[2018] QCA 41

COURT OF APPEAL

GOTTERSON JA
PHILIPPIDES JA
DOUGLAS J

CA No 191 of 2017
DC No 324 of 2017
DC No 325 of 2017

THE QUEEN

v

FARR, Cameron John **Applicant**

BRISBANE

TUESDAY, 20 MARCH 2018

JUDGMENT

PHILIPPIDES JA: The applicant was convicted on 26 July 2017 on his pleas to one count of attempted unlawful use of a motor vehicle and one count of serious assault and 19 summary offences. He was sentenced as follows: for the burglary and commit indictable offence: three years imprisonment; for two offences of unlawful use of a motor vehicle: two years imprisonment and 18 months imprisonment respectively; for each offence of enter dwelling with intent and cause serious assault: 12 months imprisonment; and for each offence of attempted unlawfully using a motor vehicle, common assault and obstruct police officer: six months imprisonment. In relation to the other summary offences, which comprised two offences of possess dangerous drugs, two offences of trespass, a charge of breach of bail,

three offences of failure to appear, two offences of driving without a licence and one offence of receiving tainted property, the applicant was convicted and not further punished. On all charges, convictions were recorded and the sentences were to be served concurrently. A parole eligibility date was set as at the day of sentence, 26 July 2017, and a declaration was made as to 397 days from 24 June 2016 to 25 July 2017 being served as pre-sentence custody.

The applicant seeks leave to appeal the sentences on the basis that they are, in all the circumstances, manifestly excessive. In relation to the circumstances of the offending, a summary has been usefully set out by the respondent in its submissions.

On 18 August 2015, the applicant was found unconscious at the Robina Railway Station, having apparently suffered an overdose. Three wads of methandienone, an anabolic steroid, was found inside his underpants. That constituted one of the summary offences of possess dangerous drugs. On 16 October 2015, the applicant was walking down Wynnum Road into oncoming traffic. He ran from police but was apprehended. In his underwear, was located a number of buprenorphine strips, and that constituted the summary offence of possess dangerous drug. When in police custody he indicated that he had suffered a heroin overdose earlier that day. An ambulance was called. In the back of the ambulance the applicant kicked a police officer in the chest and groin; that constituted the summary offence of serious assault. He was physically restrained. The applicant attempted, unsuccessfully, to spit on another police officer, and that constituted the summary offence of common assault. The ambulance stopped and a police officer attempted to calm the applicant. He continued to violently resist and had to be sedated; that constituted the summary offence of obstruct police officer.

On 16 April 2016, the applicant and others broke into a residence at Capalaba by removing a flyscreen on the back window. Once inside, a large quantity of property was taken, including computers, watches, jewellery and coins; that comprised the summary offences of burglary and commit indictable offence. Most of the property was subsequently recovered. The applicant was disturbed by neighbours and ran through another person's yard, constituting the offence of trespass. The applicant and his associates had used a vehicle he knew had been

stolen to drive to the residence, and that constituted the offence of unlawful use of a motor vehicle.

He was seen by police heading towards the stolen vehicle. Police told him to stop and he ran away to avoid arrest; hence, the summary offence of obstruct police officer. In fleeing, he ran through another person's yard, constituting a further summary offence of trespass. He subsequently entered another residence with the intent to evade police and confront or fight them if necessary, constituting enter dwelling with intent. The occupant of the residence convinced the applicant to wait in the garage, where police subsequently arrested him.

Between 21 April 2016 and 14 May 2016, the applicant failed to report on numerous occasions in accordance with his bail undertaking; that constituted the breach of bail offences. The applicant failed to appear in accordance with two separate bail undertakings on 29 April 2016, which constituted further summary offences. And on 13 May 2016, he failed to appear in accordance with a separate bail undertaking, constituting a further summary offence. On 23 June 2016, the applicant was driving a Holden Astra, but without a licence, constituting a further summary offence. He drove to a petrol station and pumped fuel into his car in the value of some $43. He sped off without paying and that comprised the stealing offence. The applicant had received licence plates stolen on 24 June 2016 from a vehicle parked in Ipswich and they were fitted to the Astra and that constituted the summary offence of receiving tainted property.

On 24 June 2016, the applicant attended a residence in Leichhardt. He knew one of the occupants Niroshni Griffin through that person's boyfriend Shane Sambrooks. Niroshni's ex-husband, Lloyd Griffin, aged 71 and their daughter had never met the applicant before. The applicant knocked at the door, Niroshni allowed him into the residence. He subsequently said he needed a car to go and get Mr Sambrooks. Niroshni refused. The applicant walked to Natasha Griffin's bedroom and told her that he needed her keys. She also refused. The applicant persisted and began searching the top of her dresser for them, that constituted

attempted unlawful use of a motor vehicle. Natasha raised her voice telling the applicant to get out of the room.

