[2017] QCA 191

COURT OF APPEAL

GOTTERSON JA
MORRISON JA
FLANAGAN J

CA No 116 of 2017
SC No 56 of 2014
SC No 916 of 2015

THE QUEEN

v

SKELI, Zef **Applicant**

BRISBANE

FRIDAY, 1 SEPTEMBER 2017

JUDGMENT

FLANAGAN J: The applicant seeks an extension of time within which to appeal against sentence. He was sentenced in the Brisbane Supreme Court on 18 November 2015. On that occasion, he was sentenced in relation to six drug-related charges, the most serious being count 4: trafficking in a dangerous drug, heroin, during the period 16 February 2011 to 19 December 2011. The applicant was also dealt with for the breach of two suspended sentences imposed by the District Court on 4 March 2011 and 20 December 2011.

On 4 March 2011, the applicant was sentenced in the District Court for a sexual assault which had occurred on 8 July 2007. He was sentenced to 12 months' imprisonment, which was wholly suspended with an operational period of three years. By committing the offences in counts 4, 5, 6, 7 and 8 on the indictment, the applicant breached the suspended sentence. The applicant was therefore at risk of the learned sentencing judge ordering pursuant to s 147(1)(b) of the *Penalties and Sentences Act* 1992 that he serve the whole of the suspended imprisonment of 12 months.

On 20 December 2011, he was sentenced in the District Court for perjury. He was sentenced to 18 months' imprisonment to be suspended for two years after he has served three months. By committing the offences in counts 5, 6, 7 and 8, the applicant breached the terms of this suspended sentence. He was therefore at risk of being ordered to serve the whole of the balance of this suspended sentence, being 15 months.

As noted by the learned sentencing judge, when the applicant committed counts 3 and 4 on the indictment, he was on bail for the sexual assault charge which was dealt with by the District Court on 4 March 2011. For the breach of the suspended sentences, his Honour activated six months' imprisonment in both instances, with those terms of imprisonment to be served concurrently.

For count 3 on the indictment, supplying a dangerous drug, heroin, the applicant was sentenced to two years' imprisonment. For count 4, the trafficking charge, a head sentence of five years was imposed. For counts 5, 6 and 7, being the supply of a dangerous drug, heroin, two years' imprisonment was imposed in each instance. For count 8, possessing property used in trafficking in a dangerous drug, six months' imprisonment was imposed.

All those sentences were ordered to be served concurrently but cumulatively upon the six months partially-activated suspended sentences. His Honour set a parole eligibility date fixed at 17 November 2017. The result was that the applicant was sentenced to five and a half years' imprisonment with parole eligibility fixed after two years, which was slightly more than a third.

There are two primary considerations in determining whether an extension of time within which to appeal should be granted. First, whether there is a good reason for the delay and, secondly, whether it would be in the interests of justice to grant the extension. A failure to satisfy the Court of the first issue is not fatal to the exercise of the discretion in favour of the applicant upon the second issue. The present application for an extension of time was not filed until 5 June 2017, which is a delay of approximately 18 months.

The applicant's unsworn explanation for this delay is detailed in the notice of application for an extension of time. At the time he was sentenced, the applicant was legally represented by counsel and solicitor. He obtained their opinion that the sentence imposed was not appellable. The applicant accepted this advice and made a decision not to seek leave to appeal the sentence. Since being incarcerated, the applicant has given further thought "about the power imbalance between me and the principal offender, Ahmetaj". The applicant sought and was provided with further legal advice from counsel. The content of that advice is not disclosed. The applicant now wishes to proceed with the present application. This explanation is, in my view, wholly unsatisfactory. It does not disclose why the applicant took approximately 18 months to seek a second opinion as to his appeal prospects.

