[2017] QCA 81

COURT OF APPEAL

SOFRONOFF P
PHILIPPIDES JA
ATKINSON J

CA No 11 of 2017
DC No 1598 of 2015

THE QUEEN

v

CURRY, Allan Kenneth **Applicant**

BRISBANE

THURSDAY, 4 MAY 2017

SOFRONOFF P: The applicant seeks an extension of time within which to appeal against his conviction. On 29 April 2016, the applicant was convicted of one count of permitting a place to be used for the production of a dangerous drug, methamphetamine, he being the occupier of the place. The evidence at the trial was that the applicant had rented the ground floor and a carport of premises at Donnybrook from a man called Williamson or perhaps from Williamson's wife. There was a fire at the premises, and police who attended the fire happened to find equipment in a shed on the property that had been used to manufacture methamphetamine. A man called McKing was later charged and convicted of producing that drug in the shed.

It was common ground at the trial that the shed had been used for that purpose by McKing. The sole issues were whether the applicant was the occupier of the shed and whether he had knowingly permitted McKing to use the shed to manufacture the drug. The evidence of control and permission was entirely circumstantial. Williamson gave evidence: although he himself continued to resort to the property for his own purposes, he said that the applicant had placed a lock on the gate to the property itself and also a lock on the door to the shed in which the drugs were manufactured. He said that he had to get the key from the applicant to gain access to the shed if he wished to go into it. His evidence was challenged by the Defence. The Prosecution invited the jury to infer control from these facts.

Control by means of possession of the key to the shed was also relied upon as a fact implying knowledge of what went on inside the shed and permission for those activities. In addition, the applicant's mobile phone had been used to send text messages to third parties which, the Crown submitted, showed knowledge of what was being done in the shed. For the purposes of this application, it is sufficient to quote one of these messages:

> "I have a mate down in the back shed doing his thing. And he needs his privacy, so please don't get up there."

Williamson's credit was attacked, and there was a suggestion that it was he who was implicated in the production of drugs rather than the applicant. The trial Judge observed that it was open to the jury to conclude that both Williamson and the applicant were involved.

The learned trial Judge correctly directed the jury that they had to be satisfied of three elements: first, that the applicant was the occupier of the shed; second, that the shed was used to produce a dangerous drug; and, thirdly, that that use was with the permission of the applicant. The second issue was not contentious, as I have said. There was, therefore, evidence from which the jury could infer both occupation of the shed by the applicant and knowing permission to use it for the proscribed purpose. Indeed, the applicant has, in oral submissions, candidly acknowledged that that was so.

The applicant contends that his legal representation was inadequate. In support of this, he has tendered a copy of the written lease to him of part of the property which was not tendered at the trial. It does not, on its face, show any lease to him of the shed or any other right in his favour to use the shed. He also submits that at the time of the trial he was ill and in a poor mental state. He had undergone medical treatment, and for many months it was thought that he might be suffering from kidney cancer. His sentencing was delayed from the date of his conviction 29 April 2016 until 6 February this year so that he could undergo treatment and further diagnosis. It now appears that the applicant is not suffering from kidney cancer, although he believed he was for a long time, and, as a result of that fresh diagnosis, he has been sentenced.

It is established that in considering whether to extend time within which to appeal the Court must examine whether there is any good reason shown to account for the delay in appealing and whether overall it is in the interests of justice to grant an extension, see *R v Tait* [1999] 2 Qd R 667 at 668 per McMurdo P, Thomas JA, Cullinane J. It may be relevant to consider whether there are any viable grounds of appeal. The applicant has – had been free on bail from the day he was convicted until he was sentenced on 6 February to a term of imprisonment for two years and six months to be suspended after 12 months. No explanation has been offered why an application for an extension of time was not made in the nine months from the day he was convicted until the date of his application, subject to one matter. The applicant has referred to the fact that he has been ill. It must be accepted that at the date of his conviction, as he says, he was not in any frame of mind to consider further legal proceedings; however, he has not suggested that his illness persisted in its effects so as to prevent his taking steps to challenge his conviction until now, nine months later.

He also points as a reason for the delay that it was not until recently that a lawyer from Legal Aid informed him that the written lease pursuant to which he occupied the ground floor of a structure on the premises and a carport had not been tendered. While the case against the applicant was not a strong circumstantial case, there was ample evidence upon which a jury could convict. The

fact that the written lease agreement was not tendered at the trial could have had no effect. The jury was directed that the applicant had rented merely the ground floor of a structure and a carport and that he had not obtained any legal right to use the shed. This is what the written agreement also showed. At the trial, the Crown did not rely upon the existence of any legal right in the applicant to use the shed.

The applicant also complains about the reliability of the evidence of Williamson; however, Williamson's credit was placed in issue at the trial, and the jury was in a position to consider – and evidently did consider – what use could be made of it. Nor has anything been raised to address the evidence of the text messages attributable to the applicant which the jury evidently accepted had been sent by him and which were capable of implicating him in the offence. In summary, the applicant has failed to satisfactorily explain his delay in a way that would justify the grant of an extension, and there is nothing to suggest that any appeal would be arguable. I would refuse the application for an extension of time.

PHILIPPIDES JA: I agree.

ATKINSON J: I agree.

SOFRONOFF P: The order of the Court is that the application for an extension of time is refused.