[2017] QCA 119

COURT OF APPEAL

SOFRONOFF P
FRASER JA
PHILIPPIDES JA

CA No 312 of 2016
SC No 1292 of 2016
SC No 1329 of 2016

THE QUEEN

v

WILKINSON, Joshua Earl **Applicant**

BRISBANE

WEDNESDAY, 7 JUNE 2017

JUDGMENT

SOFRONOFF P: The applicant was charged with 19 counts of various drug offences. He was also charged with two summary offences but nothing turns upon these and they will not be mentioned further. The most serious of the offences were three counts of trafficking. Count 11 was a charge of trafficking in methylamphetamine between 5 June 2013 and 20 July 2013. Count 12 was a charge of trafficking in cannabis between 31 May 2013 and 5 November 2013. Count 23 was a charge of trafficking in methylamphetamine between 1 May 2015 and 11 June 2015. This last offence was committed while the applicant was on bail, having been charged with counts 11 and 12.

The applicant was sentenced to six-and-a-half years' imprisonment on count 11. He was sentenced to two years' imprisonment on count 12. He was sentenced to three years' imprisonment on count 23. His parole eligibility date was set at two years and six months. He was given various other penalties in respect of the other offences and it is not necessary to recount them.

The applicant is now 33 years old. He was 29 years old and 31 years old during the period of offending. He has a long criminal history which began in 2001 when he was 17 years old. He has appeared before the Courts to be sentenced on about 40 occasions, not including his appearance in respect of the present matters. For present purposes, it is relevant to observe that he has a history of convictions of drug offences. Indeed, the first offence in his criminal history was an offence of possession of dangerous drugs committed on 13 April 2001. There followed 10 further offences or sets of offences and in total he has been convicted of 18 offences involving drugs. This includes three convictions for possessing a Schedule 1 drug in a quantity over two grams. He has also been convicted of two offences of supplying a dangerous drug.

On 18 June 2009, the applicant appeared before Justice Martin in the Supreme Court. On that occasion, he was sentenced to a term of imprisonment of three months. He had previously been sentenced to nine months' imprisonment arising out of the same series of events and, having regard to the imposition of that earlier sentence, Justice Martin imposed the sentence of three months with an order that the applicant be released on parole on the day of sentence. The matter is relevant because on that occasion, Justice Martin said to the applicant:

> "Whether you've decided to change your ways or not doesn't really matter, Mr Wilkinson, you are going to spend – on this basis, unless you do, you'll spend the rest of your life in gaol."

In respect the applicant promised to try to change his ways. The applicant's criminal history also shows an inability on his part to comply with Court orders. He breached probation on two occasions. He breached an intensive correction order and was resentenced to a term of imprisonment. He was granted a suspended term of imprisonment but breached it. The period of suspension was extended as a result of that breach but he again breached it. He has a poor history of compliance with parole.

On 27 September 2012 the applicant was sentence to a period of imprisonment of nine months with a period of 56 days to be counted as time already served. The earliest period of offending in respect of the current charges, which is 27 March 2013, was therefore within that period of imprisonment and as a consequence it can be inferred that the offences were committed while the applicant was on parole.

On 14 May 2015 the applicant was sentenced to a term of imprisonment of nine months. He had served almost 11 months' imprisonment, namely 339 days. The Magistrate who sentenced him to imprisonment for nine months declared that period as time served and as a consequence the applicant was immediately released. He then immediately began to offend and this resulted in count 23, a charge of trafficking.

During the period of offending the applicant was living at a house in Caloundra with two other men, Andrew Robertson and Stephen Murphy. He was detected as part of a police operation. Telephone intercepts show that the applicant was selling cannabis and methylamphetamine. Murphy and Robertson helped the applicant in this business. They sold drugs on his behalf and collected money for him. The intercepts show that the applicant had conducted or directed 204 transactions. The Crown allege that methylamphetamine was the main drug that he supplied. The applicant disputes this but in my view nothing turns on this in the circumstances of this particular case.

