

COURT OF APPEAL

**GOTTERSON JA
BODDICE J
JACKSON J**

**CA No 188 of 2017
SC No 74 of 2017**

THE QUEEN

v

GARCIA, Melchor Restauero

Applicant

BRISBANE

28 AUGUST 2018

JUDGMENT

BODDICE JA: On 14 July 2017, the applicant pleaded guilty to one count of torture, two counts of kidnapping, one count of possessing dangerous drugs in excess of two grams, one count of possessing dangerous drugs, one count of possessing a category R weapon, one count of discharging a weapon in a public place, and 17 summary charges, being three charges of unlawful possession of weapons, one charge of possessing explosives without authority, one charge of possessing a knife in public, four charges of possessing a dangerous drug, one charge of possessing a utensil, one charge of possessing property suspected, and six charges of breach of bail.

On 4 August 2017, the applicant was sentenced to seven years imprisonment on the torture count and lesser concurrent terms of imprisonment in respect of the remaining counts and all

of the summary charges, bar one breach of bail charge. The applicant was convicted and not further punished on that charge. It was declared the offences of torture and kidnapping were serious violent offences. Accordingly, the applicant was required to serve 80 per cent of that effective head sentence of seven years imprisonment before being eligible for parole. Some 523 days served in custody was declared as time served under those sentences of imprisonment.

The applicant seeks leave to appeal those sentences of imprisonment. The ground of appeal is that the imposition of serious violent offence declarations had the effect of making the overall sentence manifestly excessive. However, in argument, the applicant also contended his legal representatives failed to adequately present matters in mitigation of penalty and advised him he would receive a sentence of six years imprisonment with parole after two years if he pleaded guilty.

The applicant did not seek leave to amend his application and those latter assertions are not supported by any material, including a consideration of the sentencing submissions which reveals all of the mitigating factors now sought to be relied upon, were raised before the sentencing judge. There is no basis to conclude such a ground of appeal would succeed, in any event.

As to the ground of appeal that the sentences imposed were manifestly excessive, the offences to which the applicant pleaded guilty involved significant offending over an eight and a-half month period. The majority of the offences were committed between 22 July 2015 and 2 January 2016. They involved multiple drug and weapons offences. Many of those offences were committed whilst the applicant was on bail for offences committed at an earlier time in that period.

The kidnapping and torture offences were also committed by the applicant whilst on bail for that earlier offending. Each of those offences arose out of one episode. The kidnapping offences involved two male complainants. The offence of torture related to one of those complainants. Those offences occurred in circumstances where that male complainant had

failed to provide the applicant with firearms in payment of drugs supplied by the applicant to him. The second male complainant was an associate of the first male complainant.

The kidnapping offences commenced on the evening of 27 February 2016. Over a period of 36 hours, the male complainants were taken to various premises against their will. During this period, the offence of torture was committed by the applicant. That male complainant was repeatedly beaten by the applicant, sometimes with the use of an implement. He was also stabbed on occasions. He suffered bruising and bleeding. On a number of occasions during the ordeal, he apologised and begged for forgiveness. On two occasions, that male complainant had a noose placed around his neck, resulting in choking of that complainant. He had his head covered for significant periods of the torture. He was, on occasions, locked in the boot of a motor vehicle.

The torture offence ended when the male complainant was left in an isolated location with a noose around his neck without food or water. He was forced to swallow five tablets. They caused him to be drowsy. That complainant could have died, but he was able to untie himself. He sought out assistance almost two days later, on the morning of 29 February 2016.

In sentencing the applicant, the sentencing judge had regard to a number of factors. First, the applicant had entered early pleas of guilty, thereby cooperating in the administration of justice. Second, the offending occurred over a period of a little over eight months, with much of the offending occurring whilst the applicant was on bail. Third, the applicant had spent some 523 days in pre-sentence custody. Fourth, the applicant's conduct involved prolonged, gangland-style criminal conduct in circumstances where he had a complete absence of previous convictions prior to the commencement of that offending conduct, which coincided with the applicant's commencement of the use of methylamphetamine. Fifth, the applicant had suffered severe physical abuse as a child at the hands of his father and, later in life, had struggled with the breakdown of his relationship prior to embarking upon illicit drug use. As a consequence, he developed a significant addiction to methylamphetamine. Sixth, the

applicant had, since his incarceration, returned to his old self, indicating a willingness to steer clear of past bad influences.

In determining the appropriate sentence, the sentencing judge observed that whilst the offence of torture entailed sustained violence against a defenceless individual, there was no evidence that that individual suffered any permanent disability and the pleas of guilty had been entered at an early stage. Having regard to the fact that all of the offending had occurred in the context of an addiction to methylamphetamine and a life not previously marred by criminal behaviour, the sentencing judge declined to impose cumulative periods of imprisonment, notwithstanding that much of the offending had occurred whilst on bail. Instead, the sentencing judge imposed an overall effective head sentence of seven years imprisonment to capture, on a global basis, the applicant's overall criminality.

In imposing that head sentence, the sentencing judge expressly noted the impact of a serious violent offence declaration and observed that the head sentence otherwise to have been imposed was reduced to take into account all the mitigating factors. But for those considerations, the head sentence would have been "a lot higher".

A consideration of all of the circumstances of the applicant's offending, and the relevant comparable authorities, establishes that the sentence imposed by the sentencing judge involved a proper exercise of the sentencing discretion, balancing the aggravating and mitigating features relevant to that conduct. There is no basis to conclude the sentence imposed was plainly unjust or involved a misapplication of sentencing principles.

The applicant engaged in a sustained course of criminal conduct over a period in excess of eight months. That conduct included a range of offending, much of which was committed whilst the applicant was on bail for earlier offences. The most serious aspect of the applicant's offending involved a brutal, sustained period of torture over almost two days.

During that period, a largely bound and defenceless male complainant was subjected to prolonged violence, calculated at causing pain and suffering of significant magnitude. The offence included striking, kicking, punching, and stabbing of that complainant. It involved the use of

implements and, on occasions, suspension by a noose, requiring the complainant to stand on tiptoes to avoid choking.

All of this violence occurred in the context of a course of retribution for non-compliance with the terms of a drug transaction, and against the background of that victim having been kidnapped with another individual, who was forced to watch the acts of torture. The conduct of the applicant would have been terrifying for both the kidnapping victims and the source of enormous ongoing pain for the male complainant who was being tortured by the applicant.

The criminal conduct constituting the offence of torture would, itself, justify a sentence of imprisonment of at least seven years. When regard is had to the two kidnapping offences as well as the array of other offending whilst on bail, an overall effective head sentence substantially in excess of seven years was open.

The sentencing judge appropriately reduced that overall effective head sentence to reflect the applicant's lack of prior criminal history, personal circumstances, including his addiction to methylamphetamine, and cooperation shown by his early pleas of guilty. In undertaking that reduction, the sentencing judge properly had regard to the consequences of a serious violent offence declaration.

The sentences imposed on the applicant were not manifestly excessive. I would refuse leave to appeal.

GOTTERSON JA: I agree.

JACKSON J: I agree.