[COURT OF APPEAL, QUEENSLAND]

H

Davies and McPherson JJA, Thomas J

4, 23 June 1993

Sentence — Sexual offence — Crown appeal — Child victim — Indecent assault involving penetration — Suspended sentence inappropriate — Four years imprisonment substituted.

Sentence — Sexual assault on child — Range of sentences reviewed — Warning by Court that range may not be sufficiently high and could be increased in future.

The Crown appealed against a four-year suspended sentence imposed on H for offences of assault causing bodily harm and unlawful and indecent assault. The offences involved the penetration of the vagina of a young child, the penetration having been effected by an object or part of the body other than the respondent's penis. It was argued that the learned judge fell into error when sentencing H when he determined that: (i) the question of deterrence of other potential offenders was of "small moment" in this particular case; (ii) the child's physical injuries were of "small moment"; (iii) he was "reasonably satisfied" the child was not suffering any long-term problems as a result of the assaults.

Held (allowing the Crown appeal and imposing a sentence of four years with no special recommendations): (1) It was erroneous to treat the deterrence of others as a factor of "small moment".

(2) The actual injuries could not be dismissed as being of "small moment" but if the sentencing judge was referring to permanent physical disability, there was no error in that particular statement.

(3) On the evidence in this case it was a misdirection to reach a view that the child would suffer no long-term problems.

(4) A non-custodial sentence in the present circumstances was indicative of error. A review of prior cases indicated that it is not impossible for a non-custodial sentence to be imposed for offences of this type, but only in very rare circumstances will such a sentence be available.

(5) The established range of sentences in these cases may not be sufficiently high and it may prove necessary to increase it.

(6) In the present case the imposition of a suspended sentence was not justified and a sentence of four years imprisonment for the indecent assault and a concurrent sentence of six months for the assault occasioning actual bodily harm would be imposed.

Elliott v Harris (No 2) (1976) 13 SASR 516; *Paterson v Stevens* (1992) 57 SASR 213, referred to.

Tilley (1991) 53 A Crim R 1, considered.

CROWN APPEAL AGAINST SENTENCE

T Rafter, for the respondent.

M Byrne, for the appellant.

Cur adv vult

23 June 1993

THE COURT. This is an appeal by the Attorney-General against sentences imposed by a District Court judge involving the physical abuse of a child who was then almost two years old. The offences were assault causing bodily harm and unlawful and indecent assault consisting of the penetration of the vagina of the child by means of an object or part of the body other than the respondent's penis. The learned judge imposed a sentence of four years imprisonment but ordered that it be entirely suspended. A concurrent suspended sentence was imposed in respect of the first offence. The sentences were therefore, in practical terms, non-custodial, although they subject the respondent to the prospect of imprisonment if he re-offends during the prescribed period.

The respondent is 28 years of age and he has no previous convictions. The circumstances are that he had a relationship with the child's mother for a time, but not long before these offences, he found her engaged in sexual activity with another man. He forgave her, and they became engaged. However, a short time later she ended that engagement. The respondent is described as having been in a turmoil in the period leading up to the commission of these offences and is said to have lost weight, become sleepless and forgetful and tearful. He is of below average intelligence and virtually illiterate. He has worked most of his adult life in farming and in bricklaying.

The details of the assault are not actually known, because the respondent was alone with the child and claims to have a blackout as to what happened. Accordingly the event can only be understood by inference from the injuries and his behaviour before and after.

He collected the child by arrangement from a child care centre and took her home. When her mother arrived some time later she noticed that the child had a bruise under one eye and blood was trickling from her vagina down her legs. The respondent claimed that she had been playing in the sandpit and had rubbed sand on herself and started bleeding. The child was taken by the mother to a doctor and then to a hospital. The examination showed a laceration of the vagina and perineum 1 cm deep and 1 cm long. The wound required seven stitches in the vagina, the mucosa, the hymen and the introital area. There was a small laceration of the rectum. It was said that she made a good recovery from those injuries, but there was a disruption to the normal pattern of the hymen and perineum.

The bruise to the face was a small linear mark, and the photographs do not suggest any serious injury in that area. However at least short-term psychological effects upon the child were not disputed. These included a regression in toilet training by 12 months, disrupted sleeping patterns and a recurrence of bed wetting. The child's mother became distrustful of men and obsessively protective towards her.

The respondent later claimed that he had been upset with the child's mother and that he had slapped the child's face and "given her two hard hits" to the vagina. This however does not reconcile with the medical evidence. The medical opinion was that there had been a deliberate and

forceful insertion of an object directed at the vagina itself. The best description of the incident is that it was "sexualised aggression towards the child which seemed to represent a displacement of his unexpressed rage towards his ex-girlfriend". That was the opinion of Dr Hogan, a consultant psychiatrist who examined the respondent and supplied a report on his behalf.

