

THE QUEEN

v.

JASON MARK ROBERTS

Coram: Casey J (presiding)  
Bisson J  
Williamson J  
Hearing: 25 September 1990  
Counsel: C J Thompson for Crown  
Josephine Baddeley for Appellant  
Judgment: 24 October 1990

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JUDGMENT OF THE COURT DELIVERED BY CASEY J

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Jason Mark Roberts pleaded guilty to one count of sexual violation by rape, two of unlawful sexual connection and one of assault. The offences occurred on 22 February 1990 when he was almost 19, and the victim was the 3-year old daughter of his de facto wife by another man. She lived with her grandparents in Australia, and had been staying for some two months on holiday with her mother and the applicant. They had been living together for some two years and had one child of their own.

At 6.30 in the evening he and the girl were waiting in his car for his wife to return from an appointment. He bought a small bottle of drink and took the child for a walk. She started crying for her mother; he swore at her and pushed her over, causing cuts to her face and some bruising. He carried her back to the car and struck her across the buttocks some 8 or 10 times. He took down her pants and put his fingers into her vagina and 'worked them round'. Then he pushed the neck of the soft drink bottle into her anus. After that, having gained an erection, he inserted his penis into her vagina and moved her around on top of him. As might be expected, she was continually complaining. Finally he pulled her off himself and dressed her.

Her mother returned shortly afterwards. She noticed the abrasions to her face and understood she had been involved in an accident with a swing. Later she saw blood in the girl's pants and took her to hospital where the full extent of her injuries was discovered. The police were notified and at interview Roberts made a full confession after an initial denial. He was charged and pleaded guilty before depositions, and was committed to the High Court where he was sentenced on 22 June 1990 to concurrent terms of 12 years' imprisonment for the rape, and 8 years for the unlawful sexual connection. He was convicted and discharged on the assault charge. He seeks leave to appeal against

these sentences on the grounds that the term of 12 years was manifestly excessive.

The sentencing Judge went to some lengths to explain his reasons for what he accepted was an apparently harsh sentence. He referred to the medical reports of examinations on the girl's admission to hospital, disclosing both chronic physical and sexual abuse and vaginal and anal penetration. There was bruising (both recent and several days old) to her head, chin, upper abdomen and left thigh; the whole of her buttocks area was covered with old bruises, and there was fresh bruising also. There was evidence of hair having been torn from her head, and of a fresh burn under the toes of one foot. There was also considerable damage to her anus and genitals which the doctors described as very severe and they could have been life threatening. She is expected to have emotional problems requiring long term rehabilitation. As well as admitting the conduct involved in these charges, the applicant acknowledged that he had struck the child on previous occasions and torn hair from her head. The only reason he gave to the police for the physical abuse was anger, and he could offer no explanation for the sexual assaults.

Roberts had a record of one very minor offence of dishonesty over four years ago; he has no history of violence or sexual assault, and his family reported no problems with his upbringing. He appears to have been in

regular employment since leaving school and until these offences had a stable domestic relationship with the girl's mother. Psychological and neurological reports supplied to the Court suggest nothing that would explain or mitigate his behaviour.

The Judge said he was influenced by three factors - the need to protect society; to express society's abhorrence at the conduct; and to exact just retribution. As to the first, he said he could not preclude the possibility of another attack upon an innocent child at some future date. On that ground alone he could see every reason to impose the maximum sentence. He ruled out any thought of preventive detention because of the sense of sheer hopelessness either that or the imposition of the maximum sentence could induce.

Ms Baddeley correctly pointed out that preventive detention was not an option in this case, as the qualifying conditions were not satisfied. She also submitted that he was not justified in thinking that Roberts posed a threat to society requiring a lengthy term of imprisonment. There is a sordid pattern of physical assault on this little girl while she lived with him, but no suggestion of other sexual misconduct, and there is no expression of concern for the future in the specialist reports on him. The likelihood is that an appropriate term of imprisonment will be enough to deter this young man from a repetition of anything like this conduct.

