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THE QUEEN v ROBERT JOHN SOLWAY; (ATTORNEY-GENERAL OF QUEENSLAND: Appellant); THE QUEEN v ROBERT JOHN SOLWAY - BC9502249

SUPREME COURT OF QUEENSLAND COURT OF APPEAL
FITZGERALD P, PINCUS JA and DEMACK J

164 and 187 of 1995

21 June 1995, 22 August 1995

CRIMINAL LAW -- conviction -- indecent dealings with a girl under 14 years and under 16 years -- whether unsafe and unsatisfactory.

CRIMINAL LAW -- sentence -- denial of guilt, lack of remorse -- whether sufficient to warrant interference of court -- sentence lenient -- danger that present sentence may wrongly be treated as a benchmark.

Kuhl (Court of Appeal, CA No 369/1992, 5 February 1993, unreported) Gardner (Court of Appeal, CA No 10/1994, 12 April 1994, unreported) Grey (Court of Appeal, CA No 447/1994, 15 May 1995, unreported) Melano (Court of Appeal, CA No 393/1994, 1 December 1994, unreported) Dales (Court of Appeal, CA No 32/1995, 4 August 1995, unreported)

Pincus JA

Mr Solway was convicted in the District Court of four counts of indecently dealing with a girl under the age of 14 years and one count of indecently dealing with a girl under the age of 16 years. He seeks to appeal against those convictions on the ground that the verdicts were unsafe. We have before us, also, an appeal against sentence by the Attorney-General; the sentence was one of imprisonment for 2 years and 6 months on each count, the whole being suspended with an operational period of 5 years. The appeal against conviction is out of time, but the application for an extension of time was argued, and will be discussed, as if it were an appeal.

APPEAL AGAINST CONVICTION

The Crown case was that Solway, who lived nearby the complainant, dealt with her indecently on six occasions; one of the counts was the subject of a nolle prosequi. The other five occasions related to times when the complainant was about 8 or 9 years old (counts 1, 2 and 4), 9 or 10 years old (count 3) and 11 years old (count 6). On each occasion the complainant had visited the respondent's home where, according to her allegations, the offences were committed.

As to count 1, the allegation was that Solway asked the complainant to rub his penis and said that if she did so she would be given chewing gum. He put her hand on his penis and she rubbed it, as a result of which he ejaculated. Count 2 related to an incident in which, so the complainant said, Solway put her on his clothes washing machine and kept asking her if she had pubic hair; he said that he would find out and put his hand or hands under her pants and on her vagina. Count 3 was an allegation that Solway put the complainant on the floor, stood over her and tried to get her to take his penis in her mouth. She resisted by closing her mouth, preventing the entry of his erect penis which was against

her lips. Count 4 was an allegation that when the complainant told Solway that she had appendicitis, he said he had studied to become a doctor and that he would test to find out if the complainant had appendicitis or not; he then touched her on the vagina, underneath her clothing. The sixth count, and the last which went to the jury, related to an occasion when, while Solway and the complainant were swimming, he put his hands under her swimming togs and on her vagina.

There were a number of discrepancies in the evidence of the complainant; these were relied on in the argument advanced for Solway and will now be discussed. She was asked whether rubbing of her vagina or around her vagina by Solway happened on many occasions and said yes. When asked if he rubbed it vigorously, she replied "No, not - I don't remember, but not usually". But when asked a similar question, she replied "No. I said I don't know. Not vigorously.". She was then asked "Sometimes did he rub it vigorously?" and responded "I don't remember", but later admitted, in effect, that she had said during the committal proceedings that he sometimes rubbed it vigorously.

Next, it was put to the complainant that, with respect to count 2, she had said at the committal that Solway pulled her pants down, and it was suggested that her evidence at the trial was that he just put his hands under her pants. The complainant attempted to explain the apparent discrepancy by saying that her pants "just came down. They may have gone down to my knees, but he didn't actually pull them down. He just put his hand down". With respect to the occasion (count 1) when the complainant alleged Solway ejaculated, it was put to her that in her statement to the police she said this had happened "lots of times", and her response, at the trial, was "Yes, but not regularly. It didn't happen every time". She also said, at the trial, that on one occasion ejaculate went on to Solway's shorts and agreed that it was the first time that she had said this. Next, a point was made of the fact that she did not appear to be able to say whether Solway's penis was circumcised or not.

Lastly, in relation to the abandoned count, a complaint was made at the trial that it was opened that Solway lay or squatted on top of the complainant and tried to pull her pants down, whereas the evidence was that "he kept trying to get on top of me and I just kept squirming over".

Apart from these specific criticisms of the evidence of the complainant, Solway's counsel relied on the absence of corroboration of the complainant's story and on the fact that during the years in which the offences supposedly occurred the complainant persisted in visiting Solway's house. It was pointed out that Solway gave evidence denying any improper conduct.

