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THE QUEEN v ROY KEVIN GOULDING - BC9404080

SUPREME COURT OF QUEENSLAND COURT OF APPEAL
MCPHERSON, PINCUS JJA AND WILLIAMS J

CA 154 of 1994

27 July 1994, 3 August 1994

CRIMINAL -- indecent dealing with boy under 14 years -- offence 1982 trial 1994 -- trial judge did not err in refusing to stay indictment -- Jago v District Court (NSW) (1989) 168 CLR 23 at 33-4 applied -- fresh evidence -- results of inquiries made at outset of trial forwarded to solicitor but not brought to his personal attention -- consideration whether evidence fresh and cogent -- held not meet Mickelberg test (1989) 167 CLR 259 at 273.

SENTENCE -- 2 years imprisonment recommendation parole after 6 months -- not excessive.

McPherson, Pincus JJA and Williams J

After a trial in the District Court, the appellant was convicted of indecently dealing with a boy under the age of 14 years, and sentenced to imprisonment for a period of two years, with a recommendation that he be eligible for parole after serving six months. He has appealed against his conviction on two grounds: Firstly, that the learned trial Judge erred in the exercise of his discretion in ruling that the indictment should not be stayed; and Secondly, that fresh evidence, not available at the time of trial, would have substantially affected the weight of the complainant's evidence to such an extent that the jury would have entertained a reasonable doubt as to the guilt of the accused.

He also seeks leave to appeal against the sentence on the ground that it is manifestly excessive.

The indictment alleged that the offence occurred "on a date unknown between 31 December 1981 and 1 January 1983 at Toowoomba". The trial took place on 21 March 1994. In other words, the offence was approximately twelve years old at the time of trial. An application was made to the learned trial Judge for an order, in the exercise of his inherent jurisdiction, staying the trial as an abuse of process. In support of that, it was submitted that the recollections of witnesses would be "imperfect", and that the appellant was deprived of the opportunity of raising a defence such as alibi because the complainant could not be pinned down to any date in the twelve month period alleged in the indictment. The learned trial Judge described those submissions as "fair comment" but refused the stay. In the course of doing so he pointed out that the recollection of witnesses could be properly tested before the jury by cross-examination.

The complaint leading to the prosecution was first made to the police on 25 June 1993, and thereafter the matter seems to have proceeded with due expedition. There was no suggestion of any improper delay on the part of prosecuting authorities.

In the end, it was virtually conceded by experienced senior counsel for the appellant that the application was based on considerations of delay alone. In that event, the observations of Mason CJ in Jago v District Court (NSW) (1989) 168 CLR 23 at 33-4 are pertinent: "The factors which need to be taken into account in deciding whether a permanent stay is needed in order to vindicate the accused's right to be protected against unfairness in the course of criminal proceedings cannot be precisely defined in a way which will cover every case. But they will generally include such matters as the

length of the delay, the reasons for the delay, the accused's responsibility for asserting his rights and, of course, the prejudice suffered by the accused. . . . In any event, a permanent stay should be ordered only in an extreme case and the making of such an order on the basis of delay alone will accordingly be very rare. . . . To justify a permanent stay of criminal proceedings, there must be a fundamental defect which goes to the root of the trial 'of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences'. . . . Where delay is the sole ground of complaint, an accused seeking a permanent stay must be 'able to show that the lapse of time is such that any trial is necessarily unfair so that any conviction would bring the administration of justice into disrepute'. . . . For that reason, and because there is no right to a speedy trial or trial within a reasonable time independent of the right to be protected from unfairness resulting from undue delay, I would dismiss the appeal."

Whether this trial took place in 1984 or 1994, the main issue would be that of credibility as between the complainant and the appellant.

It must also be remembered that when one speaks of "fairness" in the context of criminal justice, that also involves the interest of the community in having a person accused of having committed a serious offence brought to trial.

The discretion is a wide one, but in this case it cannot be said that the learned trial Judge failed to take into account relevant considerations, or took into account irrelevant considerations. There is no error such as would justify this Court interfering with the exercise of his discretion. Further, considering the record as a whole, there is nothing to lead this Court to conclude that the trial as it unfolded was unfair.

Counsel for the appellant sought an adjournment in order to place before this Court more details as to fresh evidence said not to have been available at the trial and its likely impact on the jury. In the course of argument, counsel fully apprised this Court of the nature of the alleged fresh evidence and conceded that this Court could, if it was so minded, determine the substantive argument in the light of what it was told from the bar table.