When the applicant was arrested he was found with two quantities of methylamphetamine on his person, weighing about half an ounce. Other quantities of methylamphetamine were found at his house and equipment relating to trafficking in drugs was also found. On one occasion, he was found to have himself purchased three ounces of methylamphetamine over a period of seven days from his own supplier for the purpose of resale. Murphy and Robertson were charged in relation to their participation in these offences.

Murphy was sentenced to a term of imprisonment of three years to be eligible for parole after seven months. Robertson was sentenced to a term of imprisonment of three-and-a-half years, to be eligible for parole after 10 months. Murphy also had a lengthy criminal history but was treated by the sentencing judge as an accessory. The judge who sentenced him regarded his offending as being at the low end of the scale of trafficking offences. He had also entered a timely plea of guilty.

Robertson was found to have been remorseful about his conduct and had indicated an early intention to plead guilty. He was 24 years old at the time of offending. He had only one prior conviction for possession of cannabis. The sentencing judge took into account that Robertson was also suffering from an acquired brain injury which affected his behaviour. Having regard to the need for parity with Murphy's sentence and by taking into account the matters in mitigation applicable to Robertson, the sentencing judge set an earlier parole period for Robertson than would otherwise have been set.

In this case, although it seems to have been common ground that the applicant was suffering from some mental health issues and although it had been submitted by his counsel that he was suffering from a bipolar disorder, there was no evidence before the learned sentencing judge to identify the nature of any particular illness. Nevertheless, the learned sentencing judge sentenced the applicant upon the basis that he did have some untreated mental health issues. The applicant has a young son who is in foster care and he is genuinely concerned to forge a relationship with his son when he is able to do so. The learned sentencing judge expressly took that into account as a relevant matter in mitigation of sentence.

Much of the applicant's difficulties appear to stem from his drug addiction. He has been using drugs since he was 14. He has undertaken a number of courses whilst he has been in prison and he has turned to religious studies in an effort to change his life. The learned sentencing judge took into account the applicant's addiction and his earnest and persistent efforts to improve his life.

The applicant was sentenced to an effective period of imprisonment of six-and-a-half years. A period of 511 days was declared as pre-sentence custody. His parole eligibility date was fixed at 9 December 2017. This was two-and-a-half years from the date he was taken to have first been incarcerated in relation to these offences, namely 10 June 2015. The applicant now argues that this sentence was excessive and that her Honour's sentencing discretion must be taken to have miscarried.

He submits that his legal representatives told him that it would be a good idea to plead guilty to these charges and they advised him that the case against him was strong. He says that he was told that he could expect a sentence of about 10 years if he pleaded not guilty and was found guilty after a trial. He says that he was told by his counsel that his counsel would submit that an appropriate sentence would see him released on the day of sentence on parole or on probation or by way of a suspended sentence. He complains that he only consulted with his solicitors three times before sentence and that he only spoke to his counsel on the day of sentencing for about 45 minutes.

Upon the facts alleged by the Crown and which were accepted for sentencing purposes, the advice that the applicant received was good advice. The case against him was based upon telephone intercepts and, having regard to the pleas of guilty entered by his accomplices, the Crown would have had no difficulty in proving its case against him. Further, his counsel did indeed, remarkably, make a submission that an appropriate sentence would see his client released on the day of sentence. Quite rightly, that submission was not accepted by the learned sentencing judge.

None of these matters are capable of impugning the exercise of discretion. The applicant has also obtained a statement from one Daniel J Williams. Mr Williams says that police officers forced him to write statements implicating the applicant. He says that everything that he wrote about the applicant was false. The applicant wishes the Court to take Mr Williams' statement into account in considering the matter. However, Mr Williams' statement concerned events that had occurred in 2012. None of the charges with which the Court is concerned is alleged to have been committed

in 2012, and it is difficult to see how Mr Williams' statement, even if given in evidence, and even if true, could possibly affect the outcome of this proceeding.