Quite apart from this unexplained delay, the interests of justice do not require the grant of an extension of time. There is no suggestion that his Honour erred in activating six months of the suspended sentences to be served concurrently. The applicant's primary complaint is that the head sentence of five years for the trafficking count was manifestly excessive. The first difficulty for the applicant is that the head sentence of five years' imprisonment for this offence accorded with that sought by his counsel at the sentence hearing. In the *R v Flew* [2008] QCA 290 at [27], Keane JA, as his Honour then was, identified the hurdle that an applicant for leave to appeal faces in such circumstances:

> "Next, it should be noted that the sentence imposed was in accordance with that proposed to the learned sentencing judge by the applicant's Counsel. While it is true that the imposition of a just sentence is the responsibility of

> the sentencing judge, appeals are available to correct errors on the part of sentencing judge, not to provide a second hearing on the sentence as if the first sentence was merely provisional. When an offender seeks leave to appeal against a sentence on the ground that the sentence is manifestly excessive, it must be recognised that the ground of the application is directly contradicted by the conduct of the applicant's case before the sentencing judge by which the applicant is bound."

The applicant submits that while he is most likely bound by his counsel's submission, the recommended head sentence of five years was made on the basis that it would be tempered by a suspended sentence after a certain period of time. What appears to be suggested in the applicant's submission is that as the learned sentencing judge chose to impose a parole eligibility date instead of a suspended sentence, the head sentence of five years should have been less. The difficulty with this submission is that a further suspension was not appropriate in circumstances where the applicant had offended on bail, was in breach of two previous suspended sentences and had resumed his criminal activity following his release from prison.

The more fundamental hurdle for the applicant is that the sentence imposed cannot be viewed as manifestly excessive. The applicant was aged between 21 and 23 at the time of the offences. His offending was revealed as a result of a police investigation. The principal target of that investigation was Ahmetaj. The applicant was charged with a number of individual supply counts which were performed on Ahmetaj's behalf. The applicant was involved in doing legitimate work for Ahmetaj, who ran a car dealership and a security business. The applicant was an employee of Ahmetaj. Ahmetaj was engaged in the business of trafficking in schedule 1 drugs, predominantly heroin. This operation was conducted on a wholesale basis.

Whilst the applicant did legitimate work for Ahmetaj, he was also his driver and gofer. The applicant operated within a discrete part of Ahmetaj's drug network. At one stage, Ahmetaj lost his driver's licence and the applicant was employed to drive him around and do errands for him. It was accepted that almost all of the errands that the applicant carried out for Ahmetaj and almost all of the driving was in relation to legitimate businesses. The applicant was, however,

involved at a number of levels in Ahmetaj's extensive drug business. He committed acts which knowingly aided Ahmetaj's illicit business of drug trafficking. He knew that Ahmetaj was involved in the drug trade. The learned sentencing judge described the applicant's conduct as wilful blindness. It was also accepted that Ahmetaj intentionally kept the applicant in the dark about details of some of the illegal activities.

The applicant's involvement was limited to a small number of those with whom he dealt, in particular, people by the name of Price, Beach and Walker. The applicant was used by Ahmetaj as a buffer to put distance between himself and the drug transactions. Telephone intercepts reflected the applicant engaging in coded talk that was consistent with the supply of heroin. Call records showed frequent contact with Ahmetaj and the purchasers of drugs.

The applicant was involved in Ahmetaj's trafficking for a period of approximately 10 months, being from February 2011 through to December 2011. The applicant's involvement only stopped when he was sent to prison as a consequence of his conviction for perjury. After his release from prison in March 2012, however, he continued to assist Ahmetaj in relation to a number of other drug supplies. This conduct occurred while he was subject to a suspended sentence. The applicant's role in the trafficking was summarised by the learned trial judge as effectively that of a messenger, a gofer, a courier.

The applicant was also a party to activities that facilitated Ahmetaj's drug trafficking. He had actual involvement in drug transactions with or for Ahmetaj. It was not possible for the Crown to ascertain how much money the applicant earned from the drug trafficking activities to which he was a party. It was submitted on behalf of the applicant at sentence that he was simply employed at a salary of $500 a week and that the drug activities in which he was engaged were simply encompassed as part of the wider duties that he performed in that employment for Ahmetaj.