It was a very serious attack upon an innocent child and nothing can be said in defence of it. It is a type of activity which the community views with revulsion. There is no doubt that aggression and sexual interference with young children is prevalent and it comes frequently before the courts. Such conduct has always been thought abhorrent, but community consciousness and disapproval of it has undoubtedly increased over the last decade.

The increasing seriousness with which such activity is regarded is to some extent supported by the legislative history. Until 1975, maximum penalty for indecent assaults on females was two years (s 350 of the *Criminal Code* (Qld)). In that year it was increased to seven years. In 1989, ss 337 and 350 were combined, retaining seven years as the maximum sentence for an indecent assault upon a person of either sex, and providing penalties of up to 14 years for any indecent assault which includes penetration of the vagina or anus with any object or any part of the body other than the penis.

There are three respects in which the learned judge is said to have fallen into error in the reasoning which preceded the sentence.

1. "... so far as other potential offenders are concerned it seems to me that that aspect of sentencing is of small moment in this case".

In a case of this kind the deterrence of others from like conduct is a very important factor. This has been repeatedly emphasised: *Adams and Hayward; Ex parte A-G* (unreported, Court of Appeal, Qld, 18 August 1992); *Davies* (unreported, Court of Criminal Appeal, 28 July 1987); *Thompson* (unreported, Court of Appeal, 13 May 1992). The following statement is worthy of citation:

> "... the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only a light punishment. If a court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probably future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine the appropriate amount of punishment" (*Cuthbert* (1967) 86 WN (Pt 1) (NSW) 272 at 277-278, approving a passage in *Radich* [1954] NZLR 86 at 87).

In the present matter this factor has been given too little weight. It was erroneous to treat it as "of small moment".

2. "... so far as physical injuries are concerned, ... they seem to be of small moment".

In context, the learned judge was referring to future consequences. It would be wrong to think that the actual injuries could be dismissed as being

of small moment, but if the statement is taken as referring to the question of permanent physical disability, as we think it should, there is no error in this particular statement.

3. "... I am reasonably satisfied that the child will not show any long term or have any long term problems as a result of these incidents".

There is no basis upon which this statement could safely be made. It is true that there was no evidence to show that there would be any long-term emotional or psychological problems, but equally there was no evidence that there would not be such problems. One doubts whether even so-called experts can reliably predict such a phenomenon but commonsense suggests that there very easily could be problems of this kind. We think that in general it is unwise for a sentencing judge to engage in predictions of the unpredictable. It is enough in cases of this nature to appreciate that there may be adverse consequences. On the evidence in this case it was a misdirection to reach the view that there would be no long term problems.

Quite apart from these misdirections, we consider that the sentence which was effectively non-custodial in circumstances such as the present is indicative of error. We have been referred to a number of cases involving the interference with young girls by parents or persons in the position of parents. These include:

Case	Offences	Age of Girl	Age of Offender	Relationship	Sentence	Reference
1. Harmer; Ex parte A-G	6 Ind Dlg	12	38	Father	Fine $500 with 3 yr bond	CCA 11/10/84
2. Meloury; Ex parte A-G	2 Ind Dlg	2 girls 11 & 6	35	de facto Stepfather	Probation for 3 yrs with conditions	CCA 6/11/85
3. Davies	4 Ind Dlg	10	51	Tutor (friend of parents) in child's bedroom	3 yrs	CCA 28/7/87
4. Covill	5 Ind Dlg	13	49	Stepfather	3½ yrs (upheld by majority)	CCA 19/5/88
5. Spunner	4 Ind Dlg	13	Not known	Stepfather	2½ yrs	CCA 8/8/90
6. Herbert	2 Ind Dlg	2 girls 4 yrs & 1½ yrs	Not known	Friend of family (babysitting)	3 yrs	CCA 18/9/90
7. Sedgewick	6 Ind Dlg	About 6	49	Day care centre proprietor	18 mths	CCA 20/9/91
8. Powell	1 Ind Assault & 1 Ind Dlg		43	Father	18 mths	CA 23/10/91
9. Thompson	4 Ind Dlg	10-11	33	Stepfather	3 yrs rec parole 12 mths	CA 13/5/92
10. Vidot	2 Ind Dlg	15	42	Stepfather	18 mths	CA 20/10/92
11. McNaught	Several Ind Dlg	About 9	About 25	Boarder	3 yrs	CA 3/2/93
12. Kuhl; Ex parte A-G	6 Ind Dlg	5	47	Foster parent	3 yrs (suspend)	CA 5/2/93

Case	Offences	Age of Girl	Age of Offender	Relationship	Sentence	Reference
13. Tramacchi; Ex parte A-G	Maintain sexual rel/ship with child	9	35	Stepfather	4 yrs rec parole 9 mths (upheld by majority)	CA 31/5/93