In his written submissions, the applicant has dealt in detail with each of the instances cited to support the count of trafficking which make up the trafficking charge in count 12. He raises matters that, to a lesser or greater degree, would contest a conclusion that he was implicated in any criminal way in the alleged acts. At least he would submit that, although he is guilty of something, he is not guilty of the charge of trafficking to which he pleaded guilty.

In short, the applicant's submission raises matters that would seek to challenge the basis upon which he has been sentenced. He would seek to challenge the facts contained in the schedule of facts tendered by the prosecution at sentencing and which, subject to minor exceptions, were accepted by his counsel as a basis upon which he could be sentenced.

No evidence has been sought to be adduced or tendered that would be capable of falsifying the factual basis of the sentence or, more relevantly, that could demonstrate that her Honour proceeded upon any error of fact. There is no fresh evidence or any new evidence and nothing has been raised that shows that an error of fact grounded the sentence. Indeed, his counsel expressly submitted that he had instructions not to contest the matters of fact alleged by the prosecution. In addition, at the hearing and before the learned sentencing judge heard submissions from the prosecution and from the defence, she expressly informed the applicant that he had an opportunity to raise any matter that he wished to raise and he did not do so.

The applicant also complains about the lack of comparability between his sentence and those imposed upon his accomplices, Murphy and Robertson. However, his case, as the principal offender and an offender moreover with a long history of drug offences, is entirely different from the cases presented by his accomplices. The disparity in sentencing is based upon those substantial differences between the three cases.

The tenor of the applicant's submissions can be understood from the concluding part of his written submission, namely:

> "The outcome I wish to achieve is to be resentenced with the facts contested, considering by the time I arrive at trial I would of done 3 years... I feel that I should be released, if not on a suspended terms then with my charges dropped *[sic]*."

In my respectful view that is a fanciful submission. The applicant does not submit otherwise that the discretion miscarried. In my view the sentence was not only within the possible range of proper and appropriate sentences but was lenient.

The applicant also complains that the period of 11 months that he had served some years previously and that had been taken into account when he was sentenced in the Magistrates Court should have been taken into account again when he was sentenced by the learned sentencing judge in respect of these matters. He appears to base this argument upon the proposition that he had been on remand for offences which included the current offences and therefore his period in custody over those 11 months related to these offences. Obviously, having been declared as time served in respect of a period of imprisonment, the 11 months cannot be taken into account again as time served. However, the period of imprisonment in respect of which he was sentenced on that prior occasion was only nine months and it follows that a short period of two months or so that was declared on that previous occasion remained, as it were, to his credit.

The learned sentencing judge was aware of this and referred to the history, as I have related it, in connection with this issue and expressly said, when concluding her sentencing remarks, that she was taking all of these factors into account. The sentence that she considered could appropriately have been imposed was, in fact, higher than the sentence which she did impose and it can be seen that her Honour took into account matters in mitigation including the period of two months to which I have referred. No error has been demonstrated in this respect.

In truth, the applicant's contention is that he is really not guilty of the offences, or some of them, to which he has pleaded guilty and would like to have his plea of guilty vacated so that he can have his trial. There is no suggestion that he did not know when he was pleading guilty that he was pleading guilty to the offences of trafficking and the other offences to which he pleaded guilty. Nor is there any suggestion or evidence that he did not intend to plead guilty when he actually did so. Nor has any improper inducement been demonstrated or suggested that could be capable of vitiating these pleas: see *R v Carkeet* [2009] 1 Qd R 190 at [25] per Fraser JA.

In my view no error has been shown in the exercise of discretion by the learned sentencing judge. I would refuse leave to appeal against the sentence. Nor has any ground been shown that would justify setting aside the plea of guilty and, to the extent that this proceeding is capable of being regarded as an application to vacate that guilty plea, I would refuse that application. Otherwise, to the extent that this case has been conducted upon the implicit footing that it is an appeal, I would refuse the appeal.

FRASER JA: I agree.

PHILIPPIDES JA: I also agree.

SOFRONOFF P: The order of the Court is that the appeal is dismissed, and the application for leave to appeal against sentence is dismissed.