was away, speak to any member of his family, because he was scared of the consequence if he said something.
- [28] The complainant accepted he first told his cousin K about these events, during a telephone call in late 2012, when he was aged 17 years. He was confused about his sexuality and it was in that context he told K about the applicant. He accepted he told his cousin he was 15 the last time the complainant did anything to him.
- [29] It was a matter for the jury to determine whether the complainant's explanation for those events and for his failure to complain at an earlier time caused them to have a reasonable doubt as to the applicant's guilt. There is no basis to conclude the applicant's counsel failed to adequately place before the jury the relevant matters necessary for its consideration when determining whether to accept the complainant as reliable and truthful.

- [30] There is also no basis to conclude the applicant would have viable prospects of establishing, on appeal, that the evidence did not support his guilt of each of the offences beyond reasonable doubt. That ground essentially constitutes an allegation that the verdicts of the jury were unreasonable. Such a ground requires the court to undertake an independent assessment of the evidence as a whole, to determine whether it was open to the jury to be satisfied beyond reasonable doubt that the applicant was guilty of each offence. In undertaking that assessment, regard must be had to the circumstance that setting aside a jury verdict on such a ground is a serious step.⁹
- [31] A consideration of the evidence given at trial supports a conclusion that on the whole of the evidence it was open to the jury to be satisfied of the applicant's guilt of each of the offences beyond reasonable doubt. The complainant gave a consistent account of his hand being grabbed forcefully by the applicant causing him pain, (count 1) and then of two acts of anal penetration by the applicant against the complainant's resistance (count 2 and 3).
- [32] The jury heard the applicant's denial of those allegations as part of the pre-text call. In that conversation the applicant said he and the complainant did not have intercourse "they just masturbated, that's all". The applicant denied ever touching the applicant's backside, saying "I didn't put my penis in your bum. Nah, I did not, you know that too". He apologised for masturbation, not intercourse, as he did not have intercourse with the applicant. The complainant denied ever masturbating with the applicant.
- [33] The jury also heard the content of the complainant's complaint to his cousin, K, and to his grandmother, W. K spoke to the complainant on 10 November 2012. He was bothered by something so she asked him what it was and the complainant said "There's a few things that have happened to me when I was younger."¹⁰ The complainant said he had been raped. She asked who it was and did she know him. At first the complainant said "no" and then he said "I think so". He said it was Grandad G.
- [34] The complainant went on to say on one occasion he was in the kitchen. The applicant came up behind him and kissed him on the neck and let him know when he was going to be coming to visit him. On another occasion the complainant was sleeping with another cousin when the applicant tried to wake him up. There was another occasion when the complainant was raped in the kitchen. The complainant said his family was downstairs. K said the complainant was hesitant, not wanting to give her more detail. K asked the complainant how old he was when it stopped the last time. The complainant said he was 15. The complainant said he was raped and left in tears.
- [35] W spoke to the complainant on the night of 11 November 2012. The complainant told her he wished he had his childhood back. He said he was raped by Grandad G. The complainant said he was punched from behind, pinned down by the freezer and raped when he was in grade seven.
- [36] Finally, the jury heard evidence from A, the complainant's other grandmother, about the T Festival in 2008. A described her residence as a full house over that period. In 2008, the complainant once said to her "I don't like" the applicant. She

⁹ *R v Sun* [2018] QCA 24 at [31].

¹⁰ T1-49/14.

asked why, but the complainant did not say anything to her. That conversation was when the complainant was in grade eight.

- [37] A consideration of the complainant's evidence and of that evidence as a whole, supports the findings of guilty of each count beyond reasonable doubt. The differences raised by that evidence were matters for the jury's consideration. The jury was properly directed in relation to the matters to take into account in determining whether, in respect of each count, they were satisfied beyond reasonable doubt of the applicant's guilt of that offence.

Conclusion

- [38] A consideration of the whole of the circumstances, supports a conclusion that it is not in the interests of justice to grant an extension of time within which to appeal the applicant's convictions.
- [39] I would order that the application for an extension of time within which to appeal the applicant's convictions be refused.