[2017] QCA 152

COURT OF APPEAL

SOFRONOFF P
MORRISON JA
ATKINSON J

CA No 83 of 2017
DC No 194 of 2016

THE QUEEN

v

McLEOD, Bradley Robert **Applicant**

BRISBANE

WEDNESDAY, 19 JULY 2017

JUDGMENT

SOFRONOFF P: Justice Morrison will give the first judgment.

MORRISON JA: This is an application for an extension of time to seek leave to appeal against sentences imposed in the District Court on 16 June 2016. The application to extend time was filed on 21 April 2017, and thus more than eight months out of time.

The approach applicable on an application such as this is that laid down in *R v Tait* [1999] 2 Qd R 667 at 668:[1]

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[1] [1999] 2 Qd R 667, [1998] QCA 304, at 668. Internal citations omitted.

> "…the Court will examine whether there is any good reason shown to account for the delay and consider overall whether it is in the interests of justice to grant the extension. That may involve some assessment of whether the appeal seems to be a viable one. It is not to be expected that in all such cases the Court will be able to assess whether the prospective appeal is viable or not, but when it is feasible to do so, the Court will often find it appropriate to make some provisional assessment of the strength of the applicant's appeal, and take that into account in deciding whether it is a fit case for granting the extension. Other factors include prejudice to the respondent, but in the case of criminal appeals this is not often a live issue. Another factor is the length of the delay, it being much easier to excuse a short than a long delay."

Explanation for the delay

The applicant has advanced an explanation[2] in relation to the delay. It is as follows:

(a) after he was sentenced, he had no further contact with his solicitor or barrister, each of whom appeared for him at his sentence;

(b) it was not explained to him that he had only 28 days in which to initiate an appeal;

(c) he did not receive anything from his lawyers, asking him if he wished to appeal;

(d) he was not aware that he had only 28 days in which to appeal;

(e) after the sentence, there came a time when he discussed his case with other prisoners and discovered that there have been other cases which have resulted in lesser sentences;

(f) discovering that there were other cases with different sentences, he decided he should appeal.

What is notable about the applicant's explanation is that he does not say that he was unaware that he had the right to appeal against the sentence. All that he has said is that his lawyers told him nothing and he was unaware that the time limit was 28 days. It is therefore appropriate to

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[2] Albeit, not sworn in affidavit form.

proceed on the basis that at all material times, the applicant was aware that he had a right to appeal against his sentence if he so wished.

Support for taking that approach can be drawn from the fact that the applicant is no stranger to the criminal legal system. The affidavit of Ms McGregor exhibits transcripts of sentencing proceedings in Western Australia on 3 August 2007 and 4 December 2008. On the first of those occasions, the applicant was sentenced to 12 months' imprisonment, suspended for 18 months, for the offence of aggravated burglary. On the second occasion, he was sentenced to two years for offences including assault occasioning bodily harm, depravation of liberty and breaching an earlier suspended sentence. On each of those occasions, the applicant was represented by lawyers. Further, his criminal history in Queensland includes convictions and fines for various drug related offences, possession of weapons and breach of various bail or probation orders, those offences occurring between 2011 and 2013.

I do not consider the applicant's explanation to be adequate. Knowing that he had a right to appeal, he stood by for over eight months, subsequent to the initial time period within which an application for leave to appeal should have been filed. He says that he was overwhelmed by the sentence and had discussions with fellow prisoners:

> "Once I came to grips with the situation and calmed down –"

and was:

> "…in a position to think clearly and rationally."

No further elucidation is given of just when that was but the applicant does not say that it was beyond the 28 day period.

The position, therefore, is that the applicant always knew that he had a right to appeal, and only decided to appeal at some point many months after the time period had expired, when he decided that there was some basis for an appeal. That explanation is not acceptable as it would erode the efficacy of the 28 day time period, effectively permitting applicants to decide if and when they would make an application for leave to appeal.

Merits of the appeal

The applicant pleaded guilty to a series of offences all stemming out of one course of action on 21 December 2014. On that day, he broke into a house, armed with a knife, restraint implements and blunt weapons with the intention of raping and robbing the woman who lived there. He attacked his victim, hitting her on the head and punching her repeatedly in the face. She attempted to defend herself. With great courage, she picked up a coffee table and attacked him. He was able to take it from her and, in a cowardly way, hit his defenceless victim with it. Even then, she bravely fought back, charged at him and fought until it became impossible.

He threatened her with the knife as she struggled to get free. He tied her hands and put his hand over her mouth to keep her quiet. At that point, she was bleeding profusely and thought she was going to die. The applicant then dragged her, wrists bound, into a bedroom where he sexually assaulted her by touching her through her clothes. He then dragged her back to the lounge room, where overcoming her struggles by punching her, he used the knife to cut her clothing and proceeded to violently rape her. He did so regardless of the fact that she was menstruating at the time, pulling out her tampon in the process.

