

SUPREME COURT OF QUEENSLAND

CITATION: *R v Kennedy and Watkins; ex parte A-G of Queensland*
[2002] QCA 26

PARTIES: **R**
v
KENNEDY, Kenneth James
WATKINS, Ross Kingsley
(applicants)

FILE NO/S: CA No 259 of 2001
CA No 260 of 2001
SC No 321 of 1999

PARTIES: **R**
v
KENNEDY, Kenneth James
WATKINS, Ross Kingsley
(respondents)
EX PARTE ATTORNEY-GENERAL OF
QUEENSLAND
(appellant)

FILE NO/S: CA No 263 of 2001
CA No 264 of 2001
SC No 321 of 1999

DIVISION: Court of Appeal

PROCEEDING: Applications for leave to appeal against sentence
Appeals against sentence by A-G (Qld)

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 22 February 2002

DELIVERED AT: Brisbane

HEARING DATE: 8 February 2002

JUDGES: de Jersey CJ, McPherson and Williams JJA
Judgment of the Court

ORDER: **1. The appeals by the Attorney-General are dismissed.**
2. The applications for leave to appeal against sentence are refused.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND
INQUIRY AFTER CONVICTION – APPEAL AND NEW
TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY

CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE -- accused charged with carrying on the business of trafficking in cannabis and methylamphetamine – – co-accused found guilty of supplying methylamphetamine and two counts of aggravated possession of LSD and methylamphetamine -- convicted persons also pleaded guilty to torture, extortion, two counts of deprivation of liberty and one of assault occasioning bodily harm -- whether accused's sentence of seven years imprisonment for trafficking, torture, extortion, deprivation of liberty and assault within range – whether co-accused's sentence of four years imprisonment for possession, torture, extortion, deprivation of liberty and assault within range -- cross-appeal by Attorney-General to increase sentence.

CRIMINAL LAW – PARTICULAR OFFENCES – DRUG OFFENCES

CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON

COUNSEL: T D Martin SC for the appellants in CA Nos 259 of 2001 and 260 of 2001
 L Clare for the respondent in CA Nos 259 of 2001 and 260 of 2001
 L Clare for the appellant in CA Nos 263 of 2001 and 264 of 2001
 T D Martin SC for the respondents in CA Nos 263 of 2001 and 264 of 2001

SOLICITORS: Boe and Callaghan for the appellants in CA Nos 259 of 2001 and 260 of 2001
 Director of Public Prosecutions (Queensland) for the respondent in CA Nos 259 of 2001 and 260 of 2001
 Director of Public Prosecutions (Queensland) for the appellant in CA Nos 263 of 2001 and 264 of 2001
 Boe and Callaghan for the respondents in CA Nos 263 of 2001 and 264 of 2001

- [1] **THE COURT:** Watkins and Kennedy have applied for leave to appeal against sentence, and the Honourable the Attorney-General has appealed.
- [2] Watkins, who is 43 years old, pleaded guilty to carrying on the business of trafficking in cannabis and methylamphetamine between July 1996 and January 2000. He was sentenced to four years' imprisonment. He also pleaded guilty to various offences committed on 16 May 1999: torture, extortion, two counts of deprivation of liberty and one of assault occasioning bodily harm. Those offences attracted a term of three years' imprisonment, to be served cumulatively upon the four year term. His effective sentence, therefore, is seven years' imprisonment. His past criminal history was limited, comprising offences committed between 1982 and 1984.