The complainant's evidence was that on the afternoon in question, he was wearing his school uniform. He placed the incident as occurring "around about September but I can't be certain". Under cross-examination, he was asked whether he recalled going to school on the day the incident occurred, and he replied: "Yes, faintly". Other answers given during cross-examination at least carried the implication that he was then attending school. It should also be noted that there was some evidence that he changed schools about the end of 1982 because "he had a lot of trouble" at the first school.

The trial extended over two days. At or about the time of commencement of the trial, counsel then appearing for the appellant asked his instructing solicitor to make inquiries as to the complainant's attendance at school in around September 1982. The solicitor put such inquiries in train, and a response was obtained prior to the end of the trial. The information that became available established that the complainant did not attend the first school during the month of September, and that his attendance at schools throughout 1982 had been spasmodic. Through inadvertence, the solicitor did not personally become aware of that information prior to the end of the trial. The fresh evidence said to support the ground of appeal was therefore evidence that was available in the office of the appellant's solicitor during the trial, but not personally known to counsel and the solicitor.

It was conceded that in order to establish a right to a re-trial on the ground of fresh evidence, the appellant ordinarily had to show that such evidence was "fresh", in the sense that it was not reasonably available at the trial, and that (applying the test confirmed in Mickelberg v The Queen (1989) 167 CLR 259 at 273) there was "a significant possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at the trial".

The appellant has not clearly discharged the onus of establishing that the evidence in question was "fresh". The significance of the question as to the complainant's attendance at school was clearly appreciated by his legal representatives at the outset of the trial, and the complainant was cross-examined on that point. The evidence in question was available to his legal representative prior to the conclusion of the trial and in those circumstances it is

difficult to conclude that it meets the description of being "fresh". But that requirement could, in a proper case, be regarded as of less significance if the evidence in question was cogent and the likelihood of the jury being influenced by it was great. Indeed, in an appropriate case even evidence which is not fresh may be adduced on appeal: Ratten (1974) 131 CLR 510.

In this case, particularly given the inability of the complainant to give a precise date for the offence, the impact of the new evidence would not be considerable. Here the evidence goes essentially to the complainant's credit. It does not directly impact upon the question whether or not the offence was committed. Given the whole context of the trial, the "fresh evidence" does not have that degree of cogency such as to enable this Court to conclude that, if admitted, there was a significant possibility that the jury would have acquitted the appellant.

If the fresh evidence referred to by counsel was placed before this Court, then the conclusion reached would be that it did not warrant setting aside the conviction and granting a new trial. In those circumstances, there is no point in granting an adjournment to enable that evidence to be formally placed before the Court.

It follows that the appeal against conviction should be dismissed.

The offence was a fairly serious example of indecently dealing with a boy under the age of 14 years. The conduct involved the appellant touching the boy, who was then aged 12 or 13 years, on the groin, kissing his inner thighs, sucking his penis, and then rubbing his own penis on that of the boy.

The appellant was a friend of the complainant and his family; he was referred to "Uncle Roy". The appellant was approximately 37 years of age at the time the offence was committed and 49 years at trial. He had no previous convictions.

In the course of imposing sentence, the learned trial Judge noted that there was "no suggestion that the conduct was performed at any other time and was of comparatively short duration". He referred to it as "an isolated occasion".

At the conclusion of the incident, the appellant threw $10 onto the bed and said: "That ought to keep you quiet". That was referred to by the learned trial Judge as being "an aggravating feature".

The learned trial Judge also took into account that the appellant's circumstances had changed over the period of time from commission of offence to trial; he used the expression "stale offence".

In all of the circumstances, the learned trial Judge was correct in concluding that he had no alternative but to "make some part of the sentence an immediate term of imprisonment".

Given the nature of the offence, the particular circumstances of this offence, and all the matters to which reference has been made as being relevant to the issue of penalty, a sentence of two years imprisonment with a recommendation for parole after six months, although by no means light, cannot be said to be manifestly excessive. In the circumstances, the application for leave to appeal against sentence should be refused.

The appeal against conviction should be dismissed and the application for leave to appeal against sentence refused.

Order

APPEAL AGAINST CONVICTION DISMISSED. APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE REFUSED.

Counsel for the appellant: Herbert QC

Solicitors for the appellant: Legal Aid Office

Counsel for the respondent: Byrne QC

Solicitors for the respondent: Director of Prosecutions

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