Given the terms of imprisonment imposed for the drug-related offences were ordered to be served concurrently, the five years' head sentence imposed for the trafficking charge reflects the totality

of the applicant's offending in respect of drugs. One of the supply charges, count 6, involved heroin weighing 84.063 grams with a pure weight of 11.432 grams. This offence was committed on 14 April 2012, shortly after the applicant had been released from prison in March 2012. Similarly, counts 5 and 7 were also committed shortly after the applicant was released from prison.

In oral submissions, counsel for the applicant emphasised that on three occasion his Honour, in the course of submissions, referred to the applicant's role as that of a "henchman". Nothing turns on this description. First, his Honour did not repeat this description in his sentencing remarks. His Honour carefully and accurately identified the applicant's role in both the legitimate business and his employer's extensive trafficking enterprise. More importantly, the applicant has not demonstrated that the description of "henchman" resulted in the imposition of a sentence that was, in all the circumstances, manifestly excessive.

The primary error sought to be identified by the applicant is that the learned sentencing judge failed to sufficiently take into account certain mitigating features. These included the fact that the applicant had become involved in the criminal activity because of his role as a legitimate employee. He was a young man at the time and it is reasonable to infer that due to the power imbalance he wanted to please his boss and keep his job. Most of the applicant's tasks were connected with legitimate business. The difficulty with this submission is that the learned sentencing judge expressly took each of these mitigating factors into account.

The applicant, however, submits that the severity of the sentence suggests that they were not given proper weight or consideration. This is because the sentence imposed, according to the applicant, was manifestly excessive. In seeking to identify the appropriate sentencing range, the applicant refers to *R v McAway* [2008] QCA 401; *R v Burrell* [2013] QCA 41; *R v Cooney; Ex parte Attorney-General (Qld)* [2008] QCA 414; *R v Challacombe* [2009] QCA 314; and *R v Baradel* [2016] QCA 114. The learned sentencing judge was referred to two of these decisions, namely, *Burrell* and *Cooney*.

In particular, the decision in *Burrell* does not suggest the sentence imposed in the present case was manifestly excessive. Burrell was sentenced to six years' imprisonment with parole eligibility after two years for trafficking methylamphetamine and other drugs over a three month, as opposed to a 10 month, period. He was sentenced on the basis that he worked for a man, Betts, as a runner. Burrell did not profit, had a drug habit and was 26 to 27 years of age at the time of the offences but did have an extensive criminal history for drug and property offences.

Similarly, Cooney was sentenced to five years' imprisonment with parole eligibility after two years for trafficking cocaine and other drugs over a four and a-half month period. This was not disturbed on appeal. Whilst he was older than the present applicant, he only had a minor criminal history. There was no evidence of commercial sales outside of Cooney's sale to an undercover police officer. He was a customer who did not make a living through drug trafficking.

The applicant's reliance on *McAway*, *Challacombe* and *Baradel* are misplaced. As submitted by the Crown, each of those cases involved young offenders with no or limited criminal histories who carried on their own streel-level drug businesses. In the present case, the applicant's offending was made more serious because it occurred whilst he was subject to suspended sentences and, for counts 3 and 4, was on bail. The learned sentencing judge referred to the persistence of the applicant's conduct, which included re-engaging in criminal activity after he had served the three months of his suspended sentence.

The sentence imposed was well within the range and cannot be considered manifestly excessive. The applicant's appeal against sentence is, in my view, without merit. The application for an extension of time within which to appeal against sentence should be dismissed.

GOTTERSON JA: I agree.

MORRISON JA: I also agree.

GOTTERSON JA: The order of the Court is that the application for an extension of time within which to appeal against sentence is dismissed.