- [3] Kennedy, who is 46 years old, pleaded guilty to drug offences committed in 1998 and into the following year, supplying methylamphetamine and two counts of aggravated possession of LSD and methylamphetamine, for which he was imprisoned for 18 months. He also pleaded guilty to torture, extortion and two counts of deprivation of liberty, and was sentenced, as for Watkins, to three years, to be served cumulatively. Kennedy's effective sentence therefore is four and a half years' imprisonment. Kennedy had a past criminal history including assault occasioning bodily harm, weapons and minor drug offences and offences involving dishonesty.
- [4] The reason for the difference between the seven year and the four and a half year terms is, obviously, Watkins' conviction for carrying on a substantial business of trafficking in unlawful drugs. He acted as a point of delivery in respect of 20 to 25 instances of the supply of one pound lots of cannabis. More significantly, he regularly sold methylamphetamine to a group of about five persons, all addicts (including himself) and persons who themselves sold drugs. Such sales in 1999 yielded Watkins at least \$30,000. An aggravating circumstance was his resumption of the trafficking business within days of his being released on bail.
- [5] Kennedy's drug convictions concerned a single supply of methylamphetamine and aggravated possession of methylamphetamine and LSD. The methylamphetamine was contained in an ounce of powder, and exceeded the prescribed quantity of two grams. The LSD comprised 150 tabs on two sheets.
- [6] The offences committed on 16 May 1999 arose out of Watkins' attempts, with the assistance of Kennedy, to obtain payment of a drug debt said to have been owed by a complainant Brookes. Watkins went to Brookes' home and confronted him. Watkins was in company with two other men, and armed with an axe handle.
- [7] Watkins demanded the money. The complainant, who had no money, managed to run into undergrowth but was persuaded to give himself up. The three men drove him to Watkins' house, where Kennedy joined them. Together the applicants drove the complainant to a number of places chasing funds. During the trips both applicants demanded payment, and Watkins punched the complainant hard in the face. Eventually they took the complainant to the Bandidos' Clubhouse. It had earlier been the scene of a violent homicide, and these offences occurred while the prosecution in respect of that homicide was proceeding.
- [8] The applicants tied up the complainant and placed him in a locked room. Over the ensuing hours, the applicants took turns at assaulting the complainant by punching, kicking and whipping him with an electrical cord. They made concerted attempts to use an electric tazer or "stun gun". Repeated demands for money led to their forcing the complainant to telephone his mother in Adelaide. The complainant told his mother that he was being held by the Bandidos. The applicants threatened to kill him during that telephone call. The complainant's mother could not raise the money. The applicants further assaulted the complainant, before eventually releasing him, bruised and bleeding. He caught a train to Brisbane and sought protection from the police. The complainant's face and hands were swollen, and his nose, chest and hand were bruised. There were lacerations to his forehead, right cheek and right ear, and a perforation to his right eardrum. The physical injuries were not, however, of high order and did not leave residual disability. The more

substantial disturbance from the complainant's point of view was the enormous fright involved in what must have been a terrifying experience.

- [9] The learned sentencing judge properly acknowledged the need to impose appropriately deterrent penalties in relation to such violent offending. But the appellant, the Attorney-General, contends that the three year terms do not reflect the gravity of the offending or offer sufficient general deterrence, and that the respective aggregated terms, seven years and four and a half years, inadequately address the overall criminality of the applicants. For their part, the applicants contend that the sentences are manifestly excessive.
- [10] In relation to the offence of torture and the associated offending, we were referred by the Director of Public Prosecutions, who appeared for the Attorney-General, to *Edwards CA 173/2001*, *Kelly, Barber and Perry CA 114, 115, 147/1991* and *Coleman CA 343/1995*.
- [11] The eight year term imposed in *Edwards* was for much higher order torture inflicted upon a female complainant who was over a prolonged period also subjected to grossly humiliating conduct. The criminality involved in that offence of torture substantially exceeded that involved in the present case.
- [12] *Kelly, Barber and Perry* were sentenced to terms of seven years, five years and three years following conviction at a trial. Again, the dimensions of the torture exceeded those in the present case, extending to strapping gelignite to that complainant's leg and lighting its fuse. Those sentences must also be seen as reflecting no reduction for any plea of guilty.
- [13] *Coleman* was a case of organised extortion involving repeated dire threats made by an accused with an extremely bad prior criminal history. *Coleman* was sentenced to five years' imprisonment with parole recommended after two years.
- [14] Counsel for the applicants took issue with the learned judge's view that Kennedy's purpose in possessing the ounce of powder containing more than the prescribed two grams of methylamphetamine was "at least in part...commercial". His Honour had in mind sales to support the offender's personal habit, not uncommon with substantial users as Kennedy was. This was a legitimate conclusion. Counsel also took issue with the judge's finding that the complainant Brookes would have known of the then current proceedings against members of the Bandidos Motorcycle Club on a charge of murder, tending to aggravate the psychological impact upon Brookes of the torture to which he was subjected. For reasons which follow, this could not, even if valid criticism, effect the outcome of the case.
- [15] The drug offences were serious, especially of course the trafficking count, and it is reasonable to say, as submitted by Mrs Clare, that the torture substantially elevated the overall level of criminality. While the effective sentences of seven years and four and a half years may properly be described as somewhat lenient, even allowing as they do for the pleas of guilty, they do not call out for the sort of correction the Court contemplates on appeal by the Attorney-General. Had this Court been faced with a sentence of three years for this torture taken alone, even following the pleas of guilty, there would have been a strong case for increase on appeal. But it is the aggregate sentences to which the Court must now look, and the seven year and four and a half year terms are not so low as to warrant adjustment. On the other hand, as

follows, they could not with any approach to realism be described as excessive, let alone manifestly so.

- [16] Neither the three years for the torture, nor the four years for the trafficking, to which there were pleas of guilty, should however be regarded as sitting comfortably within the requisite range: they should be regarded as low order penalties which survive appeal only because the Court must focus on the aggregate terms, in the context of the constraints by which the Court is traditionally, and appropriately, limited in determining appeals by the Attorney-General.
- [17] The appeals by the Honourable the Attorney-General are dismissed. The applications for leave to appeal against sentence are refused.