Counsel for Solway conceded that commonly, very young complainants in cases of this sort prove to be unable to give an account which is completely self consistent. Perfect consistency in telling a story of events which took place over a period of years when the complainant was very young will not necessarily be treated as a quality which makes the story very credible; it might rather create a suspicion that there has been some coaching.

The proper disposition of a case of this sort is very much a matter of impression, but it seems to me clear enough that this is not a matter in which the Court should set aside the jury's verdict. A reading of the complainant's evidence does not by any means give the impression that the story is a fabricated one or one such as to be unworthy of credit, even giving the fullest weight to the discrepancies to which attention has been drawn.

I would refuse the application for an extension of time on the ground that, the matter having been argued as if on an appeal, the convictions must stand.

ATTORNEY-GENERAL'S APPEAL AGAINST SENTENCE

Solway was born on 27 August 1946; he is thus 48 years old. He has no previous convictions. When the offences were committed he was a serving police officer, but the trial judge was told that he left the police service (as a result of stress and depression) shortly after the laying of the complaints relative to this trial. He is a married man with two young children.

The factors which the primary judge referred to, in giving reasons for the sentences imposed, included that the incidents

had taken place over a period ranging from nine years to five years ago, that the offences were "well towards the lesser range of indecent dealing", that as a result of the matters being brought to the attention of the police in December 1993 Solway was invalided out of the police service, that his Honour was "not blind to what you might expect as a former police officer should you be actually incarcerated", and that there was no evidence put before the judge of any lasting psychological harm to the complainant. As has been mentioned, the judge imposed a suspended sentence of 2 years and 6 months for each offence, setting the operational period at 5 years.

Although far worse cases of indecent dealing come before the courts from time to time, what was done to the complainant here was by no means trivial and the offender persisted in interfering with the child for a period of some years. There is nothing to suggest remorse and as the judge's remarks recognised, the girl was put through a committal and a trial; that was apparently a traumatic experience, which his Honour described during the hearing as follows:

"I believe that the girl was under extreme pressure in the witness box . . . she was clearly almost terrified. I was in a position to see her hands through the gap in the witness box. They were never still. She kept playing with her dress. She was rubbing her hands together. She was scrubbing at her palms with her handkerchief. I am not saying she was crying or hysterical but she was clearly under great pressure.

I would, if it ever came to the question of a mis-trial, definitely advise the Director of Prosecutions that another trial should not take place considering the condition of the girl".

His Honour was also informed that the incidents had "certainly affected [the complainant] as time has passed. Her principal concern, it would appear at the moment, was the adverse affect that it's had - and no doubt also the pending court case - has had on her education and her schooling results" .

The orthodox theory is that Solway is not to be given extra punishment for his apparent lack of remorse and for having put the victim through the traumatic experience of being publicly questioned about all these matters at committal and trial; but he is not entitled to the substantial leniency which the cases show can often be justified in such cases, where there is an admission of guilt. Not all the other matters the judge referred to as justifying leniency have much strength. His Honour apparently treated the allegations as "old", but the lapse of time between the last of the offences thought to have taken place in 1989 and the police becoming involved in 1993 was hardly sufficiently substantial to bring the case into the "old matter" class. Then, his Honour mentioned the occupation of the offender as being likely to affect his treatment in prison; but his position as a police officer must, or should, have made him acutely conscious of the seriousness with which the law treats conduct of the kind in which he engaged. It must be accepted that he suffered a bad psychological reaction when he ascertained that these matters were being investigated; but shame and fear of exposure must commonly bear heavily on the mind of an offender.

It is necessary to make reference to some of the authorities which might be thought to justify such leniency as was accorded to this offender. Kuhl (Court of Appeal, CA No 369 of 1992, 5 February 1993, unreported) was a man of about the same age who, with his wife, had had many children placed in his charge; the two acted as foster parents at the behest of the Government. Byrne J pointed out in his reasons that none of the many other children who had been successfully fostered had been subjected to ill-treatment. As a result of the offences Kuhl's marriage had broken down and his remorse had been "frank and considerable". Although the offences committed in that case seem to have been more serious than here, there were two circumstances which tend to distinguish the case: the lesser one was that the offender's long-standing marriage was broken up by the events in question, and the major one, already referred to, was the offender's considerable remorse; when taxed with the offences he readily admitted them. The Court upheld the imposition of suspended sentences. Kuhl was referred to in Gardner (Court of Appeal, CA No 10 of 1994, 12 April 1994, unreported), being treated as a comparable case, and there a suspended sentence was imposed, on appeal.