Lloyd Griffin was awoken by the yelling. He approached the applicant and began physically removing him from the residence. The applicant punched him in the side of the neck with a closed fist constituting serious assault which was count 2. As a result, Mr Griffin retreated to another room and the applicant left the house. The applicant was later intercepted by police driving the Astra and that constituted the summary offence of driving without a licence. He was arrested and then held in pre-sentence custody.

The applicant's antecedents and criminal history are as follows. The applicant was born on 12 November 1977 and was 37 and 38 years of age when he committed the offences. He had a criminal history, which the sentencing judge took into account, quite properly, as relevant and lengthy, and as including convictions for offences involving drugs and violence, and property crime. He was first ordered to serve a period of actual imprisonment on 12 November 2001. His relevant criminal history included the following:

- An armed robbery on 10 February 2002 for which he was sentenced to three and a half years imprisonment, suspended after 14 months for an operational period of three and a half years. The offence occurred when he was 24 and was subject to both a probation order and suspended sentence. He entered a neighbourhood store, threatened the owner with a large knife to obtain an amount of cash.
- Additionally, whilst subject to that suspended sentence, he committed other offences which included three offences of robbery with circumstances of aggravation on three separate occasions in December 2004, for which he was sentenced on 20 January 2006. The first robbery in time occurred when he pretended to want to help a woman carrying her bags to the car with a young child. When he arrived at the car he pretended to be armed with an offensive instrument which the complainant attributed as a hammer. He took the car despite resistance from the complainant. The car contained property including a significant amount of money. The complainant

suffered a sore arm. The second robbery occurred at a convenience store at Carina. He threatened a woman with a screwdriver before taking $200 from the till. Her husband fought off the applicant causing him some injury. The complainants both suffered some minor injuries and there were some lasting effects as the female complainant remained fearful of young men entering the store. The third robbery occurred at a car park at Southport. The complainant and his girlfriend were in a vehicle when a female associate of the applicant approached them asking for a cigarette and later money. A fight ensued where the applicant became involved. He took the complainant's car keys and drove off in the car, which included some property. The applicant was sentenced to seven and a half years imprisonment for the first two robberies and he was sentenced to seven years imprisonment for the third. There was a partial activation of the suspended sentence. All sentences were concurrent and there was no order for parole.

- Upon correctional officers conducting a routine search of the applicant's cell and locating a syringe on 9 November 2006, the applicant was dealt with for possessing a prohibited article and a new parole eligibility date was set. On 8 October 2008, the applicant was dealt with for dealing a prohibited thing as a result of his admission to correctional officers that he had a syringe and a number of tablets hidden in his cell. He was sentenced to two months imprisonment to be served cumulative to his sentence. On 3 December 2008, the applicant was dealt with for dealing with a prohibited thing, which concerned retrieving a loaf of bread thrown by another inmate, containing a cut down syringe. A sentence of three months' imprisonment to be served cumulative to his sentence was imposed.
- On 17 April 2014, the applicant was sentenced in relation to four counts of aggravated supply of a schedule 2 drug in a correctional institution. This concerned his conduct while not in custody of posting four envelopes on two separate days containing buprenorphine to persons within a correctional facility. He received a sentence of 11 months and 14 days with an immediate parole release date.

- On 21 August 2014, he was sentenced to 18 months imprisonment with a parole eligibility date after six months for offences of unlawful use of a motor vehicle and burglary and commit indictable offences.
- He subsequently committed the last summary offences in 2015 while subject to parole.

A court report which was tendered outlined the applicant's poor compliance with his last two parole orders. Noting the applicant had demonstrated pro-criminal behaviours such as further offending and providing a positive sample to illicit substances, he was assessed as unsuitable for further community based supervision. He has a lengthy traffic history.

The sentencing judge observed that the two charges on indictment and the 19 summary offences for which the applicant was being sentenced spanned a period of two months. The offending, in context, called for condign punishment. The burglary offence was regarded as probably the most serious, although the serious assault on a 71 year old man on 24 June 2016, enter dwelling with intent, and unlawful use of motor vehicles on 16 April 2016, and the episode involving serious assault, common assault and obstruct police on 16 October 2016, were also serious in and of themselves. The sentencing judge had close regard to the applicant's relevant prior convictions.