The circumstances revealed in those cases vary considerably. Most of them involved very intimate sexual contact short of penetration and in most there was an absence of physical injury. It is to be remembered that the cases preceding 1989 were based upon Code sections which provided for lower maximum penalties. The average effective sentence in the above cases is just under two years imprisonment. In three instances (cases 1, 2 and 12) sentences were upheld in which effectively non-custodial sentences had been imposed. All three are instances of unsuccessful appeals by the Attorney-General. Two of these (*Meloury* and *Harmer*) are explicable on the basis of special circumstances, but there is a difficulty in reconciling the third (*Kuhl*) with the sentencing pattern. The facts in *Meloury* are at the less serious end of the scale, involving touching of the external genital area, and the delay in institution of the appeal by the Attorney-General seems to have influenced the court against increasing the sentence. *Harmer* was an exceptional case in which the respondent had been a very good father. The complainant retained a high degree of affection for him. Out of remorse he had disclosed his wrongdoing to his wife and other members of the family. In other words, his remorse preceded investigation and indeed led to it. His family remained dependent on and supportive of him.

In the other cases where light sentences were imposed, the circumstances were notably less serious than those in the present case. For example, in *Sedgewick* it was observed that the assaults did not involve the integrity of the body of the child.

The case that is most difficult to reconcile with the sentencing level discernible in the above analysis is *Kuhl*. In that case the offender was given a suspended sentence of three years, and an appeal by the Attorney-General seeking to increase the sentence was rejected. In many respects (early plea of guilty, no previous convictions, uncharacteristic conduct, absence of evidence of effect on child, home life in ruins) it is difficult to distinguish it from the present matter. It lacked the gratuitous violence and physical injury of the present matter, but it involved the corruption of a girl of tender years, including conduct such as inducing her to suck his penis. It must be said that *Kuhl* stands out of line.

Mr Byrne, who appeared for the Attorney-General, submitted that the factors placing the present matter at the higher end of the available range are the gratuitous violence, the actual physical injuries, and, as he submitted, the psychological harm to the victim and the family.

There is currently a high level of community outrage against persons who commit this kind of offence. It is proper that the court be aware of this and take it into account in framing sentences, at the same time standing firm against any lynch mentality or vigilante attitude that would have the respondent treated as less than a human being. There must be punishment at a level that will deter others but rehabilitation must not be overlooked.

The review of the cases would seem to indicate that whilst it is not impossible for a non-custodial sentence to be imposed, very special circumstances will be needed before such a result may occur. In many instances the offenders are weak persons, or may have psychological problems, and commonly the discovery of the offence leads to devastating effects on their own future lives. Such factors are not to be regarded as in themselves special, as they existed in most of the above cases in which substantial imprisonment was imposed. The most common recent range in cases of this kind is between two and three years imprisonment. The present case has the aggravating circumstance of physical attack and injury upon a victim not quite two years old.

Reports from psychologists show that after the event the respondent has been in a state of adject terror, fearing reprisal from the child's mother and relatives, and fearing the consequences of his actions. He was provided with antidepressant medication and on the evidence he was most unlikely ever to re-offend. Although the psychologists describe him as having feelings of remorse, in view of his claim not to remember the incident and his disbelief that he could have done anything wrong, it is difficult to measure the extent of it or accurately to distinguish it from fear of the consequences. Reports from psychologists may sometimes give insight into the conduct and actions of the offender, but they cannot excuse the inexcusable. The dominant factors that have emerged from our examination of the cases are that it is necessary for the courts to take a hard line on matters of this kind and to impose sentences that will deter others. The present matter is a serious example of the offence and it justifies a sentence at the higher end of the range. It is necessary to sound a warning that the range in the above cases may not be sufficiently high, and it may prove necessary to increase it. It would however be unfair to the respondent to make the present matter a test case for this purpose. It is however desirable that we give notice of the need for a harder line to be taken on these offences.

In the present case the imposition of a suspended sentence was not justified. A suspended sentence, of course, is not a mere formality, and may be regarded as "significant punishment" (*Elliott v Harris (No 2)* (1976) 13 SASR 516 at 527; *Paterson v Stevens* (1992) 57 SASR 213 at 216) but in the present case it has the mark of a cosmetic rather than a real punishment: cf *Tilley* (1991) 53 A Crim R 1, where a sentence of five years with parole after two weeks was regarded as illusory and inappropriate.

In our view the appropriate sentence is one of four years imprisonment, with no special recommendations. The appeal will be allowed.

The sentences below should be set aside and in their place there should be a sentence of four years for the indecent assault involving penetration, and a concurrent sentence of six months for the unlawful assault occasioning bodily harm. A warrant should issue if requested.

Appeal allowed

Solicitors for the respondent: *Lyons.*

KJM