Perhaps the most difficult case for the Crown is Grey (Court of Appeal, CA No 447 of 1994, 5 May 1995, unreported), where a suspended sentence was imposed; the indecent dealing charged there was more serious than any in the present case, although there was no repetition of it. What appears to have saved the offender from prison was his extreme

remorse; it was said that "his shame was so great that he did not want to venture out of the house in case he met an acquaintance". It must be said that the result of Grey is difficult to reconcile with the general trend of sentencing in such cases as these.

What may be argued to mark this case out from others in which, in comparable circumstances, non-custodial sentences have been imposed is principally the denial of the offences and lack of remorse. The question is whether this difference is sufficient to warrant the interference of the Court at the behest of the Attorney-General. There can be no question but that the sentence is a lenient one, but as is argued by Mr Rafter for Solway, it is an unusual course to send an offender who is at large to prison for a relatively short period, as we are urged by the Attorney to do. The main consideration in favour of the Attorney's appeal is that, unless this Court imposes a custodial sentence, judges of the District Court may well feel free, even where there is significant sexual interference with a young girl and no indication of repentance, to impose non-custodial sentences. The principal consideration against allowing the sentence appeal is the principle in Melano (Court of Appeal, CA No 393 of 1994, 1 December 1994, unreported) and cases which have followed it.

The sentence imposed is not one which I would have imposed. But in the whole of the circumstances, and in particular the fact that the offender has apparently undergone some suffering as a result of his offences, I have concluded, not without considerable hesitation, that the sentence should be left as it is. It appears to me that the danger that the present sentence may, wrongly, be treated as establishing a benchmark, is insufficient to warrant allowing the appeal which must, in my view, therefore be dismissed.

Demack J

I have read the draft reasons of Pincus JA. I agree that the application for an extension of time within which to appeal should be refused, for the reasons Pincus JA has given.

In respect of the Attorney-General's appeal against sentence, the outline and argument in support of the appeal recognised that the range within which the sentence should have been imposed was 12 months' to 2 1/2 years' imprisonment. The sentences asked for were 18 months' imprisonment on each charge, served concurrently, or imprisonment for 2 1/2 years to be suspended after serving 18 months, with an operational period of 5 years, again served concurrently.

I have been unable to understand why if a sentence of 18 months is appropriate, it could also be appropriate to add on a further 12 months which is then suspended for 5 years. The latter sentence would seem to me to be far more severe than the former. The point that is made is that these convictions required the imposition of a custodial sentence.

The cases to which Pincus JA has referred do not establish such a proposition. I agree that the appeal should be dismissed.

Fitzgerald P

The circumstances giving rise to Solway's appeal against conviction and the Attorney-General's appeal against sentence are set out in the reasons for judgment of Pincus JA. I agree with his Honour that the appeal against conviction should be dismissed.

The Attorney-General's appeal against sentence is more difficult to decide.

Cases such as those referred to by Pincus JA, especially Grey, seem to have contributed to an attitude of leniency by sentencing judges towards those who commit offences such as those in this case; there is also probably a degree of sympathy towards offenders such as Solway, despite total disapproval of their revolting conduct; commonly, as in this instance, the offender is a middle-aged or older family man who has otherwise led a blameless life and has a satisfactory

work record; unfortunately, there is usually little or no psychiatric or psychological evidence available to explain why such persons engage in grossly aberrant behaviour towards quite young children.

Leaving aside matters in which, by such evidence or otherwise, a case for special consideration is established, child molesters should, in my opinion, be sent to jail; an attempt to deter such behaviour should be made in an effort to protect children. Of course, genuine remorse may reduce the period of imprisonment otherwise called for.

To my mind, this was a case in which imprisonment was called for; Solway was a police officer who escaped dismissal and associated financial loss and then exhibited a total lack of remorse, exposing the complainant to the trauma of giving evidence and being cross-examined on two occasions.

However, Solway's sentence was within range having regard to the earlier decisions to which Pincus JA has referred, which - as I hope I have made clear - I think should no longer be followed: see, now, for example, Dales (CA No 32 of 1995, unreported, judgment delivered 4 August 1995). Although Solway should have been required to serve a period in prison, I am, together with the other members of the Court, disinclined, in the circumstances, including Solway's return to the community after trial, to increase his sentences.

Accordingly, I agree with the orders proposed by Pincus JA.

Order

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO APPEAL AGAINST CONVICTION REFUSED. ATTORNEY-GENERAL'S APPEAL AGAINST SENTENCE DISMISSED.

Counsel: Mr A Rafter for the applicant/respondent.

Mr D Bullock for the respondent to the application and for the appellant in the appeal.

Solicitors: Carew and Company for the applicant/respondent.

Director of Prosecutions for the respondent to the application and for the appellant in the appeal.

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