

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2013 0183

CHRISTOPHER JOHN BLACKWOOD

Applicant

v

THE QUEEN

Respondent

JUDGES

NEAVE and COGHLAN JJA

WHERE HELD

MELBOURNE

DATE OF HEARING

10 February 2014

DATE OF JUDGMENT

26 March 2014

MEDIUM NEUTRAL CITATION

[2014] VSCA 47

JUDGMENT APPEALED FROM

DPP v Blackwood (Unreported, County Court of Victoria, Judge Gamble, 4 September 2013)

CRIMINAL LAW - Appeal against sentence - Applicant pleaded guilty to two counts of sexual penetration of a child under sixteen and three counts of indecent act with or in the presence of child under sixteen - Respondent conceded one indecent act sentence manifestly excessive but total effective sentence within range - Total effective sentence of six years with non-parole period of three years six months - Whether sentence manifestly excessive - Leave granted - Appeal dismissed.

CRIMINAL LAW - Application for leave to appeal against sentence - Application to add ground of appeal - Whether trial judge erred in describing conduct as 'premeditated' - No error - Leave to add ground granted - Leave to appeal with respect to this new ground dismissed - No point of principle.

APPEARANCES:

COUNSEL

SOLICITORS

For the Applicant

Mr P F Tehan QC

Malkoun & Co

For the Crown

Mr B F Kissane

Mr C Hyland, Solicitor for
Public Prosecutions

NEAVE JA:

1 I agree with Coghlan JA.

COGHLAN JA:

2 On 17 July 2013, the applicant pleaded guilty to the offences set out in the table below. After a plea conducted on that day and on 4 September 2013, he was sentenced on 4 September 2013 to a total effective sentence of six years' imprisonment with a non-parole period of three years and six months.

| Charge on Indictment C13580062 | Offence | Maximum | Sentence | Cumulation |
|--|---|---|------------------|------------|
| 1 (RK) | Sexual penetration of a child under sixteen [s 45(1) <i>Crimes Act 1958</i>] | 25 years [s 45(2)(b) <i>Crimes Act 1958</i>] | 3 years | 12 months |
| 2 (RK) | Sexual penetration of a child under sixteen [s 45(1) <i>Crimes Act 1958</i>] | 25 years | 3 years 6 months | Base |
| 3 (LB) | Indecent act with or in the presence of child under sixteen [s 47(1) <i>Crimes Act 1958</i>] | 10 years [s 47(1) <i>Crimes Act 1958</i>] | 18 months | 8 months |
| 4 (LB) | Indecent act with or in the presence of child under sixteen [s 47(1) <i>Crimes Act 1958</i>] | 10 years | 12 months | 4 months |
| 5 (LB) | Indecent act with or in the presence of child under sixteen [s 47(1) <i>Crimes Act 1958</i>] | 10 years | 16 months | 6 months |
| Total Effective Sentence: | | 6 years | | |
| Non-Parole Period: | | 3 years 6 months | | |
| Pre-sentence Detention Declared: | | <i>Nil</i> | | |
| 6AAA Statement: | | TES 7 years 6 months NPP 5 years | | |
| Other orders: Sex offender Registration for Life. Forensic Sample Order. Sentenced as a serious sexual offender Charges 3, 4 and 5. In respect of these charges, the judge made orders for concurrency rather than cumulation, however the effect is stated above in terms of cumulation. | | | | |

3 The circumstances of the offending are set out in the Registrar's neutral Summary as follows:

Charges 1 and 2: RK

4. The offences against RK occurred when she was 9 years old. On an unknown date between 1 June 2004 and 8 January 2005, RK and her father (the applicant's business partner) were at the applicant's home. After some discussion of the business with RK's father, the applicant asked RK if she wanted to stay the night, which she did. RK was good friends with the applicant's son, who was a similar age to RK.
5. That evening, RK, the applicant and his son were watching television in the lounge. The applicant was sitting on one couch; RK and his son on another. When the applicant's son fell asleep, RK sat next to the applicant. The applicant rubbed her vagina on the outside of her clothing for ten minutes. She moved to the other couch. A few minutes later, the applicant moved onto the floor next to her and rubbed her vagina over clothing again (these were uncharged acts).
6. Two or three minutes after the applicant finished rubbing RK's vagina over her clothing, he placed his hand in her underwear and rubbed her vagina (charge 1).
7. A few minutes later, the applicant moved onto his knees and removed RK's pyjamas and underpants. He penetrated her vagina with his tongue (charge 2). The applicant asked RK if she wanted him to continue but she said she had to go to the bathroom. The applicant told RK that it was a secret and that she should not tell the applicant's wife about it. RK asked if the applicant did that to his wife to which he replied 'not really' or 'she didn't like it'. When RK returned from the bathroom, the applicant asked if she wanted him to continue. RK said she wanted to go to sleep. The matter was not reported to police by RK until late January 2012.