However, we are in full agreement with the other matters which weighed with the Judge - the need to express society's abhorrence, and allied with that, the need for retribution or a proper level of punishment. He rightly said that in terms of rape and sexual violation it is difficult to imagine an offence which could be worse. It might be possible to analyse Roberts' conduct as essentially an assault, aimed at giving vent to his urge and frustration, perhaps in part directed at the child's mother over her delay in returning to the car. There was a suggestion in the reports that he was stressed beyond his years by the responsibilities he had undertaken. But the brutal and premeditated nature of the sexual attacks takes this well beyond the kind of assaults on young children inflicted out of sheer bad temper, or by a parent trying to cope whose self-control has snapped. Roberts had clearly become sexually excited by what he was doing to the child and deliberately set out to gratify himself as well as to inflict further pain upon her. The unique character of these offences against the background of his earlier violence to her rules out any attempt to compare sentences in other cases in the hope of finding an appropriate precedent. Counsel tried, but could offer nothing of assistance.

Although the Judge may have overstated the risk of further offending, we cannot say that he was wrong in giving

serious consideration to the maximum sentence of 14 years. It is indeed difficult to imagine a worse case of rape or sexual violation, having regard to the age of the victim, the beating and sexual torture inflicted upon her, and the applicant's position of trust as her stepfather. In spite of her well presented and responsible submissions, Ms Baddeley has not persuaded us that a starting figure of 14 years was too high.

The Judge took into account the early confession and plea of guilty. We do not accept Ms Baddeley's suggestion that a separate allowance should have been made for each of these acts; conviction was a virtual certainty even without his police statements. The plea of guilty followed on from his confession, and he is in the same position as any other accused who, faced with conviction, seeks to mitigate his sentence by relying on co-operation and an early plea. He is entitled to some consideration, but the pre-sentence reports suggest little in the way of genuine remorse in his attitude; his primary concern appeared to be the prospect of a long term of imprisonment.

The other factor taken into account by the Judge was the applicant's age, although he was not certain that he should pay regard to it because of the lack of confidence that he would not re-offend. As noted above, we have our reservations about the validity of such doubts. However, in an indirect way the Judge did take his age into account when he said towards the end :

"My conclusion is that, while the maximum sentence of 14 years imprisonment would be justified, the fact that Mr Roberts volunteered a full statement of what had happened to the Police warrants a reduction in the penalty. I am also prepared to reduce the term because of the other matters I have touched upon, including the possibility that psychologically the maximum term could have a symbolic impact on Mr Roberts and leave him totally without hope. But it cannot, in all conscience, be a dramatic reduction in the maximum term having regard to all the circumstances of the case and all the considerations I have touched upon."

While it is true that a long sentence can bear heavily on a youthful offender, it must be remembered that the applicant was almost 19 and had assumed the privileges and responsibilities of an adult in his working and personal life. This Court has made it clear on a number of occasions that youth will not save an offender from the full impact of an appropriate sentence when this is called for to mark society's condemnation of especially vicious conduct. Despite the age of the applicants (some were a good deal younger than Roberts), very long sentences have been upheld. In R v Crime Appeal 265/88 (2 December 1988) Bisson J said in delivering the judgment of this Court :

"At the present stage we have to say that in cases of serious child abuse by a young offender, youth alone does not automatically justify leniency. We cannot overlook that to impose anything less than a substantial term of imprisonment could be misinterpreted. It could look like a licence to indulge in this sort of conduct without fear of really serious punishment. We note the sentencing Judge's comments about what he called community hysteria, but it is the responsibility of this Court to try to balance all the competing considerations."

This was a difficult sentencing matter in which the Judge had little in the way of guidance from precedent, because mercifully there must be few, if any, occasions in recent years where an offender has been guilty of such brutal conduct towards a child. While the Judge was influenced by some considerations which we think were not well-founded, we cannot say that the 12 year term he imposed, although severe, was outside the limits of a properly exercised sentencing discretion.

The application for leave to appeal is dismissed.

*M. G. Casey J.*

Solicitors: Crown Solicitor, Otahuhu