[2019] QCA 213

COURT OF APPEAL

MORRISON JA
PHILIPPIDES JA
BUSS AJA

CA No 155 of 2019
DC No 2004 of 2018
DC No 33 of 2019

THE QUEEN

v

CUTHBERTSON, Timothy Albert **Applicant**

BRISBANE

MONDAY, 14 OCTOBER 2019

JUDGMENT

MORRISON JA: The applicant went to a motor dealership to discuss his proposed purchase of a car. He and the dealer negotiated a price of $60,385. The paperwork was completed, and the applicant told the dealer he would be paying in cash. He said he would transfer that cash directly into the dealership's bank account. He was given those account details.

At about 3.30 pm the same day, the applicant went to a bank and deposited a personal cheque for $60,385 into the dealership's account. As the applicant knew at the time, he did not have any funds to match the cheque and never had the ability to buy the car.

About 11 am the following day, the finance department of the dealership told the dealer that the $60,385 was showing in their bank account. The applicant went to the dealership, took

possession of the car and drove it away. The next day, the bank reversed the deposit because the cheque bounced. Consequently, the funds were taken out of the dealership's account.

The dealership could not make contact with the applicant but discovered that he had traded the car to "Hock Your Ride" for $25,000. The dealership had to pay $29,500 to Hock Your Ride to get the car back.

The applicant was charged under s 408C(1)(b) and (2)(d) of the *Criminal Code* 1899 (Qld) with one count of dishonestly obtaining property from another, that property being of a value over $30,000 but less than $100,000.

On 29 January 2019, he pleaded guilty to that count and was sentenced to three years' imprisonment. The sentencing judge declared that 83 days of pre-sentence custody was to be time already served under the sentence. In addition, there were two summary fraud charges of dishonestly obtaining property; in each case he obtained money for mobile phones that he never delivered. On those he was sentenced to six months' imprisonment. Because his previous parole order was automatically cancelled, s 184(2) of the *Corrective Services Act* 2006 (Qld) applied to set the parole eligibility date at the halfway mark.

The prosecution submitted that the sentence would be no less – should be no less than four years, with parole eligibility after serving one third. The applicant's Counsel submitted that the sentence should be three years, with parole eligibility after serving three months. The head sentence imposed by his Honour reflected the head sentence contended for by the applicant's counsel.

On 5 June 2019, more than three months beyond the time limited to appeal, the applicant filed an application to extend time to appeal. He seeks to challenge both his conviction and his sentence. The proposed grounds of appeal are:

(a) he was wrongly convicted, notwithstanding his guilty plea, because he should have been charged under s 427A of the *Code*, ie obtaining property by passing a valueless cheque, rather than s 408C;

(b) for that reason, his sentence proceeded on an erroneous basis and is manifestly excessive.

The principles applicable to an application for an extension of time are well established. In *R v Tait* [1999] 2 Qd R 667 at 668, this Court said that the task was to examine whether there is any good reason shown to account for the delay and consider whether it is in the interests of justice to grant the extension. That may involve some assessment of whether the appeal seems a viable one, and, if it is not, there is no point to the extension. See *Crabbe v Queensland Police Service* [2013] QCA 312 at [10].

The applicant's explanations for the delay are that:

(a) he misunderstood the charges at the time;

(b) once he was sentenced, he "went into a state of shock and depression and have undergone a series of health problems to get myself back on my feet", also that he had "not been in a clear state of mind" and only understood his case for an extension of time "in the past months"; and

(c) he only had limited resources to gain access to the prison library; ultimately, he found "new information" in relation to s 427A of the *Code*.

None of those reasons satisfactorily account for the delay.

The applicant was charged on indictment and represented by Counsel at the sentencing hearing, which proceeded upon an agreed statement of facts. The agreed statement listed the offence by reference to s 408C(1)(b) and (2) and set out the facts. There cannot be any credible suggestion that he misunderstood the charges.

As the learned sentencing judge noted, the applicant's criminal history spanned four states, Queensland, New South Wales, Victoria and Western Australia, and he had been convicted "over an extended period" of offences involving dishonesty of a similar nature. Queensland convictions and sentences of imprisonment for fraud and deception included February 2009, May 2011, February 2013, October 2014 and November 2018. The applicant had been

previously imprisoned many times for such offences. Whilst a psychologist's report showed the applicant to have a depressive disorder, the likely motivators for the present offending were impulsive traits and a need to impress friends. Nothing in the above matters would warrant a conclusion that the applicant likely went into shock as a result of being sentenced for the present offences.

As to his becoming aware of the offence provided for under s 427A, that does not assist. Nothing is said as to: (i) whether he knew that he had a right of appeal; (ii) what, if anything, he was told by his Counsel about that; (iii) whether he spoke to his lawyers about the prospects of an appeal; and (iv) when he became aware of s 427A of the *Code* and what was done as a result. Nor does the applicant explain why three months elapsed before filing.

Further, in my view, the proposed appeal lacks merit.

First, the applicant was 31 at the time of the offence and 32 at sentencing. He was represented by Counsel at the sentencing, where he not only agreed the statement of facts but entered a plea of guilty to the charge identified both on the indictment and in that statement of facts. Nothing in the psychologist's report apparently suggested that he was under a mental disability that might affect his comprehension of the nature of the charge. Nothing to that effect appears from the sentencing remarks nor from his Counsel's submissions. There is therefore no reason to conclude that the applicant's guilty plea was other than entered of his own free will and with the benefit of legal advice. That imposes a considerable hurdle to setting aside the plea. See *Meissner v The Queen* (1995) 184 CLR 132 at 141.

Secondly, the facts in the agreed statement, which are not challenged before this Court, are that the applicant took a car valued at more than $60,000 knowing that, contrary to what he told the dealer (that is, he had enough money to pay cash for it) he had no funds and therefore had paid nothing for it. Plainly he dishonestly obtained the car which was worth more than $30,000 but less than $100,000. Those facts support the charge laid under s 408C of the *Code*.

Thirdly, the fact that another charge might have been preferred does not mean that the conviction was in error. The charge under s 408C was open on the facts, presented on the indictment, and a guilty plea was entered. There is no basis to conclude that there has been a miscarriage of justice.

Fourthly, there are significant difficulties confronting the challenge to the sentence. The applicant's Counsel submitted that a three year head sentence was appropriate. To that extent, the sentence was in accordance with what was sought on his behalf. That creates a substantial hurdle for manifest excess. See *R v Flew* [2008] QCA 290 at [28]. In any event, it is not reasonably arguable, having regard to the facts and circumstances of the offending and all relevant sentencing factors (including the mitigation referred to in his Honour's sentencing remarks), that the head sentence was unreasonable or plainly unjust. Further, because the applicant's existing parole order was cancelled s 184(2) of the *Corrective Services Act* applied to set the parole eligibility date at the halfway mark. That aspect, contrary to the applicant's submissions, offers no ground for a challenge to the sentence.

For these reasons, I would refuse the application to extend time to appeal.

PHILIPPIDES JA: I agree.

BUSS AJA: I also agree with Justice Morrison.

MORRISON JA: The order of the Court is that the application to extend time to appeal is refused.