Charges 3, 4 and 5: LB

8. The offences against LB occurred when she was 14 years old. The applicant's family and LB's family were close. In January 2005, the applicant's family and LB's family holidayed together at Mallacoota.
9. The applicant hired a road buggy and took LB and his son for a ride. The applicant allowed LB to steer the buggy and while she was doing this, the applicant rubbed her breasts over her clothing for five to ten minutes (charge 3).
10. On another day, during the same holiday (possibly the next day or a few days later) LB was leaning against a wooden rail at a beach lookout. The applicant came up behind and hugged her tight. His arms were wrapped around her shoulders. LB's statement did not refer to any touching of her breasts in relation to this charge. In his record of interview, the applicant volunteered that he fondled LB's

breasts over her clothing (charge 4).

11. On another night, during the same holiday (possibly the next day or a few days later) LB, her mother and the applicant were seated on the same couch, watching a movie. The applicant was in the middle. At one point, the applicant began surreptitiously rubbing LB's thigh. LB's mother was not aware of what was occurring. LB moved her leg, but the applicant persisted and on each occasion resumed rubbing her thigh (charge 5).
12. When the movie finished, everyone went to bed. An hour or two later, the applicant knocked on LB's bedroom door before entering the room. He touched LB's arm but she pretended to be asleep. He persisted in trying to wake her and she then pretended to wake up startled. The applicant was laying [sic] on the floor and asked LB for a massage. The applicant told her that he felt a connection with her and asked her whether the two of them could have a relationship. LB pointed out the age difference, the fact that the applicant was married and the fact that the applicant was like a father figure to her. The applicant said those things did not matter and he promised that they would have fun. LB said she was tired and asked the applicant to leave. The applicant kissed LB on the forehead and told her not to tell anyone about what had occurred.
13. The applicant and his son left the next morning. After they left, LB told her parents what had happened. She did not wish to report the matter to police. A year or two later, the applicant wrote LB a letter of apology.
14. In late January 2012, LB's family became aware of the police investigations regarding the offending against RK. In that context, LB decided to tell the police what had happened.

RECORD OF INTERVIEW

15. The applicant, of his own volition, attended Box Hill Police Station on 30 January 2012 and participated in a record of interview. He answered questions about the offences against RK and volunteered the offending against LB.

4 The respondent conceded before the appeal hearing that the sentence on charge 5 was manifestly excessive, ie 16 months, but submitted that because of the accumulation of six months on that charge that the total effective sentence was within the range and no different sentence should be imposed.

Ground 1 – Manifest excess

5 Without conceding that the sentences on charges 1 and 2 were within the range, it is fair to say that Mr Tehan QC concentrated in his submission on the

sentences on charges 3, 4 and 5. He submitted that the 18 months accumulation on those charges was simply 'too much' having regard to the nature of the offending alleged. That proposition, he argued, was supported by an analysis of the individual head sentences on those charges. The sentences of 18 months, 12 months, and 16 months were out of proportion to the offending.

6 Mr Tehan also relied upon the fact that his Honour had sentenced above the range submitted by the prosecution.¹

7 The respondent submitted that when the orders for cumulation are taken into account a total effective sentence of six years with a non-parole period of three years and six months was appropriate.

8 The applicant was sentenced on charges 3, 4 and 5 as a serious sexual offender pursuant to Part 2A of the *Sentencing Act 1991*.

Ground 2 - Premeditation

9 In his sentencing remarks, his Honour said:

33. As I said to your counsel during the course of the plea hearing, I have difficulty with the suggestion that your marital difficulties were causally connected to your offending. The offences that you committed against each girl were clearly premeditated, not spontaneous, and carried out for your own sexual gratification. I note that in the same interview, you told the police that you had been prepared to use the services of adult prostitutes in the past. Other than your pursuit of your own pleasure, there is no other real explanation for your sexual abuse of these two complainants. In saying that, I am not overlooking what the psychologist Mr Healey said, but I am not prepared to accept and act on it, given the speculative language in which he expressed himself.

10 Mr Tehan submitted that there was nothing about either sets of offending which justified the use of the word 'premeditation'. If his Honour was using the expression in the way it is used relating to other crimes, indicating a significant planning and organisation, then Mr Tehan may be correct.

¹ *DPP v Blackwood* (Unreported, County Court of Victoria, Judge Gamble, 4 September 2013) [33].

11 If, however, the paragraph is read as a whole, I regard what his Honour said
as being a rather emphatic rejection of the suggestion that the offending was a
response to his marital difficulties. If it be an error, it is not one which leads to a
different sentence being imposed.

12 I would grant leave to add the ground of appeal, but I would not grant leave
with respect to it.

13 The matters in mitigation of the applicant were substantial, but his offending
remains largely unexplained. Although the sentence is high, I am not convinced that
the total effective sentence is outside the range open to his Honour.

14 One major aggravating feature of offending of this kind is that we now know
that the effect on young victims is ongoing, as the Victim Impact Statements show.
The offending on charges 3, 4, and 5 was serious and it was in that context that the
applicant (who was about 33 years of age) sought to establish an entirely
inappropriate sexual relationship with a 15 year old girl. The offending on charge 5
was particularly brazen.

15 The other aggravating feature of the offending was that it constituted a breach
of trust not only with the complainants but with their families who were entitled to
trust the applicant. It should also be noted that although the offending on charges 3,
4 and 5 was objectively towards the lower end of the range, the applicant did fall to
be sentenced as a serious sexual offender. Because of the view taken by the
respondent on charge 5, I would grant leave to appeal but I would dismiss the
appeal.