Given the nature and volume of the applicant's previous convictions, the sentencing judge was required under s 9(10) of the *Penalties and Sentences Act* 1992 (Qld) to treat them as an aggravating factor in the offending. The sentencing judge noted the applicant's criminal history demonstrated a propensity, at least, towards property offending. In imposing sentence, the sentencing judge correctly recognised the need to protect the community. He observed:

> "In the end, if you keep committing these sorts of offences, the only thing that is going to happen is that you are going to get sentenced to longer and longer periods of jail to protect the community."

In order to succeed on an application such as this, it is required to be demonstrated that the sentencing discretion has miscarried in the way identified in *House v The King*. The applicant's outline of argument and his oral submissions raised a number of matters. He

contended that he had not committed the summary offences of burglary and commit indictable offence and unlawful use of a motor vehicle on 16 April 2016. However, the applicant is not seeking to appeal his convictions or to have his pleas set aside. And there is no error demonstrated in the material before the Court which would, in any event, justify the Court not acting on his pleas.

A second matter that the applicant raised concerned a sentence passed on a co-offender, Glen Russell. At sentence, there were no submissions advanced in relation to issues of parity. It seems that this issue was raised because of a misunderstanding by the applicant as to the sentence imposed on Russell. He received two months imprisonment for burglary and 27 months for unlawful use of a motor vehicle. Consistent with what was said in *R v Nagy*,[1] the sentencing judge was entirely correct in his approach to reflect the overall criminality of the applicant's offending in imposing the sentence for the burglary and there cannot be said to be any justifiable sense of grievance arising as a result of any parity issue.

A third matter raised by the applicant was that the sentence imposed of three years imprisonment was manifestly excessive and, in addition, the sentence was manifestly excessive in that there was a failure to impose a suspended sentence. The applicant seemed to resile from the complaint as to the three year head sentence, having regard to what he now understands to be the sentence imposed on Russell. In any event, it cannot be said that the sentence of three years imprisonment was outside the proper exercise of the sentencing discretion when regard is had to the comparative of *R v Vaughan*,[2] where a three year sentence suspended after 18 months was imposed on a much younger offender who also had an extensive criminal history. In addition, the comparative of *R v Donald*[3] demonstrates that the head sentence was within range. A three year sentence was imposed in that case also. The contention that the head sentence was manifestly excessive also faces the obstacle that that was not a matter that was placed in contest by the applicant's legal representative as being inappropriate.

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1 [2004] 1 Qd R 63 at [39].
2 [2005] QCA 348.
3 [2000] QCA 399.

Since the five summary charges were committed in 2015 while the applicant was subject to parole, any period of imprisonment ordered in relation to those charges automatically cancel the applicant's parole order by virtue of s 209 of the *Corrective Services Act* 2016 (Qld). In the absence of those terms of imprisonment being wholly suspended, the Court is required to fix the date of the offender's eligibility for parole. I accept the respondent's submission that wholly suspending the five offences committed in 2015 would not have appropriately reflected the seriousness of those offences, that is, the serious assault and common assault. But, in any event, there was no error in the sentencing judge declining to adopt the approach urged by the applicant's counsel to suspend the sentences. The applicant had an unfavourable court report and, as accepted by his own counsel who observed:

> "Much like all of the offending and probably the vast majority of the offences on the history, he was ravaged by drug addiction at the time."

In those circumstances, the suspended sentence on any count was clearly undesirable. Given the learned sentencing judge's findings, which were clearly open, that the applicant's history demonstrated a longstanding drug problem which the applicant had been unable to conquer and had led to the commission of the present offending, an order for eligibility for parole as at the sentence date as opposed to a suspension was not an error.

The sentencing judge appropriately moderated the sentences to reflect the pleas by setting a parole eligibility date as at the date of sentence. As was stated in *R v Tahir; ex parte Attorney-General (Qld)*,[4] the fixing of a parole eligibility date earlier than the midway point will usually ameliorate the sentence by creating at least a prospect, and perhaps a qualified expectation, of release on parole earlier than otherwise would be the case.

In the circumstances, the sentences imposed by the sentencing judge were well within the sound exercise of the sentencing discretion. Accordingly, the application for leave to appeal against sentence should be refused.

GOTTERSON JA: I agree.

DOUGLAS J: I agree.

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4 [2013] QCA 294 at [20].

GOTTERSON JA: The order of the Court is that the application for leave to appeal against sentence is refused.