The applicant then forced the complainant into the bathroom and insisted she have a shower. He demanded cash and eventually took her bank card, credit card, driver's licence and car keys. He threatened her that if she did not give him the right PIN number, he would return. While the applicant was trying to take the ignition key for her car, the complainant managed to escape. She went next door in a distressed state, largely naked, and covered in blood. The applicant stole the car and when he was apprehended later, resisted arrest, in the process assaulting a police officer and causing damage to business premises nearby.

The complainant suffered severe injuries, including a deep laceration to her scalp, multiple facial injuries, including a broken nose, numerous abrasions and bruises.

Out of those circumstances, the applicant pleaded guilty to:

(a) rape;

(b) entering a dwelling with intent, by breaking and whilst armed;

(c) assault with intent to commit rape;

(d) robbery;

(e) unlawful use of a motor vehicle;

(f) serious assault on a police officer; and

(g) wilful damage.

In addition, the applicant pleaded guilty to various offences which occurred on prior occasions, including assault on a police officer, possession of utensils and pipes used in relation to drugs, possession of dangerous drugs, stealing, breach of bail, dishonesty in obtaining property from another and unlawful use of a motor vehicle. It seems apparent that he was on bail for those offences when he committed the rape, burglary and assault.

The most serious offences were those of rape, burglary and robbery. They were rightly described by the sentencing judge as "horrific". Her Honour's description bears repeating:

> "You committed a premeditated and carefully planned attack on a young woman in her own home. You arrived armed with a knife and a club, which you used after breaking into her home. You also had with you the means to restrain and to silence your victim, and you seemed to wearing a vibrating sex toy in your pants. You severely lacerated this young woman's head with the club. You assaulted her severely. You broke her nose. You bruised her and lacerated her in numerous places. You violated her in a brutal, terrifying and degrading manner. You, yourself, in your material before me, described what you did as a horrific and disgusting. You then sought to destroy evidence by forcing her to shower. You robbed her. When she fled to a neighbour's home bleeding, battered, terrified and barely clothed, you absconded in her car. You committed the other indictable offences – serious assault and wilful damage, later when police intercepted you."

That description is sufficient to indicate, as the respondent has submitted, that the applicant's case fits into the category of those where rape is accompanied by serious violence or prolonged criminality, or both. As was said in *R v Buchanan* [2016] QCA 33, where that is the case,

sentences at the upper range of a 10 to 14 year range may be warranted. The applicant was sentenced to 13 years on a rape offence. The circumstances of his offending were similar to those in *Buchanan*, where the perpetrator attacked a female victim in her home, striking on the head with a rock and causing a large gash on her arm with broken glass and then raping her. In *Buchanan*, the victim escaped semi-naked and had to run several hundred metres before gaining assistance from a passing motorist. That offender's sentence on the rape offence was 13 years and was not said to be manifestly excessive.

The similarity is striking and indicates, at least on a provisional basis, that the applicant's chances of having this sentence found manifestly excessive are not strong at all. Further support is derived from this court's decision in *R v Newman* [2007] QCA 198, another pre-meditated offence involving robbery leading to a violent rape, in that case committed by a 17 year old with no prior convictions. He was sentenced to 13 years, a sentence not found to be manifestly excessive.

The applicant also complains that the prosecutor made submissions as to the range of sentence, contending that was contrary to the decision in *Barbaro v The Queen* (2014) 253 CLR 58.[3] That submission is misconceived. His sentence occurred subsequently to the amendment to s 15 of the *Penalties and Sentences Act* 1992 (Qld), which reversed the effect of the decision in *Barbaro*.

Conclusion

This is not a case such as *R v DAQ* [2008] QCA 75. In that case, Keane JA[4] discussed the issue of delay in making an application for leave to appeal, observing that:

> "…an applicant for an extension of time who has failed to observe statutory time limits by reason of ignorance or inadvertence or even incompetence, and who is obliged, because of a short period of unintentional delay, to seek an extension of time in order to institute an appeal, can expect to be given

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3 (2014) 253 CLR 58.

4 With whom Fraser JA and Mackenzie AJA concurred.

> the benefit of an extension where there is an arguable case that an appeal may succeed."[5]

This case does not involve ignorance, inadvertence or incompetence as the applicant always knew he had a right to appeal, nor is it a case of a short period of unintentional delay, let alone one where there is an arguable case that the appeal might succeed.

In my view, the explanation for the delay in filing the notice of an application for leave to appeal against the sentence is inadequate to justify the grant of an extension of time. Further, a provisional assessment of the prospects of success on the proposed appeal reveals a distinct lack of merit. I am unable to conclude that any demonstrable miscarriage of justice would be perpetuated by the refusal of an extension of time. I would refuse the application for an extension of time.[6]

SOFRONOFF P: I agree. I would only add that had an extension been granted and had leave to appeal been granted, I would have required the Crown to make submissions as to whether the sentence was too lenient.

ATKINSON J: I agree with the decision and the reasons of both the President and Justice Morrison.

SOFRONOFF P: The order of the court is that the application for extension of time within which to appeal is refused. Call the next matter, please.

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5 *DAQ* at [10].
6 *R v GV* [2006] QCA 394 at [3].