



Summary of Judgment

DENNIS MALCOLM GILL V THE QUEEN

[2019] VSCA 92

30 April 2019

The applicant stood trial in the County Court on two separate indictments, each pertaining to historical sex offences against boys residing at Sutherland Homes, in Diamond Creek in the mid-1970s. The offences included buggery, attempted buggery, and various forms of penetrative indecent assault. At the time of the offending, the applicant was engaged as a welfare officer at the facility, and was aged between 27 and 28. The five complainants were aged between 8 and 13 at the time.

The first indictment contained three charges, and the applicant was convicted on all of them. The second indictment contained 18 charges, and the applicant was convicted on 14 of them. In total, in respect of both indictments, the applicant was sentenced to 15 years and 10 months' imprisonment, with a non-parole period of 11 years.

Today, the Court of Appeal (Justice Kyrou, Justice Kaye and Justice Weinberg) refused leave to appeal against both conviction and sentence.

In relation to the application for leave to appeal against conviction, the applicant argued that the acquittals on charges 1-3 of the second indictment were logically and factually inconsistent with the convictions on charges 4-5. Accordingly, those convictions were said to be unsafe and unsatisfactory.

Charges 1-5 on the second indictment concerned a series of offences that were said to have been committed against a single complainant within a relatively short period of time. The offending the subject of charges 1-3 was alleged to have taken place in the shower block of the facility. The offending the subject of charges 4-5 was said to have occurred nearby, in the caravan in which the applicant then resided. It was argued that the complainant's evidence in relation to all five charges should be regarded as indivisible, and that the jury's verdicts were for that reason inexplicable.

The Court held that there was a rational explanation for the jury's having acquitted the applicant on charges 1-3, but convicted him on charges 4-5. The evidence regarding the shower block offending involved a number of improbabilities. However, as regards charges 4-5, the evidence of two other complainants that the caravan was the principal location of the abuse committed against them, which was cross-admissible as tendency evidence, gave significant support to the complainant's evidence in relation to the charges on which the applicant was convicted. The differing verdicts could be readily explained and were capable of being understood as resting on a rational footing. Accordingly, leave to appeal against conviction was refused.

In relation to the application for leave to appeal against sentence, the applicant relied on two grounds. The first asserted that the sentencing judge had misapplied the principle of totality. More particularly, it was submitted that the total effective sentence was disproportionate to

the applicant's overall criminality, and was, in accordance with relevant sentencing principles, 'crushing' having regard to his age (now 70) and serious ill-health. It was also said that the orders for cumulation had been made without proper regard to the fact that some of the offences had been committed in close temporal proximity to each other, while others had a standalone character.

The second asserted that the individual sentences, total effective sentence and non-parole period were all manifestly excessive. It was submitted that insufficient weight had been given to delay, and to the applicant's age and ill-health.

The Court noted that the offending in this case was particularly serious. It took place over a period of at least some months, and involved a number of vulnerable boys. It involved some elements of grooming. The evidence was that the effects upon them had been profound, and were ongoing. The applicant had shown no remorse whatever. There was the additional aggravating feature of his having been entrusted with their care.

The Court accepted that the sentence imposed meant that the applicant might spend the remainder of his life in prison. In that sense, it could be argued that the total effective sentence was, as claimed, 'crushing'. However, in the circumstances of this case, that sentence was wholly commensurate with the gravity of the applicant's offending, and did not cross the threshold into manifest excess. Accordingly, leave to appeal against sentence was refused.

NOTE: This summary is necessarily incomplete. It is not intended as a substitute for the Court's reasons or to be used in any later consideration of the Court's reasons. The only authoritative pronouncement of the Court's reasons and conclusions is that contained in the published reasons for judgment.